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SHORTER ARTICLE

Provisional Measures in the African Human Rights System

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Abstract

Provisional measures have increasingly played a key role in protecting individual and collective rights in the African human rights system. The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights (Court) have exhibited a proactive stance in indicating provisional measures in cases relating to the protection of the right to life, social and economic rights, and political rights, including electoral participation. The far-reaching measures of the Court, however, along with the general proactivity of the Court in finding human rights violations, have sparked a backlash, leading Rwanda, Tanzania (where the seat of the Court is located), Benin, Côte d'Ivoire and, more recently, Tunisia to withdraw their declarations allowing individuals and non-governmental organisations to petition the Court directly.

This article analyses the role of provisional measures in the African human rights system and explores the implications of this proactive approach in the context of the ongoing crisis within the African Union. It argues that the Court should show resilience vis-à-vis State reactions, asserting its role as a human rights guarantor in the region. Providing more clarity and guidance to applicants requesting emergency protection, as well as making the measures as specific as possible, could be beneficial in this respect. This would allow petitioners to gain more confidence in their pursuit of the protection of this mechanism.

Keywords: regional human rights systems; African Court on Human and Peoples' Rights; African Charter on Human and Peoples' Rights; African Commission on Human and Peoples' Rights; interim measures; provisional measures

1. Introduction

Over the last few years, the African Court on Human and Peoples' Rights (AfCHPR, Court) has been playing an increasingly prominent role in protecting individual and collective rights, enhancing debates about democracy and the rule of law on the African continent. This has been achieved by a series of judgments of the Court that have vigorously upheld democratic principles. In 2021, for instance, the Court delivered a judgment in *Noudehouenou*, in which it found the entire constitutional amendment

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process in Benin to be invalid.[1] In 2022, it delivered another judgment in *Western Sahara*, in which it held that Morocco violated the Sahraoui Peoples' collective right to self-determination and governance.[2] And in June 2023, it ordered Tanzania to change its National Elections Act because it employed senior civil servants to perform the administrative and operational roles of its Electoral Commission.[3] The African Commission on Human and Peoples' Rights (Commission) too, despite adversities, has made significant efforts to uphold human rights standards in Africa. In November 2024, for example, it delivered a brave decision condemning Ethiopia for not allowing all Ethiopians to participate freely in the 2015 elections.[4]

Many of these applications before the Commission and the Court are accompanied by requests for provisional measures, whose purpose is to safeguard the status quo ante, that is, to preserve a situation until a final judgment is rendered.[5] Provisional measures in the African system have attracted relatively little comment thus far.[6] To date, the Court has considered 93 requests for interim protection and has issued 53 orders indicating provisional measures.[7] To put this in perspective, the number of orders indicated represents more than one third of the judgments of the Court on the merits.[8] The high number of both requests and orders should not come as a surprise. The trend of more frequent provisional measures requests is noticeable also before the other two regional human rights courts[9] and United Nations (UN) human rights bodies, such as the Human Rights Committee,[10] as well as the International Court of Justice.[11]

[1] *Houngue Éric Noudehouenou v Republic of Benin* (2020) App No 003/2020. See OI Akinkugbe, '*Houngue Éric Noudehouenou v Republic of Benin*, App No 003/2020' (2021) 115 AJIL 281, 284.

[2] *Bernard Anbataayela Mornah v Burkina Faso* (2022) App No 028/2018.

[3] ibid para 121. See SH Adjolohoun and P Nantulya, 'Why the African Court on Human and Peoples' Rights Matters' (*Africa Center for Strategic Studies*, 8 July 2024) <https://africacenter.org/spotlight/african-court-on-human-and-peoples-rights/>.

[4] *Robert F Kennedy Human Rights and Institute for Human Rights and Development in Africa (IHRDA) v Ethiopia* Communication No 599/16 (African Commission on Human and Peoples' Rights (ACommHPR), 2023) paras 49, 247. See also *IHRDA v Burundi* Communication No 636/16 (ACommHPR, 2022).

[5] S Rosenne, *Provisional Measures in International Law* (OUP 2005) 4.

[6] ZM Teferra, 'Provisional Measures in International Human Rights Law: The Practice of the African Court on Human and Peoples' Rights' (2022) 6 African Human Rights Yearbook 28, 34; C Burbano Herrera and F Viljoen, 'Danger and Fear in Prison: Protecting the Most Vulnerable Persons in Africa and the Americas by Regional Human Rights Bodies through Interim Measures' (2014) 33 NQHR 163; G Naldi, 'Interim Measures of Protection in the African System for the Protection of Human and Peoples' Rights' (2002) 2 AHRLJ 1.

[7] See the list of cases on the website of the African Court on Human and Peoples' Rights (AfCHPR), *AfCHPR Cases: Provisional Measures* <https://www.african-court.org/cpmt/provisional-measures>. Cf Teferra (n 6) 33 nn 22, 35 (noting, however, that certain applicants, such as Ajavon and Noudehouenou, filed more than one request for interim protection).

[8] AfCHPR, *AfCHPR Cases: Decisions* <https://www.african-court.org/cpmt/statistic>. According to its statistics as at December 2025, the Court has issued 460 decisions, of which 144 are judgments on the merits.

[9] Burbano Herrera and Viljoen (n 6) 178ff. See also F González, 'Urgent Measures in the Inter-American Human Rights System' (2010) 7 SUR 51–73; K Dzehtsiarou and V Tzevelekos, 'Interim Measures: Are Some Opportunities Worth Missing?' (2021) 20 ECHRLR 1.

[10] G Naldi, 'Interim Measures in the UN Human Rights Committee' (2004) 53 ICLQ 445.

[11] See the increase in the number of orders indicating provisional measures made by the International Court of Justice (ICJ): *Judgments, Advisory Opinions and Orders* <https://www.icj-cij.org/decisions>.

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Understanding the function of provisional measures in the caseload of the African Court appears to be vital. On the one hand, the rise in requests for provisional measures showcases the gradually increasing confidence in the Court's role as a human rights guarantor in Africa among individuals and communities. On the other hand, the orders indicated by the Court have been at the heart of the discontent of African Union (AU) Member States with the Court.[12] The proactive stance of the Court has triggered fierce reactions from States, as evidenced by the recent wave of withdrawals of declarations made under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights (Protocol),[13] under which States accept the competence of individuals and non-governmental organisations (NGOs) to petition the Court directly. Between 2016 and 2020, Rwanda, Tanzania (where the seat of the Court is located), Benin and Côte d'Ivoire all withdrew their Article 34(6) declarations, with Tunisia also withdrawing in 2025.[14] These withdrawals have undermined the much-needed direct access to institutions mandated with protecting individual human rights.[15] They have also fuelled the existing crisis of democracy and rule of law across the continent.[16] Individual States have been opposing the democratisation project of the AU and the Regional Economic Communities (RECs),[17] as evidenced by the withdrawal of the military-led Alliance of Sahel States (Mali, Burkina Faso and Niger) from the Economic Community of West African States (ECOWAS)[18] and, more recently, from the International Criminal Court (ICC).[19]

Against such a backdrop, this article sheds light on the mechanism of provisional measures in the context of the African human rights system. The article is structured as follows. Section 2 contains brief introductory remarks on the African system, with a

[12] SH Adjolohoun, 'A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights' (2020) 20 AHRLJ 1, 14; M Faix and A Jamali, 'Is the African Court on Human and Peoples' Rights in an Existential Crisis?' (2022) 40 NQHR 61.

[13] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III).

[14] Republic of Rwanda, 'Withdrawal from the Declaration under Article 34(6) of the Protocol to the African Charter' (24 February 2016); Republic of Tanzania, 'Instrument withdrawing the Declaration under Article 34(6) of the Protocol to the African Charter' (21 November 2019); Republic of Benin, 'Instrument of Withdrawal of the Declaration under Article 34(6) of the Protocol' (25 March 2020); Republic of Côte d'Ivoire, 'Instrument withdrawing the Declaration under Article 34(6) of the Protocol to the African Charter' (29 April 2020); Republic of Tunisia, 'Notice of Withdrawal of Declaration under Article 34(6) of the Protocol' (7 March 2025).

[15] F Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 ICLQ 63, 72.

[16] CM Fombad, 'An Overview of the Crisis of the Rule of Law in Africa'(2018) 18 AHRLJ 213.

[17] O Ajala, 'Understanding the Crisis of Democracy in West Africa and the Sahel' (*Geneva Centre for Security and Policy*, 19 October 2023) <https://www.gcsp.ch/publications/understanding-crisis-democracy-west-africa-and-sahel>.

[18] ECOWAS, 'Press Statement on the Withdrawal of Burkina Faso, the Republic of Mali, and the Republic of Niger from ECOWAS' (29 January 2025) <https://www.ecowas.int/press-statement-withdrawal-burkina_mali_niger/ >; E Olumba and O Ajala, 'ECOWAS: West African Trade Bloc Shaken as Three Member States Withdraw and Form Their Own Alliance' *The Conversation* (28 February 2024) <https://theconversation.com/ecowas-west-african-trade-bloc-shaken-as-three-member-states-withdraw-and-form-their-own-alliance-224209>.

[19] Human Rights Watch, 'Sahel Countries: ICC Withdrawal Endangers Civilians' (24 September 2025) <https://www.hrw.org/news/2025/09/24/sahel-countries-icc-withdrawal-endangers-civilians>.

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particular emphasis on the Commission and the Court as well as brief reference also to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). Section 3 provides an overview of questions related to the authority of these bodies to indicate provisional measures and maps out the relevant legal bases and requirements for requests to be successful. Section 4 discusses the proactive approach of African bodies to indicating provisional measures, and the unavoidable political ramifications of such an approach. It highlights the use of the Court as a platform for challenging violations of core human rights as well as the lack of participatory and democratic structures of governance in Member States. Section 5 identifies challenges and limitations in the African bodies' approach to provisional measures and makes some suggestions for the way forward.

As this article argues, the frequency of requests for provisional measures is illustrative of the growing confidence that aggrieved applicants demonstrate towards the system and, specifically, the Court. At the same time, the Court has been increasingly proactive in cases involving core rights, such as the rights to life and a fair trial,[20] and, more recently, also political and electoral rights.[21] There should be optimism about the role of the Court in shaping the global human rights discourse and promoting democratic participation in Africa. Better guidance to applicants and more precise information about procedural requirements could however be beneficial in enabling greater compliance with the Court's orders.[22]

2. The African system and the Banjul Charter

The idea of a human rights court for Africa was born in the 1960s, being first discussed at the Pan-African Conference in 1961 that was held in Lagos, in which lawyers, judges and law professors from 23 countries participated.[23] However, the process of adopting the African Charter on Human and Peoples' Rights (ACHPR, Charter) under the auspices of the then Organization of African Unity (OAU) (now the AU), was delayed by the various endemic and structural problems besetting African countries, as well as various ideologies rejecting Western concepts of rights.[24] The Charter was

[20] 'Report of Judgments, Advisory Opinions and Other Decisions of the African Court on Human and Peoples' Rights' in *African Court Law Report (2006–2016)* (Pretoria University Law Press 2019) vol 1, xx–xxi (containing a detailed subject index and referring to a total of 18 cases related to the death penalty).

[21] 'Report of Judgments, Advisory Opinions and Other Decisions of the African Court on Human and Peoples' Rights' in *African Court Law Report (2020)* (Pretoria University Law Press 2022) vol 4 (see the orders for provisional measures mentioned in xix–xvii and the relevant judgments on the merits categorised by 'substantive rights' in xxv–xxvi); 'Report of Judgments, Advisory Opinions and Other Decisions of the African Court on Human and Peoples' Rights' in *African Court Law Report (2021)* (Pretoria University Law Press 2024) vol 5, xxi.

[22] African Union, *The Dar Es Salaam Communiqué* (3 November 2021) para 9 (noting that compliance at present is about 10 per cent); T Mutangi, 'Enforcing Compliance with the Judgments of the African Court on Human and Peoples' Rights: Prospects and Challenges' in A Adeola (ed), *Compliance with International Human Rights Law in Africa: Essays in Honour of Frans Viljoen* (OUP 2022) 183.

[23] F Viljoen, 'A Human Rights Court for Africa, and Africans' (2004) 30 BrookJIL 1, 6; LM Lombard, 'African Conference on the Rule of Law Held at Lagos, Nigeria, in January' (1961) 47 ABAJ 563.

[24] A EI-Obaid and K Appiagyei-Atua, 'Human Rights in Africa: A New Perspective on Linking the Past to the Present' (1996) 41 McGillLJ 819, 822; VO Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions* (Martinus Nijhoff 2001) 1–17.

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only adopted by the Member States of the OAU in 1981.[25] The innovations of the Charter have attracted some positive comment.[26] However, many authors have questioned the relevance of the Charter to the continent,[27] or underlined the need for more political commitment by AU Member States to the Charter, the Court and the Commission.[28]

For nearly two decades the Commission was the only body in this system assuming a monitoring, quasi-judicial role.[29] The Court was set up in 2005, 18 years after the Commission started functioning, following the adoption and entry into force of the Protocol.[30] To add uncertainty to the system's future, there is also the prospect of the Court being merged with the African Court of Justice (through the 2008 Protocol),[31] while also extending its jurisdiction to criminal matters (through the Malabo Protocol).[32] However, it is unlikely that these developments will materialise, given the limited ratifications of these instruments,[33] financial challenges[34] and other complexities related to the structure of the proposed merged Court.[35]

The Charter is complemented by other human rights instruments, in particular, the African Charter on the Rights and Welfare of the Child (ACRWC),[36] the Maputo Protocol on the Rights of Women[37] and the African Charter on Democracy, Elections and Governance.[38] These are implemented and monitored by key bodies of the AU,

[25] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR). See F Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff 2003).

[26] F Viljoen and L Louw, 'The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation' (2004) 48 JAL 1, 1.

[27] CA Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights' (2001) 23 HRQ 327, 328; El Obaid and Appiagyei-Atua (n 24) 27.

[28] RM D'Sa, 'Human and Peoples' Rights: Distinctive Features of the African Charter' (1985) 29 JAL 72, 81.

[29] R Murray, 'African Commission on Human and Peoples' Rights' in *Max Planck Encyclopedia of International Law* (2014).

[30] F Viljoen, 'African Court on Human and Peoples' Rights (AfCHPR)' in *Max Planck Encyclopedia of International Law* (2011) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e6>.

[31] Protocol to the African Charter on the Establishment of the African Court of Justice and Human Rights (Protocol of Sharm El Sheikh) (adopted 1 July 2008, not yet in force) Assembly/AU/13(XI).

[32] Protocol on Amendments to the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (adopted 27 June 2014, not yet in force) Assembly/AU/12(XXIII).

[33] Viljoen (n 15) 84.

[34] K Clarke, C Jalloh and V Nmehielle, 'Introduction' in K Clarke, C Jalloh and V Nmehielle (eds), *Origins and Issues of the African Court of Justice and Human and Peoples' Rights* (CUP 2019) 1–48.

[35] F Viljoen, 'AU Assembly Should Consider Human Rights Implications before Adopting the Amending Merged African Court Protocol' (*AfricLaw*, 23 May 2012) <https://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/>.

[36] African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (ACRWC).

[37] African Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted in September 2000, entered into force in November 2005) CAB/LEG/66.6.

[38] African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012). On the 'unique attributes' of this Charter, see B Kioko, 'The African Charter on Democracy, Elections and Governance as a Justiciable Instrument' (2019) 63 JAfrL 39, 41.

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including the Commission and the Court. Specifically, the ACRWC is monitored by ACERWC, which will be discussed in Section 3.2. There are also various special mandates, including rapporteurs and working groups working on various themes,[39] the latter of which may also urge governments to take immediate action as part of their mandates.[40]

3. Provisional measures in the African human rights system

3.1. The powers of the Commission

The Charter does not contain an explicit provision relating to the powers of the Commission to indicate provisional measures. Under the Charter, the powers of the Commission to investigate emergencies are relatively weak,[41] as the only option available to it is to submit relevant information to AU leaders requesting them to attend to the matter,[42] if they so decide.[43]

The Commission, however, has expanded its powers by unilaterally asserting its authority to indicate provisional measures in its own practice. In 1995, eight years after its establishment, the Commission decided to insert a provision in its Rules of Procedure authorising it to indicate measures to avoid irreparable damage to the victim[44] in cases requiring immediate attention.[45] The formal requirements for such 'emergency communications' are the same as those pertaining to any petition that reaches the Commission under the category of 'other communications'.[46] The Commission has nonetheless exhibited great flexibility in its consideration of the requirements pertaining to provisional measures, particularly its assessment of the exhaustion of domestic remedies.[47] Also, it may indicate provisional measures (or 'warnings') not only at the request of an applicant who files a request, but also proprio motu, as warranted by the circumstances of each case.[48]

There are two broad issues which the Commission faces in respect of its legitimacy and acceptance. The first issue relates to transparency and accountability. Article 58(3) of

[39] For an overview, see R Murray and M Evans, *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (2nd edn, CUP 2008).

[40] See, e.g. ACommHPR, 'Letter of Urgent Appeal on Environmental Contamination in Kabwe, Zambia' (23 April 2025).

[41] Viljoen (n 23) 22; Naldi (n 6) 3.

[42] ACHPR (n 25) art 58(3). See also Rules of Procedure of the African Commission on Human and Peoples' Rights (1995) (ACommHPR Rules of Procedure) rule 85(1).

[43] ACHPR (n 25) art 59.

[44] ACommHPR Rules of Procedure (1995) (n 42) rule 111. Following updates to these rules, this provision was renumbered to rule 98 (2010) and rule 100 (2020).

[45] ACommHPR, 'Information Sheet No 2: Guidelines of the Submission of Communications' (1987, as amended) <https://archives.au.int/handle/123456789/2071>. See also Teferra (n 6) 33; Naldi (n 6) 4 (referring to Odinkalu (n 27) 6–7.

[46] ACHPR (n 25) arts 47–54, 55–59. See also ACommHPR Rules of Procedure (2020) (n 44) rule 100 (referring to ACHPR (n 25) art 115 on 'Consideration of Communications—Seizure of the Commission').

[47] H Onoria, 'The African Commission on Human and Peoples' Rights and the Exhaustion of Local Remedies under the African Charter' (2003) 3 AHRLJ 1, 11–12 (referring to the 'constructive' exhaustion of remedies).

[48] See ACommHPR Rules of Procedure (2010) (n 44) rule 98(1) ('on its own initiative'); ACommHPR Rules of Procedure (2020) (n 44) rule 100 ('on its initiative').

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the Charter vests the AU Assembly of Heads of States and Government (AU Assembly) with the primary responsibility to examine any cases of emergency submitted to it by the Commission,[49] which pursuant to Article 59 are confidential.[50] Furthermore, the measures indicated by the Commission are not published in separate documents (as, for example, in the press releases of the European Court of Human Rights (ECtHR)) and are only referred to as part of the decisions of the Commission on the merits.[51] As a result, it is not possible to know with certainty exactly how many measures the Commission has indicated, nor how many requests have been submitted to the AU Assembly. By the same token, it is unclear whether the Commission has taken prior action in cases where the complaint has been found inadmissible on the merits (for example, for non-exhaustion of domestic remedies)[52] or those where a complaint has been discontinued following an amicable settlement of the dispute (as occurred in the case against Djibouti concerning atrocities committed against members of the ethnic group Afar).[53]

The second issue is the implementation of the orders and the lack of compliance with such orders. The Charter does not contain guidance as to the implementation of orders. It is also evident that, more often than not, States have simply failed to comply.[54] The case of the execution of the Ogoni 9 (among the first cases that the Commission had to consider) confirms this viewpoint.[55] Likewise, in an early case of the Commission relating to the arbitrary deportation of two prominent political figures—Chinula and Banda—from Zambia to Malawi, the Commission requested that Zambia adopt provisional measures allowing the burial in Zambia of Chinula, who had died in Malawi, and the return of Banda.[56] Zambia, however, did not comply with the measures.[57] In the case of *Zegveld v Eritrea*, despite the Commission issuing an order requiring the immediate release of 11 political detainees imprisoned in Eritrea incommunicado,[58] years later most of them remained imprisoned or were missing.[59]

[49] ACHPR (n 25) art 58(3): 'A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study'.

[50] ACHPR (n 25) art 58(3): 'all measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly … shall otherwise decide'.

[51] Burbano Herrera and Viljoen (n 6) 116. See also R Murray, 'Confidentiality and the Implementation of the Decisions of the African Commission on Human and Peoples' Rights' (2019) 19 AHRLJ 1, 11.

[52] *The Law Offices of Ghazi Suleiman v Sudan* Communication No 220/98 (ACommHPR, 2002).

[53] *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti* Communication No 133/94 (ACommHPR, 2000).

[54] Viljoen and Louw (n 26) 3; R Murray and E Mottershaw, 'Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (2014) 36 HRQ 349, 350ff. See also V Ayeni and A von Staden, 'Monitoring Second-Order Compliance in the African Human Rights System' (2022) 6 African Human Rights Yearbook 3, 5.

[55] On the background of the case, see S Cayford, 'The Ogoni Uprising: Oil, Human Rights, and a Democratic Alternative in Nigeria' (1996) 43 Africa Today 183.

[56] *Amnesty International (AI) v Zambia* Communication No 212/98 (ACommHPR, 1999) paras 13–14, 48.

[57] R Phiri, 'Zambia: Government Blocks Dead Chinula's Return' *All Africa* (9 January 1988) <https://allafrica.com/stories/199801090020.html>.

[58] *Liesbeth Zegveld and Messie Ephrem v Eritrea* Communication No 250/2002 (ACommHPR, 2003).

[59] UNHRC, 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea, Mohamed Abdelsalam Babiker' (7 May 2024) UN Doc A/HRC/56/24.

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3.2. The powers of ACERWC

The ACERWC, which was established by the ACRWC in 2001, is mandated to interpret and apply the ACRWC.[60] The ACRWC mentions the ability of the ACERWC to examine communications, but is silent on provisional measures. The ACERWC, however, has asserted the authority to indicate them in its practise 'in order to prevent any other harm to the child or children who would be victims of violations'.[61] The ACERWC also monitors the implementation of its decisions, and follows up with the respondent States.[62]

The ACERWC has issued ten decisions on the merits so far.[63] Akin to measures indicated by the Commission, the measures indicated by the ACERWC are also not published in separate documents and are only referred to as part of the ACERWC's decisions on the merits. The first case where an examination of provisional measures requests appeared in the decision was a complaint related to access to health during detention, in which the Committee found that the applicant had failed to meet the requirements of urgency and irreparable harm.[64] The second case dealt with the application of the death penalty in Sudan, in relation to the imminent execution of three individuals for crimes committed while they were under the age of eighteen.[65] The applicants requested the ACERWC to order Sudan to stay the executions. The measure was granted on the basis of Article 5(3) ACRWC which prohibits the death sentence for crimes committed by children.[66] The ACERWC requested the State to respond within 15 days on the implementation of these provisional measures.[67] However, the State did not respond.[68] Since the ACERWC lacks a follow-up mechanism on the implementation of provisional measures, there is no publicly available information on whether the State actually complied with the measure.

In other cases, the ACERWC has shown dynamism in relation to emergencies by sending urgent letters of appeal. In 2019, for instance, it issued a letter of appeal to Tanzania, jointly with the Commission, regarding the right to education of pregnant

[60] ACRWC (n 36) art 42.

[61] ACERWC, 'Revised Guidelines for the Consideration of Communications and Monitoring Implementation of Decisions by the African Committee of Experts on the Rights and Welfare of the Child', section VII(1)–(3).

[62] ibid section VII(4).

[63] As of April 2025, the ACERWC had received 26 communications, and had decided ten on the merits (five declared inadmissible, three reached an amicable settlement, four are still at the admissibility stage and four are pending). See ACERWC, *Communications* <http://www.acerwc.africa/en/communications/table>. B Mezmur, 'Happy 18th Birthday to the African Children's Rights Charter: Not Counting Its Days but Making Its Days Count' (2017) 1 African Human Rights Yearbook 125, 143–47.

[64] *Dalia Lotfy (on behalf of Sohaib Emad) v Egypt* Decision No 008/Com/002/2016 (ACERWC, May 2017) para 10.

[65] *Taha Fadul v Republic of the Sudan* Communication No 003/2020 (2022) Decision on Admissibility No 001/2022, paras 15–16. On the merits, the Committee also found a violation of the Charter: *Taha Fadul v Republic of the Sudan* Communication No 003/2020 (2023) Decision on Merits No 004/2023.

[66] *Taha Fadul v Republic of the Sudan* Communication No 003/2020 (18 September 2018) Request for Provisional Measures.

[67] ACERWC, 'Revised Guidelines for the Consideration of Communications', section VII(4) (noting that States should respond within 15 days on the implementation of this measure, from the day of the receipt of the request).

[68] *Taha Fadul* (2022) (n 66) para 17.

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girls.[69] In the relevant individual communication, it ordered the State to immediately prohibit the practice of forced pregnancy testing and subsequent expulsion of pregnant and married students from schools in Sudan.[70] It also ordered the State to remove both pregnancy and wedlock as grounds for expulsion of schoolgirls in education laws in order to give 'immediate attention to the realisation of children's rights'.[71]

3.3. The powers of the Court

The power of the Court to indicate provisional measures derives from the Protocol, which provides it with considerable discretion, stating in Article 27(2) that 'in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons' the Court 'shall adopt provisional measures as it deems necessary'.[72] The Court will generally determine whether to adopt provisional measures following a preliminary examination of its jurisdiction, either upon a reference from the Commission, at the request of the applicant or proprio motu.[73] Further, the Court has explained on many occasions that the criteria of urgency, gravity and irreparable harm stated in both the Protocol and the Rules of Procedure are cumulative.

However, the meaning of these terms has not been clearly defined. As the Court has reiterated on many occasions, the applicants need to produce specific evidence to demonstrate urgency, gravity and the likelihood of irreparable harm.[74] However, the Court generally does not define irreparable harm but, rather, associates it with a 'reasonable probability' of its occurrence, when considering the applicant's circumstances.[75] In a few instances, however, the Court has attempted to elaborate further. For instance, in *Flora Mustafa*, the Court stated that irreparable harm consists of 'damage that cannot be sufficiently redressed or compensated through any subsequent reparation',[76] while in *Kajoloweka* it stated that 'it is established in instances where the impugned acts are capable of seriously compromising the

[69] *Legal and Human Rights Center and Center for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania* Decision No 012/2019 (ACERWC, 2022) 37, para 103 (referring to ACommHPR and ACRWC, 'Letter of Urgent Appeal' (21 July 2017)).

[70] ibid 39, para 109.

[71] ibid.

[72] Protocol to the African Charter (n 13) art 27(2); AfCHPR Rules of Court (amended 1 September 2020) rule 59(1). Cf Naldi (n 6) 5.

[73] AfCHPR Rules of Court (n 72) rule 59(1).

[74] *Hossou and Adelakoun v Republic of Benin* (2021) App No 009/2021, para 27.

[75] *Sebastien Germain Ajavon v Republic of Benin* (2021) App No 062/2019, para 63: '[w]ith respect to irreparable harm, the Court considers that there must be a 'reasonable probability of occurrence' having regard to the context and the Applicant's personal situation'. In this case the Respondent State had suggested a definition that it is not simply harm that is difficult to remedy, but additionally, 'refers to acts whose consequences cannot be erased, remedied or compensated, even by payment of compensation' but this was not followed by the Court (para 27). The findings in *Ajavon* are also followed in *Noudehouenou* (2020) (n 1) para 50; *Noudehouenou v Republic of Benin* (2021) App No 004/2020, para 31; *Noudehouenou v Republic of Benin* (2022) App No 004/2020, para 28; *Cheikh Mohamed Cherif Koné and Dramane Diarra v Republic of Mali* (2023) App No 004/2024, para 32; *Romaric Jesukpego Zinsou v Republic of Benin* (2021) App No 008/2021, para 24 ('reasonable risk of its occurrence with regard to the context and the personal situation of the Applicant').

[76] *Flora Mustafa v Republic of Malawi* (2024) App No 008/2023, para 22.

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rights … in a way that prejudice would be caused prior to the Court making a determination on the merits'.[77]

Furthermore, there is no particular definition of gravity, or extreme gravity in the Court's jurisprudence—rather, the Court often mentions that 'urgency is consubstantial with extreme gravity'.[78] Urgency, in turn, appears to be dependant not only on the nature of the harm as irreparable, but also on the likelihood and imminence of harm since, according to the Court, urgency also means that there is a 'real and imminent risk of irreparable harm' that will be caused before the Court renders its final decision, noting also that this risk should not be a purely hypothetical one.[79] It has therefore been suggested that the Court could benefit from more rigour and consistency in relation to the interpretation of these terms—and, generally, from more conceptual precision.[80]

4. The increasing proactivity of African bodies in indicating provisional measures and its implications

4.1. Proactivity of the Commission

Cases before the Commission, and subsequently also provisional measures requests, are not all publicly available. It does seem, however, that consideration of requests prior to 2013 were limited in number,[81] and that the Commission gradually began to take a more proactive approach from 2010 onwards. For example, in a 2011 case concerning the imminent execution by hanging of the suspects of the 2004 Sinai bombings, the Commission took urgent action to request the Egyptian Government to stay the executions just a few days after being seized of the case,[82] with which Egypt complied.[83]

By virtue of its own practice and Rules of Procedure, the Commission has been open to accepting applications by the public, NGOs, communities or even entire peoples,[84] without necessarily identifying specific individuals as victims.[85] As a result, it has also been able to develop its jurisprudence with respect to Indigenous Peoples' rights,

[77] *Charles Kajoloweka v Republic of Malawi* (2020) App No 055/2019, para 23. See Teferra (n 6) 50–51.

[78] *Noudehouenou* (2022) (n 75); *Noudehouenou* (2021) (n 75) paras 22, 29; *Noudehouenou* (2020) (n 1) para 48; *Guillaume Kigbafori Soro v Republic of Côte d'Ivoire* (2020) App No 012/2020; *Adelakoun* (n 74) 24.

[79] *Ayadhi Fathi v Republic of Tunisia* (2023) App No 001/2023, paras 19–22; *Ajavon* (n 75) para 61; *Houngue Éric Noudehouenou v Republic of Benin* (2020) App No 010/2021, para 36; *Soro* (n 78) para 32. See also *Hammadi Rahmani v Republic of Tunisia* (2024) App No 008/2024, para 22.

[80] Analytically, see Teferra (n 6) 51.

[81] Burbano Herrera and Viljoen (n 6) 170 n 36 (stating that according to available information, only 22 out of 28 requests were granted between 1993 and 2013). See also Viljoen and Louw (n 26) 3. See, however, Murray and Mottershaw (n 54) 32.

[82] *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt* Communication No 334/06 (ACommHPR, 23 February–3 March 2011) paras 39–40.

[83] Redress, 'Defying Justice: Egypt's Failure to Implement the African Commission's Decisions on Ending Torture' (Briefing Paper, October 2024) 14 <https://redress.org/publication/defying-justice-egypts-failure-to-implement-the-african-commissions-decisions-on-ending-torture/>.

[84] *Kevin Mgwanga Gunme v Cameroon* Communication No 266/03 (ACommHPR, 2009).

[85] See, e.g. *Legal Resources Foundation v Zambia* Communication No 211/98 (ACommHPR, 2001); *Open Society Justice Initiative v Côte d'Ivoire* Communication No 027/2020 (ACommHPR, 2021).

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including their cultural rights.[86] Cultural rights have generally been given limited attention in the human rights discourse and even more so in Africa, where 'culture' has been largely weaponised to justify exclusion, marginalisation, discrimination and other human rights violations.[87] The Commission, however, has endeavoured, to some extent, to compensate for the historical neglect of social, economic and cultural rights, and has also affirmed that these rights generate obligations of immediate application under the Charter.[88] The landmark *Endorois* case,[89] in particular, has provided inspiration to other human rights bodies, including the Inter-American Court of Human Rights,[90] as the first international ruling on the right to development and the first definition of peoples and Indigenous Peoples in the African system. It is worth noting that in *Endorois*, the Chairperson of the Commission addressed an urgent appeal to the President of the Republic of Kenya based on reports received by the Commission alleging harassment of the Chairperson of the Endorois Welfare Council.[91]

At the same time, the Commission has been delivering landmark decisions on the merits with respect to cases involving grave human rights violations and massacres, such as the *Kilwa* case.[92] Since 2018, the work of the Commission has been undermined by political pressure in the context of the AU.[93] This appears to have resulted in a significant decrease in the number of provisional measures orders issued in 2019 and 2020.[94] The 2020 revised Rules of Procedure of the Commission contain certain passages that could be interpreted as attempts to excessively regulate the Commission, hence impacting its independence vis-à-vis other African bodies.[95] The updated Rules of Procedure also imposed obstacles on the relinquishment of cases to the Court, such as the introduction of a requirement of prior consent by the complainant.[96] Consent may be

[86] See, e.g. *The Nubian Community in Kenya v Kenya* Communication No 317/06 (ACommHPR, 2015); *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* Communication No 276/03 (ACommHPR, 2013).

[87] Odinkalu (n 27) 330–31.

[88] ibid 349.

[89] *Endorois* (n 86). For a discussion, see J Gilbert, 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights' (2011) 60 ICLQ 245, 251–52.

[90] Indicatively, see *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* (Judgment) IACtHR Ser C No 14 (2012) para 216 (referring to *Endorois* (n 86)).

[91] *Endorois* (n 86) para 43.

[92] *IHRDA v Democratic Republic of Congo* (2016) App No 393/2010, 70 (in which it found that Congo had to offer collective reparations to the inhabitants and their families, who were victims of the massacre of 2004). See also *Nnamdi Kanu and Indigenous Peoples of Biafra v Republic of Nigeria* Communication No 680/17 (ACommHPR, 22 February 2018) paras 23–25 (in which the Commission indicated that Nigeria should refrain from taking any further action to avoid irreparable damage against the victim and the members of the Indigenous Peoples of Biafra and their leader).

[93] AU Executive Council, 'Decision on the Report on the Joint Retreat of the Permanent Representatives Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR)' (28–29 June 2018) AU Doc EX.CL/Dec.1015(XXXIII) 1, para 5. See S Nabaneh, '2020 en Revue: Un Accent sur La Commission Africaine des Droits de l'Homme et des Peuples' Coalition for the Independence of the African Commission' (2021) 1.

[94] Amnesty International, 'The State of African Regional Human Rights Bodies and Mechanisms 2019–2020' (2020) 8 <https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR0130892020ENGLISH.pdf>. The decline in provisional measures requests, however, could also be due to the COVID-19 pandemic.

[95] Nabaneh (n 93) 9.

[96] ACommHPR Rules of Procedure (2020) (n 44) rule 130(2).

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extremely hard to achieve in certain situations, such as when the applicants are detained incommunicado[97] or when they wish to remain anonymous. Given the low number of States that have accepted the procedure of individual petitions directly to the Court under Article 34(6) Protocol, this may have a negative impact on the system as a whole. Furthermore, unlike the previous 2010 Rules of Procedure, the revised Rules of Procedure do not provide for the Commission's power to refer matters to the Court in cases of non-compliance.[98]

Still, however, it seems that the Commission's work continues to provide some relief for victims of human rights violations. In 2022, the Commission indicated provisional measures for the first time in a situation concerning widespread human rights violations in the context of an armed conflict—to protect civilians from irreparable harm in the Tigray Region in Eritrea.[99]

4.2. Proactivity of the Court

In the initial years of its operation, the Court exercised its power to order provisional measures sparingly. The first two successful provisional measures requests were initiated by the Commission and involved the situation in Libya in the context of the uprisings in the north of the country, in 2011 and 2012, respectively. In the former, the Commission requested the Court to take action and order Libya to undertake investigations with respect to human rights atrocities.[100] In the latter, it requested the Court to order Libya to respect the rights of Gaddafi himself, such as, for example, having access to a lawyer.[101] Although these orders did not have any real prospect of being implemented, they did show that the Court might be willing to adopt a more dynamic stance from then on.[102]

The Commission's stance with respect to cultural and land rights, particularly in *Endorois*, has arguably also influenced the Court to some extent. In *Ogiek*, for example, one of the first cases that reached the Court directly from the Commission's relinquishment of jurisdiction, the Court recognised an immediate need to protect indigenous land rights over the Mau Forest Complex where the Ogiek people lived.[103] Despite the lack of compliance with the provisional measures orders and the subsequent

[97] See, e.g. *Berhane Abrehe Kidane v State of Eritrea* Communication No 704/18 (ACommHPR, 2 November 2018); UN Human Rights Committee (HRC), 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea' (16 May 2019) UN Doc A/HRC/41/53, para 21 (Eritrea did not comply with the measures and the applicant died while in custody).

[98] ACommHPR Rules of Procedure (2010) (n 44) rule 118; Ayeni and Staden (n 54) 26.

[99] PanAfrican Lawyers Union Legal Action Worldwide and Debevoise & Plimpton, 'Tigrayan Victims Secure Provisional Measures Relief in Landmark Human Rights Case against Ethiopia' (Press Release, 17 October 2022) <https://legalactionworldwide.org/accountability-rule-of-law/tigrayan-victims-secure-provisional-measures-relief-in-landmark-human-rights-case-against-ethiopia/>. See also HRC (n 97).

[100] *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* (2011) App No 004/2011.

[101] *African Commission on Human and Peoples' Rights v Libya* (2013) App No 002/2013.

[102] Viljoen (n 15) 73–74; E Polymenopoulou, 'African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya, Order for Provisional Measures, 25 March 2011' (2012) 61 ICLQ 767, 771–72.

[103] *African Commission on Human and Peoples' Rights (on behalf of the Ogiek Indigenous Community) v Kenya* (2017) App No 006/2012.

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judgments on reparations by Kenya (the Ogiek are still struggling to realise their rights, as evidenced by recent applications to the Court),[104] the Court's orders and judgments still set an important precedent in the area of indigenous land rights.[105] The Court has also exhibited a proactive stance in finding violations of media freedom. Shortly after delivering its judgment in *Zongo*, concerning the murder of an investigative journalist in Burkina Faso,[106] the Court was seized of a case brought by another journalist, Samba Konaté, who was detained in Burkina Faso on defamation charges.[107] In this case, provisional measures were also indicated in respect of the journalist to allow him access to medical care while detained. This willingness of the Court to indicate provisional measures in relation to medical care has also been confirmed in other cases,[108] such as *Noudehouenou*,[109] in which the Court ordered Benin to remove all impediments to the applicant's access to medical care as well as to provide him with copies of his medical files.[110] However, the Court indicated that claims should be as specific as possible and supported by adequate evidence.[111]

Between 2016 and 2020, the Court dealt with a high number of cases involving the mandatory imposition of the death penalty for certain crimes, such as murder. There were 17 such cases brought against Tanzania in 2016 alone,[112] and another four between 2019 and 2021.[113] All the requests for provisional measures in these cases were granted.[114] This shows the determination of the Court to indicate provisional measures in emergency situations—without considering in detail the procedural requirements which could prevent an order being made.[115] Similar proactivity has been visible in the area of political rights, such as in *Noudehouenou*,[116] *Soro*[117] and *Ajavon*.[118] In these cases, the Court granted the requests for the indication of provisional measures, ordering the respondent States to remove obstacles in order to allow the applicants (prominent political figures and opposition leaders) to exercise

[104] *Letuya v Republic of Kenya* (2024) App No 010/2024 (one of the most recent requests concerning the Ogiek in Kenya, which was rejected due to lack of jurisdiction).

[105] Cf Gilbert (n 89) 270.

[106] *Abdoulaye Nikiema (Norbert Zongo) v Burkina Faso* (2014) App No 013/2011, para 156. Cf Adjolohoun and Nantulya (n 3).

[107] *Lohé Issa Konaté v Burkina Faso* (2013) App No 004/13.

[108] Cf *Leon Mugesera v Republic of Rwanda* (2017) App No 012/2017.

[109] See *Noudehouenou* (2022) (n 75). See also generally Akinkugbe (n 1) 284–85.

[110] *Noudehouenou* (2022) (n 75) para 81.

[111] *Noudehouenou* (2021) (n 75), paras 37–39.

[112] African Court Law Report vol 1 (n 20). See also Viljoen (n 15) 70.

[113] Including *Bashiru Rashid Omar v Tanzania* (2021) App No 045/2020.

[114] Teferra (n 6) 35 (noting that 'between March 2013 and December 2019, the Court dealt with provisional measures in 38 applications and it declined to adopt such measures only in two applications'). TM Makunya, 'Decisions of the African Court on Human and Peoples' Rights during 2020: Trends and Lessons' (2021) 21 AHRLJ 1230, 1234.

[115] For a discussion, see Teferra (n 6) 43–45 (discussing the lack of 'extreme urgency' given Tanzania's moratorium on the death penalty, and the fact that there was no indication that the detainees were going to be executed soon).

[116] *Noudehouenou* (2020) (n 1); *Noudehouenou* (2022) (n 75) para 56.

[117] *Soro* (n 78). Cf *Laurent Gbagbo v Côte d'Ivoire* (2020) App No 25/2020, para 36. See Makunya (n 114) 1247.

[118] *Ajavon* (n 76).

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their rights to vote and to stand for election. In *Noudehouenou*, in particular, the Court found violations of the principle of peoples' consensus in electoral matters, as guaranteed in the African Charter on Democracy, Elections and Governance.[119] More recently, in *Rahmani*, the Court granted the request by the applicant and other members of the Tunisian judiciary, who petitioned the Court to stay the implementation of a Tunisian law dismantling the country's judicial system in order to allow citizens to 'participate freely in the governance of their country'.[120]

The orders in these cases add to the dynamic stance of the Court on the merits, many of these cases exemplifying its use as a forum for strategic litigation and social mobilisation.[121] It is also clear from the nature of the applications submitted to the Court that individuals still have confidence in the African system. In *Adelakoun*, for example,[122] the applicants went as far as requesting the Court to suspend the decision of the Malian Constitutional Court, which declared that judgments of the Court of Justice of ECOWAS were non-binding, and claimed that the decision 'would constitute a violation of the right of access to justice protected by Article 7 of the Charter'.[123]

4.3. Response to the proactivity of the Court: Article 34(6) declaration withdrawals

The proactive stance of the Court has, however, not been without hostile reactions. The hostility started with Rwanda, which withdrew its declaration under Article 34(6) Protocol in the course of proceedings before the Court (related to the stay of execution of Mrs Umuhoza, who was sentenced to death for propagation of genocidal ideology).[124] Tanzania and Benin followed,[125] with both countries publicly announcing that they would not comply with the Court's orders.[126] This stance was emulated by Côte d Ivoire, which withdrew its declaration following the indication of provisional measures in *Soro*.[127]

Whilst orders indicating provisional measures are certainly not the only reason for discontent, unsurprisingly, the Court appears to have been more hesitant to indicate provisional measures following the withdrawals. Of the 22 requests for the indication of provisional measures between 2022 and 2025, only three were granted.[128] A request to

[119] *Noudehouenou* (n 1) paras 114, 247 (referring also to the African Charter on Democracy, Elections and Governance (n 38) art 10).

[120] *Rahmani* (n 79) para 10.

[121] Akinkugbe (n 1) 284–85; Makunya (n 114) 1248; JT Gathii and J Mwangi, 'The African Court of Human and Peoples' Rights as an Opportunity Structure' in JT Gathii (ed), *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change* (OUP 2020) 253.

[122] *Adelakoun* (n 74) para 27.

[123] ibid para 20 (provisional measures request was rejected).

[124] Withdrawal of Rwanda (n 14); *Ingabire Victoire Umuhoza v Rwanda* (2022) App No 003/2014, para 2; Adjolohoun (n 12) 6.

[125] Withdrawal of Tanzania (n 14); Withdrawal of the Republic of Benin (n 14); Adjolohoun (n 12) 13–14. See also *Ghaby Kodeih v Benin* (2020) App No 006/2020, which was cited in Benin's Declaration of Withdrawal.

[126] Adjolohoun (n 12) 6ff.

[127] Withdrawal of Côte d Ivoire (n 14); *Soro* (n 78). See also Adjolohoun (n 12) 16.

[128] *Moulaye Baba Haïdara v Republic of Mali* (2024) App No 009/2024; *Rahmani* (n 79); *Noudehouenou* (n 1). See also Teferra (n 6) 35 (noting that the Court in 2021 rejected 22 of the 29 requests for provisional measures).

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stay executions in Tanzania was also dismissed.[129] *Rahmani*, in which the Court ordered Tunisia to stay the implementation of a law of reforming the Tunisian judicial system, was one of the three cases in which provisional measures were granted,[130] alongside a judgment ordering Tunisia to repeal various presidential degrees and 'return to constitutional democracy within two years from the date of notification of [the] judgement'.[131] Shortly after, Tunisia also notified the Court of the withdrawal of its Article 34(6) declaration,[132] making it the fifth State to withdraw.

While it is premature to draw definitive conclusions, the proactivity of the Court in ordering provisional measures does not appear to have been in vain. This is not only because of the actual use of the Court as forum for political change but also because, regardless of State reactions, the orders and judgments have already been widely read and used by civil society for advocacy and scrutiny purposes, in addition to being debated before UN human rights bodies.[133] The case of *Ally Rajabu* illustrates this point well since, on the merits, the Court found that the mandatory imposition of the death penalty constituted not only an arbitrary deprivation of life under the Charter, but also a violation of human dignity,[134] with these findings being hailed by international NGOs as a step towards the abolition of the death penalty in Africa.[135]

5. Limitations and challenges to the African bodies' practices

5.1. Prima facie jurisdiction and other procedural requirements

Certain procedural challenges warrant examination. According to its established jurisprudence in the context of orders for provisional measures, 'the Court need not ascertain that it has jurisdiction on the merits of the case, but it simply needs to satisfy itself that it has prima facie jurisdiction'.[136] Typically, at this stage of proceedings the Court confines itself to examining, for example, whether the respondent State has accepted the jurisdiction of the Court under Article 34(6) Protocol, and whether it has ratified the Charter or any other relevant human rights instruments.[137] This allows the Court to be proactive without necessarily having to establish full jurisdiction over the

[129] *Bahati Mtega and Flowin Mteve v Tanzania* (2023) App No 009/2019.

[130] *Rahmani* (n 79) paras 31–38.

[131] *Ibrahim Belguith v Republic of Tunisia* (2022) App No 017/2021 (Merits, 22 September 2022) para 147 (viii).

[132] Withdrawal of Tunisia (n 14); N De Silva and M Amadi, 'Renewed State Backlash Against the African Court: Tunisia is the Fifth State to Withdraw Individual and NGO Access' (*EJIL:Talk!*, 23 May 2025) <https://www.ejiltalk.org/renewed-state-backlash-against-the-african-court-tunisia-is-the-fifth-state-to-withdraw-individual-and-ngo-access/>.

[133] By way of example, see UNHRC, 'Question of the Death Penalty: Report of the Secretary-General' (26 July 2022) UN Doc A/HRC/51/7, para 36.

[134] *Ally Rajabu v United Republic of Tanzania* (2019) App No 007/2015, paras 114, 158; Adjolohoun (n 12) 11–12.

[135] Amnesty International (n 94) 26. This is despite the fact that in later cases the Court has shifted away from *Rajabu*, finding, sadly, that the mandatory imposition of the death penalty and execution by hanging is not a violation of the ACHPR.

[136] AfCHPR Rules of Court (n 72) rule 49(1).

[137] *Konaté* (n 107) para 15; *Komi Koutché v Republic of Benin* (2019) App No 020/2019; *Noudehouenou* (n 1) para 14.

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case.[138] The Court has consistently examined its prima facie jurisdiction on the merits, without examining in detail the admissibility of complaints.[139] Nonetheless, an examination of admissibility could also be useful at this stage, facilitating a more positive reception from the respondent States. This is especially true for those cases that are seemingly likely to be inadmissible at a later stage such as, for example, those where domestic remedies are not exhausted prior to addressing a case to the Court.[140]

Furthermore, more explicit reasoning with respect to urgency and the other procedural requirements would be much welcomed, if only for the purpose of judicial clarity. By way of example, in a case against Tanzania involving electoral violence, the applicants requested the Court to stay the 2020 elections, and ensure that independent candidates were able to run for election.[141] The Court did not grant the request for the indication of provisional measures, because the applicants 'could have sought the provisional measures earlier than they did'.[142] In this way, however, the Court omitted to address the context, namely, the 'arrests and harassment of opposition politicians and journalists'.[143] Further, as pointed out by various authors, there is nothing that prevents the Court from examining whether an application is generally well-founded, including the conditions of admissibility, at the stage of considering its prima facie jurisdiction.[144] This would arguably better serve the rationale of the procedures, including time, effort and resources.

5.2. Better guidance to applicants

Applicants before the Court would benefit from more guidance on the requirements for a request for provisional measures, as well as on the nature of requests that are likely to be declined from the outset. It is evident, for example, that the Court does not consider sudden precarity,[145] nor financial distress in general,[146] as matters rising to the threshold of irreparable harm. Better guidance to applicants, therefore, as well as more detailed interpretation of the irreparable harm criterion, would go a long way in enhancing the authority of provisional measures. Likewise, it could be stated in advance that certain types of concerns are unlikely to be the object of an order indicating provisional measures. In cases relating to the rights to liberty and a fair trial, for example, the Court typically upholds requests for access to health and medical care for those detainees and prisoners whose health is at stake, but has never gone as far as ordering their release.[147] This

[138] For a critical overview, see Teferra (n 6) 36–40.

[139] Teferra (n 6) 40.

[140] ibid 41, referring, for instance, to *Elie Sandwidi and the Burkinabe Movement for Human and Peoples' Rights v Burkina Faso* (2020) App No 014/2020.

[141] *Legal and Human Rights Centre and Tanganyika Law Society v Tanzania* (2020) App No 036/2020, para 11.

[142] ibid para 27.

[143] ibid para 8. See also, Teferra (n 6) 37–39.

[144] Teferra (n 6) 41; Adjolohoun (n 12) 10. See also Statement by Judge Bensaoula Chafika in *Fathi* (n 79) para 11.

[145] *Koné and Diarra* (n 75) paras 41–42.

[146] *Flora Mustafa* (n 76) para 27.

[147] *Konaté* (n 107) para 6. See, however, the Joint Dissenting Opinion of Judges Ramadhani, Tambala and Thompson.

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approach is in line with the approach of other regional courts such as the ECtHR, which typically rejects requests for the release of prisoners as part of interim measures—even in the context of a hunger strike.[148] It would also be useful to find ways to dismiss from the outset requests of a nature that are unlikely to be granted in discrete rulings (similar to the single judge formation at the ECtHR). Moreover, it could also be emphasised in the form of formal guidance to applicants that, unless a specific personal harm is demonstrated, requests are likely to be rejected (in the European context, such guidance has been issued in the form of practice directions annexed to the updated Rules of Procedure (2024)).[149] In accordance with the case law of the AfCHPR, laws impacting on political rights—such as banning political rallies—could be suspended pending the adjudication of a case on the merits, provided the applicants meet the requirements (in particular, that of irreparable harm).[150] The Court, however, could be more affirmative in its guidance to prospective applicants that constitutional changes should not normally be the object of consideration in the context of provisional measures as a matter of urgency.[151]

5.3. Realistic expectations and greater specificity in the orders

Orders indicating provisional measures that are far-reaching or unrealistic are likely to be counterproductive. Hence, while orders without a real prospect of implementation were arguably accepted in the early years of the Court's operation (as, for example, in the cases against Libya), serving to distinguish the Court's role from the more politicised role of the AU,[152] this no longer seems to be the case. As African human rights bodies are maturing, the prospect of actual implementation and compliance enhances the effectiveness of the mechanism. This is especially true in cases involving large sums of public expenditure to facilitate the realisation of such orders. The *Ajavon* case, for example, prompts the question whether there should be a better balancing mechanism between the rights of the applicant (who was unable to participate in the elections because of his previous criminal conviction for cocaine trafficking) and the financial burden on States to reorganise their elections.[153] In other cases, the orders also appear to contain broad indications with little prospect of State compliance. In the case

[148] See, e.g. *Semih Özakça v Turkey* App No 45940/17 (European Court of Human Rights (ECtHR), 2 August 2017); *Nuriye Gülmen v Turkey* App No 46171/17 (ECtHR, 2 August 2017) (the Court refrained from ordering the prisoners' release, although it did order the State to allow the applicants to consult with doctors and have access to medication, and even directly requested the applicants to call off their hunger strike). See also *Horoz v Turkey* App No 1639/03 (ECtHR, 31 March 2009) (concerning the death of an inmate following hunger strike, in which the Court found no violation of the right to life).

[149] See ECtHR, Rules of Court (updated 28 March 2024); ECtHR, 'Practice Direction: Requests for Interim Measures' (updated 28 March 2024) para 6 (noting that the 'circumstances of a case must therefore exceed a high threshold of seriousness for Rule 39 to be engaged').

[150] *Tanganyika* (n 141) para 28 (although, in this case, the request for provisional measures was rejected because the Applicants had not demonstrated how this process would occasion irreparable harm to them or in the exercise of their rights).

[151] See, e.g. *Ibrahim Belguith v Republic of Tunisia* (2022) App No 017/2021, para 35 (finding the applicants' request to adopt legislation ensuring the supremacy of the Constitution, as well as reestablish the Constitutional Court moot); *Adelakoun* (n 74) para 27.

[152] MJ Ayissi, 'African Commission on Human and Peoples' Rights v Libya' (2017) 111 AJIL 738; Polymenopoulou (n 102) 772.

[153] Makunya (n 114) 1256; Teferra (n 6) 42.

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concerning Noudehouenou's first application to the Court to allow him run in the 2021 presidential elections in Benin, for example, the orders contained general indications to remove administrative, judicial and political obstacles to the applicant's candidacy.[154] It is unlikely that States will comply with measures involving deep political changes as a matter of urgency and within a short space of time, before a case is adjudicated on the merits.

5.4. Developing a culturally sensitive approach

The Court's understanding of the criteria of urgency and irreparable harm could be further developed in the field of the right to equality, in light of Article 18 Charter, which protects the dignity of women but also refers to values such as family and morality.[155] A culturally sensitive approach could encourage women and girls to request provisional measures in cases involving gender-related human rights violations, such as forced pregnancy testing, lack of consent to marriage and female genital mutilation, which is still seen by some as 'African heritage'.[156] Such cases so far have typically not been accompanied by requests for provisional measures,[157] yet they involve extreme urgency and irreparable harm. A more proactive stance by African bodies towards integrating a gender perspective on human rights could therefore contribute to more women having recourse to African human rights bodies and, eventually, also requesting interim relief. A case against Ghana involving the right to education for girls of the Ashanti communities living in rural areas that is currently pending before the Court could be the first step in this direction.[158]

6. Conclusion

The frequent indication of provisional measures has been a positive development since the early years of the Court's operation. Regardless of the outcome of the requests, the proliferation of requests for the indication of provisional measures exemplifies in and of itself the success of the system. It is a sign of growing confidence in the mechanism, exuding hope for the future.[159] Applications for provisional measures concerning political reforms and electoral matters, in particular, indicate the growing confidence of individuals in the Court. The Court in these cases has been proactive in protecting the right to participate freely in democratic life. This last point is evidenced by the series of orders in politically charged and high-profile cases such as *Soro*, *Noudehouenou* and *Ajavon*. Further, the provisional measures of the Court in death penalty cases have been a catalyst for wider public debate and advocacy on the subject—for this reason alone,

[154] *Noudehouenou* (n 1) para 20.

[155] Odinkalu (n 27) 42–43.

[156] *Kamau v Attorney General* [2021] KEHC 450 (High Court of Kenya, Constitutional Petition No 244 of 2019) para 2(a) (applicant complaining about the unconstitutionality of the criminalisation of performing Female Genital Mutilation).

[157] See, e.g. *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the IHRDA v Republic of Mali* (2018) App No 046/2016.

[158] *IHRDA and Solomon Joojo Cobbinah v Republic of Ghana* App No 001/2024 (pending).

[159] See also Makunya (n 114) 1236.

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the contribution of African bodies to enhancing the global human rights discourse is truly unique.

At the same time, the proactive stance of the Court has triggered adverse reactions from certain AU States—Benin, Côte d'Ivoire, Rwanda, Tanzania and Tunisia. Even the work of the Commission has been undermined by political pressure in the context of the broader crisis within the AU. It seems that, following State reactions and withdrawals of their declarations under the Protocol, the Court has been indicating provisional measures with more caution.

In this context, it is hoped that African human rights bodies will continue to show resilience, serving as a platform to promote participatory structures of governance. It is important for individuals and prospective applicants not to lose their confidence in the African human rights system. Some more guidance in the form of practice directions could be useful in this respect, to ensure that measures are as specific and as realistic as possible.

Finally, the Commission and Court serve as a paradigm of standard-setting in Africa. It is important to note that both these bodies, along with ACERWC, are slowly building their own worldview and approach to human rights by reference to their own jurisprudence and views. The Commission and the Court have played a vital role in interpreting and protecting human rights, including Indigenous land rights as well as social, economic and cultural rights—taking stock of the continent's own challenges. Their contribution could grow in other areas of human rights law, such as those relating to gender equality and women's rights, especially in matters deserving of urgent protection.

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