

PROVISIONAL MEASURES UNDER THE AFRICAN HUMAN RIGHTS SYSTEM: THE AFRICAN COURT'S ORDER AGAINST LIBYA

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ABSTRACT*

Provisional measures by regional human rights courts present an important protective mechanism for preventing, stopping or remedying human rights violations in grave, urgent or similar situations. No less important is the potential of provisional measures to provide not only individual justice for specific applicants but also cast a spell on the whole situation, and thereby protect populations facing large-scale or gross violations of international human rights and humanitarian law. At the height of an armed conflict that witnessed large-scale violations of international human rights, the African Court on Human and Peoples' Rights, in the first instance since its inauguration almost six years ago, ordered provisional measures against the state of Libya in March 2011. While the orders may have had no immediate consequences on the situation, the African Court's pronouncement was itself a signal of great moment. This article reviews this development and the challenges and opportunities for future orders for provisional measures by the African Court.

INTRODUCTION

The regional human rights system remains one of the greatest achievements in the internationalization of human rights.¹ Today,

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* Please take note that the developments discussed in this article are as of June 2011, when it was written.

regional human rights systems are important venues for the protection and promotion of human rights in Africa, the Americas and Europe.² In Africa, the regional human rights system is anchored mainly in the African Charter on Human and Peoples' Rights³ and the African Court on Human and Peoples' Rights,⁴ whose mandate is to complement and reinforce the functions of the African Commission on Human and Peoples' Rights.⁵ Despite its promise, the African Court has been beset by inactivity heretofore, compared to its counterparts, as well as institutional and political setbacks rooted in the architecture of the

¹ See generally DINAH SHELTON, REGIONAL PROTECTION OF HUMAN RIGHTS (2008); HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT 925 (3d ed. 2008); See MAGDALENA SEPÚLVEDA, THEO VAN BANNING, GUÐRÚN D. GUÐMUNDSDÓTTIR & CHRISTINE CHAMOUN, UNIVERSAL AND REGIONAL HUMAN RIGHTS PROTECTION: CASES AND COMMENTARIES XXXV–XXXVII (2004); Mary Robinson, *Human Rights in Transformation: From the Last Fifty Years to the Next Fifty*, Foreword to THE FUTURE OF INTERNATIONAL HUMAN RIGHTS XV, XV – XVI (Burns H. Weston & Stephen P. Marks, eds., 1999).

² See generally Robin C. A. White & Clare Ovey, *Preface to the Fifth Edition* of ROBIN C.A. WHITE & CLARE OVEY, JACOBS, WHITE, & OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS, at xix, xix–xxi (5th ed. 2010); DAVID HARRIS, MICHAEL O'BOYLE & COLIN WARBICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1–3 (2d ed. 2009); Germain Baricako, *The African Charter and African Commission on Human and Peoples' Rights, Introductory Preface to THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE 1986–2006* 1, 1 (Malcolm D. Evans & Rachel Murray eds., 2d ed. 2008); see generally I HUMAN RIGHTS LAW IN AFRICA: INTERNATIONAL HUMAN RIGHTS IN AFRICA (Christof Heyns ed., 2004); see generally JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (2003); see generally THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS (David J. Harris & Stephen Livingstone eds., 1998).

³ African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, 21 I.L.M. 58, O.A.U. Doc. CAB/LEG/67/3 rev. 5 [hereinafter African Charter]; see generally CHRISTOF HEYNS & MAGNUS KILLANDER, COMPENDIUM OF KEY HUMAN RIGHTS DOCUMENTS OF THE AFRICAN UNION (4th ed. 2010), for a discussion of key human rights instruments constituting the African human rights system.

⁴ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *adopted on* June 10, 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force Jan. 25, 2004), *available at* <http://www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf> [hereinafter African Protocol or Protocol]; see generally Chaloka Beyani, *A Human Rights Court for Africa*, 15 INTERRIGHTS BULL. 1 (2004); Frans Viljoen, *A Human Rights Court for Africa, and Africans*, 30 BROOK. J. INT'L L. 1, 1–2 (2004); Nico Krisch, *The Establishment of an African Court on Human and Peoples' Rights*, 58 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 713, 720 (1998) (Ger.); Julia Harrington, *The African Court on Human and Peoples' Rights*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1986–2000, *supra* note 2, at 305.

⁵ The African Commission on Human and Peoples' Rights is established under article 30 of the African Charter, and was first inaugurated in November 1987. The African Charter on Human and Peoples' Rights art. 30, *adopted on* June 27, 1981 (entered into force Oct. 21, 1986), *available at* http://www.achpr.org/english/_info/charter_en.html [hereinafter the African Commission or the Commission].

African human rights system.⁶ Its first judgment in 2009, which saw the rejection of the first application by an individual to the Court on grounds of lack of jurisdiction, has not been particularly inspiring.⁷ Most recently, however, the Court issued an important ruling in March 2011, ordering provisional measures against Libya in the armed conflict in its territory.⁸ However, absent the African Union's political will and effective follow up procedures, these orders remain without much force. More vexing is the failure of the African Court's orders to expressly implicate the non-state party in the armed conflict in Libya.

Provisional measures by regional human rights courts present an important protective mechanism for preventing, stopping or otherwise remedying human rights violations in grave, urgent or similar situations.⁹ More important is the potential of provisional measures to provide not only individual justice for specific applicants but also protect populations in situations involving large-scale or gross violations of international human rights and humanitarian law.¹⁰ In the African human rights system, the African Court is empowered to adopt such provisional measures as it deems necessary, in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons.¹¹ Yet, until the recent order against Libya, the African Court has not deployed provisional measures in any of the human rights situations that have

⁶ See generally GEORGE MUKUNDI WACHIRA, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: TEN YEARS ON AND STILL NO JUSTICE (2008); see generally Gina Bekker, *The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States*, 51 J. AFR. L. 151, 151 (2007); Makau Mutua, *The African Human Rights Court: A Two Legged Stool?*, 21 HUM. RTS. Q. 342, 357–62 (1999).

⁷ *In re Michelot Yogogombaye v. Republic of Senegal*, Application No. 001/2008, *Judgment* (African Ct. Human & Peoples' Rights, Dec. 15, 2009), available at http://www.african-court.org/fileadmin/documents/Court/Latest_Judgments/English/JUDGMENT_MICHELOT_YOGOGOMBAYE_VS._REPUBLIC_OF_SENEGAL_1_.pdf; for a discussion of the judgment, see, e.g., Charles Chernor Jalloh, *Michelot Yogogombaye v. Republic of Senegal*, 104 AM. J. INT'L L. 620 (2010); Jamil Ddamulira Mujuzi, *Michelot Yogogombaye v. The Republic of Senegal: The African Court's First Decision*, 10 HUM. RTS. L. REV. 372, 372 (2010).

⁸ *In re African Comm'n on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Application No. 004/2011, *Order for Provisional Measures*, ¶23 (African Ct. Human & Peoples' Rights, Mar. 25, 2011), available at http://www.african-court.org/fileadmin/documents/Court/Cases/Orders/ORDER_-_APPLICATION_NO._004.2011.pdf.

⁹ EVA RIETER, PREVENTING IRREPARABLE HARM: PROVISIONAL MEASURES IN INTERNATIONAL HUMAN RIGHTS ADJUDICATION 83 (2010); Jo M. Pasqualucci, *Interim Measures in International Human Rights: Evolution and Harmonization*, 38 VAND. J. TRANSNAT'L L. 1, 7 (2005).

¹⁰ Pasqualucci, *supra* note 9, at 7; see also CECILIA MEDINA QUIROGA, THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM 171(1988) in relation to the Inter-American human rights system.

¹¹ African Protocol, *supra* note 4, art. 27(2).

plagued Africa since its creation almost five years ago.¹² Paradoxically, during this period, the African Union has contemplated granting criminal jurisdiction to the African Court in these situations, a number of which are now the subject of preliminary investigation or trials at the International Criminal Court.¹³

What is the effect of the order for provisional measures against Libya, and how is it different from requests for provisional measures that have been issued by the African Commission? Can the African Court's provisional measures claim enhanced protection of human rights in the region? And how could the enforcement of these judgments be guaranteed? In exploring these issues, this essay examines the recent order for provisional measures against Libya by the African Court within the broader context of complementarity in the African human rights system. There is, however, a caveat: the system of complementarity in the African human rights system is work in progress, and as such, the analysis will of necessity resort to the procedural rules of the African Court and the African Commission.

The second part of the essay sketches the technique of provisional measures, its history under the African Commission, and the recent order for provisional measures against Libya by the African Court. In view of its limited scope, the essay only sketches the events leading to the order against Libya, discounting other developments before the

¹² Several countries have recently witnessed or continue to witness human rights crises since the establishment of the African Court. See, e.g., Rhoda E. Howard-Hassmann, *Mugabe's Zimbabwe, 2000–2009: Massive Human Rights Violations and the Failure to Protect*, 32 HUM. RTS. Q. 898, 898 (2010); see generally GENOCIDE IN DARFUR: INVESTIGATING THE ATROCITIES IN THE SUDAN (Samuel Totten & Eric Markusen eds., 2006); Maina Kiai, *The Crisis in Kenya*, J. DEMOCRACY, July 2008, at 162; see generally GERARD PRUNIER, *AFRICA'S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTINENTAL CATASTROPHE* (2008).

¹³ See African Union, Decisions Adopted During the 17th African Union Summit (July 1, 2011), [http://www.au.int/en/sites/default/files/Assembly_AU_Dec_363-390_\(XVII\)_E.pdf](http://www.au.int/en/sites/default/files/Assembly_AU_Dec_363-390_(XVII)_E.pdf). It also requesting the African Commission "to reflect on how best Africa's interests can be fully defended and protected in the international judicial system and to actively pursue the implementation of the Assembly's Decisions on the African Court of Justice and Human and Peoples' Rights so that it is empowered to try serious international crimes committed on African soil." *Id.* See also Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/Dec.213(XII), ¶ 9, 12th Sess. (Feb. 1–3, 2009) (mandating "the Commission [of the African Union], in consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010."); see generally Charles Chernor Jalloh, *Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction*, 21 CRIM. L. F. 1 (2010).

United Nations Security Council, the United Nations Human Rights Council, and the International Criminal Court, which are beyond its scope. The third part of the essay examines the system of monitoring the African Court's judgments through the African Union organs. In concluding, the paper exposes the challenges and opportunities for future orders for provisional measures by the African Court and its future successor.¹⁴

COMPLEMENTARITY BETWEEN THE AFRICAN COURT AND AFRICAN COMMISSION

In the wake of serious human rights violations and atrocities in Africa peaking in the 1980s and 1990s, debate on the establishment of a regional human rights court to strengthen the nascent African human rights system acquired center stage.¹⁵ In 1998, the African Court was established to complement and reinforce the functions of the African Commission.¹⁶ The African Court has contentious jurisdiction in all cases and disputes submitted to it concerning the interpretation and application of the African Charter and other applicable human rights instruments, as well as advisory jurisdiction on any legal matter relating to the Charter or any other relevant human rights instruments.¹⁷ In exercising its jurisdiction, a system of complementarity with the African Commission,

¹⁴ The African Court on Human and Peoples' Rights is transitional due to the "merger" of the Court with the African Court of Justice in 2008 via Protocol on the Statute of the African Court of Justice and Human Rights. Protocol on the Statute of the African Court of Justice and Human Rights, 11th Sess., Assembly/AU/Dec.193-207 (XI) (June 30-July 1, 2008) [hereinafter New Protocol]; At the recent AU Heads of State and Government meeting at their 17th Ordinary Session in Malabo (Equatorial Guinea) from 23rd June to 1st July 2011, it was decided that the transitional instruments relating to the merged Court be "finalized." See Decisions Adopted During the 17th African Union Summit, *supra* note 13.

¹⁵ Julia Harrington, *The African Court on Human and Peoples' Rights*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1986-2000, *supra* note 2, at 306; Erika de Wet, *The Protection Mechanism Under the African Charter and the Protocol on the African Court on Human and Peoples' Rights*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JAKOB TH. MOELLER 713, 724 (Gudmundur Alfredsson, Jonas Grimheden, Bertram G. Ramcharan & Alfred de Zayas, eds., 2001).

¹⁶ African Protocol, *supra* note 4, pmb1.

¹⁷ *Id.* arts. 3, 4; See Anne Pieter van der Mei, *The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa?*, 18 LEIDEN J. INT'L L. 113, 119-122 (2005) (analyzing the Court's jurisdiction); A.P. van der Mei, *The Advisory Jurisdiction of the African Court on Human and Peoples' Rights*, 5 AFR. HUM. RTS. L. J. 27, 35-37 (2005); see generally Robert Wundeh Eno, *The Jurisdiction of the African Court of Human and Peoples' Rights*, 2 AFR. HUM. RTS. L.J. 223 (2002); Inger Österdahl, *The Jurisdiction Ratione Materiae of the African Court on Human and Peoples' Rights: A Comparative Critique*, 7 REV. AFR. COMMISSION HUM. & PEOPLES' RTS. 132, 136 (1998).

which has concurrent contentious¹⁸ and advisory¹⁹ jurisdiction, is presupposed as discussed below.

REFERRAL OF CASES BY THE AFRICAN COMMISSION TO THE AFRICAN COURT

The relationship between the African Court and the African Commission is mainly regulated by the Protocol establishing the Court, the Rules of the Court,²⁰ and the Rules of Procedure of the Commission.²¹ The Protocol provides that the Court shall complement the Commission's protective mandate.²² Under the Protocol, the African Commission, state parties and African intergovernmental organizations have direct access to the Court.²³ In contrast, individuals and relevant NGOs with observer status before the African Commission may only initiate cases directly before it where a state makes a declaration accepting the competence of the Court to receive such cases.²⁴ With the inherent limitations of inter-state complaints due to the principle of non-interference in the internal affairs of States in the African Union and the

¹⁸ African Charter, *supra* note 3, arts. 48–52, 55–59.

¹⁹ *Id.* art. 45(3).

²⁰ African Court on Human and Peoples' Rights [ACHPR], *Interim Rules of Court*, (June 20, 2008), http://www.chr.up.ac.za/test/images/files/documents/ahrdd/theme03/african_court_rules.pdf [hereinafter *Rules of the Court*]; See "*Protecting Human Rights in Africa*": *Welcome to the African Court on Human and Peoples' Rights*, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, <http://www.african-court.org> (last visited Nov. 15, 2011).

²¹ AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, RULES OF PROCEDURE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (2010) [hereinafter *Rules of the Commission*]. The African Commission's first Rules of Procedure were adopted during its second ordinary session held in Dakar (Senegal) from February 2 to 13, 1988. These Rules were revised during the Commission's 18th ordinary session held in Praia (Cape-Verde) from October 2 to 11, 1995. Subsequently, the Rules were revised further and adopted at the Commission's 44th and 47 sessions held in Abuja (Nigeria) from 10 to 24, 2008, and Banjul (The Gambia) from May 12 to 26, 2010 respectively. See generally Gina Bekker, *Recent Developments in the African Human Rights System, 2008 – 09*, 9 HUM. RTS. L. REV. 668, 670 (2009); African Commission on Human and Peoples' Rights (July 15, 2011), <http://www.achpr.org/english/ROP/Rules%20of%20Procedure.pdf>.

²² African Protocol, *supra* note 4, art. 2.

²³ *Id.* art. 5(1).

²⁴ *Id.* arts. 5(3), 34(6). At the time of writing this essay, four states (Burkina Faso, Ghana, Malawi and Mali) have accepted the Court's jurisdiction unconditionally, whereas Tanzania has accepted the Court's competence provided only that "all domestic legal remedies have been exhausted and in adherence to the Constitution." THE UNITED REPUBLIC OF TANZANIA DECLARATION (2010), *available at* http://www.african-court.org/fileadmin/State_Declarations/Declaration_Tanzania.pdf.

qualified access of individuals and non-governmental organizations,²⁵ the African Commission is currently the main pathway to the African Court.²⁶ In the past, it remained unclear at what stage the Commission could refer cases to the Court.²⁷ However, the revised procedures of the African Commission have now clarified different types of referrals by the Court.

The first category comprises cases in which the African Commission has taken a decision with respect to an interstate or individual communication under the African Charter, and the “Commission considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication.”²⁸ The African Commission’s findings, which have been considered as “views,” “observations,” or “recommendations,” typically declare whether there has been a violation of the African Charter and how the state party ought to remedy the violations.²⁹ Generally, the Commission’s recommendations have been assumed to be non-binding, although they are hortatory.³⁰ The functional basis, therefore, underlying the referral by the Commission to the Court is that this is likely to induce compliance

²⁵ See Dan Juma, *Access to the African Court on Human and Peoples’ Rights: A Case of the Poacher Turned Gamekeeper?*, 4 ESSEX HUM. RTS. REV. 1, 1–3 (2007); Scott Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?*, 10 HUM. RTS. Q. 249, 262–63 (1988).

²⁶ In contrast, articles 29 and 30 of the new Protocol of the merged African Court provides that the following entities are eligible to submit cases to the Court: State Parties; the Assembly of Heads of State and Government of the African Union and other organs of the Union authorized by the Assembly; the African Union Parliament; a staff member of the African Union; the African Commission on Human and Peoples’ Rights; the African Committee of Experts on the Rights and Welfare of the Child; African Intergovernmental Organizations accredited to the Union or its organs; African National Human Rights Institutions; and individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs, subject to a declaration by the responding State Party. New Protocol, *supra* note 14, arts. 29, 30.

²⁷ In the “old” European system of protection and the current Inter-American system, the Commission could refer cases to the Court after ‘consideration’ of the case and the adoption of the case. For this discussion, see Viljoen, *supra* note 4, at 33.

²⁸ *Rules of the Commission*, *supra* note 21, r. 118(1), 112(2).

²⁹ See *id.* r. 92; see generally Chidi Anselm Odinkalu & Camilla Christensen, *The African Commission on Human and Peoples’ Rights: The Development of Its Non-State Communication Procedures*, 20 HUM. RTS. Q. 235, 277 (1998); Rachel Murray, *Decisions by the African Commission on Individual Communications Under the African Charter on Human and Peoples’ Rights*, 46 INT’L & COMP. L. Q. 412, 428 (1997); Harrington, *The African Court on Human and Peoples’ Rights*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE SYSTEM IN PRACTICE 1986–2000, *supra* note 2, at 322–26.

³⁰ Gino Naldi, *The African Union and the Regional Human Rights System*, in THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE 1986–2006, *supra* note 2, at 36; But see Frans Viljoen & Lirette Louw, *The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation*, 48 J. AFR. L. 1, 9–10 (2004).

following the Court's transformation of the Commission's recommendations into binding judicial decisions. The pitfall of this procedure is that it is essentially a "follow-up" or an "implementation" mechanism, coming late in the life of a case.³¹ The second problem is the assumption that referral to the African Court- where the African Commission has not succeeded- would ensure compliance. Indeed, complex factors are often at play in human rights regimes, and the juridical nature of the decisions *per se* should not be deemed as the key driver toward compliance.³² Put differently, the binding nature of the decision alone does not lead to compliance. Even so, in light of its new procedures, it is not clear why the African Commission should not pursue its own follow-up measures,³³ perhaps political means, including notifying the Executive Council of the African Union instead of offloading these cases to the African Court.

The second type of referrals to the African Court is a category of cases in which the Commission has taken "Provisional Measures against a State Party" to the African Court Protocol and the Commission "considers that the State has not complied with the Provisional Measures requested."³⁴ Unlike the first category which may be transmitted to the African Court following the African Commission's decision on merits of the case, this procedure may be instituted immediately after a communication is filed at the Commission, and the Commission issues provisional measures.³⁵ In light of the urgency of such cases, the referral may be made by the Chairperson or Vice-Chairperson of the

³¹ Under Rules 112(2) and 118(2) of the Rules of the Commission, state parties have as much as 180 days of being informed of the African Commission's decision (and the consideration of the Commission's Activity Report by the African Union Assembly) to inform the Commission of all measures, if any, taken or being taken by the State Party to implement the decision of the Commission. *Rules of the Commission*, *supra* note 21, r. 112(2), 118(2).

³² See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935, 1937 (2002).

³³ See *Rules of the Commission*, *supra* note 21, r. 112. Note that whereas there are timeframes for follow-up procedures, Rule 118 provides none in respect of submitting the case to the Court where there is non-compliance. *Id.* r. 118. A case may thus be submitted before the follow-up procedures.

³⁴ *Id.* r. 118(2).

³⁵ *Id.* r. 98(1). Under Rule 98(1) of the Rules of the Commission, "At any time after the receipt of a Communication and before a determination on the merits, the Commission may, on its initiative or at the request of a party to the Communication, request that the State concerned adopt Provisional Measures to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands." *Id.*

Commission if it is not in session.³⁶ However, the caveats lodged above in relation to the first category of cases, and the history of non-compliance with the African Commission's interim orders raises doubts whether this second layer of legality, or the bolstering of such orders' juridical status through the African Court will induce better compliance.³⁷

The third genre of referrals may be made following a determination of the African Commission that a situation constitutes serious or massive violations of human rights as provided for under Article 58 of the African Charter.³⁸ This procedure, under which the African Commission referred the Libyan case to the Court,³⁹ is important as it bypasses the bottlenecks inherent in the African Charter's institutional arrangements.⁴⁰ The procedure also provides a venue for cooperation between the African Court and the African Commission in situations of serious or massive human rights violations, with the former providing protective functions, backstopped by the latter's promotional activities.⁴¹ However, a setback is that the Commission has no powers to seize the Court outside an individual or interstate communication,⁴²

³⁶ *Id.* r. 98(2). Rule 98(2) of the Rules of the Commission. Under Rules 26 and 27 of the Rules of the Commission, the Commission holds at least two ordinary sessions every year and may hold an extra-ordinary session if there is need. Under Rules 14 and 15 of the Rules of the Court, the Court holds four ordinary sessions every year, but may be convened by the President, who serves on a full time basis. *See* African Protocol, *supra* note 4, art. 21(2).

³⁷ Compliance and non-compliance here are used loosely to refer to non-observance of express requests of the African Commission (and later, the Court) regarding the subject, without regard to the nuances of the concepts. There is no study, in this regard, that is known to have assessed the question of compliance. *See generally*, Frans Viljoen & Lurette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004*, 101 AM. J. INT'L L. 1 (2007); INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 412 (Mashood A. Baderin & Manisuli Ssenyonjo eds., 2010); OBIORA CHINEDU OKAFOR, THE AFRICAN HUMAN RIGHTS SYSTEM, ACTIVIST FORCES, AND INTERNATIONAL INSTITUTIONS 78, 284 (2007).

³⁸ Rules of the Commission, *supra* note 21, r. 84; *see generally* Rachel Murray, *Serious or Massive Violations Under the African Charter on Human and People's Rights: A Comparison with the Inter-American and European Mechanisms*, 17 NETH. Q. HUM. RTS. 109, 109 (1999).

³⁹ *See infra* Part 4.

⁴⁰ African Charter, *supra* note 3, art. 58(2). The Commission is required to notify the Assembly of Heads of State and Government of these special cases, which "may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations." *Id.*

⁴¹ Mutua, *supra* note 6, at 360–61.

⁴² *See* Rules of the Commission, *supra* note 21, r. 84(1) & (2), r. 118(3). However, during the revision of the Rules of the African Commission, there is the possibility of referring cases of serious and massive human rights violations to the court even where "there is no complainant." *See* Rule 124(2) of the Interim Rules of the African Commission on Human and Peoples' Rights (July 15, 2011), <http://achpr.org/english/other/Interim%20Rules/Interim%20Rules%20of%20Procedure.pdf>.

despite the existence of special mechanisms through which the Commission can conclude the existence of a situation of serious or massive violations of human rights.⁴³ In all the above categories of cases submitted to the Court, both the Rules of the Court and the Commission suggest that such cases should not necessarily have undergone any proceeding before the Commission, except the first category referred after determination on the merits.⁴⁴ In particular, the second and third categories may be submitted before the admissibility stage,⁴⁵ thereby providing a critical frontier for human rights protection. Finally, the Commission could also develop a system of prophylactic remedial action under the second and third categories of cases discussed above, by immediately referring applications or situations to the African Court where the state is not likely to comply with its decisions, based on past patterns.

REFERRAL OF CASES BY THE AFRICAN COURT TO THE AFRICAN COMMISSION

The African Court is competent to request the opinion of the African Commission on admissibility of a case instituted by an individual or a non-governmental organization which has observer status before the Commission.⁴⁶ This is a complementary function,⁴⁷ under which convergence of practice within the Commission and the Court is also likely to emerge.⁴⁸ In addition to streamlining the admissibility decisions of the African Commission, it could also improve the

⁴³ For a discussion of the African Commission's special mechanisms, see *infra* note 66.

⁴⁴ Communications go through four main stages at the Commission generally as follows: Seizure, admissibility, merits and remedies. See Frans Viljoen, *Communications under the African Charter: Procedure and Admissibility*, in THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE 1986–2006, *supra* note 2, at 77. Rules of the Commission, *supra* note 21, r. 124(2); Protocol, *supra* note 4, art. 6(1).

⁴⁵ See generally Viljoen, *supra* note 4, at 25–35.

⁴⁶ Protocol, *supra* note 4, arts. 5(3), 6(1), 34(6); *Rules of the Court*, *supra* note 20, r. 33(1)(f).

⁴⁷ Rules of the Commission, *supra* note 21, r. 89(1), 117.

⁴⁸ Protocol, *supra* note 4, art. 6(2). There is a requirement under Article 6(2) of the Protocol, and Rules 39 and 40 of the Court, mandating the Court to apply the admissibility norms established in Articles 50 and 56 of the African Charter. Similarly, the African Commission applies these norms under Articles 50 and 56 of the African Charter and Rules 105, 106, 107 and 119(1) of the Rules of the Commission.

jurisprudence of the Commission, which must now contain reasons for the decisions.⁴⁹

Complementarity between the African Court and the African Commission goes beyond the admissibility inquiry. Under Article 6(3) of the Protocol, the African Court may consider a case or transfer it to the African Commission upon the Court's or the Commission's determination of the admissibility inquiry.⁵⁰ Moreover, a disjunctive reading of the provision from the other clauses of the article means that the Court can transfer any case (at any time, and not necessarily related to an admissibility referral) to the Commission. For instance, the Court could transfer a case to the African Commission- even if such case had been submitted earlier to the Court by the Commission under Article 5(1) of the Protocol- before the merits stage for amicable settlement,⁵¹ or fact-finding.⁵²

In essence, the power of the African Court to refer cases to the African Commission can discourage forum shopping by petitioners.⁵³ It could also standardize admissibility norms and procedures as well as provide a cooperative mechanism for sharing out of cases between the Court and the Commission. However, in the absence of policies or guidelines, a practice of "cherry-picking" hard or easy cases by the Court may develop, given that it does not have compulsory jurisdiction.⁵⁴

⁴⁹ Rules of the Commission, *supra* note 21, r. 89, 107; *see generally* Viljoen & Louw, *supra* note 37.

⁵⁰ Protocol, *supra* note 4, art. 6(3).

⁵¹ For a similar argument albeit in a somewhat different context under the African human rights system, see Viljoen, *Communications under the African Charter*, in *THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE 1986–2006*, *supra* note 2, at 93. Viljoen, *supra* note 4 at 47. *See* American Convention on Human Rights art. 48(1)(f), 1144 U.N.T.S. 123, O.A.S.T.S. No. 36 (Nov. 22, 1969) for the relationship between the Inter-American Court and the Commission on amicable settlement; African Charter, *supra* note 4, art. 52; *see also* Rachel Murray, *A Comparison Between the African and European Courts of Human Rights*, 2 *AFR. HUM. RTS. L. J.* 195, 199–201 (2002).

⁵² *See generally* Rachel Murray, *Evidence and Fact-finding by the African Commission*, in *THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE 1986–2006*, *supra* note 2, at 139.

⁵³ *See generally* Frans Viljoen, *Communications under the African Charter: Procedure and Admissibility*, in *The African Charter on Human Rights: The System in Practice 1986–2006*, *supra* note 2, at 93, for a similar argument in a somewhat different context under the African human rights system. *See also* Viljoen, *supra* note 4, at 47.

⁵⁴ African Protocol, *supra* note 4, arts. 3(2), 5(3) (relating to jurisdictional questions and cases instituted directly by individuals or non-governmental organizations).

CONSULTATIONS BETWEEN THE AFRICAN COURT AND THE AFRICAN COMMISSION

Consultations are an important element of complementarity between the African Court and the African Commission. The subject of such consultations may include a wide array of legal, policy and operational issues such as inter-institutional coordination, evidence gathering, and working methods and procedures. The Protocol establishing the Court and the procedures of the Court and the Commission acknowledge this imperative and mandate consultations in a number of spheres. For example, Article 33 of the African Protocol requires the Court to consult the Commission on its procedures, and the Rules of the Court and the Commission provide for such consultations.⁵⁵ At the operational level, the bureaus of the Commission and the African Court “shall meet at least once a year, and as often as necessary to ensure a good working relationship between the two institutions.”⁵⁶ There is also an interface for complementarity between the Court and the Commission where cases pending before the latter are submitted by state parties that had lodged a complaint to the Commission, or against which the complaint had been lodged at the Commission in accordance with Article 5(1)(b) and (c) of the Protocol.⁵⁷ Finally, in the conduct of inquiry procedures,⁵⁸ consultations between the Court and the Commission should be encouraged so as to harness the competences of the institutions.

RELATIONS REGARDING ADVISORY OPINIONS

The Protocol empowers the African Court to “provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments” at the request of a member State of the African Union (AU), any of its organs, or any African organization recognized by the AU.⁵⁹ The Commission is technically an organ of the AU,⁶⁰ and is thus

⁵⁵ *Rules of the Court*, *supra* note 20, r. 29(4); *see id.* at r. 33; *Rules of the Commission*, *supra* note 21, r. 115(4).

⁵⁶ *Rules of the Commission*, *supra* note 21, r. 115(4).

⁵⁷ *See Rules of the Court*, *supra* note 20, r. 33(1)(b).

⁵⁸ *Protocol*, *supra* note 4, art. 26(1); *Rules of the Court*, *supra* note 20, r. 45(3).

⁵⁹ *Protocol*, *supra* note 4, art. 4.

⁶⁰ *African Charter*, *supra* note 3, art. 30; *Protocol*, *supra* note 4, art. 4; *Rules of the Court*, *supra* note 20, r. 68(3).

competent to refer a request for an advisory opinion to the Court. It also has concurrent, but slightly limited jurisdiction to “interpret all the provisions of the present Charter at the request of a State party, an institution of the AU or an African Organization recognized by the AU.”⁶¹ This requires complementarity between the Court and the Commission.

In the first instance, the African Court and the African Commission have the inherent *compétence de la compétence* to determine whether there exists jurisdiction over a matter that is referred to them. However, the Court may not issue an advisory opinion on a subject matter that is being examined by the Commission.⁶² With leave of the Court, the Commission may also appear as an interested party in respect of an advisory opinion pending before the Court.⁶³ Similarly, where the Commission is requested to provide an advisory opinion, it shall immediately inform the President of the African Court.⁶⁴ In their totality, these provisions provide safeguards against duplication or conflict in the advisory practice of the African human rights system.⁶⁵ Further, they also foreclose forum shopping, where contentious or other issues before the Commission may be disguised in the form of requests for advisory opinions to the Court.

INFORMATION SHARING BETWEEN THE COURT AND THE COMMISSION

The African Commission- especially its special mechanisms⁶⁶ is the repository of information that accrues from the Commission’s

⁶¹ African Charter, *supra* note 3, art. 45(3). At the time of writing the Commission has issued only a single advisory opinion. *See Rules of the Court, supra* note 20, r. 70(2); *see Rules of the Commission, supra* note 21, r. 117; *see* ACHPR, Advisory Opinion of the African Commission on Human and Peoples’ Right on the United Nations Declaration on the Rights of Indigenous People (May 2007), http://achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf.

⁶² African Protocol, *supra* note 4, art. 4; *Rules of the Court, supra* note 20, r. 68(3).

⁶³ *Rules of the Court, supra* note 20, r. 70(2); *see generally* van der Mei, *supra* note 17; *Rules of the Commission, supra* note 21, r. 117.

⁶⁴ Rules of the Commission, *supra* note 21, r. 116(1).

⁶⁵ van der Mei, *supra* note 17, at 37.

⁶⁶ These comprise mainly special rapporteurs and working groups. *See generally* Rachel Murray, *Special Rapporteurs in the African System*, in THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE 1986–2006, *supra* note 2, at 344–45; Bahame T.M. Nyanduga, *Working Groups of the African Commission and Their Role in the Development of the African Charter on Human Rights Special Mechanisms*, in THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE 1986–2006, *supra* note 2, at 379.

promotional and protective functions.⁶⁷ In the course of time, the African Court will also accumulate information that could be useful in strengthening the regional human rights system. The Rules of the Commission and the Court thus lay out instances in which information sharing between the Court and the Commission is triggered. In referrals in contentious cases discussed above, the body submitting the cases is required to provide a report or information relating to such case.⁶⁸ In addition to informing the Court on requests for advisory opinions, the Commission has determined that it shall send these opinions to the President of the African Court as soon as they are adopted.⁶⁹

THE PATHOLOGY OF PROVISIONAL MEASURES BEFORE THE AFRICAN COMMISSION

Although the system of provisional measures under the African human rights system has had its modest successes, it has been heretofore far from promising. In the period preceding establishment of the African Court, there existed no express foundation for provisional measures in the African Charter on Human and Peoples' Rights or its Protocols. However, the African Commission sealed this lacuna by providing for interim measures in its rules of procedure,⁷⁰ implied in its quasi-judicial status and protective function.⁷¹ In pursuance of its mandate, the Commission can request respondent states to adopt provisional measures to prevent irreparable harm to victims of the alleged violation at any time

⁶⁷ See generally THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE 1986–2006, *supra* note 2.

⁶⁸ *Rules of the Court*, *supra* note 20, r. 29(1)–(3) (where the Commission refers a case to the Court, or where the Court refers a case to the Commission for an opinion on admissibility, or for determination, respectively).

⁶⁹ Rules of the Commission, *supra* note 21, r. 116(2).

⁷⁰ Rule 109 of the first Rules of the Court adopted on 13 February 1988, and revised in 1995 as Rule 111, provided in part that the “Commission may” before making its final views known to the Assembly on the communication “inform the State party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation.” See ACHPR, *Rules of Procedure of the African Commission on Human and Peoples' Rights*, r. 111 (1995),

http://achpr.org/english/_info/rules_en.html; Rule 98(1) provides in part that the “Commission may, [at any time after the receipt of a communication and before a determination on the merits], on its initiative or at the request of a party to the Communication, request that the State concerned adopt Provisional Measures to prevent irreparable harm to the victim or victims of the alleged violation.” Rules of the Commission, *supra* note 21, r. 98(1).

⁷¹ On the distinction between express, inherent and implied authority to grant interim measures by international human rights tribunals and quasi-judicial bodies, see Pasqualucci, *supra* note 9, at 7.

following the receipt of a communication relating to individual complaints. The Commission may adopt such measures *propriu motu*, or upon request based on its discretion.⁷² The procedure requires further that the respondent state “report back on the implementation of the Provisional Measures requested. . .within fifteen (15) days of the receipt of the request for Provisional Measure.”⁷³

These edicts notwithstanding, provisional measures in the African human rights system have been haunted by a history of non-compliance by States and only a few isolated cases have had their intended effect.⁷⁴ The first explanation is not unique to the African human rights system; it is grounded in the paradox of international human rights law, in which the state bears the primary duty to respect, protect and fulfill these rights, yet the state remains the key threat to these rights.⁷⁵ The second explanation stems from the weaknesses of the protective mandate of the African Commission, caused in part by the African Charter’s normative limitations and the Commission’s initial narrow interpretation of the Charter’s confidentiality requirements.⁷⁶ The third shortcoming is that the provisional measures, conducted within the powers of the African Commission to receive communications, are embedded in the political will and good faith of the states in the absence of enforcement procedures.⁷⁷ Finally, claims by states that the Commission’s decisions are not binding in the absence of express Charter authority have impugned the efficacy of provisional measures.⁷⁸

⁷² Rules of the Commission, *supra* note 21, r. 98(1).

⁷³ *Id.* r. 98(4).

⁷⁴ See Frans Viljoen, *Communications under the African Charter: Procedure and Admissibility*, in *THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE*, *supra* note 2, at 86; FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA* 326 (2007); FATSAH OUGUERGOUZ, *THE AFRICAN CHARTER OF HUMAN AND PEOPLES’ RIGHTS: A COMPREHENSIVE AGENDA FOR DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA* 639 (2003).

⁷⁵ See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 *HARV. INT’L L. J.* 201, 221 (2001).

⁷⁶ African Charter, *supra* note 3, art. 59; see Chidi Anselm Odinkalu, *The Individual Complaints Procedures of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment*, 8 *TRANSNAT’L L. & CONTEMP. PROBS.* 359, 367 (1998); Odinkalu & Christensen, *supra* note 29, at 236–37.

⁷⁷ See generally RACHEL MURRAY, *HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION* 50–52, 57–63 (2004).

⁷⁸ See generally Rachel Murray, *supra* note 29, at 431; see also Viljoen & Louw, *supra* note 30; see Harrington, *The African Court on Human and Peoples’ Rights*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE SYSTEM IN PRACTICE 1986–2000*, *supra* note 2, at 322–26.

A detailed treatment of the practice of provisional measures before the African Commission is neither feasible nor profitable here, but a few cases stand out in particular. In the two and half decades since the inception of the African Commission in 1987, the Commission has issued requests for interim measures in a number of important cases discussed below. The most familiar of these cases involved a series of communications concerning human rights violations occasioned by the unlawful detention and trial of Kenule Beeson Saro-Wiwa and members of an indigenous group living in the oil producing areas of Nigeria.⁷⁹ These communications alleged violations of the rights to personal liberty and security, fair trial, life, freedom of assembly and association, freedom of expression, health and freedom from cruel and degrading treatment.⁸⁰ In the meantime, at the end of October 1995, Saro-Wiwa and a number of other co-defendants were sentenced to death for incitement to violence and murder.⁸¹

Although this case warranted urgent protective measures due to the imminent threat of irreparable harm through the death penalty, the petitioners did not seek, nor did the African Commission grant requests for provisional measures *proprio motu* at the time of seizure. A few days after the death penalty sentence, the Commission was petitioned to adopt provisional measures to prevent the executions, in response to which the Commission immediately invoked interim measures as requested, urging that the executions be delayed until it had discussed the case with the Nigerian authorities.⁸² The Commission received no response from Nigeria, and in November 1995, barely a week after the Commission's appeal, all the accused persons were executed in secret.⁸³ In deciding on the merits of this case, the Commission found that Nigeria had, through its actions and failure to "institute provisional measures,"⁸⁴ violated various provisions of the African Charter.⁸⁵

⁷⁹ International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. v. Nigeria, 12th Annual Activity Report (2000), AHRLR 212 (African Comm'n Human & Peoples' Rights, 1998).

⁸⁰ *Id.* ¶ 13.

⁸¹ *Id.* ¶¶ 2, 4, 7.

⁸² *Id.* ¶¶ 7–8.

⁸³ *Id.* ¶¶ 9–10.

⁸⁴ *Id.* at 73.

⁸⁵ African Charter, *supra* note 3, arts. 1, 4, 5, 6, 7(1), 9(2), 10(1), 11, 16, 26.

In a similar case involving a murder convict liable for the death sentence,⁸⁶ Botswana failed to comply with the African Commission's interim orders. The case arose out of a communication brought on behalf of a woman who had been convicted of murder by the High Court of Botswana in December 1999 and subsequently sentenced to death. The complaint alleged violations of the right to life, fair trial, and freedom from inhuman treatment and punishment.⁸⁷ Following its receipt of the communication in March 2001, the Commission wrote to Botswana appealing for a stay of execution pending consideration of the communication by the Commission.⁸⁸ No response was received by the Commission.⁸⁹ Information was received later at the Commission indicating that the execution was undertaken at the end of March 2001⁹⁰. In its decision of November 2003, the Commission, however, found that Botswana had not violated the Charter, since neither violation of substantive provisions nor the provisional measures in the absence of "proof that the fax [containing the request] was indeed received by the President of Botswana."⁹¹

As discussed above, cases involving judicial executions are paradigmatic candidates for provisional measures, and it is hard to reconcile this case with the *Saro-Wiwa* case discussed above.⁹² In this case, non-compliance with provisional measures was itself found to be an independent violation of the African Charter. As such, the *Bosch* case contradicts the Commission's view in *Saro Wiwa*.⁹³ In this communication, as in the *Saro Wiwa* case, the Commission could have found a violation of Article 1 of the Charter for two related procedural

⁸⁶ ACHPR, *Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2003–2004*, ¶ 2, at 95, http://www.achpr.org/english/activity_reports/activity17_en.pdf [hereinafter *Seventeenth Annual Activity Report*].

⁸⁷ *Id.* ¶¶ 1–5, at 94.

⁸⁸ *Id.* ¶ 10, at 95.

⁸⁹ *Id.* ¶ 11, at 95.

⁹⁰ *Id.*

⁹¹ *Id.* ¶¶ 25, 29, 37, 46, 50, at 97–101.

⁹² *International Pen v. Nigeria*, AHRLR 212 (African Comm'n Human & Peoples' Rights, 1998), available at http://www.univie.ac.at/bimtor/dateien/acomhpr_1998_international_pen_andothers_onbehalfofsarowiwa_v_nigeria.pdf; see *supra* notes 57, 60, 61 and accompanying text; see Viljoen, *supra* note 44, at 87; see Yves Haeck, Clara Burbano Herrera & Leo Zwaak, *Non-Compliance with a Provisional Measure Automatically Leads to a Violation of the Right of Individual Application ... or Doesn't It?*, 4 EUR. CONST. L. REV. 41, 41 (2008).

⁹³ Frans Viljoen, *Communications under the African Charter: Procedure and Admissibility*, in THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE 1986–2006, *supra* note 2, at 87.

reasons. First, Botswana's alibi that it did not receive the request for provisional measures suggests that a "provisional measure is not effective until it has been received by the state."⁹⁴ Second, the issue was not whether there was "proof that the fax was indeed received by the President of Botswana,"⁹⁵ but instead "whether there was sufficient proof that the fax was sent to the appropriate person or institution."⁹⁶

Forceful expulsion represents another category of cases in which provisional measures may be warranted in international adjudication. In *Amnesty International v Zambia*,⁹⁷ the African Commission issued a request for provisional measures against the unlawful deportation of the complainants to neighboring Malawi on grounds that they were allegedly a danger to peace and good order in Zambia.⁹⁸ The complainants, both prominent political figures in Zambia, claimed that their expulsion was malicious. Although the Commission found that the deportations violated the African Charter,⁹⁹ it made no determination on non-compliance with its provisional measures, which remained unenforced.¹⁰⁰

In *Liesbeth Zegveld v Eritrea*, the African Commission was petitioned on the legality of the detention of eleven political dissidents who were formerly officials of the government of Eritrea, with a request for provisional measures.¹⁰¹ The complainants alleged violations of the right to protection from discrimination, security of the person, liberty and fair trial.¹⁰² Following the receipt of the complaint in April 2002, the Commission wrote a letter to the Eritrean President urging provisional measures pending the outcome of the complaint.¹⁰³ In its final determination of the communication in November 2003, the Commission found that the *incommunicado* detention of the subjects of the

⁹⁴ Rachel Murray, *Developments in the African Human Rights System 2003 –04*, 6 HUMAN RIGHTS L. REV. 160, 175 (2006).

⁹⁵ *Seventeenth Annual Activity Report*, *supra* note 88, ¶ 50, at 101.

⁹⁶ Frans Viljoen, *Communications under the African Charter: Procedure and Admissibility*, in THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE 1986–2006, *supra* note 2, at 87.

⁹⁷ *Amnesty International v. Zambia*, 12th Annual Activity Report (2000), AHRLR 325 (African Comm'n on Human & Peoples' Rights, 1999), available at http://www.achpr.org/english/activity_reports/activity12_en.pdf.

⁹⁸ *Id.* ¶¶ 39, 42.

⁹⁹ *Id.* ¶¶ 44, 50, 53, 54.

¹⁰⁰ *Id.* ¶ 39.

¹⁰¹ *Zegveld v. Eritrea*, Commc'n. No. 250/2002, 17th Activity Report (African Comm'n Human and Peoples' Rights, 2003).

¹⁰² African Charter, *supra* note 3, arts. 2, 6, 7(1), 9(2).

¹⁰³ *Zegveld*, Commc'n. No. 250/2002, ¶ 10.

communication without charge since September 2001 was a violation of Articles 2, 6, 7(1) and 9(2) of the Charter.¹⁰⁴ In observing that it had made appeals to Eritrea for provisional remedial measures without any response from the State as to whether such had been effected, the Commission urged and recommended that Eritrea order the immediate release of the eleven detainees and their compensation.¹⁰⁵

The last of these is a case against Kenya¹⁰⁶ filed in May 2003 by a non-governmental organization on behalf of the *Endorois* community, an indigenous community of approximately 60,000 people in Kenya. The complainants in that case alleged violations resulting from the forcible displacement of the *Endorois* from their ancestral lands, failure to adequately compensate them for the loss of their property, disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture.¹⁰⁷ In August 2004, the African Commission issued an appeal to Kenya, requesting it to stay any action or measure by the state in respect of the subject matter of the communication, pending the decision of the Commission.¹⁰⁸ Despite the Commission's appeal for interim measures, the complaints raised in the case continued unabated, including the construction of a road on *Endorois* traditional land as well as the pollution of the waterways used by the community.¹⁰⁹ Additionally, the sale of the land in question,¹¹⁰ and harassment of a community leader involved in the communication is also alleged to have continued,¹¹¹ despite the Commission's appeals to Kenya.

There is no doubt that there are cases in which provisional measures have been a source of human rights protection or positive change.¹¹² Considering the complexity of the idea of compliance, even the cases above, despite their pathologies, are not altogether barren. However, the cases above represent the difficulties of implementing the African Commission's decisions or recommendations in the last quarter

¹⁰⁴ *Id.* ¶¶ 50–62.

¹⁰⁵ *Id.* postamble

¹⁰⁶ See Centre for Minority Rights Development (Kenya) v. Kenya, Commc'n. No. 276/2003, 27th Activity Report (African Comm'n Human & Peoples' Rights, 2003).

¹⁰⁷ *Id.* ¶¶ 1–21.

¹⁰⁸ *Id.* ¶ 32.

¹⁰⁹ *Id.* ¶ 14.

¹¹⁰ *Id.*

¹¹¹ *Id.* ¶ 43.

¹¹² See, e.g., Interights *ex rel.* Safia Yakubu Husaini v. Nigeria, Commc'n. No. 269/2003 ¶10 (African Comm'n Human & Peoples' Rights, 2005); Constitutional Rights Project v. Nigeria, Commc'n. No. 87/93, 87th Activity Report ¶6–10 (African Comm'n Human & Peoples' Rights, 2000).

century since its inception.¹¹³ It appears, as was in the *Saro-Wiwa* case, that a key obstacle has been the claim by states that provisional measures are not binding. Yet, as discussed here, inasmuch as the findings of the African Commission may be considered legally binding, so should the provisional measures.¹¹⁴

THE AFRICAN COURT'S ORDER FOR PROVISIONAL MEASURES AGAINST LIBYA

THE AFRICAN COURT'S POWER TO ADOPT PROVISIONAL MEASURES

The African Court represents a promise to strengthen the African human rights system's protective functions. Although the Court has been in existence for only five years, the recent referral of the Libyan case by the Commission to the Court and the subsequent adoption of provisional measures in the case provide crucial clues on the Court's potential to cast its shadow in the violent conflicts occasioning massive human rights violations in the continent. However, it also appears that the Court's intervention will depend on the interlocutors mandated in the African Protocol to refer cases to the Court. In some cases, the Court's main interlocutor, the African Commission has preferred instituting its own investigations, which may come too late after human rights violations.¹¹⁵ The order for provisional measures in the Libyan case is therefore important in signaling the African Commission's willingness in future to refer cases, and the African Court's approach to its protective mandate.

The procedural history of the case is as follows. In February 2011, the wave of civilian uprising, witnessed across North Africa and

¹¹³ George Mukundi Wachira & Abiola Ayinla, *Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples' Rights: A Possible Remedy*, 6 AFR. HUM. RTS. L. J. 465, 465 (2006). See S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011). See also U.N. Human Rights Council, Rep. of the International Commission of Inquiry to Investigate an Alleged Violation of International Human Rights Law in the Libyan Arab Jamahiriya, ¶ 36, U.N. Doc. A/HRC/17/44 (June 1, 2011) (Advance Unedited Version).

¹¹⁴ See *supra* notes 30–33; see also *infra* notes 140–149 and accompanying text.

¹¹⁵ For example, in relation to the human rights situation in Kenya on January 2008, the author and two other human rights advocates travelled to the African Commission's 4th annual extraordinary session in Banjul (The Gambia) between February 17th and February 23rd. 2008, to petition for protective measures in relation to gross human rights violations in the country, but they were denied a formal audience on the grounds that the Kenyan state was not represented at the session. Instead, the Commission discussed the human rights situation in Kenya and adopted a resolution to send a fact-finding mission to Kenya to investigate serious human rights violations that are alleged to have taken place in the country. See Activity Rep. of the Afr. Comm'n on Human and Peoples' Rights, 13th Sess., June 24–28, 2008, EX.CL/446(XIII) (2008).

the Middle East, metamorphosed into an armed conflict in Libya.¹¹⁶ The government of Libya responded with brutal force against civilian protesters, in contravention of international human rights and humanitarian law thus prompting international action.¹¹⁷ Toward the end of February 2011, three non-governmental organizations, the Egyptian Initiative for Personal Rights, Human Rights Watch and INTERIGHTS submitted a request for provisional measures to the African Commission.¹¹⁸ While noting and condemning the human rights violations in Libya, the Commission did not request any provisional measures, but instead passed a resolution in March 2011, among other things, calling on the responsibility of the African Union to take all the necessary political and legal measures for the protection of the Libyan population.¹¹⁹ The African Commission also instituted proceedings before the African Court against the Libyan state for “serious and massive violations of human rights guaranteed under the African Charter.”¹²⁰ The Court immediately informed Libya, the AU organs, state parties and the complainants of the application, noting that the matter was of “extreme gravity and urgency.”¹²¹

As noted above, the African Protocol provides that in cases of extreme gravity and urgency, where it is necessary to avoid irreparable harm to persons, the African Court shall adopt such provisional measures as it deems necessary.¹²² Such measures may be prescribed to any of the

¹¹⁶ See S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); U.N. Human Rights Council, Rep. of the International Commission of Inquiry to Investigate an Alleged Violation of International Human Rights Law in the Libyan Arab Jamahiriya, ¶ 36, U.N. Doc. A/HRC/17/44 (June 1, 2011) (Advance Unedited Version).

¹¹⁷ Rep. of the International Commission of Inquiry to Investigate all Alleged Violation of International Human Rights Law in the Libyan Arab Jamahiriya, *supra* note 116.

¹¹⁸ See *The International Centre for the Legal Protection of Human Rights*, INTERIGHTS, <http://www.interights.org>; Press Release, Libya: Africa’s Rights Body Should Act Now...Groups Urge Continent’s Human Rights Commission to Take Steps to Halt Abuses, EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS (Feb. 25, 2011), <http://eipr.org/en/pressrelease/2011/02/25/1105/>.

¹¹⁹ See the Commission’s resolution at its 9th extra-ordinary session held in Banjul, The Gambia, from 23 February to 3 March 2011, ACHPR, *Resolution on the Human Rights Situation in the Great Socialist Peoples’ Libyan Arab Jamahiriya*, ACHPR/RES.181 (EXT.OS/IX) (Mar. 1, 2011).

¹²⁰ *In re African Comm’n on Human and Peoples’ Rights v. Great Socialist People’s Republic of Libyan Arab Jamahiriya*, Application No. 004/2011, *Order for Provisional Measures*, (African Ct. Human & Peoples’ Rights, Mar. 25, 2011), http://www.african-court.org/fileadmin/documents/Court/Cases/Order_for_Provisinal_Measures_against_Libya.pdf.

¹²¹ *Id.* ¶ 8.

¹²² African Protocol, *supra* note 4, art. 27(2).

parties “in the interest of the parties or of justice.”¹²³ Following the issuance of an order for provisional measures, the Court is required to notify the parties to the case, the African Commission, the Assembly, the Executive Council and the African Union Commission of the interim measures.¹²⁴

At the end of March 2011, the African Court issued an order for provisional measures against Libya, *proprio motu*.¹²⁵ The first since the establishment of the Court, this order lays down in broad strokes the African Court’s tests precedent to ordering provisional measures in grave human rights situations. The first element is the existence of *prima facie* jurisdiction,¹²⁶ which provides room for sufficient flexibility in the exercise of the Court’s discretion.¹²⁷ The Court’s standard suggests that an order for provisional measures may be made pending determination of inadmissibility or jurisdiction on the merits of a case.¹²⁸ The question of jurisdiction, therefore, would be whether the state concerned is party to the African Charter and the Protocol establishing the Court and the competence of the party to institute or refer the case to the Court.¹²⁹ The second element is the requirement for “extreme gravity and urgency,”¹³⁰ “imminent risk,”¹³¹ and “risk of irreparable harm.”¹³² As a subjective test, what constitutes imminence, urgency, gravity, harm and risk will depend on the circumstances of each case.¹³³ Finally, in stating that the conflict in Libya made it necessary for it to order provisional measures “without

¹²³ *Rules of the Court*, *supra* note 20, r. 51(1).

¹²⁴ *Id.* r. 51(3).

¹²⁵ *In re African Comm’n on Human and Peoples’ Rights v. Great Socialist People’s Libyan Arab Jamahiriya*, Application No. 004/2011, *Order for Provisional Measures*, ¶9–10 (African Ct. Human & Peoples’ Rights, Mar. 25, 2011), available at http://www.african-court.org/fileadmin/documents/Court/Cases/Orders/ORDER_-_APPLICATION_NO_004.2011.pdf. Although the African Commission, which had been petitioned to adopt provisional measures, had resolved that the events in Libya constituted a “grave” and “alarming human rights situation,” it did not seek an order for protective measures from the Court. See Resolution on the Human Rights Situation in the Great Socialist Peoples’ Libyan Arab Jamahiriya, *supra* note 120.

¹²⁶ *African Comm’n*, Application No. 004/2011, ¶15.

¹²⁷ See RIETER, *supra* note 9, at 83.

¹²⁸ *African Comm’n*, Application No. 004/2011, ¶24; see also RIETER, *supra* note 9, at 83, 803.

¹²⁹ African Protocol, *supra* note 4, arts. 3, 5.

¹³⁰ *African Comm’n*, Application No. 004/2011, ¶22–24; African Protocol, *supra* note 4, art. 27(2).

¹³¹ *African Comm’n.*, Application No. 004/2011, ¶13.

¹³² *African Comm’n*, Application No. 004/2011, ¶¶20, 22.

¹³³ See RIETER, *supra* note 9, at 792 (discussing the concepts of “imminence,” “immediacy,” “proximity,” “likelihood” and “risk.”).

written pleadings or oral hearings” or “without any proceedings,”¹³⁴ it seems that the Court has adopted a purposive interpretation of its protective mandate, opening its doors for such requests in future.

THE EFFECT OF THE AFRICAN COURT’S ORDER FOR PROVISIONAL MEASURES

The African Court’s order for provisional measures is only as important as its effect. As a matter of law, legal obligations flow from provisional measures, as illustrated by the cases discussed above.¹³⁵ Provisional measures thus provide an important testing site for state compliance with the final decisions of the African Court. The measures also provide a venue for the construction of a system of “collective enforcement,”¹³⁶ given that parties to the case and AU organs must be notified of the interim measures at the time of issuance of the order,¹³⁷ whereas the Court’s annual reports must also be submitted to the AU, with recommendations in the event of non-compliance with these measures by the State concerned.¹³⁸ However, the handling of the African Commission’s annual reports by the AU and its predecessors recommends little optimism in this front.¹³⁹

As a judicial organ, the status of the African Court is not dispositive on the question, what is the effect of the African Court’s order for provisional measures? In the first place, the issue turns on the question whether orders for provisional measures are judgments.¹⁴⁰ Whereas this is not fully determinative of the effect of the Court’s order for provisional measures, categorizing the Court’s order for provisional

¹³⁴ See *African Comm’n*, Application No. 004/2011, ¶¶ 13, 23.

¹³⁵ See *supra* notes 79–114 and accompanying text.

¹³⁶ This idea is based on the European human rights system, reaffirmed in several cases. See e.g., *Loizidou v. Turkey*, App. No. 15318/89, ¶¶ 70, 75, 93 (Eur. Ct. H.R. Mar. 23, 1995), <http://www.echr.coe.int/ECHR/EN/hudoc>; *Austria v. Italy*, App. No. 788/60, 4 Y.B. Eur. Conv. on H.R. 116, at 140 (1961 Eur. Comm’n on H.R.); *Cyprus v. Turkey*, App. No. 8007/77, 85 (Eur. Ct. H.R. July 10, 1978).

¹³⁷ *Rules of the Court*, *supra* note 20, r. 51(3).

¹³⁸ *Id.* r. 51(3).

¹³⁹ See Bronwen Manby, *Civil and Political Rights in the African Charter on Human and People’s Rights: Articles*, in *THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE 1986–2006*, *supra* note 2, 171, 207–12, for a description of some problems.

¹⁴⁰ See RIETER, *supra* note 9, at 42; JERZY SZTUCKI, *INTERIM MEASURES IN THE HAGUE COURT 93* (1983) (discussing the distinction between orders for provisional measures, “provisional judgments,” “interim judgments” and “final judgments.”).

measures as a judgment attaches a binding effect, given that the African Court delivers judgments which are binding.¹⁴¹ Although provisional measures neither constitute a prejudgment on the merits of the subject matter as they do not meet the *res judicata* requirements,¹⁴² some provisional measures may constitute judgments.¹⁴³ In such cases, an order for provisional measures could be binding *qua* judgment.¹⁴⁴

Another perspective is that the nature of provisional measures, binding or otherwise, is largely a juristic question that implicates the remit of state obligations in international law. It appears that a good faith interpretation of human rights treaty provisions leads to the finding that orders for provisional measures are binding or obligatory.¹⁴⁵ From this functional standpoint, provisional measures advance the object and purpose of human rights treaties, so that even if orders for provisional measures are not judgments *strictu sensu*, they are binding.¹⁴⁶ This conclusion is supported by the jurisprudence of the International Court of Justice,¹⁴⁷ the Inter-American Human Rights Court,¹⁴⁸ and most recently, the European Court on Human Rights.¹⁴⁹ Second, whether or not provisional measures are binding is but the first level of analysis, and the second level must turn on the question of enforcement, which is the locus of the debate in the next part.

The effect of the order for provision also revives the question how non-state actors should incur accountability in international human

¹⁴¹ African Protocol, *supra* note 4, art. 28; *Rules of the Court*, *supra* note 20, r. 61.

¹⁴² RIETER, *supra* note 9, at 88; SZTUCKI, *supra* note 140, at 179, 262. For an exception where provisional measures have the force of *res judicata*, see EDWARD DUMBAULD, INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES 163, 4 (1932).

¹⁴³ See HWA Thirlway, *The Indication of Provisional Measures by the International Court of Justice*, in INTERIM MEASURES INDICATED BY INTERNATIONAL COURTS 1, 27 (Rudolf Bernhardt ed., 1994).

¹⁴⁴ African Protocol, *supra* note 4, art. 28; *Rules of the Court*, *supra* note 20, r. 61.

¹⁴⁵ *Boyce et. al. v. Barbados*, Expansion of Provisional Measures, Order of the Court, ¶ 6 (Inter-Am. Ct. H.R. June 14, 2005), available at http://www.corteidh.or.cr/docs/medidas/boyce_se_02_ing.pdf.

¹⁴⁶ See Viljoen & Louw, *supra* note 30, at 3 n. 9 (“If the legally binding nature of the eventual findings of the [Court] is accepted, the provisional measures must also be binding.”).

¹⁴⁷ *LaGrand Case* (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶ 109 (June 27). It should be noted that the ICJ is not a human rights court. See Rosalyn Higgins, *Interim Measures for the Protection of Human Rights*, 36 COLUM. J. TRANSNAT’L L. 91, 91 (1997).

¹⁴⁸ *Constitutional Court v. Peru*, Provisional Measures, Order of the Court, “Having Seen,” ¶ 14 (Inter-Am. Ct. H.R. Aug. 14, 2000), available at http://www.worldcourts.com/iacthr/eng/decisions/2000.03.14_Constitutional_Court_v_Peru.pdf.

¹⁴⁹ *Mamatkulov v. Turkey*, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, 2003), <http://www.echr.coe.int/ECHR/EN/hudoc>; see generally Alastair Mowbray, *A New Strasbourg Approach to the Legal Consequences of Interim Measures*, 5 HUM. RTS. L. REV. 377 (2005).

rights law.¹⁵⁰ Whereas the state bears primary responsibility before international human rights bodies, international criminal law now has deconstructed the abstractness of the state and extended accountability to individuals and potentially other non-state actors.¹⁵¹ In the human rights situation in Libya, not only have state actors been implicated, but also armed opposition groups,¹⁵² yet the order for provisional measures fails to directly reach these groups.¹⁵³ In the context of regional human rights systems as laboratories for innovative international human rights protection, nothing prevents the African Court from considering the reach of interim measures to non-state entities in conflict situations even where they are not parties to the case.

ENFORCING THE AFRICAN COURT'S ORDER AGAINST LIBYA THROUGH THE AFRICAN UNION

PARADOXES IN LIBYA'S HUMAN RIGHTS RECORD

Libya is one of the members of the African Union and has ratified almost all the regional human rights instruments.¹⁵⁴ According to Libya, these norms take “precedence over national laws and could be directly applied by the courts once they had been ratified.”¹⁵⁵ In the protective procedures of the African human rights system, Libya has been almost absent heretofore. In the few hundreds of communications that have been lodged at the African Commission in the last two decades, none of the petitions have been directed against Libya.¹⁵⁶ In the African

¹⁵⁰ See generally ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); Andrew Clapham, *Human Rights Obligations of Non-state Actors in Conflict Situations*, 88 INT'L REV. RED CROSS 491, 491 (2006).

¹⁵¹ See generally WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 224 (4th ed., 2001).

¹⁵² U.N. Human Rights Council, *supra* note 117, ¶¶ 206–07.

¹⁵³ Perhaps the issue would be easier if such groups were parties to the case, in which situation the interim measures would be applicable to them if so directed by the Court. *Rules of the Commission*, *supra* note 20, r. 51(1) (“Pursuant to article 27(2) of the Protocol, the Court may, at the request of a party, the Commission or on its own accord, prescribe to the *parties* any interim measure which it deems necessary to adopt in the interest of the parties or of justice.”) (emphasis added).

¹⁵⁴ See *OAU/AU Treaties, Conventions, Protocols & Charters*, AFRICAN UNION, <http://www.au.int/en/treaties> (last visited June 15, 2011).

¹⁵⁵ U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Libyan Arab Jamahiriya, ¶ 8, U.N. Doc. A/HRC/16/15 (Jan. 4, 2011).

¹⁵⁶ See *African Commission on Human and Peoples' Rights*, ACHPR, <http://www.achpr.org> (last updated Nov. 16, 2011).

Commission's promotional activities, Libya was among the first few African states to submit their initial and periodic state reports.¹⁵⁷ Only recently, it submitted its fifth periodic, unlike other states that face a backlog of reports.¹⁵⁸ At the global level, whereas Libya has since been suspended from membership in the United Nations Human Rights Council,¹⁵⁹ it received significant applause during the Council's assessment of its human rights records.¹⁶⁰

These phenomena expose Libya's influence within the international human rights system at a time when its human rights practices remained questionable. What is paradoxical is that during this period in which Libya hosted at least two sessions of the African Commission¹⁶¹ and led the United Nations Commission on Human Rights,¹⁶² other accounts painted a bleak picture of human rights in Libya.¹⁶³ On balance, perhaps such hypocrisies and duplicities exhibited by Libya are by no means its preserve; and they illustrate the

¹⁵⁷ Org. of Afr. Unity [OAU], *Resolution on [the Sixth Annual Activity Report of] the African Commission on Human and Peoples' Rights*, AHG/Res 227 (XXIX) (1993). As at 1993, the African states that had submitted reports included Benin, Nigeria, Cape Verde, Senegal, Rwanda, Zimbabwe, Egypt, The Gambia, Mozambique, Tunisia and Tanzania. *Id.*; see generally THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE 1986–2006, *supra* note 2, at 49.

¹⁵⁸ See *Great Socialist People's Libyan Arab Jamhuriya 5th Periodic Report*, ACHPR (2011), http://www.achpr.org/english/state_reports/Libya/5th_periodic_2011.pdf.

¹⁵⁹ Press Release, General Assembly, General Assembly Suspends Libya from Human Rights Council, U.N. Press Release GA/11050 (Mar. 1, 2011), available at <http://www.un.org/News/Press/docs//2011/ga11050.doc.htm>.

¹⁶⁰ For comments by states, see U.N. Human Rights Council, *supra* note 155.

¹⁶¹ These are the Fifth Ordinary Session held in Benghazi in April 1989 and the 29th Ordinary Session held in Tripoli, in April and May 2001. See ACHPR, Second Annual Activity Report of the African Commission April 1988–June 1989, ¶ 5, http://www.achpr.org/english/activity_reports/2nd%20Activity%20Report.pdf; Organisation of African Unity, Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2000–2001, at 20, AHG/229(XXXVII) (July 12, 2001), available at http://www.achpr.org/english/activity_reports/activity14_en.pdf.

¹⁶² See Martin S. Edwards, Kevin M. Scott, Susan Hannah Allen & Kate Irvin, *Sins of Commission? Understanding Membership Patterns on the United Nations Human Rights Commission*, 61 POL. RES. Q. 390, 394 (2008).

¹⁶³ See, e.g., Annual Report 2011: The State of the World's Human Rights, *Libya*, AMNESTY INTERNATIONAL (last visited Jan. 15, 2011), <http://www.amnesty.org/en/region/libya/report-2011>; see GEOFFREY L. SIMONS, LIBYA AND THE WEST: FROM INDEPENDENCE TO LOCKERBIE 97 (2003); Jean Allain & Andreas O'Shea, *African Disunity: Comparing Human Rights Law and Practice of North and South African States*, 24 HUM. RTS. Q. 86, 115–16 (2002); Youcef Bouandel, *Human Rights in the Maghreb*, in NORTH AFRICA IN TRANSITION: STATE, SOCIETY AND ECONOMIC TRANSFORMATION IN THE 1990S 127, 138–39 (Yahia H. Zoubir ed., 1999).

ambivalence of states toward their own human rights commitments.¹⁶⁴ It is thus not surprising that enforcement of human rights is rather weak, despite the normative evolution of international human rights.

THE AFRICAN UNION'S RESPONSES

The African human rights system is particularly overrepresented in debates on weak enforcement of international human rights law,¹⁶⁵ although such evaluations are not without critics.¹⁶⁶ As noted in the preface to this essay, the African Court was intended to be an antidote to the pathologies of the African Commission, through the former's binding judgments and enforcement procedures.¹⁶⁷ While the decisions of the Commission relating to an application are confidential and only acquire legal effect thirty days after publication following adoption by the Assembly of the African Union,¹⁶⁸ parties to the case and the African Union organs and any person concerned shall be notified immediately of the Court's judgments.¹⁶⁹ The Protocol and the Court's procedures further mandate the Executive Council to monitor its execution on behalf of the Assembly.¹⁷⁰ In addition to the publication of its final judgments,¹⁷¹ the Court is also required to present its annual report to the African Union Assembly, identifying states that have not complied with its judgments.¹⁷²

The African Protocol entrusts monitoring functions without enforcement powers. The effect of this is that in the end, should the system of enforcement be weak, compliance is not necessarily induced by the enforcement system.¹⁷³ Although no specific technologies are

¹⁶⁴ See generally Wade M. Cole, *Hard and Soft Commitments to Human Rights Treaties*, 1966–2000, 24 SOC. F. 563, 567 (2009); See also Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. OF CONFLICT RESOL. 588, 588 (2007).

¹⁶⁵ See, e.g., CLAUDE E. WELCH, JR., PROTECTING HUMAN RIGHTS IN AFRICA: ROLES AND STRATEGIES OF NON-GOVERNMENTAL ORGANIZATIONS 3–4, 151 (1995).

¹⁶⁶ See Okafor, *supra* note 37, at 78, 145 (critiquing the incompleteness of this “enforcement-centric” argument).

¹⁶⁷ Mutua, *supra* note 6, at 357–62.

¹⁶⁸ African Charter, *supra* note 3, art. 59; Assembly of the African Union, *Rules of Procedure of the Assembly of the Union*, r. 34 (July 9–10, 2002), http://www.african-union.org/rule_prot/rules_Assembly.pdf; see Viljoen & Louw, *supra* note 30, at 9.

¹⁶⁹ African Protocol, *supra* note 4, art. 29; *Rules of the Court*, *supra* note 20, r. 64.

¹⁷⁰ African Protocol, *supra* note 4, art. 29; *Rules of the Court*, *supra* note 20, r. 64.

¹⁷¹ *Rules of the Court*, *supra* note 20, r. 65.

¹⁷² African Protocol, *supra* note 4, art. 31; *Rules of the Court*, *supra* note 20, r. 51(4).

¹⁷³ In the Inter-American human rights system, for instance, it has been noted that it is not necessarily the legal status or the system of enforcement that is determinative. See Conference, *Advocacy Before Regional Human Rights Bodies: A Cross-Regional Agenda*, 59 AM. U. L. REV.

provided for the exercise of the monitoring function by the AU organs, these arrangements are premised on the assumption that these organs “can take additional measures to force compliance, such as passing resolutions urging states to respect the Court’s judgments.”¹⁷⁴ Yet, in reality, these assumptions yield to other considerations and factors, such as political calculus which impede collective enforcement. While a recent study has found that there has been progress over the last decade in the form of elaborate discussion of the African Commission’s annual human rights reports by the AU Executive Council, states still conspire to dilute or obstruct meaningful resolutions during the examination of those reports.¹⁷⁵ The African Court, which relies on this system, faces a similar problem.

In light of the multiple efforts by the African Union, it is perhaps too early to assess the African Union’s response to the human rights situation in Libya. However, the response so far provides little hope on the AU’s and state practice in future. First, Libya’s response to the Court is formulaic, as is the African Union’s. On April 9, 2011, Libya denied the claims of human rights violations in its territory, and “expressed its willingness to subject itself to criminal (sic) investigations by the Court, if deemed necessary.”¹⁷⁶ Libya’s response, therefore, raises questions how the African Court should follow up such responses from states.

Second, the debates in the multiple sites of the African Union, while cognizant of the grave human rights situation in Libya, have given little attention to the enforcement of the African Court’s judgment as a vernacular for engagement with Libya. The Peace and Security Council (PSC), the High-Level ad hoc Committee established by the PSC to monitor the Libyan situation, the Assembly of Heads of State and Government and the Pan-African Parliament have all focused an “African solution” and non-intervention in Libya.¹⁷⁷ Questions arise, for

163, 196 (2009) (“[C]ompliance with friendly settlement agreements is much higher than compliance with merits reports issued by the Inter-American Commission.”).

¹⁷⁴ Mutua, *supra* note 6, at 357.

¹⁷⁵ See, e.g., Viljoen and Louw, *supra* note 37, at 34 (discussing delay of the publication of an investigative mission report on and a decision against Zimbabwe following filibustering by states at the African Union).

¹⁷⁶ Chairperson of the Commission, *Rep. of the Chairperson of the Commission on Current Challenges to Peace and Security on the Continent and AU’s Efforts*, ¶ 36, EXT/ASSEMBLY/AU/2. (01.2011) (May 25–26, 2011).

¹⁷⁷ African Union, Decision on the Peaceful Res. of the Libyan Crisis, Extraordinary Assemb. of the Union on the State of Peace and Security in Afr., EXT/ASSEMBLY/AU/DEC(01.2011), ¶7, Extraordinary Sess. (May, 25, 2011); *Motion on the Security Situation in Libya*, PAN-AFRICAN PARLIAMENT (May 21, 2011), <http://www.pan-african-parliament.org/News.aspx>; Communiqué

example, whether this implies deemphasizing judicial measures, perhaps including the African Court's decisions. While this is not a suggestion that a political solution is not desirable, the omission to use the human rights mechanisms as central arsenals in the resolution of the Libyan crisis reveals the challenges ahead.

This omission is in large part the function of the AU organs' preoccupation with finding a "political solution" as well as Libya's grip on regional affairs since the establishment of the AU.¹⁷⁸ Although the future is certain to change, Libya has in the past exerted considerable hegemony and influence in the region,¹⁷⁹ and is perhaps one of the states recently accused by the AU Assembly of seeking to "impose their will on the [AU] decision-making process."¹⁸⁰ It follows that the Executive Council or the Assembly may not yield much in terms of the enforcement of the order against Libya. Yet immediacy is the premise of orders for provisional measures. While this is only a preliminary assessment, the decisions of the Assembly in July 2011 rejecting the International Criminal Court's indictment of Muammar El Qaddafi and proposing instead the granting of jurisdiction to the African Court "to try serious international crimes committed on African soil"¹⁸¹ leave doubts about the AU's unequivocal commitment to human rights law.

CONCLUSION

The African human rights system is built upon an arsenal of preventive, protective and remedial techniques, institutions and norms. In the realm of protection, provisional measures have had mixed results. The discussion above illustrates that the promise of interim measures to prevent, stop or otherwise remedy human rights violations in grave or urgent situations remains in the horizon. Although it is perhaps premature to assess the effect of the recent order for provisional

of the Peace and Sec. Council, 265th Meeting, Mar. 10, 2011, ¶ 6, PSC/PR/COMM.2 (CCLXV) (July 15, 2011).

¹⁷⁸ See Bronwen Manby, *The African Union, NEPAD and Human Rights: The Missing Agenda*, 26 HUM. RTS. Q. 983, 984–85 (2004); See MURRAY, *supra* note 79, at 46–47.

¹⁷⁹ See Yoweri Museveni, *The Qaddafi I Know*, FOREIGN POL'Y, (Mar. 24, 2011), www.foreignpolicy.com/articles/2011/03/24/the_qaddafi_i_know (conceding that the President of Libya "would not respect the rules of the AU. Topics or discussions that had been covered by previous meetings would be resurrected by Qaddafi. He would 'overrule' a decision taken by all other African heads of state.").

¹⁸⁰ See Decisions Adopted During the 17th African Union Summit, *supra* note 13.

¹⁸¹ *Id.*

measures by the African Court against Libya, it is now clear that the Court and its successor will occupy an important position in the prevention and resolution of some of Africa's vexing human rights and humanitarian crises. However, questions remain on how to enforce the African Court's judgments, and therein lies the challenge. In the end, it appears that nothing short of normative and institutional innovation and adaptation by the African Court, the African Commission and other organs of the African Union will strengthen the system of protection of human rights in Africa. Most importantly, the end result must be a closing of the chasm between rights declared and rights realized.