

**CREATING SUSTAINABLE DEMOCRACY IN AFRICA
- AN AFRICAN SUPRANATIONAL BODY FOR THE
EFFECTIVE SUPERVISION OF ELECTIONS IN
AFRICA**

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Declaration

I, **TAZORORA TG MUSARURWA**, declare that the work presented in this dissertation is original. It has never been presented to any other university or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. In this regard, I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the degree of Master of Laws (LLM in Human Rights and Democratisation in Africa).

Signature.....

Date.....

Supervisor: Professor EK Quashigah

Signature.....

Date.....

Ideas that don't tend to become words are bad ideas, that words that don't tend to become acts are bad words."

Anonymous

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Dedication

This dissertation and this degree are dedicated to my family.

To my late parents Willie and Elizabeth Musarurwa who set a high standard of education, hard work and integrity. To my Aunt, Martha Muzadzi and my late Uncle, Augustine Muzadzi who have been my parents and believed in me, even when I stopped believing in myself. To my wonderful sisters and brothers who have been a pillar of support at all times. May God bless you all; and through this degree I hope I make you proud!

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Tazorora TG Musarurwa

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ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ANC	African National Congress
APRM	African Peer Review Mechanism
AU	African Union
AUESC	African Union Electoral Supervisory Commission
EAF	Electoral Assistance Fund
EAU	Electoral Assistance Unit
ECOWAS	Economic Community of Western African States
ECK	Electoral Commission of Kenya
EISA	Electoral Institute of Southern Africa
EMB's	Electoral Management Bodies
EU	European Union
EU EOM	European Union Electoral Observer Mission
CCPR	International Covenant on Civil and Political Rights
CESCR	International Convention on Economic Social and Cultural Rights
COG	Commonwealth Observer Group
COMESA	Common Market for East and Southern African countries
GNU	Government of National Unity
IPU	Inter-Parliamentary Union
IDEA	Institute for Democracy and Electoral Assistance
IEC	Independent Electoral Commission (South Africa)

INEC	Independent Electoral Commission
KEDOF	Kenya Electoral Domestic Observatory Forum
MDC	Movement for Democratic Change
MPLA	Popular Liberation Movement of Angola
NEPAD	New Partnership for Africa's Development
NGO	Non Governmental Organization
NRM	National Resistance Movement
OAU	Organization of African Union
ODM	Orange Democratic Movement
PAP	Pan African Parliament
PDP	Peoples' Democratic Party
REC	Regional Economic Community
SADC	Southern African Development Community
UN	United Nations
UNDP	United Nations Development Programme
UN EAD	United Nations Electoral Assistance Division
UNGA 9	United Nations General Assembly
UNIOSIL	United Nations Integrated Office in Sierra Leone
UNITA	National Union for the Total Independence of Angola
ZANU (PF)	Zimbabwe African National Union (Patriotic Front)
ZEC	Zimbabwe Electoral Commission
ZESN	Zimbabwe Electoral Support Network

Chapter One: Introduction

1.0 Background of the study

The issue of governance is a prime concern in African development strategies.¹ Intrinsicly intertwined with this factor is that of elections. African leaders seem to generally agree that a change of government should be by the ballot and not by the bullet. The African Charter on Democracy, Elections and Governance, which was adopted in January 2007 by African Heads of Government, is evident of this general consensus even though the Charter is not yet in force.² Notwithstanding this consensus, African leaders are still not prepared to leave office after being voted out by the people. As such, these politicians have resorted to manipulating the ballot system. It seems paradoxical that elections which ought to be the key to democracy are now the 'wisest' tool in legitimising autocratic rule.

The current strategy by the African Union is to encourage the creation of independent electoral commissions that have their independence entrenched in national constitutions. The Declaration on the Principles Governing Democratic Elections in Africa, adopted in July 2002, is the attempt by the African Union to encourage the independence of these institutions. However, recent elections in Kenya and Zimbabwe have exposed the inherent weaknesses of the current system. Both Kenya and Zimbabwe have independent electoral bodies but were subject to manipulation by incumbent government authorities.

Both these elections revealed that electoral bodies wield immense power and if such power is not directed responsibly it could result in mass killings of the citizenry. This study thus takes the Kenya and Zimbabwe examples as a starting point for the need to overhaul the current system. It may be argued though that the Kenya and Zimbabwe scenarios are exceptions that do not warrant a system overhaul. However, it is to be suggested herein that the current system is based on Western models that do not reflect the African state of affairs.³ It is for this reason that such system continues to be undermined regardless of the entrenchment in national constitutions.

¹ See EK Quashigah & OC Okafor, in EK Quashigah & OC Okafor, *Legitimate governance in Africa – International and domestic legal perspectives* (1999) who note that Africa has witnessed an unprecedented wave of democratisation 'a phenomenon that might accurately be described as a search for more legitimate governments and governance' 7.

² 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 The introduction of multiparty democracy in Africa assumed that Africa had a credible judicial system, a free press, a vibrant civil society, an informed citizenry amongst other factors. Africa's democratic institutions should thus reflect these disparities.

Elections are one of the major causes of conflict in Africa. Disputed results and an imbalance in the powers of the competing parties have resulted in various major conflicts in Africa.⁴ This study thus approaches the subject also from a conflict resolution angle and sees the solving of election related problems as a solution to part of Africa's conflict problems. An important consideration is also how Africa can consolidate democratic gains by creating institutions that nurture sustainable democracy.

Furthermore, it will be argued herein that whilst Africa is in the process of harmonising its electoral laws for all countries to conform to certain objective standards, the ultimate solution could be for all countries to accede to an AU body that will enforce such a standard. Monitoring individual country compliance will thus no longer be necessary. In any case the AU has committed to bring all African countries into one 'United States of Africa'.⁵ This dream may not be achieved for a long time but it is achievable and to be achieved it has to be done progressively. Through the harmonisation of trade laws, movement of people, and banking laws, Africa moves slowly to form a single union state. Likewise, the formation of a single electoral body also supports the realisation of a union state.

As will also be seen in this paper, there are three important bodies that are important in elections. These are 1) electoral bodies that conduct elections, 2) election observers and 3) electoral courts. Real power should lie in the electoral bodies with the courts and observers verifying that such power has been exercised in accordance with accepted international best practices. This, however, is not currently the case with African elections, as the real power lies in incumbent governments that become both player and referee at election time. AU Declarations that call for impartiality from electoral commissions and the judiciary are in several instances not worth the paper they are written on when they are wantonly violated by incumbent governments.

1.1 Objectives of the study

The objective of this study is to provide a novel working mechanism for the supervision of elections that would no longer be municipal based but rather the subject of a supranational body that is not answerable to municipal authorities. In essence, this study will consider the possibility of a new African Union body responsible for African elections. Rather than just mooted an idea, this study will attempt to justify the need for such a body, as well as answer

⁴ The 1992 Angola elections, 1998 Lesotho elections and the recent 2007 Nigeria and Kenya elections stand out as some of the worst forms of violence after people refused to accept the outcome of the election.

⁵ See the AU's resolution in its 11th Ordinary Session held from 30 June to 1 July 2008 in Sharm El-Sheikh, Egypt; in which it "REAFFIRMS its decision in the Accra Declaration to "accelerate the economic and political integration of the African continent, including the formation of a Union Government for Africa with the ultimate objective of creating the United States of Africa..." Available www.africa-union.org. Accessed 10 August 2008.

the practical questions that may hamper the establishment of such a body and also provide for some of the modalities regarding how such a body may work.

To enhance the objectives, the study will necessarily commence with a theoretical background of the rationale for having elections. The study will also emphasise on the human rights aspect of elections, namely the right to self determination and the right to participate in public affairs as provided in various human rights instruments.

By analysing recent African elections, this study intends to show that the current strategy of wholly relying on municipal electoral authorities is subject to manipulation and can result in humanitarian catastrophes and illegitimate governments. By so doing a justification of introducing a new AU body responsible for supervising African election is made perspicuous.

1.2 Usefulness of the study

An underlying premise of this study is that African problems need African solutions. African solutions are not merely solutions devised by Africans. African solutions have to be suitable to the African terrain and acceptable to the African people. Quashigah and Okafor question whether it is not:

more fruitful to locate the relative irrelevance and dismal performance of the post colonial African state in the *agency* (thinking and behaviour) of the leaders of African states and the *structures* (internal composition, inter-ethnic relationships and institutional arrangements) that characterise post-colonial states? ⁶

In this regard this study is proposing that a regional mechanism to supervise African elections is best suited to deal not only with African electoral problems but with the role of elections in establishing liberal democracy and managing conflict in Africa. By proposing such a mechanism this study initiates debate on how regional systems can be authorised to deal more decisively with African elections. Through this study the inherent weaknesses in municipal electoral bodies is brought to the fray and the need to reform this system is made clear.

1.3 Critical questions

This study brings to the fore various questions related to the possibility of why such a body should even be considered. An attempt has been made to answer, as concisely as possible, the following questions that come to mind:-

Is such a body really feasible and practical?

⁶ Quashigah & Okafor (above n1) 9.

Will states agree to have their election supervisory powers usurped?

Why not just strengthen the capacity of the independent electoral commissions?

Should the cases of Kenya and Zimbabwe warrant an overhaul of the whole system?

Does this body not unduly infringe on the doctrine of state sovereignty?

What guarantee is there that this body will truly be independent?

How will this body work with current electoral commissions?

How will this body relate with other African Union organs?

What of working electoral commissions, such as the one in South Africa?

What does one do if not satisfied with the decision of this body; is there any right of appeal or review?

Who will fund the operations of such a body?

1.4 Research Questions

- 1) Is there a legal and philosophical basis for conducting elections in Africa?
- 2) Are there inadequacies in the current African electoral system?
- 3) Can and should an African body be established to conduct and supervise elections in Africa?

1.5 Methodology

This is a desk and library based research. As such it will seek reliance from both published and unpublished material. Internet sources are also widely referred to. The study will also analyse primary sources of data such as international agreements, municipal statutes and case law. As such this will mainly be a library and internet based study. The study will, however, also rely on informal interviews with experts on elections and related matters.

1.6 Limitations

There is currently no similar body in the international human rights system and thus this is virgin ground that has numerous challenges. As there is no literature on the subject, reliance is placed on the modalities of other supranational bodies. The study may therefore be dismissed by some as being utopian. This study must be considered as an introductory

paper to a topic that deserves much discussion and will therefore require more in-depth answers to some of the critical questions that have been posed above.

This study would have originally been more enriched with interviews from electoral experts familiar with the African terrain; due to time and resource constraints this was not possible and to a certain extent this affects the quality of the work. It must also be remembered that this is a limited word research that cannot fully tackle all the problems that may need to be addressed by such a novel and possibly controversial topic.

None of these, however, should be construed as an excuse to fallacious reasoning or factual errors as the author is aware of all the limitations impacting on the study.

1.7 Literature Review

A wide array of literature is available on African elections, theories of government and also on models of how elections should be conducted. There is also voluminous literature on the monitoring of elections in various countries.

Viljoen F, *International human rights law in Africa*, 2007 analyses the African human rights system, which includes organs of the African Union. This text is useful in explaining how AU organs can be used in conflict related matters. It does not, however, mention any aspects of elections *per se*.

Nohlen D et al (editors), *Elections in Africa a data handbook*, (1999) gives an overview of the electoral systems of all African countries making it a good starting point in the analysis of African elections. The book is however slightly outdated and does not offer concrete solutions on how to handle contemporary problems.

Quashigah EK & Okafor OC (Ed's) *Legitimate governance in Africa – International and domestic legal perspectives* (1999) has several chapters in their book explaining the basis on which a government attains its authority in Africa. It is useful in justifying the need for credible elections in Africa.

Ouguerouz F *The African Charter on Human and Peoples' Rights - A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) goes into detail in explaining the rights in the African Charter, which include the 'right to vote'. The book does not, however, go into any detail regarding the electoral processes and their effect on democracy.

Tikikel 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 explains how the new African Democracy Charter can be used to promote credible elections in Africa. The current study builds on to these findings by arguing that Africa needs to go a step further by establishing a supervisory body for elections that will fulfil the aspirations in this new charter.

Hatchard et al, *Comparative constitutionalism and Good Governance in the Commonwealth* (2006). This book highlights some of the African experiences of promoting democracy and gives some insight on measures to improve the status quo.

Sisk & Reynolds (ed's) *Elections and conflict management in Africa* has various chapters that show the exact nature of electoral related conflict in Africa. This book gives a deeper understanding on how elections can be used to stop conflict, the limitations of elections and when elections can promote conflict.

Goodwin-Gill GS *Free and fair elections* (2006) discusses the concept of free and fair elections and developments that have globally aided in establishing international best practices. This book is useful in highlighting the benchmarks, but like other texts, it advances for change without a change of the system.

This study will also rely on numerous newspaper reports and several internet sources so as to adequately cover the numerous views on elections in Africa. Online publications that provide new views on African elections are also resorted to.

1.8 Outline of chapters

Chapter one will basically introduce the study as was enumerated in the proposal (will not necessarily be a replication of the proposal).

Chapter two will give a theoretical rationale for elections as well as the human rights perspective of elections. The concept of free and fair elections and electoral conflict in Africa will also be introduced.

Chapter three will introduce the current system and highlight the pitfalls by focusing on some case studies, especially those of Kenya and Zimbabwe. By using case studies, this chapter reveals the loopholes in the AU strategy of obtaining credible elections. While doing so, this chapter justifies the need for a system overhaul by showing not only the inadequacies of the current system but how it cannot be made to work within the existing framework.

Chapter Four introduces the African Union's Electoral Supervisory Commission (AUESC) as a new body that will supervise elections in African countries. This chapter will show how such

a body may be utilized to solve the current election problems in Africa. The chapter proceeds to explain the modalities of how this body will work and considers some of the challenges to the creation of such a body.

Chapter Five - Conclusion and recommendations.

Chapter Two: The Concept of Elections

2.0 Introduction

It is now generally accepted that the inter play between human rights and democratisation cannot be ignored and that these two concepts are two sides of the same coin. In this chapter this relationship between the concepts is illuminated in that elections, although engineered by a political process, are there to serve an ultimate human rights purpose. Political scientists may therefore look at elections as being part of the republican process where the sovereign lies in the will of the people and it is these people that must consent to be governed by any government. Human rights lawyers, on the other hand, may see elections as part of the right to self-determination and the right to participate in society, in that a people have a right to determine themselves by freely choosing who should govern them.

This chapter first introduces some of the theories of democracy and government that justify elections from both a political science and human rights perspective. Some theories on democracy and elections are thus explored at the outset. The right to self-determination and the right to participate in public life as enumerated in international human rights law are also explained as legal justification for elections. A brief justification for elections is thus served by this part. Secondly, there is an introduction to the concept of free and fair elections; and why this concept also serves as the underlying basis for proposing an all Africa body to conduct elections. In Africa, elections have also been used as a vehicle to stop conflict and usher in democracy. This aspect of elections and conflict management will thus also be briefly looked at here.

In short, this chapter should illuminate the basis, justification and purpose of elections in Africa

2.1 Elections and political philosophy

There are various types of governments⁷ and there are various types of democracies.⁸ There are also various theories that explain these governments and democracies. This study will only focus on democracy as a form of government and will take the assumption that

⁷ According to R Scruton *A dictionary of political thought* 1996 governments can be divided into 1) constitutional and non-constitutional government, 2) absolute and limited government, 3) political and non-political government and 4) power interests in government that lead to the distinctions of monarchy, democracy, oligarchy and tyranny 218.

⁸ For example there is representative democracy and there is direct democracy. A representative democracy is one where the citizenry elects people to represent them in public office. In direct democracy, practised in ancient Greece, all adult men participated in public office directly. Bernard Manin *The principles of representative government* 1997 8. Emphasis in this paper is on consolidating a 'genuine' democracy through elections rather than just an 'electoral' democracy or a 'hybrid' democracy.

Africa is generally pro-democracy and thus no space is dedicated to justifying democracy as a form of government.⁹ The purpose of this treatise is to generate debate on methods that can be used in Africa to consolidate our democracies, not to advance arguments on how democracy is a better form of government.

Jean-Jacques Rousseau, who furthered the social contract theory advanced by Thomas Hobbes, provides a good starting point in the justification of elections in a representative democracy. According to Rousseau, governments draw their authority from those that they are governing.¹⁰ A legitimate government is thus one that draws its power from the will of the people. A legitimate government, therefore, is one that meets the needs and wishes of the citizenry.¹¹ This theory, which is indeed the basis of democracy, makes it clear that those governments that get into power without the consent of the people cannot really be called governments in the democratic sense. In the same regard, John Locke advanced the proposition that political power is morally legitimate, and those subject to it are morally obligated to obey, only where the subjects have *freely* consented to the exercise of such power and only where that power continues to be exercised within the terms of the consent given.¹²

Political theorists, however, fall short in defining who should and should not be able to vote. It is for this reason that the South African apartheid government could call itself a democratic government notwithstanding the fact that the vast majority of people were prohibited from voting because they were non - white. Likewise, nineteenth century America only allowed white male property owners the right to vote, denying the right to women and all black people.¹³

As a matter of fact, some of the so called 'utilitarian' theories advanced by the most prominent of theorists such as Jeremy Bentham and John Stuart Mills which provide for the larger population determining the fate of the whole population seem to purposefully thwart

⁹ One of the objectives of the African Democracy Charter is to 'promote adherence, by each state party, to the universal values and principles of democracy and respect for human rights' (Article 2 (1)). The Charter does not, however, define what democracy actually is.

¹⁰ AJ Simmons, *Justification and legitimacy essays on rights and obligations*, 2001 129.

¹¹ See also EK Quashigah 'Legitimate governance in Africa: The responsibility of the international community' in Quashigah and Okafor (above n1) where it is noted that '*elections are aimed at achieving a representative government and representative governance has become an index for democratic governance and therefore for governmental legitimacy.*' 469.

¹² AJ Simmon (above n10) 131. The essence of Locke's theory is that no person has a 'God given' right to rule another person unless such latter person consents to being ruled.

¹³ Black people and women were allowed to vote only after the civil war by a constitutional amendment but in reality the discrimination persisted until the 1960's. D Nohlen *Elections and electoral systems* 1996 15. See also *Guide to US elections- 5th edition* 2005 24 & 32.

the human rights cause.¹⁴ Although sounding logical and noble at first instance, these theories subject minorities to the ultimate will of the majority.¹⁵ The importance of highlighting the utilitarian approach is that elections that ignore the will of the minorities will normally result in conflict. Thus, there is a need for a human rights approach which justifies the state not simply by the will of the majority but by the will of all its citizens.¹⁶ It is for this reason that democracy theories, such as the utilitarian approach, fail to be largely attractive when they are not intertwined with human rights.

This may seem a bit contradictory because elections are about majority rule. It is usually a winner takes all approach, and the will of the majority is for all purposes taken to be the will of the whole population (regardless of the fact that it is only the electorate that votes). In this respect political philosophers do not seem to tackle the question of how we can have democratic elections that not only take into account utilitarian approaches but rather are all encompassing. Election related conflict has been blamed on the *weak* African state where there has been a refusal to accept the result by the losing candidates. Some African philosophers have even gone further to suggest that Elections are *unAfrican* in that traditional African societies formulated decisions by consensus and leaders were not elected in the manner advanced in contemporary democracies.¹⁷

In this regard Ake attacks the argument that democracy (including elections) is an alien concept that violates the integrity of African culture. According to Ake:

[t]his argument, premised on the misconception that democracy is solely a Western creation, stems from a confusion between the principles of democracy and their institutional manifestations. The principles of

¹⁴ John Mills although agreeing that no man should forcefully rule another man justified colonial domination on the basis that 'uncivilised' or 'barbaric' people could not rule themselves and thus had to be dominated. He however makes a good point when he says that a representative government would not serve people well if people did not value it and are unwilling to defend it, unable to do what it requires, and are not able to maintain it. MF Plattner 'Liberalism and Democracy: Can't Have One Without the Other' *Foreign Affairs*, March/April 1998 available at <http://www.foreignaffairs.org/19980301faresponse1382/marc-f-plattner/liberalism-and-democracy-can-t-have-one-without-the-other.html> accessed 10 September 2008.

¹⁵ According to R Hardin 'Public choice versus democracy' in D Copp et al (Ed's) *The idea of democracy 1995* "This is not to say that the democratic, majoritarian urge is wrong. At base it seems to have genuine appeal, both moral and practical. But it is nevertheless conceptually incoherent and, when defined in simple terms, practically infeasible." 171.

¹⁶ According to V Helgesen 'Elections: a vehicle for triggering or tempering conflict?' *www.idea.int Posted: 2008-02-11* Accessed 30 August 2008 'If political life is all about "the winner takes it all", democracy may be undermined over time by polarization and potentially (*sic*) conflict or at best by public dissatisfaction and disenfranchisement. The way electoral and political institutions and processes are designed have immense importance. In ethnically divided societies, for example, it is particularly important that the political process is designed in a way that offers meaningful engagement for group interests and needs.' (Website editorial by the Secretary General of the Institute for Democracy and Electoral Assistance in Africa (IDEA)).

¹⁷ See also Lipset, SM (ed), *The encyclopaedia of democracy*, 1995 who suggests that democracy may promote conflict due to the fundamental principle of political competition that underlie democratic practise.

democracy include widespread participation, consent of the governed and public accountability of those in power. These principles may prevail in a wide variety of political arrangements and practices which naturally vary according to historical conditions.¹⁸

Ake's argument is particularly important in that this thesis attempts to address the question of how to protect and advance the universal principles of democracy with institutions particularly designed to suit the nature of the African state. It is thus strongly argued that an African election body is the best way to espouse democracy with an African engineered body particularly suited for the African environment.

Whatever the case may be, the general consensus is that elections remain the best way to appoint those that govern a state, but the question of how best we can make elections work remains rather elusive. Arguments that elections are *unAfrican* are counter-productive; the focus should rather be how we can make elections more relevant and appropriate to the African setting. An African philosophy (or philosophies) of making elections work in Africa is necessary in this debate as the *blind* importation of western election models and philosophies seems not to work as it should in Africa.

For Africa the time for illegitimate governments is over. An illegitimate government is one that has no mandate to govern from the people. This mandate to govern can only be given through elections and when a government takes control through force (coup d'état) or a flawed electoral process it lacks legitimacy.¹⁹

2.2 Elections and human rights

Political scientists have written widely on elections that it seems African legal academics have forgotten that elections have also a human rights aspect that is embedded in major human rights instruments, such as the Universal Declaration on Human Rights (Universal Declaration)²⁰, the International Convention on Civil and Political Rights (CCPR), and the African Charter on Human and Peoples' Rights (African Charter)²¹. Elections, nonetheless, on a practical level remain the bed stone of human rights. Governments, although having the state machinery to abuse human rights, have it in their power to protect citizens from human rights violations. The 'rights' leadership is thus paramount in the human rights cause as a wrong leadership leads only to an abuse of the state's power. Two important rights are

¹⁸ C Ake 'Rethinking African Democracy' *Journal of Democracy* 1991 Vol 2 Number 1 32 34.

¹⁹ D Copp, 'The idea of a legitimate state' in LP Pojman *Political philosophy: Classic and contemporary readings 2002* 150. The state may, however, remain legitimate even though its government has become illegitimate.

²⁰ Article 21(3) provides that '*the will of the people shall be the basis of the authority of government*'.(my emphasis.).

²¹ For example, F Viljoen, *International human rights law in Africa*, 2007 hardly mentions anything about elections as being part of the human rights cause in Africa and this may suggest that elections are largely a political – democratisation process not in the strict realm of human rights law academia.

relevant with regard to elections. The first is the right to self-determination and the second is the right to vote or to participate in society. These will be briefly discussed below.

2.2.1 Right to self-determination

Common Article 1(1) of the CCPR and the International Convention on Economic Social and Cultural Rights (CESCR) provides that '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' In the same fashion Article 20(1) of the African Charter provides as follows:

[a]ll peoples shall have the right to existence. They shall have the *unquestionable* and inalienable right to self-determination. They shall *freely* determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.²²

The strong language used by the African Charter can certainly not only be directed to the colonial and apartheid governments of the 20th century but should have a similar impact on all African governments that attain authority by any means other than the will of the people.

The right to self-determination is a broad right but here the particular focus is on peoples' right to determine themselves through freely electing those who should govern them. In *Jawara v Gambia*²³ the African Commission on Human and Peoples' Rights (African Commission) found the military government of Gambia, which had taken over the state by a *coup*, to have violated Article 20 of the African Charter. According to the Commission 'the military *coup d'état* was therefore a grave violation of the right of Gambian people to freely choose their government as entrenched in Article 20(1) of the Charter.'²⁴

Furthermore, in the case of *Constitutional Rights Project and Another v Nigeria*, where the Sani Abacha government had annulled elections that had been declared by observers to be free and fair, the African Commission held that:

A basic premise of international human rights law is that certain standards must be constant across national borders, and governments must be held accountable to these standards. The criteria for what constitutes free and fair elections are internationally agreed upon, and international observers are put in place to apply these criteria. It would be contrary to the logic of international law if a national government with a vested interest in the outcome of an election were the final arbiter of whether the election took place in accordance with international standards. In the case the government does not even attempt to defend its decision to overrule the judgement of international observers.²⁵

²² My emphasis.

²³ *Jawara v Gambia* (2000) AHRLR 107 (ACHPR2000).

²⁴ Para 73.

²⁵ (2000)AHRLR 191 (ACHPR 1998) Para 48.

A proper interpretation of the African Charter would also suggest that governments that refuse to leave power after electoral defeat or those that manipulate the ballot system to the extent that the result does not reflect the will of the people also violate Article 20 of the African Charter. Such actions can also be described as a *de facto coup d'état* as the end result is a government that has imposed itself upon the people.²⁶

2.2.2 The right to participate in public life

The right to participate in public life is provided for in Article 21 of the Universal Declaration and Article 25(1) of the CCPR. This right is also secured in Article 13 of the African Charter which provides that:

Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.²⁷

This right, which is distinct from the right to self-determination, grants people the right to *freely* determine their political status and to choose the form of their constitution or government.²⁸ According to Sepulveda et al:

Everyone should be able to participate in society, to defend her/his interests, to help create a society, which also fulfils her/his interests and desires. The freedom to vote and stand for elections and the freedoms of association and assembly are the major political expressions of such participation. These rights form the bases for any representative, democratic process, active civil society, and ensure that public affairs are truly public.²⁹

In General Comment 25, the Human Rights Committee further stressed that the right to vote and participate in public affairs 'lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.'³⁰

In this regard, elections are also important as they make holders of public office accountable to the people. Those who fail to account or who account inadequately will be voted out of office. Through elections, communication channels are opened allowing citizenry to air views and election candidates to address those views. Leaders who are unable to show responsibility in such forums will be removed from office. Through this process the citizenry also get to own the policies that are made by their leaders.

²⁶ See also the Human Rights Committee General Comment 12 (21st session 1984) and the CEDAW Committee General Comment XXI (48th Session 1996) where the right to self determination is further expanded upon.

²⁷ See also F Ougergouz *The African Charter on Human and Peoples' Rights – A comprehensive agenda for human dignity and sustainable democracy in Africa (2003)* who argues that Article 13 is vague but it is preferable as it is flexible 177.

²⁸ N Jayawickrama, *The judicial application of human rights law – National, Regional and International jurisprudence*, 2002 791. The right to self determination is a group right that cannot be asserted by just one individual unlike the right to vote and participate in public affairs which can.

²⁹ M Sepulveda et al, *Human rights reference handbook*, 2004 299.

³⁰ 57th Session (1996) United Nations International human rights instruments 2006 207.

From the foregoing it becomes clearer that elections are an important human rights aspect as they set the momentum for a democratic government that can comply with human rights norms. The bond between democracy and human rights is also elucidated by the general comment which emphasises the point that a stronger human rights approach may be needed in the democratisation process.

2.3 Elections and Conflict in Africa

It is also necessary to look at African elections from a conflict perspective. Elections have been used in Africa as a tool for resolving civil wars and other intra-national conflicts.³¹ They have also been used as the gateway from colonial rule to independence. Strangely, elections have also been accused of fuelling conflict due to the manner in which they polarise groups, mainly on ethnic or racial grounds, especially when election rules are manipulated by incumbent regimes.³² The question of how democratisation, with its emphasis on multiparty elections, can be used to unite the nation state rather than stimulate ethnic divisions has led many scholars to be sceptical of the possibility of democracy in Africa. Elections not conducted freely and fairly will spur further conflict. Thus, election management should not only comprise of sound logistical management but should empower electoral authorities to censure any stakeholder from embarking on any activity that causes election related conflict. The latter is something conspicuously missing in present day election management.

Post election conflict is normally a result of failure to accept election results by one or more of the parties involved in the process. Such failure results, in most cases, from the inability of an electoral body to manage the elections transparently and efficiently.³³ Conflict arises as well when there is no universal respect and acceptance of the rules.³⁴ In several countries, elections ending colonial rule were in several countries conducted with the assistance of the United Nations. This was not only through the provision of peacekeepers and international observers but also through election monitors, technical assistance and an overall oversight role. This international presence gave the elections credence and avoided post-electoral

³¹ Sierra Leone, Democratic Republic of Congo, Ethiopia, Namibia, Zimbabwe and South Africa amongst others, all held internationally monitored elections after having been embroiled in civil war for several years. With these countries in mind, there also seems to be a general consensus that in spite of the inherent difficulties associated with elections there is no better alternative to ending conflict other than through elections.

³² T Sisk and A Reynolds, 'Democratization, Elections, and Conflict Management in Africa,' in T Sisk and A Reynolds (eds.), *Elections and Conflict Management in Africa* Washington, (1998), 2. See also the chapter by S Mozaffar 'Electoral systems and conflict management in Africa' where it is noted that '*...political elites leading the current democratic reconstruction in Africa tend to regard democracy as a strategy for state power. They use elections to secure it by manipulating ignorant masses struggling to cope with economic deprivation.*' 82-3.

³³ For example Angola's 1992 elections that failed to instil democratic norms.

³⁴ J Hatchard et al *Comparative constitutionalism and good governance in the Commonwealth – An Eastern and Southern African perspective* (2004) 107.

violence. Other than Angola, where UNITA under the leadership of the Late Jonas Savimbi returned to civil war, most African countries had successful and credible first elections. Africa has unfortunately been unable to maintain the trend and it is argued herein that what is needed is a permanent regional supervisory system that maintains an international presence in the conduct of elections.

West Africa is Africa's primary region of instability but of late it has seen most countries embracing democracy and forfeiting the bullet for the ballot. Conflicts in Liberia and Sierra Leone have ended by embracing elections as a port to democratic governance. Côte d'Ivoire has also recently held acceptable multi-party elections, ending several years of civil war. This, however, is only the beginning and it remains speculative whether the newly found peace is sustainable. West Africa is a volatile region where stolen elections will not be received 'warmly' by the citizenry, as is the case in Zimbabwe. The need to maintain the absence of conflict through credible elections is of paramount importance.³⁵ It would be short-sighted to suggest that elections are the only factor that contributes to conflict and thus the solution to conflict, but the important role that is played by elections in conflict resolution cannot be negated.

What Africa needs is not only peace but sustainable peace. This sustainable peace will only be a mirage if the democracy that has come through these first successful elections is not sustainable. It is therefore only sustainable democracy that can lead to sustainable peace. With the abnormal levels of violence and ethnic strife in Africa it is highly unlikely to see the emergence of states with not only the ability but the will to provide the functions and structures necessary to ensure constitutional democracy.³⁶ The emergence of the proposed all African body to supervise African elections should thus also be seen from a conflict management perspective where conflict is prevented by a credible, transparent and accountable system, and where peace is maintained by a belief in the integrity of such a system to reflect the true will of the people.

2.4 Free and fair elections

Although the conduct of elections differs amongst different jurisdictions, there seems to be a broad consensus of what constitutes a free and fair election. The Inter-Parliamentary Union's (IPU) 1994 Declaration on the Criteria for Free and Fair Elections is, to this date, the most

³⁵ See also D Sivapathasundaram 'Elections in Post-conflict Environments: The Role of International Organizations' who argues that "[w]hile there is no single best model for electoral commissions in post-conflict cases, more often than not international organizations play an important role as a means to increase public confidence in the process, given that within a post-conflict context, the issues of impartiality, transparency and trust are heightened, particularly given memories of earlier election fraud." 23.

³⁶ R Henwood 'Democracy and Elections' Human rights and democratisation Lecture notes 2008 6 (on file with author).

authoritative international guideline on free and fair elections. Although the IPU's declarations have no force in international law,³⁷ the Declaration has been endorsed by the UN General Assembly³⁸ and has been used by various international observer missions as being the benchmark in assessing whether elections have been free and fair.³⁹ It has also served as the basis of other regional guidelines on elections.

The Declaration is concise and is divided into four articles. Article 1 sets the underlying premise for elections by providing that:

1. Free and Fair Elections

In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage.

Article 2 provides for the right of all adult citizens to vote and other rights connected or incidental to the right to cast ones vote. Article 3 provides for the rights and responsibilities of the candidates and the parties whilst Article 4 provides for the rights and responsibilities of governments. The preciseness of the Declaration can be shown by the fact that after over 10 years the IPU has not found it necessary to amend the text but only to improve compliance.

However, the Declaration and international law alike, do not actually define what it means for an election to be called 'free and fair'. Literally, the term free would refer to whether the person who is voting has made his or her choice without any undue pressure whatsoever. Fair, on the other hand, would refer to the procedures that have been utilised in the election. It goes without saying, however, that this is all too simplistic and broad. So, the question that has been debated is as follows: on what basis can an election be said to be either 'free or fair' or not when the parameters of the term seem vague and over-broad?

In this regard, according to Bjornlund:

[T]he standards by which international observers assess elections remain vague... Although typically articulated as minimum standards for free and fair elections, such criteria are usually broad aspirations. Assessing whether a given election has met such standards can be extremely difficult, and external considerations often influence such assessments... The phrase "free and fair" has tended to obscure rather than clarify.⁴⁰

³⁷ The IPU is an international intergovernmental body that is made up of parliamentarians from over 129 states and it has observer status in the UN General Assembly. Its resolutions and declarations carry persuasive authority and set the standard of *opinio juris*.

³⁸ Resolution 49/190 of 1994.

³⁹ GS Goodwin-Gill, *Free and fair elections*, 2006

⁴⁰ EC Bjornlund, *Beyond Free and Fair: Monitoring Elections and Building Democracy*, 2004, 94-95.

Some scholars have suggested a formulation of 'evaluative indicators', which will form some sort of checklist in determining whether an election has been free and fair.⁴¹ Although such an approach is logical in dealing with relativism, it ignores the normative nature of election observation and the fact that value judgments remain essential in assessing the standards. Such an approach may also lead to ignoring the sum-total of the election due to an emphasis of its constituent parts.⁴²

What seems to ignite controversy is the extent to which principles and rules governing elections can be violated before an election can be declared not free and fair. Various elections have been declared by international observers as having been free and fair to the outrage of losing candidates who would have complained about irregularities.⁴³

Municipal electoral legislation does not normally refer to the term 'free and fair' but allows a court to set aside an election if the protested irregularities "affect the result of the election."⁴⁴ Africa has a rich election jurisprudence stemming from the numerous challenges that have been made by candidates against a result.⁴⁵ From this jurisprudence it is clear that courts will generally be slow to overturn an election result unless there has been substantive non-compliance with the provisions of the municipal law governing elections. The costs in time and resources of rerunning an election is cited often as being an important consideration before an election can be nullified.⁴⁶

It, however, may also be argued that the nature of election petitions naturally calls into question the issue of the institutional security of the court. In other words, courts would not normally want to be involved in the hotly contested political terrain as this jeopardises the

⁴¹ Elklit et al, 'Judging Elections and Election Management Quality by Process', 2005, Representation, Vol. 41, No. 3, 2005, 189.

⁴² Goodwin (n 37 above) 80.

⁴³ In the Ghana 2002 elections, for example, the Commonwealth Observer Group (COG) declared the election as having been free and fair notwithstanding a number of irregularities the COG admitted had existed. The COG concluded that in spite such irregularities the will of the people had been expressed in the result.

⁴⁴ See for example s116 (4) of the Namibian Electoral Act and s149 of Zimbabwe's Electoral Act.

⁴⁵ A few recent landmark decisions include the Ugandan cases of *In Re: Parliamentary Elections Act, Act 17 of 2005*; *Kabatsi Joy Kafura v Bangirana Kawooya Anifa and Another* (Parliamentary Election Petition No.0001 of 2006) [2007] UGHC 7; and *Dr. Kizza Besigye and Others v Attorney General* (Constitutional Application No. 7 of 2005) [2006] UGCC 1; Malawian case of [Republican Party v Malawi Electoral Commission and Others \(Constitutional Case No. 5 of 2004\) \[2004\] MWHC.](#) (All reported on www.saflii.org.za).

⁴⁶ See for instance the case of *Republican Party of Namibia and Another v Electoral Commission of Namibia and Others* (A387/05 ; A387/05) [2005] NAHC 2 (26 April 2005) where the Court refused to set aside parliamentary election results regardless of the fact that the Electoral Commission had not complied with the law in several instances. It was the Courts view that the irregularities did not warrant overhauling the result but, however, ordered for a recount of the ballots.

perceived independence of the court.⁴⁷⁴⁸ It is a dangerous business nullifying elections especially if such decisions determine the balance of power.⁴⁹ For example there is no court in Africa that has been bold enough to set aside a presidential election.⁵⁰

Municipal electoral jurisprudence does not really make it clear as to what legal weight should be given to the view of accredited observers. For example, if observers declare an election to have been free and fair should there remain a basis for making an election petition? If the answer to that question is 'yes' it means that observers can be wrong in their assessment of elections. If so, the reliability of electoral observers in determining an election also comes to the fray.⁵¹ In this light it is necessary that the concept of free and fair be questioned when interpreted by bodies with political inclinations such as electoral commissions, electoral observers and even municipal courts.

It is for this reason that it is suggested in this thesis an all African body with no such political inclinations would be best not only to pronounce on whether elections have been free and fair but to conduct such election in a free and fair manner. The expertise and assistance of

⁴⁷ In the Zimbabwean case of *Tsvangirayi v Registrar General of Elections and Others* (76/02/01) [2002] ZWSC 20; SC20/02 a constitutional application was made to declare provisions of the Electoral Act and certain regulations invalid. The applicant alleged that President Mugabe had been given over-arching powers to make regulations that made the playing field unfair. The majority of the Court refused to entertain the application on the basis of *locus standi* in that the applicant was claiming his supporters were being prejudiced by the partisan laws. The majority ruled that he could not make an application on behalf of supporters. Sandura JA dissented in a minority opinion arguing that the Court should have taken a broad approach to *locus standi* as it has always done.

⁴⁸ In the more recent case of *Movement for Democratic Change v Zimbabwe Electoral Commission* 8218/08 (not yet reported) an application was made to a Zimbabwe high court to compel ZEC to announce the result of the presidential election after such results had not been announced a month after the poll. In a judgment that is strangely not based on any authority whatsoever the Court dismissed the application with costs holding that there was no basis to compel ZEC to release the results as all its actions were within the law.

⁴⁹ In this respect see also the convincing essay of Theunis Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' where he argues, with reference to the Constitutional Court of South Africa, how constitutional courts in new democracies will sacrifice making sound legal decisions in certain cases so as to protect themselves from powerful, dominant political parties that can curb the powers of the courts. In South Africa the cases of *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) and that of *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC) which both dealt with elections are cited as two cases where the Court compromised on principle. In the latter case the Court refused to enunciate on "political questions". It is therefore not coincidental that electoral matters bring to the courts issues where the courts would either not want to deal with or would rather rule in favour of an incumbent ruling party. Available at http://www.saifac.org.za/docs/2008/Principle_and_Pragmatism_ICON_v2.pdf.

⁵⁰ In the Ugandan case of *Kizza Besigye v Yoweri Kaguta Museveni and another* (Election petition 1 of 2001), the court found various electoral irregularities but held that these did not meet the test of 'substantial fraud, enough to vitiate the election'. As the respondent was not personally involved in the commission of the offences, the court ruled in favour of electoral fraud and refused to nullify the presidential election. The 2007 Nigerian presidential election was also contested in court by Mr Atiku Abubakar. At the time of writing the Nigerian Supreme Court had reserved judgment. It is highly unlikely though, that that the Court will overturn the result.

⁵¹ In the May 1998 Lesotho elections, for example, international observers declared the election to have been free and fair where the opposition only won one seat. A commission chaired by South African judge Pius Langa (now Chief Justice) later found the election to have been riddled with irregularities. See Hatchard et al (n 32 above) 118.

electoral experts from electoral observer groups will further the credibility of this AU body through credible elections. Observers may, in this situation, be given a practical role to play that will make a difference rather than being stuck at the sidelines as they are now.

At the end of the day, there are basic standards for conducting elections that have to be adhered to regardless of the imperfect nature of the evaluation of such standards. What has and remains problematic is not the standard as it exists on paper but it is the institution that evaluates the standard and makes a judgment. Goodwin rightly points this out as follows:

(although) [i]nternational law at present may not permit the objective and clinical answer that many seek to the 'free and fair' question; it does, however, provide *the* standard to be achieved, namely, that the election produces an outcome which expresses the will of the people. It also prescribes certain obligations of conduct – protection of fundamental human rights – and of result – universal suffrage, equality and secret ballot...⁵²

Free and fair elections are an ideal in Africa as they are the world over. The term 'free and fair' can be equated to the other lofty ideals that are embedded in international human rights treaties. Human rights have certain objective features about them but beyond that they become flexible in order for them to remain relevant and suitable for various jurisdictions. There is thus certainly no need for a single objective factor(s) that can be ascertained with mathematical accuracy; what is needed is a credible institution to interpret and bring to life the term.

2.5 Conclusion

From the foregoing, it seems trite that elections are the bed rock of democracy; and a working democracy is the engine to the realisation of human rights. This chapter therefore, serves the purpose of highlighting why elections are so important to us from both a political and legal perspective. Although this seems to be an agreed fact, African countries still cannot or will not hold elections that adhere to the standard of 'free and fair'. International observers, although crucial in creating some form of checks and balances, have created controversy in their conflicting reports after an election. Likewise, electoral commissions that ought to be impartial have also lacked the tenacity to comply with international standards and their own enabling legislation. The fact that Both the electoral commissions and the courts have been more concerned with their institutional security, which has discredited the current system, and the need for a more harmonised approach cannot be under played.

It is for this reason, amongst others, that an African body should be established to conduct elections in Africa. Where Africa conducts its own elections as a continent and declares such elections to be free and fair, having resorted to international standards as applied in the African setting, it is unlikely that there could be any dissenting voices. The following chapter

⁵² Goodwin above 80.

goes into more detail with regard to the conduct of elections in Africa and advances the justification for an African election body more strongly.

Chapter Three: Elections in Africa - The case for an AU electoral supervisory body

3.0 Introduction

When elections are held in any African country the whole world holds its breath for a while. There is always uncertainty as to whether such elections will be peaceful; free and fair. Some European countries and the US government even go to the extent of issuing travel advisory warnings to their citizens who intend to travel to those countries that will be having elections.⁵³ This is because election time is conflict time in Africa. This has caused some sceptics to doubt the value of elections in bringing about formidable change in Africa.⁵⁴

African elections are a gamble. There is absolutely no guarantee that elections will be held in accordance with international standards regardless of the fact that the institutions that ought to provide such a guarantee exist. It could be argued that 'larger than life' individuals exert more influence than municipal institutions that have been established to ensure compliance with the law. This emphasis on the individual rather than the institution thus downplays any role that could and should be played by the institutions. It can therefore be argued that African elections are dependent on the benevolence of an incumbent head of state, instead of fairness being guaranteed by a robust legal framework.

This chapter exposes the weaknesses and inadequacy of the current African election strategy by examining the election laws and practice of the African Union through current African elections particularly those held in Kenya and Zimbabwe. This argument on the weakness of African elections is strengthened by an overview of other recent African elections and other EMB's in Africa. In the previous chapter the importance of elections was brought to light. This chapter goes a step further by showing the need to value elections through credible election supervision and a monitoring system controlled by the African Union (AU). It is to be argued that the current system of placing much importance in the so called 'independent electoral bodies' and observer missions has inherent limitations that will continue to maintain the *status quo*.

⁵³ In the recent Angolan elections foreign companies closed shop in anticipation of violence – Daily Graphic 11 September 2008.

⁵⁴ See for instance Sisk & Reynolds 'Introduction' in Sisk and Reynolds (Ed's) 1998 (above n31) who suggest that there is good reason to be sceptical about African elections as elections can exacerbate social tensions by further polarising highly conflictual societies 2.

3.1 African Election Legal Framework

3.1.1 African Charter on Democracy, Elections and Governance

The most important instrument dealing with elections in Africa is the African Charter on Democracy, Elections and Governance (the Democracy Charter). The Charter was adopted in January 2007 and is not yet in force as the requisite number of ratifications has not yet been met. The Democracy Charter is a milestone in the African human rights system and is the only such instrument of its kind in international human rights law. Its adoption emphasises the point that Africa is able to take an extra step in formulating initiatives that are unique to the African setting. There is no need for something to be tried and tested somewhere else before it is brought to Africa and be expected to work in the same way.

Chapter 2 of the Democracy Charter provides the objectives which include: [to]

- 3 Promote the holding of regular free and fair elections to institutionalise legitimate authority of representative government as well as democratic change of governments;
- 4 Prohibit, reject and condemn unconstitutional change of governments⁵⁵

Enforcement of the Democracy Charter is largely left to the AU Commission and the Peace and Security Council. With regard to elections specifically, the Democracy and Electoral Assistance Unit and the Democracy and Electoral Assistance Fund are mandated to support elections through the provision of resources.

The Democracy Charter provides the appropriate normative structure for democracy and elections in Africa but is lacking in enforcement mechanisms. It seeks reliance from the same AU institutions that are already overburdened.

3.1.2 Lomé Declaration on Unconstitutional Changes of Government (2000)

The Lomé Declaration is a strongly worded document expressing African leaders' disdain for *coup d'état's* in Africa. Part of the text reads:

[w]e reaffirm that *coups* are sad and unacceptable developments in our Continent, coming at a time when our people have committed themselves to respect of the rule law based on peoples will expressed through the ballot and not the bullet.

The Declaration emphasises the importance of free and fair elections and sets a framework of punitive measures that should be taken by the AU in the event of an unconstitutional change of government. Strictly speaking, the document does not provide for situations where there are fraudulent elections. Its main contention is that there should be no *coup's* but rather there should be 'free and fair' elections. What constitutes free and fair is left open.

⁵⁵ Article 2.

3.1.3 Durban Declaration on the Principles Governing Democratic Elections in Africa (2002)

The Durban Declaration, although still *soft law*, is arguably the most authoritative document on elections in Africa. This Declaration goes a step further than previous documents in that it actually sets out bench marks as to what constitutes free and fair elections. Article II provides for 'Principles of democratic elections'. These principles include democratic constitutions with supportive legal instruments, the doctrine of separation of powers, regular elections and impartial, competent, accountable electoral institutions that are 'staffed by well-trained personnel and equipped with adequate logistics.' The Declaration sets out the duties of states and also the rights and obligations of citizens. To a large extent it is similar to the IPU's Declaration on the Criteria for Free and Fair Elections.

3.1.4 AU Constitutive Act and NEPAD

When the OAU transformed itself into the AU it committed itself to adhere to democratic principles. As such the objectives of the AU include the promotion of 'democratic principles and institutions, popular participation and good governance'.⁵⁶ The Constitutive Act thus acts as a founding pillar to the concept of free and fair elections although not enumerating on the concept.

The emergence of the AU also saw the birth of Africa's development strategy known as the New Partnership for Africa's Development (NEPAD). In 2002 the AU adopted the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance. This Declaration is an acknowledgement of the ties between economic development and political stability. The rhetoric of democracy and good political governance is continued in Article 7 of the Declaration. Here heads of government undertake to enforce with 'renewed determination' the 'inalienable right of the individual to participate by means of free, credible and democratic political processes in periodically electing their leaders for a fixed term of office.'

3.1.5 Regional mechanisms

Regional communities also have their own instruments that complement that of the African Union. SADC has adopted the SADC Guidelines Governing Democratic Elections which also sets out the general principles of free and fair elections. These guidelines espouse the existing AU/OAU guidelines and are directed more to the rights and duties of SADC electoral observer missions. As the name suggests they are only guidelines and cannot be said to be binding upon member states.

⁵⁶ Article 3(g) of the Constitutive Act of the AU.

ECOWAS also has a regional instrument on elections known as the ECOWAS Protocol on Democracy and Good Governance (2001). It is a binding document and unlike the SADC guidelines, it calls for zero-tolerance for unconstitutional changes of government and provides for punitive measures in the event of such unconstitutional changes of government. The history of West Africa which is ridden with coup d'état's demands such a zero-tolerance approach. This instrument has several similarities with the African Democracy Charter

3.1.6 Overview of the legal framework

The most distinct observation is the lack of a binding regional instrument dealing specifically with elections in Africa. It is this void that the African Democracy Charter attempts to fill. Africa, however, is not a place that is lacking in laws. It has been argued that there is a paradox by African leaders who bind themselves to international human rights instruments in order to prevent being bound.⁵⁷ By signing international agreements a country is able to remove international focus upon it as not being a signatory.

Although it is important to have a firm legal framework, the failure to hold free and fair elections has had little to do with lack of laws. It will be argued here that failure to comply with international standards that have been emphasised and reemphasised in numerous instruments is attributable not only to the weak African state but to the lack of efficient and authoritative supervisory mechanisms in African states. By using the Kenya and Zimbabwe scenarios as key examples it will be shown that even when the electoral laws are in place, the observers are present and there is an 'independent' electoral body an election can still be so unimaginably flawed.

3.2 Kenya elections (“the Kenya crisis”)

In December 2007 the whole world had its eyes on Kenya as she held her presidential and parliamentary elections. These elections were not only a test on the gains of Kenya's democracy but the consolidation of Africa's democracy. Sadly, this test was failed dismally as the election was marred with fraud, violence, mass displacement of people and death. This part of the paper takes a short look at this election and what went wrong. Of particular importance is the abuse of the incumbent president's power over the electoral administration and how the lack of impartiality and independence from individuals (not the legal framework) can result in a humanitarian catastrophe.

There were two main political parties that were contesting the election. The Orange Democratic Movement (ODM) led by Raila Odinga and the incumbent ruling party the Kenya Rainbow Coalition (KRC) led by incumbent president Mwai Kibaki. On December 28, a day

⁵⁷ Hansungule M (Prof) LLM Class lectures, University of Pretoria, 2008.

after the poll, Odinga was reported to have taken a strong lead but after 90% of the ballots had been counted Odinga's lead shrank.⁵⁸ After Odinga's lead of over one million votes disappeared, on 30 December the Electoral Commission of Kenya (ECK) declared Kibaki the winner by over 200,000 votes. Within hours of this declaration Kibaki was sworn in as president and began making calls for national healing and reconciliation.⁵⁹

Odinga refused to recognise the outcome of the poll citing mass fraud and irregularities by the government and the ECK. Chairperson of the ECK Samuel Kivuitu agreed that there had been irregularities and also said he had been pressured by the ruling party into announcing the results but in actuality he did not know who had won.⁶⁰ In his opinion all disputes or irregularities should now be dealt with by the courts and not by the Electoral Commission. Odinga refused to petition the courts on any electoral disputes saying the courts were staffed by Kibaki's people and it would be a waste of time to petition the courts.⁶¹

There was a mixed reaction by the international community to the election result. The United States soon after the swearing-in ceremony congratulated Kibaki and called for the result to be respected. The European Union Electoral Observer Mission (EU EOM) on the other hand issued a statement calling the election flawed. The preliminary statement cited irregularities in the tallying system, a lack of transparency by the ECK, pre-election violence and campaigning on ethnic grounds amongst other irregularities in the election.⁶² The statement went short of calling the election not free and fair. Another observer mission from the International Republican Institute (IRI) issued a statement with the headline:

'IRI Delegation Praises Kenyan People for Successful Election, Urges Continued Acceptance of the Democratic Process'⁶³

This preliminary statement called the election a success and called on the people of Kenya to accept the result.

⁵⁸ Jeffrey Gettleman, "Disputed Vote Plunges Kenya Into Bloodshed", The New York Times, December 31, 2007.

⁵⁹ "Kibaki named victor in Kenya vote", BBC News, December 20, 2007. <http://news.bbc.co.uk/2/hi/africa/7164890.stm> accessed 18 August 2008.

⁶⁰ "Incumbent Declared Winner in Kenya's Disputed Election", The Washington Post, December 31, 2007, page A11. http://www.washingtonpost.com/wp-yn/content/article/2007/12/30/AR2007123002506_pf.html. accessed 18 August 2008.

⁶¹ "Odinga rejects Kenya poll result", BBC News, December 31, 2007. <http://news.bbc.co.uk/2/hi/africa/7165406.stm>.

⁶² European Union Election Observation Mission Kenya, General Elections, 27 December 2007 Preliminary Statement. Available at http://www.eueomkenya.org/Main/English/PDF/Kenya_2007_Final_Preliminary_Statement.pdf Accessed 19 September 2008.

⁶³ 'IRI Delegation Praises Kenyan People for Successful Election, Urges Continued Acceptance of the Democratic Process' www.iri.org/africa/kenya/2007-12-28-kenya.asp. Accessed 15 August 2008.

Kenya Electoral Domestic Observatory Forum (KEDOF) a local multi forum NGO which was also observing the election issued its preliminary statement in which it lauded the voting process but then went on to conclude that 'the electoral process lost credibility towards the end with regard to the tallying and announcement of the presidential result.'⁶⁴

The African response to the election seemed slow and calculated. Observer missions were cautious of their approach as they waited for widespread consensus on the illegitimacy of the result before declaring it so. The East African Community (EAC), a regional bloc of East African Countries, despite having observers did not issue any preliminary statement. It, however, issued a statement about two weeks after the election describing the election as not being free and fair. Likewise, the Pan African Parliament (PAP) observer team also issued a final statement on 24 January condemning the tallying of the ballots and described the election as not being free and fair.⁶⁵ African observer missions were thus nowhere to be found in the issuance of preliminary statements condemning the actions of Kibaki and the ECK unlike the EU EOM.⁶⁶

Kibaki was announced as the winner in a remote and very secure location, soon after that the crisis began to brew. Kenya is a multi-ethnic society and voting is largely based on ethnic lines. Odinga was supported by the Kikuyus one of the dominant ethnic groups some who stay in the Nairobi Slums and are extremely opposed to Kibaki.⁶⁷ On these lines there was widespread violence that erupted all over the country. According to Human Rights Watch even though the country is divided by ethnicity the immediate cause of violence was the rigging of the election by Kibaki.⁶⁸

Kibaki was fully aware of his illegitimacy and the consequences it would have in terms of public order. The announcement of the winner was made in the absence of journalists and soon after the announcement the government ordered broadcasting to be stopped.

⁶⁴ KEDOF 'Preliminary press statement and verdict of Kenya's 2007 general elections'. Available at <http://kenyastockholm.files.wordpress.com/2008/01/kedof-statement-31-12-07.pdf>. Accessed 20 September 2008.

⁶⁵ PAP Preliminary Statement – Kenya elections 2007 Available at <http://appablog.wordpress.com/2008/01/24/statement-of-the-pan-african-parliament-election-observer-mission-to-kenya%E2%80%99s-general-election-held-on-the-27th-december-2007/> Accessed 19 September 2008.

⁶⁶ The Common Market for Eastern and Southern Africa (COMESA) also had an observer team but it is not clear whether it issued any statement all.

⁶⁷ 'Scores dead in Kenya poll clash' BBC <http://news.bbc.co.uk/2/hi/africa/7165602.stm#map>. Accessed 19 September 2008.

⁶⁸ 'Ballots to Bullets Organized Political Violence and Kenya's Crisis of Governance' Human Rights Watch March 2008 Volume 20, No. 1 (A) www.hrw.org/reports/2008/kenya0308/kenya0308web.pdf Accessed 13 August 2008.

According to Human Rights Watch, this slipped the country into a deep sense of anxiety and hours after the announcement Kenya slid into an orgy of violence with widespread looting.⁶⁹

The violence that occurred in Kenya at this stage is well documented. It includes extra-judicial killings by the police, unnecessary use of lethal force by police and military, mass internal displacements, looting, 'ethnic-cleansing' rape of men, women and children and murder of politicians. It is reported that about 500, 000 people were internally displaced and not less than 1,000 people lost their lives as a result of the post-election violence.⁷⁰ No one had imagined that a disputed election in the 21st century would result in a humanitarian crisis of that magnitude.

Initially Odinga refused to recognise Kibaki as President and thus refused to enter into any talks with him if he were coming to the negotiating table as President of Kenya. He called for fresh elections to be held that would exclude the ECK and the resignation of Kibaki. The ODM later changed its stance on the grounds that Kibaki accepts international mediation and not that of Kenyan elders as had been suggested by Kibaki.

The stalemate was eventually brought to an end through African and international pressure but more importantly through the mediation of former UN Secretary General Kofi Annan. To put it in a nutshell, the Annan mediation brought to end the disputed election and both factions agreed to a coalition government with Odinga as prime minister and Kibaki remaining President. At present Kenya is continuing with the coalition government with everyone hoping that its fragility is not exposed to the detriment of Kenyans who have already suffered enough humanitarian crises.

The Kenya scenario is this study's first port of call on the inefficacy of EMB's and on the fickleness of international observers. What went wrong with the ECK has nothing or little to do with the legal framework establishing the ECK or the selection process of the commissioners. It was simply a case of an incumbent president abusing his authority. One may argue that the ECK chairperson showed a lack of resilience and allowed himself to be abused, but the nature of the African state run by patronage and corruption makes this easier said than done. Kenya showed the world that constitutional guarantees in fact guarantee nothing.

⁶⁹ Human Rights Watch (n68 Above) 23.

⁷⁰ Human Rights Watch (n68 above) 2. See also a more authoritative report of the Kenya National Human Rights Commission (KNHRC) 'On the Brink of the Precipice: A Human Rights Account of Kenya's Post 2007 Election' Violence available at http://mzalendo.com/Files/Election_Report.pdf which gives details on the causes of the conflict and accounts of what actually transpired on the ground. Accessed 20 August 2008.

Although there have been studies into the Kenya crisis what it all boils down to is the ECK failing to deliver its constitutional mandate. It is this lack of discretion that triggered a humanitarian crisis. As is shown in the analysis of other African countries, electoral commissions do not seem to hold the future for Africa and it is for this reasons that the AU should step into take over the overall supervision of elections.

3.3 The Zimbabwe elections⁷¹

Before Zimbabweans went to the polls they had seen from Kenya how a badly conducted election can easily slip a country into unforeseen chaos. The March 29 elections were landmark in that for the first time Zimbabweans would vote for the president, parliament, senate and local councils all at the same time. Through the mediation of President Thabo Mbeki numerous reforms had been made to the electoral laws in order for the elections to be free and fair. These changes included allowing the main opposition the Movement for Democratic Change (MDC) to nominate some people into the Zimbabwe Electoral Commission (ZEC). Translucent ballot boxes were to be used and the result of the election were to be displayed outside each polling station immediately after the counting. As will be seen below, electoral commissions can still display wanton partiality and flagrant disregard for the spirit of free and fair elections despite a strong constitutional mandate backing their establishment.

In spite of the reforms the electoral ground remained largely unbalanced; leaning in favour of the ruling ZANU (PF) party and the incumbent President Robert Mugabe. As such, even before the election, the credibility of the election was questionable. The public media provided very limited access to other parties and with its well known partisan views heavily campaigned for ZANU (PF). The opposition parties were denied the opportunity to carry out rallies which were often disrupted by the police. There was widespread voter intimidation through violence on suspected MDC supporters by non-state actors that were supported by the state. MDC Secretary – General Mr Tendai Biti was arrested and charged on trumped up treason charges while Morgan Tsvangirayi was arrested over five times for various charges thus curbing their ability to carry out campaigns during this time. In addition to this the government began distributing free farm implements in what was seen as bribing the electorate. ZEC did not murmur a word to rebuke the government or simply engage all the parties with regard to these developments.

⁷¹ A detailed and authoritative account of the Zimbabwe elections is the 'Zimbabwe Election Support Network [ZESN] Report on the Zimbabwe 29 March Harmonised Election And 27 June 2008 Presidential Run-Off' available at http://www.zesn.org.zw/publications/publication_222.doc Accessed 10 September 2008. This report as well as other internet sources has been relied on in this summary.

The Zimbabwe government invited observers from the African Union (AU), Southern African Development Community (SADC), and Common Market for East and Southern Africa (COMESA), Iran, China, Electoral Institute for Southern Africa (EISA). Observers from all European countries, the United States and Canada were banned from observing the election as their governments are 'hostile' to the Zimbabwe government. Western media houses and South Africa's etv were also not allowed to enter Zimbabwe and report on the election. Libya, Russia, Iran and China although having no credible human rights record or any known experience in electoral observation especially in Africa were invited to observe. Their silence in the whole electoral process makes much noise in revealing their inexperience and partiality in the whole process.⁷²

On 29 March 2008 voting began in Zimbabwe amidst the presence of international observers. In addition to these observers, the Zimbabwe Electoral Support Network (ZESN), a coalition of local NGO's which had over 8,000 accredited observers, also observed the election. The election was generally peaceful and orderly except for some sporadic cases of violence. Polls opened in time, electoral staff was efficient and professional; and voters generally voted in an orderly fashion.

Like Kenya everything began to go really wrong after the polls had closed.⁷³ Parliamentary and senatorial results were released slowly whilst there was a complete blackout on the Presidential results. Within a week, however, the full parliamentary results were released and for the first time in history an opposition party held the majority of seats. The MDC had won 99 seats, ZANU (PF) 97 seats, a breakaway faction of the MDC known as MDC-M had ten seats whilst one seat was held by an independent candidate.

For the next five weeks after the poll closed, Zimbabweans and the world at large would have to speculate as to whom had won the presidential election as ZEC refused to release the result. Whilst this occurred ZANU (PF) remained aggrieved with its loss of majority in parliament and ZEC announced that it was to recount the results of 23 constituencies. According to ZEC Chairman George Chiweshe reasonable grounds existed that there had been a miscount that affected the result and as such they were recounting the votes in the presence of party representatives and observers. This made the independence and impartiality of ZEC further questionable.

The region was disturbed by the delay in the release of the results prompting the Late Zambian President Levy Mwanawasa who was the chair of SADC to call for an extraordinary

⁷² Although these countries were invited to observe the elections, it is not clear whether they actually accepted the invite or whether they issued any statement at all to do with the elections.

⁷³ Interim Statement EISA Regional Election Observer Mission to the 2008 Harmonised Elections In Zimbabwe. Available at <http://www.eisa.org.za/EISA/pr20080401.htm> accessed 12 September 2008.

meeting to discuss these developments. The meeting was held on 14 April 2008 and opened with calls from President Mwanawasa to find solutions to Zimbabwe's brewing crisis. This almost useless meeting ended in calling for a government of national unity and mandated President Thabo Mbeki to continue engaging the leaders of ZANU (PF) and MDC.

As this was occurring, the MDC made an urgent application to the High Court in Harare for an order compelling ZEC to release the presidential results. This application was dismissed with costs as the judge found no provision in the electoral law that provided for the time in which the results should be released. ZEC had explained the delay on technical counting and collation grounds; reasons found to be cogent by the presiding judge.⁷⁴ The MDC was not deterred by this judgment and made another urgent application for an order declaring the recount of ballots in the 23 constituencies as being null and void. This application was also dismissed with costs with the judge saying it lacked any merit.⁷⁵ The recount continued despite the protest from the MDC and civil society but the result did not change.

On May 2, five weeks after voting, ZEC finally pronounced the presidential result. Morgan Tsvangirayi had won with 47.9% of the vote, whilst President Robert Mugabe had 43.2%. As no candidate won an outright majority there had to be a runoff between Robert Mugabe and Morgan Tsvangirayi. According to the Electoral Act this runoff had to be held no later than 21 days after the announcement of the result. Regardless of this provision ZEC announced that the runoff would be held on 27 June 2008 – 90 days later. This move was seen as a ploy to allow ZANU (PF) to recoup.

The period between the announcement of the results and the runoff will remain a scar in the history of Zimbabwe for several generations. According to ZESN the '27 June run off degenerated into a run over leaving in its wake a trail of destruction, houses burnt down, many people displaced and homeless, orphaned and homeless children and communities torn asunder.'⁷⁶ In its statement refusing to endorse the election, the SADC Electoral Observer Mission (SEOM) noted that '[t]he period leading up to the run-off election was characterized by politically motivated violence resulting in loss of life, damage to property, and serious injuries sustained and hindering political activities.' For similar reasons the AU refused to endorse the election noting that 'in the context of the AU Declaration on the

⁷⁴ As per Uchena J in *Movement for Democratic Change and Another v Chairperson of the Zimbabwe Electoral Commission and Another* 8218/08 (not yet reported). See also n above.

⁷⁵ As per Guvava J in *Movement for Democratic Change and Another v Chairperson of the Zimbabwe Electoral Commission and Another* (not yet reported).

⁷⁶ ZESN Election Report above n 47.

Principles Governing Democratic Elections in Africa, it is the considered view of the African Union Observer Mission that the election process fell short of accepted AU standards.⁷⁷

A system of state sponsored violence brewed all over the country with the police casting a blind eye to these abuses. At least 171 people were killed in election related cases. Human rights defenders were constantly assaulted and arrested by the police. ZESN was accused of being partisan and had its offices raided and documents confiscated. As a result, only 500 ZESN observers were accredited for the run off out of a previous 8,000 observers in the March 29 election. All this was done in the face of international observers some who also experienced the harassment from the police.

The silence of ZEC in all this violence and lawlessness is deafening. At no stage did ZEC make any statement or perform any action such as calling the parties so as to address the abuse of power by the government. ZEC confined itself to its procedural role of ensuring the logistics of the elections went well.

Eventually Mr Morgan Tsvangirayi could not take it anymore and he withdrew from the run-off on 22 June. Notwithstanding, ZEC refused to recognise his withdrawal from the race and maintained the election would still proceed as if he had not withdrawn. The violence, death and internal displacement of some people due to the violence became a cause for concern in the region resulting in South African President Thabo Mbeki requesting for a postponement of the election. This call was echoed by the SADC Chairperson Mr Levy Mwanawasa, the SADC organ on Politics, Defence and Security, AU Chairperson Mr Jean Ping, the UN Security Council and various western governments. The calls, however, fell on deaf ears with the Zimbabwe government proclaiming that these calls were 'idiotic noises that would not bother us.'

As such the runoff proceeded as a one man show with high voter apathy and numerous spoilt votes. Some of the spoilt votes included comments showing displeasure in how the election had been conducted. On 29 June 2008 ZEC declared Mugabe the winner and on 30 June, like Kibaki, he was immediately sworn in as President in a ceremony where regional and international leaders were conspicuously absent.

The international reaction to this sham of an election was not entirely consistent. A robust position came from Zimbabwe's neighbour Botswana which said Mugabe was an illegitimate president and called for Zimbabwe's suspension from SADC and the AU.⁷⁸ Even Kenya

⁷⁷ 'Preliminary statement of the AU Observer Mission.' Available at <http://www.eisa.org.za/PDF/rr30.pdf> Accessed 10 September 2008.

⁷⁸ "Botswana denounces Mugabe victory", BBC (2008-7-1). Accessed 1 July 2008. Available at <http://news.bbc.co.uk/2/hi/africa/7484165.stm>.

made some noise on Zimbabwe with Prime Minister Railla Odinga also calling for Zimbabwe's suspension from the AU and for fresh elections to be conducted in the presence of peacekeepers.⁷⁹

On 30 June the 39th Summit of the AU was held in Egypt where the opening speeches lacked any mention of Zimbabwe.⁸⁰ Despite the fact that the AU observers, amongst others, had declared the elections as not being free and fair, Mugabe was welcomed as a head of state and referred to as President Mugabe. The AU did, however, pass a resolution on Zimbabwe calling for a Government of National Unity (GNU) and endorsing the SADC mediated talks of South African President Thabo Mbeki.⁸¹

The lack of a strong stance from the AU will in most probability haunt this body for years to come. What is clear from the AU reactions to Kenya and Zimbabwe is that the AU does not have a clear strategy as to how it should react when elections are stolen. This is because the AU plays a 'fireman approach' – only entering when damage has already accrued and salvaging whatever it can. This is worsened by the fact that there is no law prescribing what the AU should do in cases of stolen elections. This defect can be cured by creating an AU electoral supervisory body where the AU participates in the elections from the word go as a performer and not just as a spectator.

Soon thereafter Mr Mbeki began to have talks with ZANU (PF) and the two formations of the MDC. These protracted talks led to the signing of an agreement between the three parties agreeing to form a GNU on 15 September 2008. Under the agreement, Mr Mugabe remains president but with curtailed powers. Mr Tsvangirayi becomes the Prime-Minister and Mr Mutambara a deputy prime minister. This agreement, initially hailed as the beginning to the end of Zimbabwe's turmoil can only be judged by its execution and implementation by the parties concerned. The continued suffering of the Zimbabwean people as a result of the flawed election is beyond the scope of this paper.

Unlike Kenya, Zimbabwe did not only have a flawed electoral body but also showed a warped judiciary that is unable to rule against the government.⁸² Election petitions are not business as usual for any municipal court and the need for a truly independent tribunal to

⁷⁹ 'Kenya urges AU to suspend Mugabe' BBC (2008-6-30). Accessed 30 June 2008. Available at <http://news.bbc.co.uk/2/hi/africa/7481857.stm>.

⁸⁰ 'Mugabe avoids criticism at AU talks' Al Jazeera, June 30, 2008. Available at <http://english.aljazeera.net/news/africa/2008/06/200863013246676180.html>. Accessed 20 July 2008.

⁸¹ Assembly of the African Union Eleventh Ordinary Session. Resolution on Zimbabwe Assembly/AU/Res.1 (XI). Available at www.africa-union.org. Accessed 12 July 2008.

⁸² See the numerous cases that have been cited in Chapter Two.

hear electoral petitions cannot be overemphasised. In Liberia, for example, a US judge was brought into hear the disputed 2000 Presidential election. Justice Nikki Clark presided over the case and gave judgment in just 37 days in a case that was being tracked by the international media. Her judgment was respected by all parties.⁸³ Justice Clark's decision was respected not only because of its sound judicial reasoning but because she was accepted by all parties as someone who was not just neutral in the paper sense of the word but neutral in that all parties accepted her as having no interest in the outcome of the election. This practice should be picked up by the AU in establishing a credible independent African body that would entertain electoral disputes. It must be remembered that in Kenya, Odinga refused to refer his matter to the courts saying they were all staffed by Kibaki's people.

All things being fair there would be no need for observers or electoral courts as the EMB would carry out its duty as required and expected by law resulting in a process that is accepted by all the people. This, however, is not the case and there is need for observers to cast an eye not only on the EMB but on all the stakeholders to determine whether everyone is playing by the rules. Where the rules are not adhered to, as is often the case, observers can only 'bark' about such irregularities but certainly cannot 'bite'. Their mandate does not extend to controlling the process in any way and they can only rebuke the process *ex post facto*. This is where the courts come in as they have the authority and power not only to determine whether an election was 'free and fair' but can make appropriate orders such as ordering a recount or a rerun in order to cure any irregularities that would have occurred.

So for Zimbabwe the question becomes – how does an election go terribly wrong when there is a constitutionally appointed EMB, there are 'independent' judges and there are international observers observing the election? What this emphasises is that the current approach by the AU to elections is insufficient. It is too dependent upon incumbent governments that also have an interest in the outcome of the election. What it also reflects is the need for observers to be able to play a role that contributes to a positive outcome of the election rather than the current 'scarecrow approach' where their presence is meant to merely intimidate those that intend to flout the electoral process.

Observers should not be expected to be neutral always. They have an interest in improving the election process and they cannot do so by always acting dumb, only to give an *ex post facto* analysis that contributes nothing to the current election. What is needed from observers is the wisdom of knowing when it is appropriate to be neutral and watch what is going on and

⁸³ Pudlow Jan 'In the election spotlight...again Judge Clark works for fair elections in Africa' March 15 2007 Florida Bar News <http://find.galegroup.com/ips/start.do?prodId=ips> accessed 22 October 2008.

when it is better to intervene so as to improve the process.⁸⁴ The AU needs to acknowledge this and give some teeth to African observers. This should be done through an AU electoral body that will be able to respond appropriately to the views of observers before the election and as the election proceeds. Only an AU electoral body will be able to stop the holding of elections for a certain time if widespread violence or voter intimidation would impede on the will of the people. Only an AU body would be able to trigger the systems of the AU's Peace and Security Council in a swift manner to avert the consequences of a humanitarian crisis as a result of elections.

3.4 Other African Elections

3.4.1 Nigeria

Nigeria held its presidential, gubernatorial, senatorial and local government elections in April 2007. Nigeria is the most populous country in Africa with a population of 150 million inhabitants, about a quarter of Africa's population. Conducting elections in this country is certainly not a walk in the park, especially when there are about 70 million registered voters. In the 2007 elections, 'the weakest link' was the Independent National Electoral Commission (INEC), which is the body mandated to conduct elections in Nigeria.

The elections were marked with fraud and manipulation which had occurred as well in 1998 and 2003.⁸⁵ The Nigerian election was also prejudiced by a partisan INEC. After having lost court cases, the INEC had to reprint ballot papers at the last minute to include additional candidates, such as presidential candidate (former vice president) Atiku Abubakar. Cases of candidates not appearing on the ballot sheet were also widespread. In the state of Ondo, the INEC reportedly awarded winning votes to a PDP candidate notwithstanding that the PDP did not field any candidates there at all.

Nigerians also witnessed widespread violence in the elections. At least one in every ten Nigerians claimed they had actually seen the violence occur.⁸⁶ There are reports of politicians sponsoring people to assault members of other parties. The EU EOM to Nigeria was also unable to endorse the elections as being free and fair. According to EU EOM:

⁸⁴ See Kasfir N as quoted by Sisk & Reynolds 'Elections and conflict management in Africa Conclusions and recommendations' in Sisk & Reynolds (above n 31) 153-4.

⁸⁵ John Larvie 'Reflections on the 2007 Nigerian elections and its Implications for Ghana' - A round table discussion led by John Larvie on 2 August 2007 (on file with author) 2.

⁸⁶ IFES 'A Nigerian perspective on the 2007 Presidential and parliamentary elections Results from pre- and post-election Surveys'. Available at <http://www.ifes.org/publication/150fd579def9e2c9f5b478aa99ae8fcf/A%20NIGERIAN%20PERSPECTIVE%20ON%20THE%202007%20PRESIDENTIAL%20AND%20PARLIAMENTARY%20ELECTIONS.pdf>. Accessed 15 August 2008.

The 2007 State and Federal elections have fallen *far* short of basic international and regional standards for democratic elections. They were marred by poor organisation, lack of essential transparency, widespread procedural irregularities, significant evidence of fraud, particularly during the result collation process, voter disenfranchisement at different stages of the process, lack of equal conditions for contestants and numerous incidents of violence. As a result, the elections have not lived up to the hopes and expectations of the Nigerian people and the process cannot be considered to have been credible.⁸⁷

This evaluation of the Nigerian elections was a huge disappointment to Africa as Nigeria is an African powerhouse that ought to be championing democracy in the continent. Unlike in Zimbabwe and Kenya where at least voting went on smoothly, Nigeria elections witnessed widespread logistical problems because of the INEC.

When such a country is unable to hold its own elections it sadly then lacks the credibility to criticise other countries when they do not hold their elections as required, not only by international laws but by their own domestic laws. Although Nigeria is an economic giant, the 2007 elections showed that it is still a political midget.⁸⁸

Those not satisfied with the result had to utilise municipal courts in an attempt to correct a fundamentally flawed process. No court can cure an election that was inherently defective from the onset. As stated earlier, the decision to overturn an election is a difficult one for the courts and as such it should be the exception rather than the rule. Elections are expensive and time consuming, and as such the need to get it right the first time cannot be overemphasised. The lack of impartiality shown by the INEC, regardless of its constitutional mandate, reemphasises the point that this system of totally relying on these electoral commissions is not Africa's best strategy. It is this challenge of getting elections right originally that will be best tackled by an AU electoral body.

3.4.2 Sierra Leone

The 2007 elections in Sierra Leone were landmark in that for the first time there would be transfer of power from one civilian leader to another after years of civil strife. The elections were for parliament and presidential offices and there had to be a runoff after the first round of the presidential election, as none of the candidates had obtained a 55% majority of the votes. The Commonwealth Observer Group (COG) sent a panel of eminent persons to observe the election (including the run off) and they concluded that the election was a success and the result represented the will of the people. According to COG:

⁸⁷ My emphasis. 'European Union Election Observation Mission Federal Republic of Nigeria Presidential, National Assembly, Gubernatorial and State Houses of Assembly Elections 14/21 April 2007 Statement of Preliminary Findings and Conclusions. Available at www.eueom-ng.org.

⁸⁸ Reuters 'Nigeria polls show Africa's "giant" has clay feet' 24 April 2007 Nigeria Elections http://africa.reuters.com/nigeriaelection/features/news/Africa - Reuters_com.mht. Accessed 15 October 2008.

The elections were credible. They were conducted in accordance with internationally accepted standards. NEC performed very well and the people of Sierra Leone now have a chance to consolidate the democratic traditions that have been reinforced by the professional manner in which these elections have been conducted.⁸⁹

An important feature about the Sierra Leone election is the presence of the United Nations through the United Nations Integrated Office in Sierra Leone (UNIOSIL) which included the United Nations Development Programme (UNDP) and its Electoral Assistance Division (UN EAD). Through this vehicle, the UN channelled 51 electoral experts to provide technical expertise on the election and channelled funds to assist in the election as well. The Executive Representative of the UN Secretary General, Mr Victor Angelo, co-chaired proceedings that brought together domestic and international stakeholders with the NEC Chairperson throughout the electoral process.⁹⁰ This was the second time the UN had assisted in Sierra Leone's elections and, through this effort, the elections were a success.⁹¹

From the Sierra Leone experience it can therefore be safely argued that the presence of an international body, not only as an observer, but as an equal partner in running the election, enhanced the credibility of the election and the election results. UN presence cannot, however, continue indefinitely, and there is need for a sustainable arrangement to be made, which will ensure that Sierra Leone continues to hold 'free and fair' elections. It is advanced herein that such sustainable arrangement should come from the AU through an electoral supervisory body that will take the lead role in the conducting of elections in Africa.

The example of Sierra Leone is also extremely important in showing how post-conflict societies can benefit from elections. Conflict studies are a minefield where no easy generalisations can be made. Regardless, the point to be made is that there is need to utilise elections as a vehicle to bring democracy and not as an end in themselves. As such, emerging post conflict societies, such as Sierra Leone, Liberia, Côte d'Ivoire and Guinea Bissau, cannot be allowed to slip into the same pit as did countries, such as Tanzania, Zimbabwe, Kenya, Zambia, that used elections to become one party totalitarian states, consequentially depriving citizens of democracy and human rights. If Zimbabwe and Kenya

⁸⁹ Sierra Leone Presidential And Parliamentary Elections 11 August 2007 And Run-Off Presidential Election 08 September 2007 Report of the Commonwealth Observer Group' Accessed 18 July 2008 Available at http://www.thecommonwealth.org/document/181889/34293/35144/152078/170436/sierra_leone_report.htm 37.

⁹⁰ See 'Sierra Leone's 2007 Elections' Ace Project at <http://aceproject.org/today/feature-articles/sierra-leone-s-2007-elections/?searchterm=sierra%20leone>. Accessed 15 August 2008.

⁹¹ According to a report by the UN Secretary General 'Enhancing the effectiveness of the principle of periodic and genuine elections' the UN may become a victim of its own success as countries continue to request electoral assistance. 19 October 2001 56th Session of the General Assembly 3. Available at http://www.undp.org/governance/docs/Elections-Pub_DecadeReview.pdf. Accessed 15 August 2008.

have failed to fully consolidate democratic gains acquired at independence, then what more for the volatile post conflict countries? A more concerted and rigorous effort is therefore required by the AU, which should exceed current efforts of summits and resolutions.

3.4.3 Angola

Having been embroiled in a civil war, Angola had postponed the holding of elections since 2002 claiming that the country was not yet ready to hold elections.⁹² After 16 years, Angola finally held its multiparty parliamentary election in September 2008. Thus, these elections were important to Angola as they served as an acid test to determine whether the country was now capable of conducting free and fair elections and accepting the result of such elections.

Human Rights Watch was not impressed by these elections where the ruling MPLA party won over 80% of the legislative seats. According to HRW:

Key problems identified by Human Rights Watch include obstruction by the National Electoral Commission (CNE) of accreditation for national electoral observers, its failure to respond to media bias in favour of the ruling party, and severe delays by the Angolan government in providing funds to opposition parties. The evidence obtained by Human Rights Watch on these three key issues – observers, media bias, and state funding – suggests the polls did not meet the Southern African Development Community (SADC) Principles and Guidelines Governing Democratic Elections in key areas.⁹³

The report goes on to mention logistical problems that occurred, including 320 polling stations that failed to open in Luanda because they had no ballot paper. The possibility that a large number of people did not vote because of these setbacks is cited as one of the reasons why the election fell short of SADC standards.

Other election observers were not entirely consistent on the aspect of whether the elections complied with regional and international standards. The EU EOM, which had 90 observers in Angola, initially described the polls as a 'disaster' on the first day of the poll.⁹⁴ This was due to the inability of the 320 polling stations to open in time. The EU EOM report notes the abuse of state resources by the MPLA, the media bias in favour of MPLA, cases of vote buying and corruption. One of the EU EOM observers also claimed he personally witnessed

⁹² The war ended in 2002 with the death of UNITA rebel Jonas Savimbi who had returned the country into a civil war after he refused to accept the result of the 1992 election. Since then Angola has not held any elections.

⁹³ Human Rights Watch, 'Angola: Irregularities Marred Historic Elections' Available at http://hrw.org/english/docs/2008/09/15/angola19808_txt.htm. Accessed 20 August 2008.

⁹⁴ "Angola vote organisation 'a disaster': EU observer", AFP, September 5, 2008. Available at <http://www.eubusiness.com/news-eu/1220601723.19> Accessed 2 October 2008.

people being ferried from neighbouring Congo to come and vote in Cabinda.⁹⁵ Head of the EU EOM mission, Luisa Morgantini, described the organisation of the election as poor at a press conference but did not go on to mention whether that compromised the election as a whole. Regardless of these hitches, the EU EOM, in its report, found the elections to have been successful and praised the Angolans for this democratic effort.⁹⁶

SADC, which was also observing the election, was quick to declare the elections as being "peaceful, free, transparent and credible" and a reflection of "the will of the people".⁹⁷ This response was also echoed by the AU observer mission where the head of the mission, Benjamin Bounkoulou, noted that 'Angolans showed that they can hold elections without any constraints and gave a lesson to other peoples of our continent and showed that they can also live in peace, harmony and democracy.' As if oblivious to the technical hitches that had occurred, he also said that '[w]e could see that the polling stations opened exactly at 7 a.m. and four hours later, almost everyone had already exercised their civic right.'⁹⁸ The Pan African Parliament (PAP) lamented the lack of adequate voter education and the domination of the media by the MPLA but approved the election either way.

After results were announced, where the MPLA had a sweeping victory of over 80% of the votes cast and their closest rivals, UNITA, had about 10%, UNITA cried foul and announced it would challenge the result in court.⁹⁹ A few days later it accepted the result and urged the MPLA to govern in the interests of all Angolans.¹⁰⁰ Angola now awaits the presidential elections that are to be held in 2009.

The Angola elections are interesting in that they provide a contemporary case study on the determination by observers of whether an election is 'free and fair.' Angola does not have much of an opposition and, even in spite of the poor organisation of the election, it was unlikely that UNITA, or any of the other smaller parties for that matter, would have fared any

⁹⁵ 'Observers differ on Angola vote' 09/09/2008 http://www.news24.com/News24/Africa/News/0,,2-11-1447_2390206,00.html Accessed 2 October 2008.

⁹⁶ This report is available at EU EOM website at <http://www.eueom-ao.org/index.html>. Accessed 2 October 2008.

⁹⁷ News24 (n94 above).

⁹⁸ 'AU observers consider Angola's parliamentary elections successful' People's Daily Online 7 September 2008. Available at <http://english.people.com.cn/90001/90777/90855/6494711.html>. Accessed 2 October 2008.

⁹⁹ "Angola's opposition cries foul", AFP, September 6, 2008 http://www.int.iol.co.za/index.php?set_id=1&click_id=3045&art_id=nw20080906094600517C369098. Accessed 2 October 2008.

¹⁰⁰ "Angolan opposition party accepts defeat", Sapa-Associated Press (IOL), September 9, 2008 http://www.int.iol.co.za/index.php?set_id=1&click_id=68&art_id=nw20080909093837927C731323 Accessed 2 October 2008.

better. The elections were conducted clearly below the standard called for by international best practices as enumerated in regional and international declarations. In spite of this, the observers who monitored the election decided to make a value judgment, where they probably considered that disapproving the election would not make any difference considering the weak nature of the opposition. Rather, it would be in the best interests of all, they probably reasoned, to endorse the election and highlight the weaknesses for the sake of future elections.¹⁰¹

An important premise in this study, that seems neglected by the observers, is that elections are part of a democratic process or an avenue to democracy and not democracy in themselves.¹⁰² It is insufficient to have an electoral democracy without a liberal democracy. Where elections are used as a tool to legitimize authoritarian or totalitarian regimes, observers should not hesitate to speak out about it. It is extremely short sighted not to view an election prospectively and what such election means for the future. Angola is becoming a *de facto*, one party state and the future for democracy in such states is often very bleak.

The propriety of the observers conduct is debatable, but this study intends to show that an all African election body need not have to put itself in such shoes, as technical expertise would be one of this body's specialities. Hypothetically speaking, if the Angolan election had been conducted by such a body, the result may not have differed, but the process would have been an improvement. It is the integrity of this process that is of crucial importance. Recommendations in electoral observation should not stop short in the technical aspects but should continue to provide advice on how such democracy can consolidate itself. In this light it is necessary to continue this discussion by looking at the problems of the African elections, as highlighted by these and other case studies, as a way of establishing how an AU election body would have surpassed such glitches.

3.5 Other observations

In most African countries there is no clear distinction between the government, the state and the ruling party. The distinction may exist on paper but is nonexistent in terms of the people that hold these offices. Most African personalities, be it a judge, a businessperson or a medical doctor, can be linked to a political party in one way or the other. The strategy to avoid political appointments in EMB's has been, in some cases, to include opposition parties

¹⁰¹ This is not a new phenomenon. In the 2002 Zimbabwe Presidential Elections the AU and SADC observers declared the election free and fair. 12 other observer teams including SADC Parliamentary Forum rejected the election on the grounds that it did not meet the SADC requirements for holding free and fair elections.

¹⁰² According to Ake "democracy has been reduced to the crude simplicity of multiparty elections in Africa, both by the African elite and the international community." This remains true after over ten years when this statement was made. As quoted by Sisk & Reynold in Sisk & Reynold *Election and conflict management in Africa* above n31 149.

in appointing individuals. This exercise, despite usually being a sham consultative process, is also fundamentally flawed.¹⁰³

The ideal should be appointing people who are genuinely impartial and not to balance appointees with different political inclinations.¹⁰⁴ The African experience, however, shows that such people are hard and often impossible to come by. In hotly contested elections, commissioners will, in most cases, give into their political inclinations. Unlike judges, who can be impartial in the cases, they hear and can recuse themselves when there is a conflict of interest, commissioners have an interest in the outcome of the election and they cannot recuse themselves.

This is not to say people involved in electoral administration always have an agenda to influence the outcome of the election unlawfully. The point to be made is that for African elections to be able to sustain democracy, the *wholesale* trust in people who have an interest in the outcome of the election may not be in Africa's best interests. It is for this reason that the AU must come in with international staff that has absolutely no interest on whether Party A or Party B wins the election. Even in a situation where a person in such staff has an interest, the checks and balances created by the multitude of cross cultural peoples, including municipal staff as well, makes it extremely difficult to influence the outcome of the election unlawfully.

A recent study revealed that South Africa and Ghana¹⁰⁵ were the only two countries with independent EMB's in Africa. It was noted that these two countries had their EMB's protected by the constitution with sufficiently strong mandates.¹⁰⁶ To become a commissioner in South Africa's Independent Electoral Commission (IEC) one has to be nominated from a list of candidates recommended by a panel consisting of the President of the Constitutional Court,

¹⁰³ See for example the Botswana scenario below.

¹⁰⁴ In Kenya the ECK members are nominated by the Inter- Parties Parliamentary Group (IPPG) according to their strength in parliament. In Zimbabwe the MDC was able to nominate certain commissioners to be appointed by the President for the 2008 election. This affirms the view that these commissioners have a political mandate, and although they may be a check and balance against each other, their impartiality is impeded by their appointment process and their inclinations. In any case, the chairperson wields so much power and can act with total disregard of other commissioners.

¹⁰⁵ Ghana's Electoral Commission (GEC) is arguably the most competent in Africa. It has transferred power from Jerry Rawlings NDC in 2000 to John Kufour's NPP. The author is closely following the December 2008 Ghana elections where all the parties are generally confident of the GEC's competence, independence and impartiality except for isolated fears that the ruling NPP intends to rig the election. Ghana is, however, an exception and should it successfully conduct the 2008 elections it will redefine the term 'afro-optimism' and assert itself as a torch-bearer and democracy giant in Africa. Ghana's electoral system is being studied by a colleague and has been excluded from the scope of this study.

¹⁰⁶ Anne Hammerstad, *African commitments to democracy in theory and practice - A review of 8 NEPAD countries* 2004 28.

a representative of the Commission on Gender Equality and the Public Protector.¹⁰⁷ This list is then forwarded to the President only after a majority of the National Assembly has agreed to each name. By including so many actors in the process, the author argues, the possibility of political appointments is largely reduced.

South Africa's IEC does not in fact have a strong constitutional mandate as suggested. The constitution leaves it primarily to the legislature to determine how the IEC actually functions. It is, however, not strange that it is still regarded as the best electoral commission in Africa. This is because the African National Congress (ANC) still dominates every sphere of political life and allows the IEC to maintain this independence. The IEC's independence or impartiality, it is submitted, has little to do with the IEC itself or the legal framework establishing it. The IEC has posed no threat yet to the dominance of the ANC, as political office is not as intensely contested a terrain as it could have been had there been a formidable challenge to ANC rule.

The independence of the IEC has thus not yet been really tested. We must all be too careful to declare an electoral commission as being impartial or independent before it has been involved in elections that shift power from one president (or party) to another. As such, in spite of the IEC's reputation of conducting excellent elections, South Africa will also benefit from the AU conducting its elections as other African countries have shown that elections soon after independence may not be as hotly contested years after. It will therefore be in South Africa's strategic interests to support such a body regardless of its currently efficient IEC.

Botswana also has one of the most thriving democracies in Africa. It is one of the few African countries that Freedom House rates as being 'free'.¹⁰⁸ Botswana's IEC was able to successfully conduct elections in 2004, but this was not without total dissatisfaction from opposition parties. Botswana's commission is constituted by seven people. The chairperson and deputy chairperson, who have to be judge and legal practitioner respectively, are nominated by the Judicial Services Commission. The remaining five members are nominated by an All Party Conference for a period of two parliamentary terms (ten years).¹⁰⁹

¹⁰⁷ Section 6 Electoral Commission Act 51 of 1996 (South Africa).

¹⁰⁸ Freedom House, 'Freedom in the world 2008 – Selected data from freedom House's annual global survey of political rights and civil liberties' (on file with author).

¹⁰⁹ Lekorwe (below n111) notes that prior to the 2004 elections opposition parties walked out of the All Party Conference having been dissatisfied with the process but the government went ahead to appoint commissioners whose legitimacy became questionable 73.

According to Lekorwe¹¹⁰, the Commission's independence is not guaranteed by the constitution and is largely dependent on the government for resources. The secretary of the Commission, who is the chief executive officer, is appointed by the President with no recourse to any other institutions. The IEC staff is also under the control of the public service. This leaves the Commission without proper authority over its CEO (who is more answerable to the president) and over the electoral staff. The Commission neither has the power to entertain electoral disputes nor can it reconstitute itself as a delimitation commission.¹¹¹

Botswana's dominance by a single political party has allowed the IEC to go without significant rebuke. Its ability to be efficient in election logistics has cast a shadow on substantive irregularities that still exist with regard to its composition and its actual powers. Like South Africa, Botswana's is made up of parliamentary opposition parties that do not see themselves as 'governments in waiting'. They pose no startling threat to the ruling party. Such opposition, although important, has limitations in ensuring that electoral authorities comply with international best practices.

Botswana is important in revealing a paradox, that although its IEC's independence is not guaranteed by the constitution it has been able to act quite independently. Botswana, however, further hammers the point that electoral commissions will ultimately only have such authority as is deemed necessary by the incumbent government. By having to beg for resources from the central government, the government is able to control the activities of the IEC directly and indirectly. This is one of the problems that electoral commissions in Africa face no matter how independent one desires to be, or how many legal safeguards in place, if there are no resources; independence and electoral standards will be compromised.¹¹² It is this anomaly that seeks rectification from an AU electoral body. As will be seen from the next chapter, the AU has already created a fund to assist countries that cannot adequately finance their elections. This is a step in the right direction, but this fund needs to be administered with the AU overseeing the election itself.

There are several other African countries that can be used to make a compelling case for a regional electoral body. The need to be succinct prevents a discussion on countries such as Ethiopia and other smaller francophone countries such as Cameroon, Gabon and Equatorial Guinea. Some of these countries do not even have EMB's that meet half the standard

¹¹⁰ Below n111.

¹¹¹ See the evaluation of the IEC by Mogopodi H Lekorwe, 'The role and status of the Independent Electoral Commission', *Journal of African Elections*, Vol 5 No 2 2006.

¹¹² Hammerstad (n above) 33.

required for elections. Financial constraints also make it impossible for such countries to adequately invest in free and fair elections.¹¹³

3.6 Conclusion

From this chapter the inadequacies inherent in the current approach to African elections should be resonating. A foundational problem is that the AU entrusts incumbent governments to make numerous changes to their legal systems when such changes are not in the interests of that incumbent government. In order not to look recalcitrant, governments have decided to window-dress electoral commissions, for instance by appointing partisan judges to head these commissions. What exists on paper is an independent, impartial body, but what exists in practice is a body that returns to governments to receive instructions on the way forward.

What should also resonate is that the checks and balances expected from international observers have been inadequate. African observers make decisions that are slow and calculated. Only when an election has gone wildly wrong will African observers cry foul in the mildest of language. Other than that, they would be more than happy to endorse an election to conclude it swiftly. International observers, on the other hand, may blow both hot and cold, as seen in Angola. Observers remain crucial to free and fair elections, but, in spite of the important role they play, at the end of the day it seems their reports fall on deaf ears. In both Kenya and Zimbabwe, all observers eventually issued statements declaring the elections as being flawed. Regardless of this situation, the AU still accepted both Kibaki and Mugabe as heads of state notwithstanding that they had stolen the elections right in front of the observers.

The third screaming feature of this chapter is that municipal courts are stuck between a rock and a hard place when deciding contentious electoral petitions. If a judge decides the matter strictly on legal grounds this may compromise his/her future as a judge.¹¹⁴ This is the dilemma of electoral petitions, especially those of the presidency. Zimbabwe shows us how judges will compromise this legal legitimacy for institutional security. Kenya shows us how a candidate can possibly refuse to petition the courts on the grounds that they are partisan and their decisions are already predetermined.

¹¹³ See the exposé of elections in African countries in Nohlen D et al (editors), *Elections in Africa a data handbook*, (1999).

¹¹⁴ In the controversial US decision of *Bush v Gore* 531 U.S. 98 (2000), the U.S. Supreme Court literally decided who should become the US President. The ultimate decision can be said to have been a political one rather than a judicial one as the majority Republican judges voted for Bush whilst the Democrat judges voted for Gore. According to one of the dissenting judges, “[A]lthough we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.” This case is a *locus classicus* in showing that even in the United States a municipal court may not be the best arbiter in adjudicating contentious electoral disputes.

These problems that plague African elections cannot be halted by heads of states simply making commitments to democracy. If that democracy is going to remove a head of state from power, then they will never be a genuine commitment to it. But African leaders have already made commitments to democracy and human rights in their respective countries and in Africa as a whole. As such, the AU should step in and say that 'since you have made these commitments you should allow us to move in and implement those commitments.' In essence, there is nothing new that is being created; it is a new method of enforcing age old commitments.

In the next chapter, Africa's new electoral body is introduced and an attempt is made to answer possible questions that stand in the way of establishing this body.

Chapter Four: The African Union Electoral Supervisory Commission (AUESC)

4.0 Introduction

In the previous chapter having justified the need for an African supranational body responsible for the conduct and supervision of African elections this chapter introduces such a body hereinafter referred to as the African Union Electoral Supervisory Commission (AUESC). As much as there can be no single formula as to how supranational bodies should operate, this study does not seek to impose any. Additionally, the study does also not seek to exhaust the various structures that could be used to formulate such a body. What is important to this chapter is to show how practical it is to establish this body and to highlight normative and operational challenges that would eventually see AUESC overcoming such challenges.

4.1 Existing AU Structures

Were this body to be introduced it will complement the existing AU framework in the protection of human rights and promotion of good governance. There will be no need to overhaul the organisational structure of the AU as there are steps that have already been taken to have units responsible for elections. The AU declarations on elections and primarily the African Democracy Charter provide the legal normative foundation on which AUESC would be based. It has already been mentioned that one of the inadequacies of the African Democracy Charter is the lack of a staunch implementing body that would vigorously police whether states are complying with its provisions. Specifically with regard to the elections component, AUESC would be the appropriate body to ensure that states have 'free and fair' elections. AUESC can therefore be established through a protocol emanating from the African Democracy Charter.

The AU has an Electoral Assistance Unit (EAU) which is a unit of the AU that is mandated to provide electoral technical assistance to member states should they so request. In addition the AU recently launched the Electoral Assistance Fund (EAF) to provide financial resources to member states should they be incapable of fully funding their own elections. The Fund is administered through the EAU and a Trust Forum which acts as an advisory body providing expert opinion on activities and programmes of the EAU. As such a mechanism already exists not only for providing electoral assistance but for its funding as well. These bodies could be reformed to become a part of the AUESC so as to provide experience already gained and the momentum gained in financing African elections. Furthermore, funding should not be a problem as African countries already fund their own elections and a part of such funding could be channelled towards this body. In the short term international donor

agencies that are already assisting in funding African elections could pool their funds to the EAF. Donors will in fact be more comfortable with this arrangement as there is scepticism in assisting individual EMB's as these funds can be abused by incumbent governments. Current efforts on democracy and democratisation by international finance partners may mean that this body will receive the support of the international community.

4.2 Relationship with other AU organs and composition

AUESC would be accountable to the Pan-African Parliament (PAP) which should also be responsible for nominating its members. The appointment of members should, however, be done by the AU Assembly as the highest body of the AU. The PAP will provide the necessary checks and balances to this body as it is constituted by parliamentarians from ruling and opposition parties in parliament who can aptly debate on any issues arising concerning this body. AUESC reports should be presented to both PAP and the AU Assembly. By having both parliamentarians and heads of state and governments debating the issues, the necessary checks and balances are created without necessarily intruding into its powers. Undoubtedly this will enhance the role of the PAP in promoting free and fair elections. At present the PAP sends an observer team to observe elections but like other observers it can only complain when the election does not go well.

The AU Commission which is the AU's secretariat will need to provide the mechanisms for the day-to-day operations of AUESC. The Commission should act hand-in-hand with AUESC but this relationship should be clearly defined to avoid an abuse of the Commission's authority. The Commission should also provide for avenues allowing other AU organs that are responsible for democracy and governance issues to play a part in AUESC in a manner that enhances AUESC's goals.

4.3 Relationship with municipal EMB's

The establishment of the African Court on Human and Peoples' Rights is a not a vote of no confidence in the ability of municipal courts to protect human rights. Likewise, the introduction of AUESC is not a vote of no confidence in municipal EMB's. Nowhere in history has the introduction of a supranational body meant the redundancy of its municipal equivalents. To be successful AUESC needs municipal EMB's to remain functional and the drive to ensure these EMB's are able to dispense their duties efficiently, impartially and independently should not stop.

AUESC is coming into bring credibility to the process through efficiency, impartiality and independence. A delicate process is therefore required to incorporate municipal EMB's into AUESC but ensuring the latter takes over the leadership of the process. This is indeed a

delicate process as the staff that manages elections, which is as important as those in charge of the process, are often forgotten by convention drafters yet on the ground it is these people that actually determine the process. One way of doing it is to have the chairperson of a municipal EMB as an *ex officio* commissioner in AUESC when elections are being conducted in that country. Where a proper chain of command exists and everyone is generally willing to cooperate it is unlikely that there could be too many problems. The long term vision is to eventually see municipal EMB's incorporated into AUESC.

4.4 Relationship with observers

With a regional body responsible for elections, observers should be given a more prominent role to influence the effectiveness and fairness of the process. AUESC would take over the authority of accrediting international observers and could leave the accreditation of domestic observers to the municipal EMB. The process should be as inclusive as possible with competing parties having a forum to object the accreditation of certain organisations or people. AUESC must also be able to open itself up to ensure that it also receives the necessary scrutiny from observers. The EU and the Commonwealth have expansive electoral expertise and it would be vain for AUESC to not want to tap into this experience. Relationships already exist with these bodies and also with international NGO's such as IDEA that specialise in elections. AUESC is best suited to create such relationships through the AU Commission without necessarily compromising on its independence.

The current approach of non-interference and non-hindrance by observers makes sense from the view point that elections are being conducted by municipal authorities and it would seem inappropriate if different observers wanted the processes to be done in a way that they deem appropriate. But when a robust regional body whose independence and impartiality is hardly questionable is introduced, then all that is left is ideas on how to improve the process. AUESC can create a mechanism that allows the process to be improved on as it is being carried out and not the current 'post-mortem' approach.

4.5 African Electoral Court

It is generally accepted that there is no perfect election and irregularities will always occur. This coupled with the fact that people may interpret the law in various ways makes it necessary to refer such disputes to a judicial body. Municipal courts have generally done a good job in resolving electoral disputes but they do have limitations that have been highlighted in the previous chapter. Accusations of bias tarnish the outcome of the process

regardless of sound reasoning in the *ratio* of a judgment. The need for a regional electoral court is thus essential for the success of a regional electoral body.

As elections would have become the subject of a regional body it makes little sense to then leave the adjudication of disputes to municipal judiciaries. Only a regional court should be able to order a regional body. This means that there would be need to formulate a judicial mechanism that would adjudicate on electoral disputes speedily and efficiently. Africa already has numerous judges that could be appointed mainly on an *ad hoc* basis to hear electoral petitions. Judges from other African countries could be brought into entertain petitions from another jurisdiction. By so doing, elements of impartiality and independence are entrenched. The African Court could be mandated to entertain appeals emanating from the electoral courts.

4.6 AUESC and the Doctrine of State Sovereignty

The issue of sovereignty in Africa is very controversial. The Organisation of African Unity (OAU) formed in 1961 emphasised the issue of respecting the sovereignty of member states. This meant that the internal issues of another country were out of bounds.¹¹⁵ This is one reason why the OAU could not survive into the next millennium with that constitution. These vestiges of non-interference sadly still haunt its predecessor the AU. African leaders still want a *carte blanche* to do whatever they want in their countries. The Protocol establishing African Court was signed in 1998 only entered into force in 2004 with the first judges being sworn-in in 2006. To date the court is still to hear its first case. There is reluctance by African leaders to have regional institutions interfere in 'their' affairs. This is the two faced nature of African leaders who support human rights and democracy in one forum yet in reality they are totally indisposed to the cause. There is also a double standard when African countries use the sovereignty trump card on political issues and waive it when it comes to socio-economic issues.¹¹⁶

At present the respect for the principle of sovereignty by the UN and AU has meant that these bodies will only enter the realm of a country's elections if specifically requested by

¹¹⁵ See Article 3(1) & (2) of the Charter of the Organisation of African Unity. Although the Constitutive Act of the AU repeats the principle of non-interference it also lists a host of other principles such as the right of the AU to intervene in grave circumstances. Cumulatively the principle of non-intervention is met with numerous exceptions.

¹¹⁶ The AU Report 'Prospects for the establishment of an Electoral Assistance Trust Fund' notes that '*The Africa Conference considered unanimously that, since the financing of elections is an act of sovereignty, it lies within the competence of the State and that the principle of external funding should be rejected, irrespective of whether the funds came from donors or the international community including the African Union, with the above noted exception.*' Available at http://www.africa-union.org/Structure_of_the_Commission/Political%20Affairs/Prospects%20for%20Establishment%20of%20an%20Electoral%20Assistance%20Fund.pdf. Accessed 15 October 2008.

such country.¹¹⁷ Although some countries such as Zimbabwe may cling on to sovereignty arguments to justify why no one should criticise their affairs, the truth of the matter is that African countries are slowly finding it acceptable to transfer a part of their sovereign rights to the AU. Integration through regional institutions should be seen as a 'pooling of sovereignty' rather than an abdication of sovereignty.¹¹⁸ The African Peer Review Mechanism and the African Court of Justice and Human Rights are clear examples of this movement against *strictu sensu* sovereignty. In any case the AU is generally in favour of a Union Government although the debate is still going on. This means a country will cede a substantial part of its sovereignty to a federal government. It may also be argued that as sovereignty belongs to the people and not to their leaders, AUESC is allowing the people to exercise their sovereign right to freely elect their leaders. As such the principle of sovereignty is promoted and not vitiated.

4.7 AUESC and electoral systems

The doctrine of sovereignty demands states to determine their own electoral systems. An electoral system must respond to various historical, cultural and political needs of a particular country. Although they are different types of electoral systems they can all be broadly categorised into two main types *viz* majority systems and proportional representation systems. Generally speaking, in majority systems a candidate has to garner more votes than any other candidate to be elected. In proportional representation candidates are elected into office in proportion to the votes that they have attained. One needs not out-rightly win to be elected into office. Hybrid systems contain features of both these systems.

AUESC should not impose any electoral system upon a jurisdiction as people have a right to choose their own systems. However, proportional representation systems have become popular in Africa as they allow smaller parties or groups to be represented in parliament. As Africa is in the process of harmonising its banking, trade, currency and educational policies and laws it might as well harmonise its electoral practices. It is essential that electoral systems are also approached from a human rights aspect that sees not only the majority but minorities attaining representation in legislatures. If studies are truly able to show that proportional representation systems are more beneficial to Africa then there is little reason why a progressive change to such systems by Africa should not be implemented.¹¹⁹ AUESC

¹¹⁷ See UNGA res. 56/159, 'Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization', 19 December 2001, (162-0-8), second preambular paragraph.

¹¹⁸ See Matlosa (n119 below)

¹¹⁹ According to a study by IDASA proportional representation systems are best for post conflict societies as seen by the cases of South Africa, Namibia, Mozambique and Lesotho which have all consolidated peace as a result of this system that allows inclusivity of smaller groups that would have otherwise gone

would also need to be innovative with regard to electoral systems. This requires thinking out of the box so as to respond to particular needs in a given jurisdiction and not simply being confined to the two options of proportional representation or majority systems. Although PR systems are more complex, such complexity can be tackled by a regional body having pooled the continents and other international expertise. It is in so doing that Africa creates suitable solutions.

4.8 Will the AU be able to be effective in making this body work?

The ability, capacity and willingness of the AU in promoting good governance and democracy is debatable. One could argue that Africa's 'third wave of democratisation' has been largely influenced by the West, which continues to provide the impetus for the drive. Africa's commitment to its own democracy has therefore become questionable not with regard to its ability to legislate on democracy but to its reaction to those governments that openly violate democratic principles and human rights.

It must, however, be remembered that, like the UN the AU has to manoeuvre within diplomatic protocol. As a regional body this protocol is even at a higher level as member states have a closer feeling of bondage than member states of the UN. The strategy therefore has been to strengthen AU bodies responsible for human rights such as the African Commission, the African Court and the African Children's Rights Committee. By so doing, one member state need not have to accuse another member state of violating human rights as this is done for them by the responsible body. When the African Court begins sitting, it is within its powers to order countries to behave or not to behave in a certain manner. This removes the diplomatic protocol that would have otherwise existed for the AU.

Likewise, with elections there is need for such a body. It may be argued that African electoral observers have declared elections to have been not free and fair but this failed to warrant a reaction from the AU. True as this may be, it has already been stated that there exists no proper strategy of what the AU should do in response to elections not sanctioned by observers. It is probably for this reason that African observers would prefer to endorse an election than not endorse. They seem silently aware that there is nothing that will be done should they fail to endorse the election.

AU-ECSC would provide some teeth to the AU and allow the latter to control the process as it proceeds and not to be asked to intervene when the process goes wrong.

unrepresented. K Matlosa 'SADC region: Harmonisation of legislative bodies through electoral system reforms' in *Perspectives of African Governance* 88.

4.9 Conclusion

Creating supranational organs is a huge challenge as the legal framework has to be right from the onset. This chapter does not wish to cover all the possibilities and angles but serves merely to introduce discussion topics that are relevant to the formation of such an influential body. From this chapter it should become clear that a framework already exists for the implementation of an African electoral body. Through the establishment of the EAU and the EAF the AU Commission has already shown its willingness to provide practical mechanisms that promote free and fair elections in Africa. The idea of AUESC should build on to this commitment not only by the AU Commission but by other organs such as PAP, the AU Assembly and the African Commission who have all made statements emphasising the importance of free and fair elections.

Chapter Five: Conclusion and Recommendations

This study must be seen as a contribution towards three themes that are commonly discussed with regard to elections. These are – *Why do we have elections in Africa? What has gone wrong with African elections? And, How best can we make elections work in Africa?* The Kenya and Zimbabwe elections have set a bad precedent for African elections and have also increased 'afro-pessimism'. It makes sense to constitute compromise governments in post-conflict societies that need such transitional arrangements to allow national healing. In peaceful countries where parties go to the polls pledging to play fairly and abide by the will of the people there can be no basis why the will of the people should be disregarded by the sanctioning of compromise governments. It is such scenarios and others that may not be immediately foreseeable that a regional electoral body seeks to solve.

It has been established in this study that elections serve an important role in resolving conflict and introducing a government that has a mandate to rule from the people. It is only through such governments that democratic principles and human rights can be respected. The international community is generally agreed that those who head governments should receive a mandate from a people through elections. African leaders are fully aware that elections provide legitimacy and have thus resorted to a manipulation of the ballot system. It is this manipulation that has led some people to say elections are not good for Africa as they only lead to more conflict. What causes conflict in Africa is bad leadership – not elections and not ethnicity.

A regional electoral body should be seen as an innovative way to respond to the unique nature of electoral disputes in Africa. The primary advantage of such a system is that it brings to the fore people who are genuinely independent and impartial. It also pools electoral experts from the whole region and even those from abroad. By so doing it can be assured that there will be a high level of efficiency. Africa has been able to introduce democracy but there is a serious stagnation to the process. The consolidation of democratic gains, followed by jealously guarding such democratic gains lies at the core of this study and the introduction of a regional electoral body.

When the idea of an international criminal court was mooted several years ago it was difficult to comprehend how such a court would function. As such it was probably easier to dismiss the idea than contemplating its modalities. Today the Rome Statute establishing the ICC has over 120 signatories and the Court has begun hearing cases. It is no walk in the park establishing regional bodies which would have some of a state's sovereign powers. That is why it has taken years to finally have the African Court which can supersede municipal court decisions.

It must be remembered though that there can be no perfect system, there can only be one with more or less imperfections than the other. A regional election body is the least imperfect model for successful free and fair elections in Africa. The recommendation of this study is for this matter to be seriously debated by the different organs of the AU, by NGO's, civil society, academia and by the public at large. This debate should eventually lead to the establishment of this body. If this body were to be established it would need to establish, *inter alia*, appropriate electoral systems that promote popular participation public affairs while noting the unique nature of each jurisdiction. It is necessary for Africa to show that it is serious about the commitments it makes human rights and democracy. These commitments should not be facades of trapping international aid. It is through such commitments that Africa can eventually become self sufficient.

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