

Interim measures of protection in the African system for the protection of human and peoples' rights

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1 Introduction

Many human rights instruments make provision for the appropriate convention enforcement organs to indicate interim, or provisional, measures of protection in cases of urgency in order to safeguard the rights and persons of victims of violations of human rights.¹ The purpose of this note is to examine the issue of interim measures in the African human rights system. This system is of recent origin and is the least developed of the regional systems, but it is arguably confronted with some of the greatest challenges.

The principal instrument for the protection of human rights and fundamental freedoms in Africa is the African Charter on Human and

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¹ Rule 86 of the Rules of Procedure of the UN Human Rights Committee enables the Committee to request a state party to take interim measures in order to avoid irreparable damage to apparent victims, UN Doc CCPR/C/3/Rev 5 19. Under the American Convention on Human Rights, art 63(2) authorises the court, in 'cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons', to 'adopt such provisional measures as it deems pertinent'. The court may also 'act at the request of the Commission' with respect to a case not yet submitted to it. In addition, art 29(2) of the Regulations of the Inter-American Commission on Human Rights permits the Commission to request provisional measures in 'urgent cases, when it becomes necessary to avoid irreparable damage to persons'. In Europe, Rule 39(1) of the Rules of the European Court of Human Rights allows the Chamber or its President to 'indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. See JG Merrills & AH Robertson *Human Rights in Europe* (2001) 317–18.

Peoples' Rights (African Charter or Charter),² adopted under the auspices of the Organisation of African Unity (OAU).³ The effectiveness of the Charter in promoting and protecting human rights in Africa has divided opinion and has generated considerable debate. The Charter is notable for its statist and duty-oriented nature and its inclusion of third generation rights, and has been described as 'modest in its objectives and flexible in its means'.⁴ Concerns about the substantive provisions of the Charter have been widely discussed and any further debate on these issues is beyond the scope of this paper.

2 The African Commission on Human and Peoples' Rights

The Charter established the African Commission on Human and Peoples' Rights (African Commission or Commission) which, mandated with promoting and ensuring protection of human and peoples' rights,⁵ became operational in 1987. As part of its protective mandate the

² Adopted by the Eighteenth Assembly of Heads of State and Government of the Organisation of African Unity (OAU) at Nairobi in July 1981, entered into force on 21 October 1986, reproduced in (1982) 21 *International Legal Materials* 58; and GJ Naldi (ed) *Documents of the Organisation of African Unity* (1992) 109. All of the OAU's 53 member states have now ratified the Charter. See Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999–2000 AHG/222 (XXXVI) Annex 1. For an analysis of the Charter, see EA Ankumah *The African Commission on Human and Peoples' Rights* (1996) 111–77; GJ Naldi *The Organisation of African Unity: An analysis of its role* (1999) 109–212; UO Umozurike *The African Charter on Human and Peoples' Rights* (1997).

³ It should be observed that the OAU is due to be replaced in the near future by a new pan-African organisation, the African Union. See art 33(1) of the Constitutive Act of the African Union, reproduced in (2000) 12 *African Journal of International and Comparative Law* 629, entered into force on 26 May 2001. All OAU treaties are currently being reviewed with a view to their adoption by the African Union. See Council of Ministers 74th ordinary session, CM/Dec.588(LXXIV).

⁴ B Obinna Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 141–58. For other sceptical assessments, see G Robertson *Crimes against humanity* (1999) 57–58; R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667; P Amoah 'The African Charter on Human and Peoples' Rights — An effective weapon for human rights?' (1992) 4 *African Journal of International and Comparative Law* 226.

⁵ Arts 30 & 45 of the Charter, n 3 above. Ankumah (n 2 above) at 8 prefers to describe the Commission as a 'supervisory institution'. For an analysis of the Commission, see Ankumah (n 2 above) ch 2–4; Naldi *The Organisation of African Unity* (n 2 above) 139–47; R Murray *The African Commission on Human and Peoples' Rights and international law* (2000). An extremely useful recent book is R Murray & M Evans (eds) *Documents of The African Commission on Human and Peoples' Rights* (2001) which contains, *inter alia*, the Commission's Annual Activity Reports from 1987–99.

Commission is competent to entertain applications from individuals and NGOs alleging violations of the Charter.⁶ However, the Commission has been criticised as being generally unable to act as a forceful guardian of rights.⁷ A literal reading of the Charter certainly suggests that the Commission possesses relatively weak powers of investigation and

⁶ These so-called 'other' communications are governed by arts 55–59 of the Charter, and ch XVII of the Commission's Rules of Procedure (revised), (1997) 18 *Human Rights Law Journal* 154 161–63. See further Ankumah (n 2 above) 20–28 79–110; Naldi *The Organisation of African Unity* (n 2 above) 144–47. According to the Commission the main aim of this procedure is 'to initiate a positive dialogue, resulting in an amicable resolution . . . which remedies the prejudice complained of. A prerequisite for amicably remedying violations of the Charter is the good faith of the parties concerned, including their willingness to participate in a dialogue.' Communication 25/89 *Free Legal Assistance Group v Zaire* (1997) 4 *International Human Rights Reports* 89 para 39. See further CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law & Contemporary Problems* 359 374–78. It has been suggested that the Charter does not expressly authorise the Commission to consider individual communications. Murray (n 5 above) 17–18, but Rule 114 of the original Rules of Procedure, reproduced in Naldi (ed) *Documents of the Organisation of African Unity* (n 2 above) 151–52, explicitly stated that individuals and communications could petition the Commission. In any case, this procedure is now well established in the Commission's practice. See Communications 147/95 & 149/96 *Sir Dawda K Jawara v The Gambia* Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999–2000 paras 41–42. It is important to note that one of the difficulties encountered by a student of the work of the Commission is the fact that, whereas its decisions in individual communications are available from different sources, the text of some of these decisions can vary from source to source. This becomes evident if a comparison is drawn between the communications published in the *International Human Rights Reports* and Murray & Evans (n 5 above) on the one hand, and Law Reports of the African Commission Series A Volume 1 ACHPR\LR\A\1, on the database of the Centre for Human Rights, University of Pretoria, available at <<http://www.up.ac.za/chr/ahrdb/ahrdb.html>> (accessed 31 January 2002). It is difficult to assert which should be considered the authoritative source.

⁷ Ankumah (n 2 above) 179–98; Robertson (n 4 above) 58–9. Makau wa Mutua thus describes the Commission as 'a facade, a yoke that African leaders have put around our necks', (1993) 3 *Review of the African Commission on Human and Peoples' Rights* 5 11. J Oloka-Onyango, although not as critical, is also unimpressed, 'Beyond the rhetoric: Reinvigorating the struggle for economic and social rights in Africa' (1995) 26 *California Western International Law Journal* 1 52–56. HJ Steiner & P Alston write that the Commission 'has few powers, and for the most part has been hesitant in exercising those powers or creatively interpreting and developing them', *International human rights in context* (2000) 920. See also Amoah (n 4 above) 232–237. For kinder assessments, see Umozurike (n 3 above) 67–85; Murray (n 5 above). Ankumah (n 2 above) 9, while acknowledging its failings, is nevertheless of the view that the Commission has the potential to become an effective body. More recently Odinkalu writes that 'any conclusions . . . about the work of the Commission . . . must remain tentative and probably lie somewhere between the extremes of opinion', but that 'any temptation to dismiss it as a worthless institution today must be regarded as premature, ill-informed, or both'; CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law & Contemporary Problems* 359 401–402.

enforcement.⁸ Its decisions are not formally considered to have the binding force of a ruling of a court of law, but rather persuasive authority akin to the opinions of the United Nations (UN) Human Rights Committee.⁹ However, it is encouraging to note that an expectation of compliance appears to have been engendered.¹⁰ In addition, an analysis of the Commission's decisions in recent times does suggest that the Commission is generally becoming more robust in carrying out its mandate.¹¹ Thus Odinkalu expresses the view that 'on its interpretation of the Charter, the Commission has been mostly positive and sometimes even innovative.'¹² He adds that the Commission has been successfully addressing the deficiencies in the Charter 'through its practice, evolving procedures, and jurisprudence.'¹³

⁸ Z Motala 'Human rights in Africa: A cultural, ideologica, and legal examination' (1989) 12 *Hastings International and Comparative Law Review* 373 405. Arts 47–54 of the Charter (n 3 above) make provision for inter-state communications; one has been submitted to date. See further Odinkalu (n 7 above) 374–378. A state reporting procedure is also required under art 62. In addition, protective missions have been sent to various countries and thematic rapporteurs have been appointed, although their effectiveness is still open to debate. See further Ankumah (n 3 above) 20–28, 51–77 & 79–110; Murray (n 5 above) 16–25; Naldi *The Organisation of African Unity* (n 3 above) 139–147.

⁹ See art 59 of the Charter and Rule 120 of the Commission's Rules of Procedure, as amended (n 7 above) 163; Ankumah (n 3 above) 24 & 74–75. Murray writes that the Commission has relied on these provisions enabling it to declare that there have been violations of the Charter. R Murray 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 412 428.

¹⁰ This approach would appear to be required under art 1 of the Charter. See Communication 129/94 *Civil Liberties Organisation v Nigeria* (1997) 18 *Human Rights Law Quarterly* 35. See further C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights (1998) 10 *African Journal of International and Comparative Law* 625. It may be that the Commission has come to regard its decisions on communications as binding. See Communications 137/94, 139/94, 154/96 & 161/97 *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria* (2000) 7 *International Human Rights Reports* 274 paras 113–6; Murray (n 9 above) 431; Murray (n 5 above) 53–55.

¹¹ See, eg, Communications 27/89, 46/91, 49/91 & 99/93 *Organisation Mondiale Contre La Torture and the Association Internationale des Juristes Democrates and Others v Rwanda* (1999) 6 *International Human Rights Reporting* 816; Communications 105/93, 128/94, 130/94 & 152/96 *Media Rights Agenda and Constitutional Rights Project v Nigeria* (2000) 7 *International Human Rights Reports* 265; Communications 137/94, 139/94, 154/96 & 161/97 *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria* (2000) 7 *International Human Rights Reports* 274. See further Murray (n 9 above) 428–32.

¹² Odinkalu (n 7 above) 402.

¹³ As above, 398.

2.1 The Commission's authority to indicate interim measures of protection

Although the African Charter does not provide for interim measures, Rule 111 of the Rules of Procedure does. Rule 111 states:¹⁴

- 1 Before making its final views known to the Assembly on the communication, the Commission may 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. In so doing, the Commission shall inform the state party that the expression on its views on the adoption of those provisional measures does not imply a decision on the substance of the communication.
- 2 The Commission, or when it is not in session, the Chairman, in consultation with other members of the Commission, may indicate to the parties any interim measure, the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it.
- 3 In case of urgency when the Commission is not in session, the Chairman, in consultation with other members of the Commission, may take any necessary action on behalf of the Commission. As soon as the Commission is again in session, the Chairman shall report to it on any action taken.

The purpose of interim measures is clearly then to 'avoid irreparable damage being caused to the victim' and/or to protect the interests of the parties or to ensure the proper conduct of the proceedings.¹⁵ There does not appear to be anything outwardly exceptional about this provision, and the provision conforms to standard international practice. However, an analysis of the wording of comparable human rights instruments suggests that the Commission may actually have a wider margin of discretion, at least on paper. For example, the Rules of the European Court of Human Rights refer to 'the interests of the parties or of the proper conduct of the proceedings' only. Those of the Human

¹⁴ Revised Rule 111 expands on former Rule 109, reproduced in Naldi (ed) *Documents of the Organisation of African Unity* (n 2 above) 124 150, which corresponded to what is now Rule 111(1), with the interesting exception that the term 'irreparable prejudice' was used instead of 'irreparable damage'. The ordinary meaning of 'damage' in this context may be susceptible to a wider interpretation and therefore seems preferable. Rule 111 allows the Commission or its chairman to indicate interim measures when the Commission is not sitting.

¹⁵ Communication 133/94 *Association pour la Defence des Droits de l'Homme et des Libertes v Djibouti* Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999–2000 AHG/222 (XXXVI) Annex V p 90 para 5; Communications 140/94, 141/94 & 145/95 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999–2000 AHG/222 (XXXVI) Annex V 52 para 17, seeking to ensure that that the health of the victims was not endangered.

Rights Committee and the Inter-American Commission and Court of Human Rights specify avoiding 'irreparable damage' to victims only.¹⁶ Rule 111 therefore expressly takes account of the different scenarios that may arise. It is also interesting to note that, in contrast to the position in the American system, the Commission is not restricted to indicating interim measures in urgent cases only.¹⁷

According to Rule 111, the Commission is competent to decide on its own motion whether interim measures should be indicated in any particular case.¹⁸ Unlike article 29(1) of the Regulations of the Inter-American Commission on Human Rights, however, Rule 111 is silent as to whether the Commission can act at the request of the parties. Although there is little authority in this regard, it appears that the Commission can do so.¹⁹ It is submitted that this must be the correct approach, as to do otherwise would be to minimise the obligations undertaken by the state parties.

Again in conformity with standard international practice, it is set out that an indication of interim measures should not be interpreted as prejudging the case on the merits.²⁰

2.2 The Commission's practice on the indication of interim measures of protection

The Commission has indicated interim measures in a number of cases²¹ and although the reasoning on its motivation to grant interim measures is not extensive, it is still nevertheless possible to discern certain principles.

¹⁶ n 1 above. It should be observed that the Human Rights Committee has found that disagreeable consequences do not constitute 'irreparable damage' under rule 86 of its rules of procedure. Communication 558/1993 *Canepa v Canada* UN Doc CCPR/C/D/558/1993 (1994) para 7.

¹⁷ n 1 above.

¹⁸ Communications 140/94, 141/94 & 145/95 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999–2000 para 17.

¹⁹ Communication 87/93 *Constitutional Rights Project (in respect of Zamani Lekwot and six Others) v Nigeria* at <<http://www.up.ac.za/chr/ahrd/ahrd.html>>; Communications 137/94, 139/94, 154/96 & 161/97 *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria* (2000) 7 *International Human Rights Reports* 274 para 30.

²⁰ See Rule 86 of the UN Human Rights Committee (n 1 above).

²¹ Communication 60/91 *Constitutional Rights Project v Nigeria* at <<http://www.up.ac.za/chr/ahrd/ahrd.html>>; Communications 93/92, 88/93 & 91/93 *Jean Yaovi Degli (on behalf of Corporal N Bikagni), Union Inter africaine des Droits de l'Homme, Commission Internationale de Juristes v Togo* at <<http://www.up.ac.za/chr/ahrd/ahrd.html>>; Communication 87/93 *Constitutional Rights Project (in respect of Zamani Lekwot and six Others) v Nigeria* at <<http://www.up.ac.za/chr/ahrd/ahrd.html>>; Communications 140/94, 141/94 & 145/95 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999–2000, AHG/222 (XXXVI) Annex V.

The case of *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria* is instructive in this regard.²² In 1994 and 1995 the Commission received a number of communications claiming that the detention and trial of Ken Saro-Wiwa and a number of fellow co-defendants violated their rights under the Charter, claims that were subsequently vindicated.²³ In October 1995 most of the accused, including Ken Saro-Wiwa, were sentenced to death. Given that the communications were before it, the Commission adopted interim measures, asking that the death sentences be suspended until the Commission had discussed the case with the Nigerian regime.²⁴ Regrettably the Commission was disregarded and the sentences were carried out with unseemly haste in November 1995.²⁵ The Commission was critical of the actions of the state party. It stated:

Rule 111 of the Commission's Rules of Procedure (revised) aims at preventing irreparable damage being caused to a complainant before the Commission. Execution in the face of the invocation of Rule 111 defeats the purpose of this important rule. The Commission had hoped that the government of Nigeria would respond positively to its request for a stay of execution pending the former's determination of the communication before it.²⁶

Clearly, in keeping with the *raison d'être* of interim measures, the Commission had an expectation that the respondent state would stay proceedings until such time as it had pronounced on the matter before it.

An important question that needs to be addressed is whether the Commission's decision on the adoption of interim measures is to be considered as binding on the parties to the case or whether it is to be viewed as merely advisory. The language of Rule 111 sheds no light on this matter. However, the Commission has made it clear beyond a doubt that it considers its decision on interim measures binding. In the case cited above concerning Ken Saro-Wiwa and others, the Commission observed that Nigeria was bound by article 1 of the African Charter and that one of the Commission's functions was to assist state parties to implement their obligations under the Charter.²⁷ In its reasoning the Commission found that the trial and implementation of the death sentence were in violation of the African Charter. Moreover:²⁸

²² Communications 137/94, 139/94, 154/96 & 161/97, (2000) 7 *International Human Rights Reports* 274.

²³ As above, 285.

²⁴ As above, paras 8, 19 & 21.

²⁵ As above, paras 9–10.

²⁶ As above, para 114.

²⁷ As above, paras 113–114.

²⁸ As above, para 103.

[t]he violation is compounded by the fact that there were pending communications before the African Commission at the time of the executions, and the Commission had requested the government to avoid causing any 'irreparable prejudice' to the subjects of the communications before the Commission had concluded its consideration. Executions had been stayed in Nigeria in the past on the invocation by the Commission of its rules on provisional measures . . . and the Commission had hoped that a similar situation will obtain in the case of Ken Saro-Wiwa and others. It is a matter of deep regret that this did not happen.

The Commission therefore held that the Nigerian Government had, 'in ignoring its obligations to institute provisional measures', violated article 1 of the Charter.²⁹ The Commission added:³⁰

To have carried out the execution in the face of pleas to the contrary by the Commission and world opinion is something which we pray will never happen again. *That it is a violation of the Charter is an understatement* (my emphasis).

The Commission's finding that its indication of interim measures is binding on a state party, wilful ignorance of which amounts to a violation of the Charter, must be welcomed as an extremely positive development.³¹ It should strengthen considerably the Commission's protective mandate. Although the Commission has not provided a deeply reasoned justification for its determination, its conclusion, commensurate with the teleological method of interpretation appropriate to human rights treaties,³² must be considered correct, if only on the utilitarian ground of seeking to ensure maximum protection for people at risk.

3 The African Court on Human and Peoples' Rights

It has been observed that the Commission was assigned the original role of safeguarding human rights under the Charter. However, the creation

²⁹ As above, 285.

³⁰ As above, para 115.

³¹ It is interesting to note that in the case of *LaGrand (Germany v United States of America)*, judgment of 27 June 2001, available at <<http://www.cij-icj.org>> (accessed 31 January 2002), the International Court of Justice held for the first time in its history that its orders on provisional measures of protection are binding.

³² *Wemhoff v Germany* Series A Vol. 7 (1968); *Compulsory Membership of Journalists Association Case* (1986) 25 *International Legal Materials* 123.

of an African Court on Human and Peoples' Rights³³ (the Court) with the specific task of reinforcing the role of the Commission³⁴ would appear to enhance in theory the prospects of promoting the protection of human rights in Africa. In the context of this paper, it is important to note that the Court is empowered under the Protocol to grant provisional measures. Thus, article 27(2) reads:

In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.

We must await the Court's Rules of Procedure and the relevant jurisprudence to determine how the Court will exercise these powers.³⁵ However, the question arises whether the Court will exercise its power to indicate provisional measures only when it is seized of a case or whether it will follow the American pattern and consider adopting provisional measures at the request of the Commission even before a case has been submitted to it. In terms of enhancing the protection of human rights, the latter scenario seems preferable since provisional measures could be ordered with the full authority of the Court at an early stage of the proceedings. Another question concerns the Court's position on the measures adopted by the Commission, in particular, whether such measures will be deemed to remain in force or whether they will have to be reissued by the Court. On the nature of its provisional measures it is to be hoped that, in light of the Commission's stance on this issue and developments in other jurisdictions, they will be considered obligatory.

4 Conclusion

Since its foundation, a general air of pessimism has surrounded the Commission and its work. However, the time has arrived when this perception demands reappraisal since 'through its practice, evolving procedures, and jurisprudence' the Commission has been successfully addressing deficiencies in the Charter.³⁶

³³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the OAU Assembly of Heads of State and Government at its 34th ordinary session in Ouagadougou in 1998. For one of the draft protocols, see (1997) 9 *African Journal of International and Comparative Law* 953. For the final Protocol, see <<http://www.up.ac.za/chr/ahrdb/ahrdb.html>>. The Protocol requires 15 ratifications to enter into force. See art 34(3). At the time of writing, six states have ratified. For an analysis of the Protocol, see GJ Naldi & K Magliveras 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 431.

³⁴ Art 2 Protocol (n 33 above).

³⁵ It would appear that these powers have been modelled on those of the Inter-American Court of Human Rights; Naldi & Magliveras (n 33 above) 451–2.

³⁶ Odinkalu (n 7 above) 398.

Although the problems that still persist should not be minimised, we should welcome the fact that the Commission has taken concrete steps to improve the protection of human rights. The Commission has arguably been given a broader mandate to provide provisional measures of protection than comparable international human rights systems. Its approach to the provision of provisional measures seems to be developing in a confident manner that tolerates comparison with the practices of other international human rights organs.³⁷ An important consideration is the fact that the Commission's provision of provisional measures is binding on respondent states. The Commission appears to be taking seriously its mandate that state parties to the Charter be held accountable. Indeed, it has already been observed that the Commission's jurisprudence seems to be developing positively, particularly due to the fact that its decisions are considered as binding. The Charter's protective mandate is immeasurably strengthened thereby. It may be concluded that the Commission is making progress.

³⁷ It should be observed that under arts 60 and 61 of the Charter (n 3 above), the Commission can draw inspiration from other international human rights instruments and general international law.