

Provisional measures in international human rights law: the practice of the African Court on Human and Peoples' Rights

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ABSTRACT: Under exceptional circumstances, international (human rights) courts issue orders on provisional measures preventing a party or parties before them from taking some actions pending the final determination of a case. The main purpose of such orders is to avoid a situation where the final disposition of a matter is pre-emptively rendered fully or partly meaningless by the conduct of a party. Article 27 of the Protocol Establishing the African Court on Human and Peoples' Rights also envisages the possibility where 'in cases of extreme gravity and urgency', the Court may adopt provisional measures to 'avoid irreparable harm to persons'. The African Court on Human and Peoples' Rights (Court), relying on this provision, has thus far issued about 50 orders of provisional measures, all of which were against respondent states. This article interrogates the Court's practice in this regard, with the view to fleshing out its jurisprudential inconsistencies and proposing recommendations to rectify the occasional misapplication of the procedure. Close scrutiny of the Court's jurisprudence reveals not only glaring discrepancies in approach but also, at times, unnecessary recourse to these measures even when situations do not necessarily warrant their adoption. As evidenced by the backlash from some states, which have openly expressed their refusal to comply with the Court's orders, the unwarranted use of provisional measures is likely to render the procedure ineffective and may also negatively affect the legitimacy of the Court in the eyes of its creators, the states. Therefore, the Court should fully and strictly adhere to the legal and factual conditions required to adopt provisional measures and always be alive to the intended purpose and nature of provisional measures. The Court particularly needs to adopt a balanced approach without being too liberal or too strict, as this would be overstepping its power or abdicating its responsibility to protect human rights.

TITRE ET RÉSUMÉ EN FRANCAIS:

Les mesures provisoires en droit international des droits de l'homme: la pratique de la Cour africaine des droits de l'homme et des peuples

RÉSUMÉ: Dans des circonstances exceptionnelles, les juridictions internationales (des droits de l'homme) rendent des ordonnances portant mesures provisoires empêchant une ou plusieurs parties devant elles d'entreprendre certaines actions en attendant la décision au fond dans une affaire. L'objectif principal de ces ordonnances est d'éviter une situation dans laquelle le règlement définitif d'une affaire par une juridiction internationale est rendu totalement ou partiellement sans objet par le comportement d'une partie. L'article 27 du Protocole à la Charte africaine des droits de l'homme et des peuples portant création d'une Cour africaine des droits de l'homme et des peuples

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envisage également la possibilité pour la Cour d'adopter, 'dans des cas d'extrême gravité et d'urgence', des mesures provisoires pour éviter que des personnes ne subissent un préjudice irréparable'. La Cour, s'appuyant sur cette disposition, a jusqu'à présent rendu une cinquantaine d'ordonnances de mesures provisoires, toutes à l'encontre d'États défendeurs. Cette contribution examine la pratique de la Cour à cet égard, afin de mettre en évidence les incohérences de sa jurisprudence et de proposer des recommandations pour rectifier l'application parfois erronée de la procédure. Un examen attentif de la jurisprudence de la Cour révèle non seulement des divergences flagrantes d'approche, mais aussi, parfois, un recours inutile à ces mesures, même lorsque les situations ne justifient pas nécessairement leur adoption. Comme le montre la réaction de certains États, qui ont ouvertement exprimé leur refus de se conformer aux ordonnances de la Cour, le recours injustifié aux mesures provisoires est susceptible de rendre la procédure inefficace et d'affecter négativement la légitimité de la Cour aux yeux de ses géniteurs, les États. Par conséquent, la Cour doit respecter pleinement et strictement les conditions juridiques et factuelles requises pour adopter des mesures provisoires et être toujours attentive à l'objectif et à la nature des mesures provisoires. La Cour doit notamment adopter une approche équilibrée, sans être trop libérale ou trop stricte, car cela reviendrait à outrepasser son pouvoir ou à abdiquer sa responsabilité de protéger les droits de l'homme.

KEY WORDS: African Court on Human and Peoples' Rights, provisional measures, *prima facie* jurisdiction, urgency, irreparable harm

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1 INTRODUCTION

The power to issue provisional measures (also known as 'interim', 'precautionary', or 'preliminary' measures)¹ is inherent in the nature of judicial or quasi-judicial institutions. Accordingly, most treaties establishing international or regional courts and/or their rules of procedures contain provisions allowing the courts to indicate provisional measures to preserve the interests of parties pending the final determination of cases filed before them.² Article 27 of the Protocol Establishing the African Court on Human and Peoples' Rights (Protocol) similarly empowers the African Court on Human and Peoples' Rights (African Court) to adopt provisional measures in 'cases of extreme gravity and urgency and to prevent irreparable harm to

1 In this article, these expressions are used interchangeably.

2 See art 63 of the American Convention on Human Rights (adopted on 22 November 1969); art 27 of Rules of Procedure of the Inter-American Court of Human Rights (IACHR) (adopted on 24 November 2009); art 73-77 of Rules of Court of the International Court of Justice (ICJ) (1978); Rule 94 of the Rules of procedure of the HRC (adopted on 26 July 1989); Rule 100 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (African Commission) (2020); Rule 39 of the Rules of Procedure of the European Human Rights Court (European Court) (3 June 2022).

persons'. In accordance with this provision, the African Court has thus far issued about 50 orders of provisional measures of which 22 were adopted against Tanzania, 15 against Benin, three against Côte d'Ivoire, two against Libya, two against Ghana, two against Malawi, and one against Kenya and Rwanda each. A close examination of these orders reveals that the Court regularly makes recourse to provisional measures and it is only on very rare occasions and quite recently that the Court began to deny prayers of applicants requesting the indication of provisional measures. Its case-law is also marked by some conceptual and normative ambiguity and inconsistency. Contrary to their very nature and purpose, the Court has also, in a few cases, taken unreasonably long time to consider requests for provisional measures.³

The Court's apparent liberal approach towards provisional measures may somehow be justified by the fact that these measures are inherently 'provisional' and do not necessarily prejudge the outcome of the case. Nevertheless, in some cases, provisional measures have grave consequences, for example, when they are issued to suspend national elections. In such instances, their misapplication would be indefensible by their 'provisional' nature. It is thus crucial to bear in mind not only their temporary nature but also the fact that provisional measures are exceptional procedures the use of which should only be dictated by compelling circumstances.

This article seeks to interrogate the jurisprudence of the Court and highlight areas where the Court's position towards provisional measures is problematic. It first offers a brief discussion on the nature and rationale of provisional measures and then examines how the Court deals with cases requiring urgent action to prevent irreversible harm to parties. A particular focus is given to the Court's assessment of the preliminary and substantive conditions required to adopt provisional measures. This will be followed by some general conclusions on the practice of the Court.

The article does not intend to engage in a full-fledged comparative analysis of international human rights jurisprudence on provisional measures. It nevertheless cites, when it is necessary to offer a comparative perspective, the case law of other regional and international human rights bodies, including that of the European Court of Human Rights (European Court), Inter-American Court of Human Rights (Inter-American Court), the UN Human Rights Committee (HRC), and the African Commission on Human and Peoples' Rights (African Commission).

3 TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: trends and lessons' (2021) 21 *African Human Rights Law Journal* 1243-1244; see also SMSM Dabiré 'Les ordonnances de la Cour africaine des droits de l'homme et des peuples en indication de mesures provisoires dans les affaires *Sébastien Ajavon c. Bénin et Guillaume Soro et autres c. Côte d'Ivoire: souplesse ou aventure?*' (2020) 4 *African Human Rights Yearbook* 476-496.

2 ORIGIN AND RATIONALE

The concept of provisional measures is not a recent invention and has its historical provenance in many ancient municipal Civil Procedure Codes and more formally, in the notion of ‘*interdict*’ of the Roman law.⁴ Over the course of many centuries, it has developed into a doctrine of *relief pendente lite*, which posits that ‘the effective protection of private rights is the *quid pro quo* for the prohibition of self-help by individuals’, thus, measures should be put in place to preserve the rights of one party to a case pending final resolution.⁵ The concept was later, to be precise in the early 20th century, imported into international law through bilateral and multilateral treaties.⁶ The earliest expressions of the concept are found in the 1902 Treaty of Corinto⁷ and the Bryan ‘cooling off’ treaties,⁸ which provided for peaceful settlement of disputes and provisions requiring parties to refrain from engaging in hostile acts such as war or mobilisation of force ‘in order not to impede the settlement of the difficulty or question by the means established in the present convention’.⁹ After the end of WWI, the League of Nations was established with its judicial organ, the Permanent International Court of Justice (PCIJ). The PCIJ was vested with, *inter alia*, the power ‘to indicate ... any provisional measures which ought to be taken to reserve the respective rights of either party’.¹⁰ This was subsequently included and expanded in the Statute of the International Court of Justice (ICJ) and other international treaties concluded on areas such as human rights and investment.¹¹

The notion of provisional measures appears to have been introduced into international law to rectify one of its ‘shortcomings’, that is, ‘the absence of adequate legal remedy safeguarding jeopardised interests when circumstances permitting no procrastination call for immediate action, before final judgment on the merits of a dispute can be pronounced’.¹² It is this same fact that also underpins the precautionary measures contemplated in existing provisions of

4 The notion of interdiction in Roman law denoted an order requiring the party to a case to do or not do a particular thing, usually in cases involving suits over property interests. CA Miles ‘The origins of the law of provisional measures before international courts and tribunals’ in CA Miles *Provisional measures before international courts and tribunals* (2017) 52.

5 As above, 20-21.

6 As above.

7 A treaty between Costa Rica, El Salvador, Honduras and Nicaragua, which provided in art 2 for the compulsory arbitration of disputes by Central American arbitrators.

8 A series of agreements concluded by the United States with many other countries shortly before and at the outbreak of World War I to settle disputes that could not be disposed of through arbitration.

9 Article XI of Treaty of Corinto (1902); see also art I, Treaty concerning the Construction of an Inter-oceanic Canal through the Territory of the Republic of Nicaragua, 5.8.1914 1 IELR 554; and GA Finch ‘The Bryan Peace Treaties’ (1916) 4 *American Journal of International Law* 10.

10 Art 41 of Statute of the Permanent Court of Justice (1920).

11 Art 41 of the Statute of the International Court of Justice (16 December 1920)

international human rights conventions and the various rules of procedures of the institutions established to implement them. In international human rights law, provisional measures constitute precautionary steps that international judicial and quasi-judicial institutions direct parties to take in order to maintain the integrity of their proceedings and ensure equality of parties.¹³ The principal objective is to prevent irreparable prejudice to victims of an alleged violation of human rights and preserve their rights until the final determination of a matter. As such, provisional measures aim at securing the continued enjoyment of a right, or at least, seek to avert further violation of rights.¹⁴

Interim measures are partly grounded in pragmatic considerations pertaining to the time-consuming nature of international human rights adjudication. Proceedings may take years before a case is decided with finality and in the absence of such preventive steps, the judicial process may end up being purposeless and ineffective or the irreparable damages caused to one party may render the implementation of the final resolution practically impossible. Interim measures are thus instrumental not only in protecting individuals from ongoing human rights abuses but also in safeguarding circumstances that allow the future realisation of a court's decision.¹⁵ In other words, it can be submitted that these measures have a direct bearing on a court's institutional ability to manage and resolve a dispute before it.

3 PROVISIONAL MEASURES IN THE JURISPRUDENCE OF THE AFRICAN COURT

Unlike its American counterpart,¹⁶ the African Charter on Human and Peoples Rights (African Charter) does not contain a juridical basis for

12 E Dumbauld *Interim measures of protection in international controversies* (1932) 2.

13 In this regard, Rule 39 of the Rules of ECHR clearly stipulates that interim measures should be adopted 'in the interests of the parties or of the proper conduct of the proceedings'.

14 Pasqualucci notes in this regard that 'The overriding importance of interim measures in human rights cases arises from their potential to terminate abuse rather than primarily to compensate the victim or the victim's family after the fact'; JM Pasqualucci 'Interim measures in international human rights: evolution and harmonization' (2021) 38 *Vanderbilt Law Review* 1.

15 According to Justice Trindade 'Underlying the application of provisional measures of protection (...) are superior considerations of international *ordre public*, turned into reality in the protection of the human being'; AC Trindade 'The evolution of provisional measures of protection under the case-law of the Inter-American Court of Human Rights 1987-2002' (2003) *Human Rights Law Journal* 164.

16 Art 63(2) of the American Convention on Human Rights provides that 'In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission'.

adoption of provisional measures.¹⁷ The African Commission, which was established as the monitoring body thereof,¹⁸ has rather inferred its power from its protective mandate and relied on its Rules of Procedure to indicate provisional measures.¹⁹ In contrast, article 27 of the Protocol clearly sets out the Court's power to issue an order for provisional measures and its Rules substantially reflect what the Protocol stipulates.²⁰ Rule 59(1) of the Rules of the Court provides that '[p]ursuant to article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application'.²¹ In accordance with this, as at 30 August 2022, the Court has dealt with provisional measures on 79 occasions in about 76 applications.²²

The Court has invoked its power to indicate provisional measures both in its own motion (*suo motu*) or upon request by a party, often the one initiating proceedings. The Court issued its first order on provisional measures in *African Commission on Human and Peoples' Rights v Libya* in 2011. In this case, the Court directed *suo motu* Libya to 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons', having noted that 'there [was] an imminent risk of loss of human life and in view of the ongoing conflict in Libya'.²³ In the subsequent years, the Court continued to issue, in its own motion or upon request by one of the parties, several

17 The Charter, in its art 58(1), allows the Commission to only draw the attention of the Assembly of Heads of State and Government where one or more 'communications relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights'.

18 See art 30 of the Charter.

19 Rule 100(1) of the Rules of Procedure of the Commission declares that 'At any time after receiving a Communication and before determining its merits, the Commission may, on its initiative or at the request of a party to the communication, issue provisional measures to be adopted by the state concerned in order to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands'.

20 However, there is a slight difference in formulation between the Protocol and the existing Rules; art 27(2) of the Protocol makes it mandatory for the Court to indicate provisional measures as long as the conditions thereof are met while Rule 59(1) of the Rules uses the permissible language 'may' instead of 'shall'. Considering that the Rules are subsidiary to the Protocol, art 27 takes precedence. It is obvious that the Court enjoys a wide margin of discretion in ascertaining whether the conditions are fulfilled but once it affirmatively establishes this, it 'shall' indicate provisional measures.

21 Rule 59(1) of the Rules of the Court (2020). This provision is almost identical with Rule 51 of the 2010 Rules of the Court except that the latter uses 'interim measures' whereas the former uses the alternate expression 'provisional measures'.

22 In some cases, applicants requested for provisional measures in one application more than once. Eg, in *Ajavan v Benin* (027/2020) the applicant filed three separate requests for provisional measures and in *Guillaume Kigbaforti Soro and 19 Others v Côte d'Ivoire* (012/2020) the applicant requested for provisional measures twice.

23 *African Commission on Human and Peoples' Rights v Libya* (provisional measures) (2011) 1 AfCLR 17.

orders for provisional measures in dozens of other applications involving the right to life and the death penalty,²⁴ election,²⁵ property,²⁶ freedom of movement,²⁷ the right to liberty,²⁸ the right to health,²⁹ and right to access legal representation and family.³⁰ It is evident from the Court's jurisprudence that, where a request comes from a party, adoption of provisional measures is not automatic. Rather, the Court retains the discretion to grant or deny the request depending on the circumstances of each case.³¹

The Court has generally been liberal when it comes to granting requests for provisional measures. The statistics speak for themselves; as indicated earlier, the Court has thus far adopted 50 orders for provisional measures in 76 applications. At the same time, there seems to be a clear shift in approach in its recent case law. The Court is increasingly becoming both robust in its reasoning and strict in applying the criteria for indicating provisional measures.³² In the past, for example, the Court used to grant requests for provisional measures

- 24 *Armand Guéhi v Tanzania* (provisional measures) (2016) 1 AfCLR 587, paras 21-23; *Mugesera v Rwanda* (provisional measures) (2017) 2 AfCLR 149. In cases of the death penalty, it is now customary for the Court to adopt *proprio motu* provisional measures to prevent execution of individuals on death row. See *Ally Rajabu and Others v Tanzania* (provisional measures) (2016) 1 AfCLR 59; *John Lazaro v Tanzania*, 18 March 2016, *Evodius Rutechura v Tanzania* (provisional measures) (2016) 1 AfCLR 596; *Chalula v Tanzania* (provisional measures) (2019) 3 AfCLR 232; *Dominick Damian v Tanzania* (provisional measures) (2016) 1 AfCLR 69; *Crospery Gabriel and Ernest Mutakyawa v Tanzania* (provisional measures) (2016) 1 AfCLR 70.
- 25 *Sébastien Germain Ajavon v Benin* (provisional measures) (013/2017) (17 April 2020), *Guillaume Kigbafori Soro and Others v Côte d'Ivoire* (provisional measure) (012/2020) (17 April 2020); *Laurent Gbagbo v Côte d'Ivoire* (provisional measures) (025/2020) (25 September 2020).
- 26 *Woyome v Ghana* (provisional measures) (2017) 2 AfCLR 213 (confiscation of property); *Ghaby Kedieh v Benin* (provisional measures) (006/2020) (28 February 2020) (relating to ownership of land), *Houngue Eric Noudehouenou v Benin Order* (provisional measures) (004/2020) (22 November 2021) (in relation to issuance of national identity to allow the applicant to access his bank account).
- 27 *Ndajigimana v Tanzania* (provisional measures) (2019) 3 AfCLR 522.
- 28 *Lohé Issa Konaté v Burkina Faso* (provisional measures) (2013) 1 AfCLR 310; *ACHPR v Libya* (provisional measures) (2013) 1 AfCLR 145, *Houngue Eric Noudehouenou v Benin, Order* (provisional measures) (004/2020) (6 May 2020).
- 29 *Konaté* (n 28) paras 21-22. *ACHPR* (n 28) para 19(4); *Mugesera* (n 24), (the applicant alleges violation of the right against inhuman and degrading treatment as a result of denial of access to medical care, see para 26).
- 30 *ACHPR* (n 28) ('to preserve the integrity of the person of the detainee and protect his right to access legal representation and family'); see also *Mugesera* (n 24).
- 31 The Court asserts its discretionary power every time it considers applications made with a request for provisional measures. See *Johnson v Ghana* (provisional measures) (2017) 2 AfCLR 155, para 15, *Woyome* (n 26) para 24; *Charles Kajoloweke v Malawi* (055/2019) (provisional measures) (27 March 2020), para 20; *Guéhi* (n 24) para 17.
- 32 Clearly signalling a change in approach, in *Suy Bi and Others v Côte d'Ivoire*, the Court stressed that '[it] takes into account the applicable law with regard to provisional measures which are specific. The Court cannot issue a Ruling *pendente lite* except when the basic requisite conditions are met, i.e. extreme gravity, urgency and prevention of irreparable harm to persons. *Suy Bi and Others v Côte d'Ivoire* (provisional measures) (2019) 3 AfCLR 732, paras 27-29.

in general terms without applying the criteria with respect to each request or claims made in an application.³³ However, in its latest jurisprudence, despite some discernible discrepancies, the Court is increasingly showing the tendency to examine each request individually and sequentially and grant or deny the request on the basis of the outcome of such examination. The result of this individualised assessment of each claim and request has been that the Court indicated interim measures only with respect to one or some of the claims made by a party.³⁴

The Court's recent shift in approach is clearly reflected again in the statistics. Between March 2013 and December 2019, the Court dealt with provisional measures in 38 applications and it declined to adopt such measures only in two applications. By contrast, in 2021, the Court received about 29 requests for provisional measures but granted only four, rejecting 22 and declaring moot, three of them. This may be because of the combined effect of a self-introspection into its practice, following recurring dissenting opinions of some judges of the Court itself,³⁵ and increasing criticisms from scholars and states that the Court is using its power to adopt provisional measures too liberally.³⁶

4 CONDITIONS FOR PROVISIONAL MEASURES

As a precautionary step in judicial proceedings, the adoption of provisional measures is dependent on the fulfilment of certain conditions. These conditions vary from one court to the other but essentially, most of these conditions reinforce the exceptional nature of the regime.³⁷ The Protocol also stipulates some requirements for adoption of provisional measures. The Court always examines the

33 See *Mugesera* (n 24) paras 23-28.

34 In *Komi Koutché v Benin* (provisional measures) (2019) 3 AfCLR 725, the applicant requested provisional measures for his five allegations relating to an arrest warrant issued against him, domestic criminal proceedings, extradition requests, cancellation of his national passport and probation of his participation in election but the Court granted his request only in respect of the cancellation of his passport. See *Noudehouenou* (n 26) (only one from four requests).

35 As at August 2022, there are about 13 dissenting opinions and individual declarations appended to the Court's orders of provisional measures issued in seven applications.

36 Some respondent states, particularly, Tanzania, Ghana and Benin openly refused to comply with the Court's orders of provisional measures claiming that the Court is misusing its power or that it does not have such power with respect to some of the issues raised in the requests.

37 ICJ is duty bound to give notice of the measures, not only to Parties but also the UN Security Council. See art 41 (2) of the ICJ Statute, see also S Rosenne and TD Gill *The World Court: what it is and how it works* (1989) 95. The Rules of Procedure of the European Court of Justice also require that 'An application of a kind referred to in the preceding paragraphs shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measure applied for'. It also states that 'The application shall be made by a separate document'. See art 160(3) and (4), Rules of Procedure of the Court of Justice (2012).

fulfilment of these requirements, which we can generally group into two: preliminary and substantive conditions.³⁸ Preliminary conditions pertain to the question of jurisdiction, that is, whether the Court has the competence to consider and rule on the merits of the main application. On the other hand, the substantive conditions relate to the existence of extreme gravity, urgency or irreparable harm. As part of the Court's assessment of preliminary conditions, the Court has also addressed objections relating to non-compliance with the admissibility requirements set out in Article 56 of the Charter and Rule 50(2) of its Rules. Furthermore, the preventive and temporary character of provisional measures entails that the Court should use them for exceptional circumstances and for a definite period of time. Accordingly, we will examine the preventive nature and provisional dimension of the measures as part of the substantive conditions.

At the outset, it should be pointed out that the focus and depth of the Court's assessment of both preliminary and substantive conditions differ from one case to the other. Nonetheless, in general, the Court attempts to ascertain that all the conditions are met before it adopts a particular provisional measure.³⁹ In this exercise, the Court particularly takes into account the prevailing factual circumstances surrounding the case and assesses whether such circumstances meet the threshold of gravity and imminence set out in the Protocol. The Court often refuses to adopt provisional measures if, for instance, it is obvious that there is no situation revealing extreme gravity or urgency. Nor does it grant requests for provisional measures where no risk of irreparable harm is sufficiently demonstrated.

4.1 Preliminary conditions

4.1.1 *Prima facie* jurisdiction

In international adjudication, *prima facie* jurisdiction generally denotes 'first glance or first impression competence' of a tribunal. In ascertaining its *prima facie* jurisdiction, a tribunal simply accepts *pro tempore* ('for the time being') the facts as alleged by an applicant to be true and accordingly, examines whether there is a violation of one or more of the relevant treaty provisions applicable for the case before it.⁴⁰ This does not in principle require the applicant to provide proof of his factual claims and/or the tribunal to examine, in detail, the legal and factual basis of its jurisdiction. This is different from 'jurisdiction

38 It should be noted that preliminary conditions such as the question of material or personal competence may raise substantive issues and as such, the grouping is not meant to create distinction based on the nature of the conditions or the issues that might arise in relation to such conditions. The grouping is more related to the sequence of the Court's assessment given that the Court often addresses questions of jurisdiction and admissibility, if any, before it examines other conditions to indicate provisional measures.

39 *XYZ v Benin* (provisional measures) (2019) 3 AfCLR 754, paras 10, 21

40 *Oil Platforms Islamic Republic of Iran v United States of America*, ICJ (12 December 1996), Separate Opinion of Judge Higgins para 32.

proper', which involves a thorough examination of the legal foundation and factual circumstances of a tribunal's competence. In establishing its jurisdiction proper, it is not sufficient that a tribunal makes a first glance or temporary assessment of its competence but rather it should make a definitive finding that it has the power to determine the merits of the case. Furthermore, a tribunal ascertaining its *prima facie* jurisdiction does not necessarily need to respond to all objections to its jurisdiction while a tribunal seeking to establish its jurisdiction proper must assess and dispose of all objections, if any, to its competence.

When it deals with requests for provisional measures, the African Court, like some other international courts,⁴¹ examines whether or not it has a *prima facie* jurisdiction on the merits of the application.⁴² It is the first preliminary step that the Court takes before proceeding to consider the other conditions required to indicate provisional measures. Ordinarily, the Court does not exercise its power to indicate provisional measures of protection unless the rights claimed in the application, *prima facie*, appear to fall within the purview of its jurisdiction. The Court has not thus far defined what *prima facie* jurisdiction constitutes nor has it explained what the assessment of *prima facie* jurisdiction entails. In almost all its decisions on request for provisional measures, the Court simply uses its standard formulation that 'the Court need(s) not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction'⁴³ and then it continues to examine whether the basic jurisdictional requirements set out in Articles 3 and 5 of the Protocol are fulfilled.

The Court's case law also shows a rather inconsistent picture when it comes to the substantive assessment of its *prima facie* jurisdiction. In its second case against Libya, which concerned the alleged incommunicado detention of Saif Al-Islam Gaddafi,⁴⁴ the Court simply made reference to article 3 of the Protocol without further expounding on its material jurisdiction.⁴⁵ In comparison, in *Woyome v Ghana*, the Court established its *prima facie* (material) jurisdiction after affirming that the rights alleged to have been violated are protected by the

41 See for example, ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Order on request for the indication of provisional measures of 23 January 2020, paras 16-39.

42 The Court retains the discretion and remains the master of its jurisdiction and parties are bound by the interpretation given by the Court to the scope of its competence. See art 3(2) of the Court's Protocol.

43 ACHPR (n 23) para 15, ACHPR (n 28) para 10; *Hussein v Tanzania* (provisional measures) (2019) 3 AfCLR 768 para 8.

44 The son of the late Muhammed Gaddafi, ex-President of Libya.

45 The Court merely took 'judicial notice that provisional measures may be a consequence of *the right to protection* under the Charter, not requiring consideration of the substantive issues' (emphasis added ACHPR (n 28) paras 11 & 13. The Court gives the impression that it does not need to locate the allegations in an application in a specific provision or identifiable right protected by the Charter to issue an order of provisional measure. In his Separate Opinion, Justice Ouguergouz noted that 'the Court dealt with the issue of its *prima facie* jurisdiction at the personal level (*ratione personae*) only (paras 12 to 14) but did

Charter.⁴⁶ Despite such discrepancies, the Court's interpretation of its *prima facie* jurisdiction is primarily limited to its personal and material jurisdiction. It is very rarely that the Court considers its temporal jurisdiction, less so its territorial jurisdiction. Among the very few occasions on which the Court examined its temporal jurisdiction were when it dealt with *Mugesera* and *Noudehouenou* cases.⁴⁷ The reason why the Court had to establish its *prima facie* temporal jurisdiction in these matters was ostensibly because the respondent states had withdrawn their Declarations under article 34(6) of the Protocol.

However, to the author's knowledge, in no case has the Court ever attempted to establish its *prima facie* territorial jurisdiction while considering requests for provisional measures. This may be because in almost all the applications where provisional measures were considered, human rights violations were alleged to have been committed in the territory of the concerned respondent state. There will therefore likely be an issue when provisional measures are requested with respect to applications in which human rights violations are alleged to have been committed extraterritorially.⁴⁸

On all occasions, the Court nonetheless confirms in general terms whether the state against which an application is filed is a party to the Charter and the Protocol.⁴⁹ Where the case is filed by individuals or NGOs, the Court also verifies if the respondent state has deposited the Declaration required under article 34(6) of the Protocol, instituting the individual complaint mechanism.⁵⁰

It is important to note that the Court does not always require the appearance of a respondent state or hear parties in order to establish its *prima facie* jurisdiction. It does also require the exchange of pleadings between parties to be completed. The Court may establish its jurisdiction on the basis of initial filing of pleadings without conducting oral hearing.⁵¹ However, it is generally accepted that there should

not ensure that it also had *prima facie* jurisdiction at the material level (*ratione materiae*), that is, that the rights to which it is necessary to avoid irreparable harm are *prima facie* guaranteed by the legal instruments to which the respondent state is a party to. It only sufficed for the Court to state that, in the present case, the rights in question are actually guaranteed under Articles 6 and 7 of the African Charter of which the Republic of Libya is party and the violation of which is alleged by the African Commission and thereby conclude that the Court's material jurisdiction is also established *prima facie*. Separate Concurring Opinion of Fatsha Ougergouz, para 6.

46 *Woyome* (n 26) para 20, see also *Johnson* (n 31) para 20.

47 *Mugesera* (n 24) para 20. Application 004/2020, *Houngue Eric Noudehouenou v Benin*, order (provisional measures), 6 May 2020, paras 4-5.

48 In this regard, it is worth mentioning that in its recent landmark judgment in *Bernard Mornah v Benin and 7 Other Respondent States*, although there was no a request for provisional measures, the Court adopted the notion of extraterritorial application of human rights and affirmed that it has competence to examine human rights violations alleged to have been committed outside a state's national boundaries. *Bernard Mornah v Benin & 7 Other States* (Merits) (028/2018) (22 September 2022), paras 149-150.

49 *Chalula* (n 24) paras 10-11; *XYZ* (n 39) paras 13-16, *Hussein* (n 43) 3 AfCLR 768, paras 10-11, *Yaji v Benin* (provisional measures) (2019) 3 AfCLR 771, paras 16-18.

50 *Johnson* (n 31) para 11; *Mugesera* (n 24) para 3.

always be some information that ‘appear to afford a basis on which [its] jurisdiction might be founded’.⁵² Hence, a party seeking an order for provisional measures should adduce proof or a plausible source of *prima facie* case on the merits.

It should further be appreciated that the Court may indicate provisional measures despite the existence of valid objections to its competence. As was indicated earlier, the assessment of *prima facie* jurisdiction does not require the Court to examine and rule on objections to its jurisdiction. This precisely means that theoretically, the Court may adopt provisional measures without having ‘jurisdiction proper’. Although the Court has not had such experience, the practice of other international courts evinces that provisional measures could be adopted even though the Court may later find that it has no jurisdiction proper. For instance, in the *Anglo-Iranian* case, the International Court of Justice issued an order for provisional measures while Iran (the respondent state) had raised objection to its jurisdiction which was later upheld.⁵³ Accordingly, the establishment of *prima facie* jurisdiction, and the adoption of provisional measures should not be taken as a definitive determination by the Court of its competence on the merits of a case. Parties could still raise objections to the Court’s jurisdiction by adducing supporting evidence and depending on the weight of such evidence, the Court may dismiss or sustain the objections.

- 51 In the first case, the Court established its *prima facie* jurisdiction without even serving the application on the respondent state. Justifying this, it observed that ‘in the present situation where there is an imminent risk of loss of human life and in view of the ongoing conflict in Libya that makes it difficult to serve the Application timeously on the Respondent and to arrange a hearing accordingly, the Court decided to make an order for provisional measures without written pleadings or oral hearings ...’ *ACHPR case* (2011) (n 22) para 13. In *Nuclear Tests* case, the International Court of Justice also held that ‘the non-appearance of one of the states concerned cannot by itself constitute an obstacle to the indication of provisional measures’. *Nuclear Test Case (Australia v France)*, Order on the Request for the Interim Measures of Protection 22 June 1973, para 13, para 17.
- 52 This is a basic requirement to institute proceedings before the Court. Rule 40(1) of the Rules of the Court requires that all applications must contain a summary of the facts and of the evidence intended to be adduced. In its caselaw, the Court relied on the information provided in the initial application to establish its *prima facie* jurisdiction. The nature of information or evidence could be anything as long as it is sufficient to show that the Court, on first glance, has the competence to exercise its power. In *Nicaragua v United States of America*, to establish its *prima facie* jurisdiction, the ICJ accepted the affidavits sworn by Nicaragua’s Foreign Minister and its Vice-Minister of the Interior; a memorandum allegedly addressed to the United States Embassy in Honduras by the ‘mercenary leaders’; United States legislative measures; texts of statements made in public or to the press by the President of the United States and senior officials of the United States administration; and a large number of reports in newspapers and reviews published in the United States. See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Request for The Indication of Provisional Measures Order* of 10 May 1984, paras 26 & 29; See also *Nuclear Test Case* (n 51) paras 13 & 17.
- 53 *Anglo-Iranian Oil Co. Case*, Order of 5 July 1951; *Anglo-Iranian Oil Co case* (jurisdiction), judgment of July 22nd 1952 ICJ Reports 1952, p115

4.1.2 Admissibility

The Charter as well as the Rules of the Court require that applications filed before the Court should meet certain conditions of admissibility.⁵⁴ These are: applications must disclose the identity of the applicant, be compatible with the Constitutive Act of the African Union and with the Charter, not contain disparaging or insulting languages, are not exclusively based on news disseminated through the mass media, are filed after exhaustion of local remedies and within reasonable time from the date local remedies were exhausted and finally, do not deal with cases which have already been settled in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union and the provisions of Charter.⁵⁵ Whenever it receives any application, the Court usually makes a preliminary examination of the fulfilment of these conditions and satisfies itself that the application is admissible prior to considering the merits.⁵⁶

However, the Court has been consistent that it does not examine whether an application meets admissibility conditions for the purpose of indicating provisional measures. Instead, the Court deferred its consideration of admissibility to a later stage of the proceeding where it would examine its jurisdiction proper, the admissibility of the application and the merits of the case.⁵⁷ In *Houngue Eric Noudehouenou v Benin*, the respondent state challenged the applicant's request for provisional measures raising objections to the admissibility of the application.⁵⁸ The Court nonetheless dismissed the objection recalling that 'in the cases of provisional measures, the Charter nor the Protocol provided for conditions of admissibility, the examination of those measures being subject only to prima facie jurisdiction'.⁵⁹ Similarly, in the *Consolidated Applications 014/2020 and 017/2020, Elie Sandwidi and The Burkinabe Movement for Human and Peoples' Rights v Burkina Faso*, the respondent state had raised objections to the admissibility of the application, including the lack of exhaustion of local remedies. The Court rejected the respondent's objections affirming that issues of admissibility 'are immaterial as regards a request for provisional measures' are concerned.⁶⁰ The Court therefore prefers to prioritise the preservation of the rights of the applicant by postponing the determination of admissibility to a later stage. If the Court were however to delve into the

54 See Article 56 and Rule 50 of the Rules of Court (2020).

55 F Viljoen 'Introductory note: The jurisprudence of the African Court on Human and Peoples' Rights in 2018' (2021) *The Global Community Yearbook of International Law and Jurisprudence* 2019; L Chenwi 'Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 *Human Rights Quarterly* 374-398.

56 See Rule 49 of the Rules.

57 *Soro and Others* (n 25) paras 21-23; *Ajavon* (n 25) para 49; *Josiah v Tanzania* (provisional measures) (2016) 1 AfCLR 665, para 19; *Dominick Damian v Tanzania* (2016) 1 AfCLR 699, para 19.

58 *Houngue Eric Noudehouenou v Benin*, Order (Provisional Measures), 004/2020 (6 May 2020), para 27.

59 *As above*, para 28.

determination of admissibility, it would require it to take more time and collect and evaluate evidence such as on the fulfilment of the requirement of exhaustion of local remedies or whether the matter was previously settled within the terms of article 56(5) and (7) of the Charter, respectively.

Interestingly, in *Dexter Johnson v Ghana*, the Court granted the applicant's request for provisional measures ordering the respondent state to stay his execution, after he was convicted of murder and sentenced to the death penalty. In *Ghaby Kedieh v Benin*, a case involving a dispute over land, the Court similarly issued an order for a provisional measure suspending change of ownership of the disputed land.⁶¹ The Court however later found that both applications were inadmissible.⁶²

While the Court's jurisprudence is resoundingly clear that the adoption of provisional measures does not require assessment of admissibility conditions, one may still wonder whether the Court should indicate provisional measures in a situation where an application is evidently or likely to be inadmissible. This could be the case, for example, when the identity of the applicant is not properly revealed in the application as required under Rule 50(2)(a) of the Rules of the Court⁶³, or the application contains explicit and unambiguous disparaging or insulting language or was filed without exhaustion of local remedies contrary to Rule 50(2)(c) and (e) of the same. As in the *Dexter Johnson* case, the application may also clearly indicate that it concerns issues which have already been 'settled' within the terms of Rule 50(2)(g) of the Rules. In such cases, both the demands of judicial economy and procedural fairness may require the Court to summarily consider the request for provisional measures together with the application⁶⁴ and dismiss it thereof.⁶⁵ This will have a useful role in sparing the Court's limited resources from being expended on

60 *Elie Sandwidi and the Burkinabe Movement for Human and Peoples' Rights v Burkina Faso and 3 Other States*, (014/2020 and 017/2020) (25 September 2020), para 41; see also *Ajavon* (n 25) paras 30-32.

61 *Kedieh* (n 26) para 46.

62 *Johnson v Ghana* (jurisdiction and admissibility) (2019) 3 AfCLR 99, paras 46-57; *Kedieh v Benin*, 006/2020, *Ruling (jurisdiction and admissibility)* (26 September 2021), para 70.

63 Note however that Rule 49(1)(b) of the Rules of the Court specify that an application which does not contain full information on the identity of the applicant may be processed by the Court where it is related to a request for provisional measures.

64 Unfortunately, as we will see later in this section, unlike the Rules of Procedures of other Courts (see for example, art 76 of the ICJ's Rules of Procedure), the Rules of the Court do not contain provisions allowing the Court to adopt accelerated procedure in order to prioritise some cases over others but nothing still prevents the Court therein from doing so. Indeed, in its decision on the Request for Advisory Opinion by the Pan African Parliament, the Court adopted an expedited procedure after having considered the urgency of the matter even though there was no legal basis in the Protocol or the Rules allowing the Court to do so. See *Advisory Opinion on the Request by the Pan African Parliament*, 001/2021 (16 July 2021), paras 13-20. Note that in the current Rules of the Court, the Court is empowered to prioritise cases which are selected to be dealt with under the pilot-judgment procedure. See Rule 66(1)(b) of the Rules.

applications with no prospect of success. Its European counterpart⁶⁶ has also followed the same approach with respect to applications which it identified ‘manifestly unfounded’ and eventually, declared inadmissible.⁶⁷

Furthermore, it should be recalled that despite their ‘temporary’ nature, once adopted, provisional measures may be consequential in some cases, for instance, when they have the effect of suspending national elections. This is what actually happened in *Ajavon v Benin*, where the Court invoked its power to issue provisional measures and decided to postpone local elections until it ruled on the merits of the case.⁶⁸ If the Court did not eventually find violations, it is reported that the respondent state would have shouldered, in vain, ‘the burden of technical budgeting of US\$12 million, over two years of preparation, and the costs related to campaigning’.⁶⁹ It is therefore important that the Court, in dealing with requests for provisional measures, establishes not only that it has *prima facie* jurisdiction to examine the merits of an application but also that the application is *prima facie* admissible.

4.2 Substantive conditions

In addition to the preliminary conditions discussed above, as was pointed out earlier, there are substantive requirements that must be satisfied before the Court adopts an order for provisional measures. These are: *extreme gravity and/or urgency, irreparable harm to persons and the requirement necessity and such measures should be adopted provisionally and only for preventive purpose*.⁷⁰ The Court has repeatedly underscored that when these conditions, particularly, the requirement of gravity/urgency and irreparable harm are not met, it cannot indicate provisional measures.⁷¹ The paper will now consider these conditions one after the other and examine how the Court has interpreted and applied them in its case law.

65 SH Adjolohoun ‘A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples’ Rights’ (2020) 20 *African Human Rights Law Journal* 29.

66 Nevertheless, the Rules of Procedure of the HRC require the Committee to specify, in its provisional measures, that such measures do ‘not imply a determination on the admissibility or the merits of the case’. It is therefore contemplated that the Committee may indicate provisional measures regardless of the (in)admissibility of the petition.

67 *Collins and Akaziebie v Sweden*, ECHR (8 March 2007); *Izevbekhai v Ireland*, ECHR (17 May 2011); *Omeredo v Austria*, ECHR (20 September 2011). This is in accordance with Article 35 (2) (a) of the European Human Rights Convention, which permits the Court to declare an application inadmissible if it is ‘incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application’ (emphasis added).

68 See *Ajavon* (n 25) para 69.

69 *Adjolohoun* (n 67) 29.

4.2.1 Extreme gravity and/or urgency

The first substantive prerequisite for the Court to issue an order for provisional measures is the existence of a situation of extreme gravity and/or urgency. There is a slight difference in formulation between the different versions of article 27(1) of the Protocol and Rule 59(1) of the Rules of the Court. In the English and Arabic versions, we find the expression ‘extreme gravity *and* urgency’, while the corresponding provisions of the French and Portuguese versions use the disjunctive term ‘or’, suggesting that the requirements of extreme gravity and urgency are not cumulative.⁷² The case law of the Court is also not consistent on this; in some cases, the Court appears to have applied them alternatively⁷³ whereas in some other cases, the Court has applied the requirements of ‘extreme gravity’ and ‘urgency’ conjunctively often holding that the latter is ‘consubstantial’ (a rather theological term) with the former.⁷⁴ Nevertheless, given the nature of provisional measures, urgency and extreme gravity are not only essentially intertwined but also must always be applied cumulatively. It will therefore likely be incompatible with their very purpose if the Court

- 70 Strangely, in *Kodeih case*, the Court applying Rule 51(1) of the old Rules (2010) held that ‘... it is endowed to issue orders for provisional measures *not only* in cases of ‘extreme gravity or urgency or when it is necessary to avoid irreparable harm’ *but also* ‘in the interest of the parties or of justice’. *Koedih* (n 25), para 42 (emphasis added). This seems to suggest that the Court may indicate provisional measures in ‘the interest of the parties or of justice’ without examining the existence of a situation of extreme gravity or urgency. This would certainly be contrary to the nature of provisional measures and Rule 51 (1) of the old Rules itself does not envisage such possibility. Rule 51(1) provides that ‘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’. This provision leaves no impression that allows the Court to adopt provisional measures in the interests of the parties or of justice, where there is no urgency or extreme gravity or the measures are not necessary to avoid irreparable harm. It is also difficult to contemplate in practice a situation where the Court may adopt provisional measures ‘in the interests of justice or of parties’ without relying on the existence of a situation of extreme gravity and urgency. Furthermore, it should be noted that the current Rule 59(1) omits the reference to the ‘interests of justice and of parties’.
- 71 *XYZ v Benin* (010/2020) (provisional measures), (3 April 2020), para 27, see also *XYZ v Benin* (2019) (provisional measures) 3 AfCLR 750, para 22, *Suy Bi and Others* (n 32), para 27.
- 72 Note that art 63(1) of the Inter-American Convention uses the conjunctive term ‘and’.
- 73 *Koutché* (n 34) paras 22 and 26, *Kedieh* (n 26), paras 42-45; *Sandwidi and Others* (n 62), para 65; *Landry Angelo Adalakoun and Others v Benin* (012/2021) (25 June 2021), para 24; *Landry Angelo Adalakoun and Others v Benin* (012/2021) (24 March 2022), para 20; *Noudehouenou* (n 26), para 29.
- 74 *Koutché* (n 34) para 32, *Noudehouenou*, as above, para 26. In *Noudehouenou* case, the applicant requested for provisional measures that would oblige the respondent state to apologise him and the Court for making submissions on false and imaginary facts and for criticising the Court’s decisions. The Court dismissed the request for lack of urgency without assessing the requirement of extreme gravity of the harm on his reputation and business (work). *Noudehouenou*, para 49.

decides to indicate provisional measures with respect to cases where there is a situation of extreme gravity but no urgency and *vice versa*.

In several applications, the Court has attempted to clarify the substantive content of a situation of extreme gravity and urgency and what it entails. In *Soro and Others v Côte d'Ivoire*, for example, the Court has observed that

extreme gravity presupposes that there is a real 'risk and it is imminent that irreparable harm could take place before the court renders its final judgement' in the matter and there is urgency each time 'acts which may cause irreparable harm could take place at any time before the court renders its final decision in the matters' in question.⁷⁵

Unfortunately, this interpretation of the Court erroneously conflates extreme gravity with the meaning of urgency. The notion of 'extreme gravity' is related with 'urgency' but the two are conceptually distinct from one another. Whereas intensity is inherent to the 'extreme gravity', imminence is only intrinsic to 'urgency'. As the Inter-American Court has rightly pointed out:

In terms of gravity, for purposes of the adoption of provisional measures, the Convention requires that it be 'extreme,' that is, that it be at its most intense or highest level. The urgent nature implies that the risk or threat involved is imminent, which requires that the remedial response be immediate.⁷⁶

In a similar fashion, the European Court indicates interim measures only where there is a '*serious and imminent risk of irreparable harm*'; thereby, establishing extreme gravity from the requirement of 'seriousness' and urgency from 'imminency' of the harm, respectively.⁷⁷ Accordingly, the standard of extreme gravity should be assessed on its own right based on the nature and degree of the harm whereas the existence of urgency should be gauged against the possibility and imminence of its occurrence. Again, a close study of the jurisprudence of the Court discloses that there is a considerable discrepancy in its interpretation and application of the two requirements.

The Court frequently states that each request for provisional measure shall be judged on a case-by-case basis, considering the circumstances or contexts of the case and of the applicant.⁷⁸ However, in practice, on several occasions, the Court has granted or denied requests for provisional measures without rigorous examination of the

75 *Soro and Others* (n 25), para 33, see also *Ajavon v Benin*, AfCHPR (Provisional Measures), (17 April 2020), para 61.

76 *Matter of the Penitentiary Complex of Curado regarding Brazil*, Provisional Measures, IACHR (22 May 2014), para 8, see also *Matters of Monagas Judicial Confinement Center ('La Pica'), Yare I and Yare II Capital Penitentiary Center (Yare Prison), Penitentiary Center of the Central Occidental Region (Úribana Prison), and El Rodeo I and El Rodeo II Capital Judicial Confinement Center*, Provisional Measures regarding Venezuela, IACHR (24 November 2009), *Considering clause 3 and Matter of two girls of the Taromenane indigenous peoples in voluntary isolation regarding Ecuador*, IACHR (31 March 2014).

77 See ECHR, *Interim Measures*, Fact sheet, August 2022, available at https://www.echr.coe.int/documents/fs_interim_measures_eng.pdf (accessed 21 August 2022).

78 *Ajavon v Benin* (002/2021) (29 March 2021) para 36; *Johnson* (n 31) para 15; *Chalula* (n 24) para 15; *Masudi Said Selemani v Tanzania*, 042/2019, Order of Provisional measure (20 November 2020) para 22.

standards of extreme gravity or urgency *vis-à-vis* the circumstances of the case including the particular situation of the applicant. In *Symon Vuwa Kaunda and 5 Others v Malawi*, for example, the Court nowhere in its decision referred to the requirement of urgency and simply rejected the Applicants' request for provisional measures to suspend a by-election only applying the requirements of urgency and irreparable harm.⁷⁹ On the other hand, the Court appears to have taken a definitive position that provisional measures should be indicated at all times with respect to cases involving the death penalty, regardless of demonstration of urgency and without consideration of other specific elements of each case. Suffice to mention a group of death penalty cases against Tanzania where the Court *suo motu* adopted provisional measures suspending the execution of applicants who were on death row after having been convicted of murder and sentenced to death.⁸⁰ In *Ally Rajabu and Others v Tanzania*, the Applicants were convicted and sentenced to the death penalty on 25 November 2011. The Court of Appeal of Tanzania confirmed their conviction and sentence on 25 March 2013. On 24 March 2015, the applicants filed their application before the Court challenging the decisions of domestic courts. A year later,⁸¹ that is, on 18 March 2016, the Court *suo motu* adopted a provisional measure suspending the execution of the death penalty imposed on the applicants.⁸² On the same day, in two other similar cases of *Armand Guehi v Tanzania* and *John Lazaro v Tanzania*, the Court *suo motu* indicated a provisional measure suspending the enforcement of the death penalty imposed on the applicants.

Strangely, in all the three cases, the Court neither referred to the requirement of urgency in its analysis nor did it attempt to establish from the facts that the possibility of the applicants' execution was imminent.⁸³ The Court exclusively relied on the nature of the punishment, that is, the death penalty, to satisfy itself that there existed a situation of extreme gravity and irreparable harm without taking into account, for instance, the *de facto* moratorium in place in the respondent state. Of course, it may be argued that a *de facto* moratorium does not minimise the risk of execution and thus, the criterion of urgency continues to exist as long as the death penalty remains imposed. However, considering the general trend towards abolishment of the death penalty, if there is a continuing *de facto* moratorium for some considerable time in a respondent state, this should be taken into account as a relevant factor in the assessment of urgency.⁸⁴

79 In *Symon Vuwa Kaunda and 5 others v Malawi*, O13/2021 11 June 2021, paras 21-30

80 *Rajabu* (n 24); *Lazaro* (n 24).

81 This was five years after the decision of the High Court and three years following the decision of the Court of Appeal.

82 *Rajabu* (n 24) paras 14-20.

83 As above; see also *Guéhi* (n 24), paras 15-22; *Rajabu*, paras 12-18. In *Johnson* case, the Court referred to the criterion of urgency but failed to demonstrate how it was met in this particular case. See *Johnson* (n 31), para 16.

84 See on this point the separate opinion Justice Blaise Tchikaya in *Rajabu and Others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, paras 17-20.

Accordingly, if the Court had complied with its Rules and meticulously applied the requirement of urgency, it would have considered the fact that the applicants were not executed years after their conviction and that the Applicants themselves did not indicate anything in their application showing that the respondent state was taking steps to execute them any time soon. In fact, if death penalty cases were to be presumed as having always fulfilled the requirement of urgency, the Court itself would not have waited a year or so from the date the request was made to order provisional measures.⁸⁵ The Court's complete disregard of the requirement of urgency in the said death penalty cases is thus not only incongruent with the Protocol and its Rules but also with the nature of provisional measures. Provisional measures are not designed to deal with every possible risk of harm but rather only those imminent risks that are likely to materialise prior to the Court's decision on the merits and thus, require prompt intervention. As the Court itself has correctly observed in *Houngue Eric Noudehouenou v Benin*,

Urgency (...) means a real and imminent risk that irreparable harm will be caused before it renders its final judgment. (...) the risk in question must be real, which excludes the purely hypothetical risk and justifies the need to repair it immediately.⁸⁶

The requirement of urgency therefore ensures that provisional measures are used exceptionally only where situations reveal that there is a credible and evident risk with high probability of occurrence within the foreseeable future, in any case, before the Court disposes the case on merits. Note that in its more recent cases, the Court has shown some shift in its treatment of urgency in relation to the death penalty. Although its reasoning remains flawed, it has at least begun to apply the criterion of urgency in death penalty cases. In *Bashiru Rashid Omar v Tanzania*, for instance, the Court acknowledged that 'the Respondent state has been implementing a general moratorium and has not carried out any death sentence since 1994' but it did 'not deem such commitment sufficient in the face of such a serious risk as the execution of the Applicant'.⁸⁷ The Court accordingly established that there was urgency given that 'As a matter of fact, despite the moratorium and the lack of execution in a long time, the Respondent state may at any time carry out the death penalty'.⁸⁸ One rather notable case is *Akouedenoudje v Benin*⁸⁹ where the Court for the first time rightly applied the criterion of urgency. In this case, the Court noted that:

The Applicant does not provide any evidence that he or any other specifically designated person is in a situation of urgency to which the provisions of the Inter-Ministerial Order must be applied. The Court further observes that the Applicant

85 In *Hussein case* (n 41), for instance, the applicant filed his request for provisional measures on 2 March 2018 but the court indicated provisional measures only almost a year later on 11 February 2019.

86 *Noudehouenou* (n 26), para 33

87 *Omar v Tanzania* (045/2020) (order of provisional measure) (21 February 2021), para 27

88 As above.

89 *Conoïde Togla Latondji Akouedenoudje v Benin* (024/2020) (25 September 2020), paras 23-24.

does not provide evidence as to the reality and the imminence of the irreparable damage he will suffer as a result of implementation of the Inter-Ministerial Order.

Certainly, this is a good development in the Court's jurisprudence⁹⁰ However, the Court's general analysis still overlooks the element of imminence, something which inherently epitomises urgency. In the *Bashir Omar* case, for example, the Court should have found some evidence indicating the imminent possible reverse of the *de facto* moratorium, which the respondent state has observed over seventeen (17) years, instead of relying on an unsubstantiated possibility that 'the Respondent state may at any time carry out the death penalty'.⁹¹

Be this as it may, it should be pointed out that the criterion of urgency naturally requires prioritisation of applications for provisional measures over all other matters. Unlike the Rules of Procedure of other Courts,⁹² the Rules of the Court do not explicitly provide a provision allowing or requiring the Court to give priority to requests for provisional measures.⁹³ Perhaps, for this reason, the Court has often taken longer time to adopt provisional measures than ordinarily expected.⁹⁴ As a result, either the requests for the provisional measure were overtaken by events⁹⁵ or that the Court indicated the measures too close to the expected date of materialisation of the expected harm.⁹⁶

90 See also *Mwita v Tanzania* (012/2019) (9 April 2020), para 21 (In this case, while applying the criterion of urgency, the Court appears to suggest that urgency is inherent in the death penalty. However, this is not accurate. What is rather inherent in the death penalty is the criterion of extreme gravity, certainly, not urgency).

91 In fact, once the death penalty is imposed, the possibility of execution is always there whether the moratorium is *de facto* or *de jure*, as in the former, the practice may be changed or in the latter case, the law may be amended. The relevant question that should thus be considered in determining urgency is whether there is anything showing the possibility of a change of course in the practice or in the law before the Court is likely to finalise the determination of the matter on the merits. This could be the case if the government is in the process of enforcing or amending the law to change the *de facto* or *de jure* moratorium, respectively.

92 For instance, Rule 74 of the Rules of Procedure of the International Court of Justice (1978) provides: 'a request for the indication of provisional measures shall have priority over all other cases'.

93 Rule 59(2) of the Rules only envisages the possibility where the President of the Court may solicit and obtain the views of other Judges in case of extreme urgency. However, the Court is empowered to prioritise those cases which are selected to be dealt with under the pilot-judgment procedure. See Rule 66(1)(b) of the Rules.

94 In *Hussein v Tanzania*, the applicant requested for provisional measures on 2 March, 2018, but indicated provisional measures on 11 February 2019, in *Kajoloweke* (n 31), the request was made on 18 October 2019, but the Court adopted provisional measures on 27 March 2020; in *Omar* case (n 89), the request was made on 21 November 2020 but adoption was on 26 Feb 2021 and in *Mwita* (n 92), the request was made on 29 October 2019 but the provisional measure was indicated on 9 April 2020. See on this point, Separate Concurring Opinion Fatasha Ougergouz (n 28), para 5.

95 See *Koutché* (n 34) para 24; *Nyamwasa and Others v Rwanda* (interim measures) (2017) 2 AfCLR 1, paras 34-36

96 In *Ajavon v Benin* (062/2019), the Court received, on 9 January 2020, the specific request for provisional measures in respect of the elections to be held on 17 May 2020. The Court issued the order suspending the elections on 17 April 2020, 30 days before the scheduled election date, that is, 20 May 2020. paras 7-11. See also *Adjolohoun* (n 67) 23.

Astonishingly, in *Komi Koutché v Benin*,⁹⁷ the Court even declined to pronounce itself on a request for provisional measures to suspend elections declaring that ‘the Application having been filed a week before the elections, it was materially unable to decide on such a request at such a short period of time’. The Court’s position in this case becomes questionable when one looks at the jurisprudence of other regional and international human rights bodies. For example, the HRC adopted provisional measures within a day⁹⁸ or even on the same day of the request.⁹⁹ In *Shamayev and Others v Georgia*,¹⁰⁰ the European Court indicated a provisional measure prohibiting the extradition of the applicants within two hours from the time the request was made and considering the urgency, its order was communicated to the authorities of the respondent by phone. In view of this, a period of 10 days was sufficient for the Court to make its ruling on the request for provisional measures provided that all necessary conditions were met.

4.2.2 The requirement of necessity

Article 27(2) of the Protocol stipulates that the Court shall ‘...where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary...’.¹⁰¹ In this provision, the term ‘necessary’ is mentioned twice and on the first glance, the second ‘necessary’ appears to be tautologous. However, a careful reading of the provision reveals that the repetition is clearly intentional, to achieve two different purposes. The former entails that the Court must determine whether there is a situation that dictates the adoption of provisional measures in order to prevent irreparable harm, whereas the latter seems to relate to the nature of the provisional measures that the Court adopts. In this regard, the second ‘necessary’, appears to give the discretion to choose among a range of possible provisional measures that is/are best suitable to the circumstances of the case. Regardless of this distinction, what looks so evident in the provision is the weight that the drafters attached to the requirement of necessity in the regime of provisional measures.

Unfortunately, in none of its orders has, thus far, the Court thoroughly expounded or applied necessity as an independent condition for adopting provisional measures. In international law, necessity may denote several things, depending on the context in which it is used.¹⁰² In the *Nicaragua* case, the ICJ, for example, noted that the term ‘necessary’ in Article XXIV of the Treaty of Friendship, Commerce

97 *Koutché* (n 34) para 24.

98 See *Michael Robinson v Jamaica* HRC (29 March 2000), initial submission of 9 December 1996, Rule 86/91 of 10 December 1996)

99 See *Mansaraj et al; Gborie et al and Sesay et al v Sierra Leone* HRC (16 July 2001), Initial submission of 12 and 13 October 1998)

100 E Rieter *Preventing irreparable harm: provisional measures in international human rights adjudication* (2010), 173; see also M Gavouneli ‘*Shamayev & 12 Others v Georgia & Russia*. App. 36378/02’ (2006) 100 *The American Journal of International Law* 675.

101 See also Rule 59(1) of the Rules (emphasis added).

and Navigation¹⁰³, does not mean merely ‘useful’ or ‘essential’.¹⁰⁴ Likewise, the European Court has observed that necessity as a condition to restrict human rights is ‘not synonymous with ‘indispensable’ neither has it the flexibility of such expressions as ‘admissible,’ ‘ordinary,’ ‘useful,’ ‘reasonable’ or ‘desirable.’¹⁰⁵ Furthermore, both the European Court and the Inter-American Court have stressed that proportionality is ‘implicit in the standard of necessity’¹⁰⁶ and therefore, the assessment of necessity involves a balancing exercise, the choice of the most relevant or appropriate and the least intrusive (minimal impairing) measure.¹⁰⁷

A logical interpretation of article 27 of the Protocol accordingly requires the Court to ascertain, prior to adopting provisional measures, whether the circumstances absolutely command their adoption. It must also make sure that the provisional measures indicated must also be materially able to prevent the irreversible harm. It becomes meaningless to adopt provisional measures not capable of preventing the harm or with respect to non-preventable harm. The standard of necessity enshrined in article 27 also requires the Court to undertake a sort of cost-benefit assessment¹⁰⁸ and should adopt provisional measures only if the benefit of such measures in preventing the irreversible harm outweighs the cost of enforcing such measures. For example, in *Ajavon v Benin*, the Court would have unlikely ordered suspension of local elections just a month before they were to be conducted if it properly had assessed the cost that the respondent state would have sustained as a result of complying with such measures *vis-à-vis* the harm that the applicant would incur as a result of his inability to participate in the election.¹⁰⁹ The Court would further have considered the appropriateness of the suspension and how likely was it able to prevent the purported irreparable harm.

102 In the regime of state responsibility, e.g., necessity implies an emergency situation obliging a state to engage in conduct that breaches its international obligations and it can raise it as a defence to preclude its international responsibility. Article 25, articles on state responsibility (International Law Commission, 2001).

103 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ (26 November 1984) (1984), paras 224 and 282.

104 As above, paras 224 and 282.

105 As above.

106 *Compulsory Membership Advisory Opinion*, IACHR, No. 5 OC-5/85 (1985), para 46, *The Sunday Times v United Kingdom* ECHR (1979), para 59; *Barthold v Germany* ECHR (1985), para 59.

107 *Advisory Opinion* (n 109), para 47. See also *Information severien Lentia and Others v Austria*, ECHR (24 November 1993), para 39, *Sigurdur A. Sigurjonsson v Iceland* ECHR (1993), para 41, *Amnesty International and Others v Sudan* AHRLR 30 (2000), para 80, *Christians against Racism and Fascism v the United Kingdom*, Commission decision of 16 July 1980, and *van Mechelen and Others v The Netherlands*, ECHR (23 April 1997) para 58.

108 In domestic systems, in relation to requests for injunctions, this exercise is done in accordance with the *principle of balance of convenience*, in which the likely injury or damage which would be sustained by one party if the injunction were not granted is weighed against the likely inconvenience or cost for the defendant if it was.

109 See *Ajavon* (n 77) para 69.

Finally, it should be borne in mind that, in establishing necessity, the Court does not have unfettered discretion. There is an element of objectivity in the requirement of necessity. For example, in the normal course of things, it is not necessary to order the release of an inmate, who is convicted of serious crime and sentenced to death while the suspension of execution of the sentence would suffice to avoid the irreparable harm to his life. Accordingly, the Court should exercise its discretion within the limits placed upon it by necessity, including the test of reasonableness.¹¹⁰

4.2.3 Irreparable harm to the person

The most problematic area of the Court's jurisprudence on provisional measures relates to the requirement of 'irreparable harm'. Article 27(2) of the Protocol provides that the Court shall exercise its power to indicate provisional measures if it is necessary to avoid 'irreparable harm to persons'. Three important elements are lumped together in this quoted expression: first, there must be 'harm', second, the harm must be of irreparable nature and thirdly, the harm must be directed against *persons*, a narrow and purposive interpretation of which suggests that the harm in principle should directly or indirectly affect 'natural' persons, who are generally the primary victims of 'irreparable' harm.¹¹¹ This excludes a harm affecting 'goods or legal interests that can be repairable'.¹¹²

The Court has rarely interpreted and applied these elements systematically and in a coherent manner. In fact, the Court's case law shows that there is glaring irregularity and lack of conceptual precision in its assessment of the standard of 'irreparable harm to persons' and its elements. In *Ajavon v Benin* (027/2019) and other cases,¹¹³ the Court observed, for example, that '[w]ith respect to irreparable harm, the Court considers that there must be a 'reasonable probability of occurrence' having regard to the context and the Applicant's personal situation'.¹¹⁴ On the other hand, in *Charles Kajoloweka v Malawi*, the Court remarked that:

With respect to irreparable harm, the Court recalls that it is established in instances where the impugned acts are capable of seriously compromising

110 According to the IACHR, reasonableness is 'a value judgment and, when applied to a law, it implies conformity to the principles of common sense.' *Paniagua Morales and Others* case, IACHR (25 January 1996), paras 40-41.

111 It should however be noted that some forms of harm, such as destruction of property or attacks directed against the reputation of business may have an irreversible impact on even legal persons. Furthermore, individuals may also be the ultimate victim of measures directed against companies. In the case of *Ajavon*, e.g., the applicant was a shareholder of the companies, which were a subject of tax adjustment proceedings in domestic courts. However, even in this case, the Court ordered provisional measures with respect to seizures of the property of the Applicant and his family, and not of the companies. *Ajavon* (n 80), paras 41-48.

112 See *Matter of the Penitentiary Complex of Curado regarding Brazil*, IACHR (22 May 2014), para 8.

113 *Houngue Eric Noudehouenou v Benin* (024/2020) Order (Provisional Measures), para 31; *Conaïde Togia Latondji Akouedenoudje*, (024/2020) (25 September 2020), para 22.

the rights whose violation is alleged in a way that prejudice would be caused prior to the Court making a determination on the merits of the matter.¹¹⁵

It is evident that in *Ajavon*, the Court focused more on the ‘probability of occurrence’ of the harm¹¹⁶ whereas in *Kajoloweka*, it emphasised, rightly so, on the nature of the harm itself, that is, whether it was capable of seriously prejudicing the rights alleged to have been violated. Apart from such absence of conceptual precision, the Court has also been generously adopting provisional measures in some cases without conducting a rigorous examination of the irreparable nature of the harm. All the same, in almost other identical cases, it has refused to grant requests for provisional measures strictly applying the same condition. Two comparable cases can be cited here in this regard.

First, in *Soro and Others v Côte d’Ivoire* (012/20), the Court indicated provisional measures suspending the arrest and detention warrants of the applicants on the basis that implementation of the warrants would prevent them from participating in planned presidential elections in which one of them had already indicated to stand as a candidate.¹¹⁷ According to the Court, the arrest and detention warrants issued against the applicants would engender risk of irreparable harm to the applicants, including, denying them the opportunity to participate in the said elections. In contrast, in a very similar case of *Komi Koutché v Benin*, the Court declined to grant the applicant’s request to suspend legislative elections stating, among others, that his claims were connected with the merits of the case and that it was not anyway, able to deal with the request as it had been filed a week before the elections.¹¹⁸ This was despite the fact that, as was the case in *Soro and Others*, an arrest warrant was issued against the applicants. While the two cases were obviously not identical and have their own peculiarities, the Court’s appreciation of very similar risks of harm is discernibly different, to the extent that it could be viewed as applying double standard to similar situations.

Second, in the *Legal and Human Rights Centre and Tanganyika Law Society v Tanzania*,¹¹⁹ the applicants sought to obtain a provisional measure to stay parliamentary and presidential elections alleging that the respondent state failed to allow independent candidacy, as was ordered to do so by the Court earlier.¹²⁰ The applicants also cited the shrinking political space ahead of the elections,

114 *Ajavon v Benin*, (027/2017) (1 April 2021), para 29, see also *Ajavon* (n 77), para 61; *Noudehouenou* (n 26), para 33; *African Commission on Human and Peoples’ Rights v Kenya* (provisional measures) (2013) 1 AfCLR 193, para 23; *Chrizant John v Tanzania* (2016) 1 AfCLR 702, para 16; *Gabriel and Mutakyawa v Tanzania* (2016) 1 AfCLR 705, paras 15-18; *Nzigiyimana Zabron v Tanzania* (2016) 1 AfCLR 708, paras 14-17.

115 *Kajoloweka* (n 30) para 23.

116 As discussed earlier, the ‘probability of occurrence’ is more related to the criterion of urgency than to the requirement that there must be an irreparable harm.

117 *Soro and Others* (n 24) paras 34-40.

118 *Koutché* (n 34) paras 24-26.

119 *Legal and Human Rights Centre and Tanganyika Law Society v Tanzania* (036/2020) (30 October 2020).

because of the government's ban on political activities such as political rallies and gatherings, arrests and harassment of opposition politicians and journalists and adoption of laws and policies that restrict media freedoms and free speech.¹²¹ They submitted that in the absence of corrective actions and compliance with the Court's order, 'it will be difficult, if not impossible, to have a fair, just and credible electoral process' and consequently, conducting elections in this context would be grave and irreparable to them and the whole of the Tanzanian population.¹²² The Court nevertheless refused to grant the request of the applicants. The Court stated, *inter alia*, that 'the Applicants have not demonstrated that they and Tanzanian citizens would be prevented from participating in the electoral process or that such a process would cause irreparable harm to them or in the exercise of their rights'.¹²³ Unfortunately, the Court did not consider the government's alleged actions such as arrests, promulgation of restrictive laws and arrests and harassment of opposition that the applicants cited to prove the existence of risk of irreparable harm.

One could also ask whether the aspect of 'irreparability' of the harm ever exists in relation to elections and those property-related cases, which do not directly affect the life of applicants.¹²⁴ Although it may be difficult to do so at international level, the recent jurisprudence of domestic courts show that elections, even those at the highest level, can be annulled or reversed.¹²⁵ In other words, strictly speaking, there is nothing inherently irreparable or irreversible when it comes to elections. The same applies to property interests except those which may, for instance, have sentimental value to the applicants and where a case involves a risk of serious and irreparable harm to the applicant's basic rights relating to their life or bodily integrity or human dignity.¹²⁶

120 Consolidated Application *Tanganyika Law Society and the Legal and Human Rights Centre & Reverend Christopher Mtikila v Tanzania*, 009/2011 and 011/2011 (14 June 2013).

121 *Legal and Human Rights Centre* (n 122) para 8.

122 As above, para 19.

123 As above, para 28.

124 It is not, however, unusual for international human rights bodies to indicate provisional measures in contexts of elections, particularly where criminal proceedings are instituted against individuals with apparent intention to bar or disqualify them from participating in election. For example, in *Luis Inazio da Silva's v Brazil*, the UN Human Rights Committee issued provisional measures on 17 August 2018, requesting Brazil 'not to prevent [the petitioner] from standing for election at the 2018 presidential elections, until the pending applications for review of his conviction have been completed in fair judicial proceedings and the conviction has become final'.

125 In 2017 and 2020, for instance, the Kenyan and Malawian Supreme Courts respectively annulled Presidential elections citing irregularities in the election process. Kenya Supreme Court nullifies presidential election, orders new vote, *Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others*, Kenya Supreme Court Judgment (20 September 2017); *Mutharika & Another v Chilima & Another* MSCA Constitutional Appeal 1 of 2020 (2020) MWSC 1 (8 May 2020).

126 It does not seem to be justified to indicate provisional measures with respect to property interests simply because, in the absence of the measures, its recovery or reinstatement becomes difficult or cumbersome.

However, the Court has adopted provisional measures in connection to property interests, for example, to prevent seizure or confiscation of the property of an applicant, albeit without sufficiently explaining how such seizure or confiscation threatens the fundamental rights of the applicant with *irreversible* effect.¹²⁷

In this vein, it is instructive to refer to the practice of the European Court. The latter indicates interim measures only in limited situations, and mostly, when there is a threat to ‘core rights’ such as the right to life or to prohibition against torture and inhuman or degrading treatment.¹²⁸ It has refused to adopt provisional measures in several instances involving an attempt to force a government to organise a referendum,¹²⁹ to prevent the imminent demolition of property,¹³⁰ to prevent the dissolution of a political party;¹³¹ and to suspend constitutional amendments to change the term of office of judges.¹³² In most of these cases, the ECHR rejected the requests for interim measures stressing that each case ‘did not involve a risk of serious and irreparable harm of a core right under the European Convention on Human Rights’¹³³ Accordingly, in comparison to the African Court, the

- 127 See *Woyome* (n 25) para 25; *Kedieh* (n 26) para 45; *Ajavon* (n 117) paras 35; *Sandwidi and Others* (n 62) paras 77-78, the Court refused to grant provisional measures for lack of evidence of irreparable harm despite the fact the applicants were laid off from their position and they claimed to be in a destitute situation which declared that there was no proof. Note that in *Woyome*, *Ajavon* and *Kedieh* cases, the Court simply established the existence of irreparable harm from decisions of municipal courts allowing the seizure and execution, without seeking proof of the ‘irreparable’ harm that would be occasioned to the applicants’ right to life or dignity as a result of the execution of the said decisions.
- 128 For purpose of indicating interim measures, it identifies, mainly, the right to life and the right to prohibition against torture and ill-treatment and exceptionally, the right to a fair trial (often relating to lifting judicial immunity of judges), the right to respect for private and family life, and freedom of expression as ‘core rights’. Very exceptionally, the Court may indicate such measures in response to certain requests concerning the right to a fair trial (art 6 of the Convention), the right to respect for private and family life (Article 8 of the Convention) 8 and freedom of expression (art 10 of the Convention). See, eg, *ANO RID Novaya Gazeta and Others v Russia* ECHR (10 March 2022), <https://hudoc.echr.coe.int/eng-press?i=003-7282927-9922567> (accessed 29 July 2022).
- 129 See concerning the inappropriate use of interim measures procedure with regard to requests for provisional measures against the French Government, press release of 21 December 2007, <https://hudoc.echr.coe.int/eng-press#%22itemid%22:%22003-2226998-2371975%22> (accessed 29 July 2020)
- 130 *Upravlinnya Krymskoyi Yeparkhiyi Ukrayinskoyi Pravoslavnoyi Tserkvy (Crimean branch of the Ukrainian Orthodox Church of the Kyiv Patriarchate) v Russia*, ECHR (1 September 2020) <https://hudoc.echr.coe.int/eng?i=003-677466-9056249> (accessed 4 August 2022).
- 131 In the case of *Sezer v Turkey*, the Court declined to adopt an interim measure to prevent the Turkish Constitutional Court from dissolving the AKP (Adalet ve Kalkınma Partisi – Justice and Development Party). See press release of 28 July 2008. Unfortunately, the Court did not, at least not publicly, provide reasons for denying the request. <https://hudoc.echr.coe.int/eng-press#%22itemid%22:%22003-2445826-2632882%22>
- 132 *Gyulumyan and Others v Armenia* press release of 8 July 2020, <https://hudoc.echr.coe.int/eng-press#%22itemid%22:%22003-6744576-8998072%22> (accessed 16 August 2022).
- 133 As above.

ECHR appears to have a clearer and stricter normative standard in its regime of interim measures.

In any event, it should be stressed that article 27 of the Protocol permits adoption of provisional measures where there is an actual/real danger or harm, even though it has not yet materialised. This excludes 'purely hypothetical risk' which does not justify the need to redress it immediately.¹³⁴ Interestingly, the Court seems to also require that individuals may not request for provisional measures on behalf of other persons. In *XYZ v Benin*, the Court rejected the application for provisional measures for, among others, 'the Applicant is asking the Court to order provisional measures in favour of persons who are not parties to the present case, [and]...failed to provide evidence of the urgency or gravity or irreparable harm that the implementation of the Decree could cause him *personally*.'¹³⁵ Needless to say, this does not preclude applicants from requesting provisional measures through legal representatives of their own choice.¹³⁶

4.2.4 Preventive and provisional nature

The other criterion in the regime of provisional measures is that the measures shall be provisional. This arises from the very temporary and preventive nature of such measures. As they are adopted in response to an imminent danger, the provisional character of the measures is essentially intertwined with the requirement of urgency. It is inherent in the preventive nature of provisional measures that they cannot be adopted if they potentially or prematurely dispose of a case or an issue in a case. Due to the ancillary nature of the authority to indicate provisional measures, the final judgement in a case shall therefore not be rendered inoperative or practically unenforceable by the provisional measures. Although provisional measures may in some cases lay the basis for the final resolution of a case, parties cannot use them in order to obtain some sort of interim judgment.

In its case law, the African Court has consistently underscored the provisional and preventive nature of the measures.¹³⁷ The Court has

134 *Noudehouenou* (n 26), para33. In this case, the Court rejected the applicant's request holding that 'the requested provisional measure is based on *potential* violation of rights protected by the Charter, ICCPR and UDHR', which in other words means that the danger was not real or concrete. See also *Conoïde Togla Latondji Akouedenoudje v Benin* (024/2020) Order (provisional measure), (25 September 2020), para 21.

135 *XYZ*, as above, para 23 (emphasis added).

136 Indeed, several requests for provisional measures filed before the Court have been made through legal representatives. See eg, *Babarou Bocoum v Mali* (023/2020) (23 October 2020) and *Woyome case* (n 25).

137 See for example, *Yayi* (n 51) para 29; *Noudehouenou* (n 116) para 33. In *XYZ v Benin*, Justice Ben Achour also stated that 'By definition, the measure ordered by the Court is simply provisional. This means that not only is it not final, but that it is also reviewable or even revocable at any time if, having regard to the circumstances of the case, the Court deems such action necessary. This derives from the very nature of orders for provisional measures and the Court's discretionary power to make a determination' *XYZ* (n 39), Dissenting opinion of Judge Ben Achour para 20.

also emphasised that provisional measures ‘will not in any way prejudice the findings it might make on its jurisdiction, the admissibility of the application and the merits of the case’.¹³⁸ The Court has often refused to indicate provisional measures with respect to claims that it deemed have the effect of pre-empting or prejudging the Court’s latter and final determination of the case.¹³⁹ In *Konaté*, for example, the applicant, a journalist, was convicted of defamation and sentenced to a one-year term of imprisonment and the payment of fine as damages. In his application, he challenged his sentence of imprisonment as a violation of his right to freedom of expression and prayed the Court to order his immediate release pending the determination of his application on merits. The Court denied the prayer noting that the issues in the prayer ‘correspond in substance’, to one of the reliefs sought in the merits and granting the request ‘would adversely affect consideration of the substantive case’.¹⁴⁰

The preventive nature of provisional measures has the additional effect that they cannot be adopted if they serve no purpose in averting a prospective harm. As soon as the danger disappears,¹⁴¹ the necessity to adopt a particular provisional measure also ceases to exist and if already adopted, it has to be lifted or modified, as necessary.¹⁴² Various factors of legal or factual nature may remove the state of danger. In *Nyamwasa and Others*, for instance, the applicants requested the

138 *Nhabi v Tanzania* (provisional measures) (2019) 3 AfCLR 10 para 19; *Chalula* (n 24), para 19; *Koutché* (n 34) para 33; *XYZ v Benin* (2019) (provisional measures) 3 AfCLR 745 para 24; *XYZ* (n 73) para 22

139 The Court has held that ‘a request for provisional measures prejudices the merits of an Application where the subject of the measures sought in the request is similar to the subject of the measure sought in the Application, where its purpose is to achieve the same result or, in any event, where it touches on an issue which the Court will necessarily have to adjudicate upon when examining the merits of the Application’. See *Ndajigimana* (n 27) para 25, *Glory Cyriaque Hossou and Another v Benin*, 016/2020, Order (25 September 2020), para 28. *Sandwidi and Others* (n 62) para 65; *Romarc Jesukpego Zinsou v Benin* 006/2021 (10 September 2021) para 26; In *XYZ v Benin*, the applicant requested for suspension of the work of Orientation and Supervisory Council (COS), an electoral institution, which the applicant alleged to have a composition making it an impartial body to organise free and fair elections. The Court stated that the request would touch upon the merits of the case. The Court refusing to grant the request observed that ‘the application for provisional measures to suspend the functioning of the administrative structure, the COS in question *also touches on the question of the merits* on which the Court is called upon to rule in due course’ (emphasis added).

140 *Konaté* (n 28) para 19, see also *Romarc Jesukpego Zinsou v Benin*, 6/2021 (10 September 2021) para 27 (relating to discrimination between nationals and non-nationals); *Romarc Jesukpego Zinsou & 2 others v Benin*, 7/2021 (2 September 2021), paras 22-23 (relating to the death of a student and alleged failure of the respondent state to take steps to prosecute and hold accountable the perpetrators of the crime).

141 Rule 94(3) of the Rules of Procedure of the UN ICCPR Human Rights Committee explicitly provides that ‘the Committee will examine any arguments presented by the state concerned on the request to take interim measures, including *reasons that would justify the lifting of the measures*’ (emphasis added). Unfortunately, a similar provision is not found in the Rules of Procedure of the African Court. Nevertheless, provisional measures as enshrined in the protocol and the rules of the Court are inextricably interlinked with the presence of persisting danger and there is no reason why the Court would not rescind if the danger no longer continues to exist.

Court to issue an order for provisional measure to suspend a planned referendum on a proposed amendment to a provision in the Constitution of Rwanda governing the term of Office of the President. The referendum was scheduled for 17 December 2015. Considering the urgency of the matter, the Court decided to hold a public hearing on the request on 25 November 2015. However, citing some logistical difficulties, the applicants claimed that they were unable to travel to the seat of the Court on the said date and implored the Court to defer the public hearing, which the Court did on 20 November 2015.¹⁴³ In the meantime, the referendum took place as it had been planned and by the time the Court dealt with the applicants' request for provisional measures, the request was moot. As a result, stressing the preventive nature of the measures and that the request was overtaken by events, the Court declared that it was unable to grant the request.¹⁴⁴ Similarly, in *Adama Diarra v Mali*, the Court declined to grant a request for provisional measures after the applicant was released and the request became moot.¹⁴⁵ Overall, the Court's understanding and application of the provisional character and preventive nature of provisional measures are proper and consistent with the lone exception that it often overlooks revoking provisional measures after dismissing an application for lack of jurisdiction or inadmissibility.¹⁴⁶ Provisional

- 142 This is also a common practice in other courts. For example, the European Court of Human Rights, in *A.S.B. v The Netherlands* decided to discontinue its consideration of interim measures after the applicant was given refugee status in the Netherlands and the risk of his expulsion to Jamaica was no longer there. *ASB v The Netherlands* (no. 4854/12), decision of 10 July 2012. In *A.E. v Finland*, the Court lifted the interim measures it had indicated in accordance with Rule 39 of its Rules, after confirming that the expulsion order issued against the applicant was rescinded by the respondent state. *A.E. v Finland* (no. 30953/11), decision of 22 September 2015 decision of 22 September 2015, para 30. See also *Abraham Lunguli v Sweden* (no. 33692/00) 1 July 2003. Interestingly, in *Sow v Belgium*, the Court maintained the interim measure that it had imposed until its judgment became final, that is, till the three-month period of appeal to the Grand Chamber lapsed. This was despite the fact that it found no violation. *Sow v Belgium*, (no. 27081/13), judgment of 19 January 2016, para 84.
- 143 Strangely, on 20 December 2015, the applicants' representative objected to the deferral of the public hearing despite the fact that the deferral was initially requested by the applicants themselves. Apparently, the representative's objection appears to be against the Court's decision to defer the hearing for an indefinite period of time. In hindsight, one might indeed contend that the Court should either have ruled on the request for provisional measures without holding a public hearing, as public hearing is not a condition *sine qua non* to provisional measures, or at least, defer the hearing to another date before day on which the referendum was scheduled to be held, that is, 17 December 2015. Note that in the first *ACHPR case* (2011), the Court decided to adopt an order for provisional measures 'without written pleadings or oral hearings (provisional measures)', *ACHPR case* (2011) (n 23), para 13.
- 144 *Nyamwasa and Others v Rwanda* (interim measures) (2017) 2 AfCLR 1, paras 34-36.
- 145 In *Koutché* (n 34) the Court also held that it would not grant the applicant's request for provisional measures allowing him to participate in elections, considering that his request 'has been overtaken by events as these elections have already taken place' *Koutché* (n 34), para 24; Application 047/2020, *Adama Diarra v Mali* Order (Provisional measures), 29 March 2021, para 24. See also *Ndajigimana* (n 27), paras 24-27; *XYZ* (n 73), para 27; *Yayi* (n 51), para 27; *Bocoum* (n 14), para 23.

measures generally remain in force for the duration of the proceedings or for a shorter period. If a case is disposed of for any reason and at any stage, they lose meaning and purpose and thus, should be lifted. Accordingly, the Court should explicitly revoke provisional measures, if any, when it decides to dismiss an application for any reason and at any stage of the proceedings.

5 BURDEN OF PROOF

The other issue that arises in relation to provisional measures is the question of burden of proof. Both the Protocol and the Rules of the Court do not contain provisions regulating the burden or standard of proof applicable to the regime of provisional measures.¹⁴⁷ However, where the request for provisional measure comes from a party, the Internal Judicial Directions of the Court require that the request must state the reasons, specifying in detail the extreme gravity and urgency, and the irreparable harm likely to be caused as well as the relief sought.¹⁴⁸ The request must also be accompanied by all necessary supporting documents, including, if any, relevant domestic court or other decisions.¹⁴⁹ According to the Practice Directions, it is therefore incumbent upon the requesting party to provide information for the Court to satisfy itself that the preliminary and substantive conditions are met.¹⁵⁰ In line with this, in its caselaw, the Court generally applies the traditional legal maxim that ‘he who alleges a fact shall prove it’.¹⁵¹ It often requires the party making a request for provisional measures to provide evidence of existence of extreme gravity, urgency and irreparable harm.¹⁵² Usually, the Court declines to grant the request if it is not supplied with enough information or evidence to establish, particularly, the existence of a situation of extreme gravity or urgency

146 For instance, in *Johnson case*, in its Ruling on Jurisdiction and Admissibility, the Court did not rescind its order for provisional measure despite the fact that the application was declared inadmissible. *Johnson* (n 64), para 62.

147 Rule 40(1) of the Rules simply prescribes that a party intending to commence proceedings shall file ‘Application containing a summary of the facts and of the evidence intended to be adduced’ (emphasis added).

148 *Practice Direction* no. 49, as above.

149 *Practice Direction* no. 51, as above.

150 Further, where the request relates to a case already pending before the Court, it shall bear the case number Direction nos. 50 and 51, *Practice Directions* (adopted at the Fifth Extraordinary Session of the Court held from 1 to 5 October, 2012).

151 In several cases, the Court observed that the applicant requesting for provisional measures shall ‘bear the onus of proving that [the] request meets the requirements of both urgency and risk of irreparable harm’. See *Symon Vuwa Kaunda and 5 others v Malawi* (013/2021) (11 June 2021), para 21; *Legal and Human Rights Centre and Tanganyika Law Society* (n 122), paras 27-28.

152 In the case of *Noudehouenou*, the Court took note of the applicant’s allegation that he was suffering from serious health problems requiring urgent treatment but denied the request for provisional measures since the applicant did provide ‘any evidence of his poor health other than mere assertions’ and therefore he did not ‘sufficiently demonstrated the urgency and irreparable harm he faces, as required by Article 27 of the Protocol’. *Noudehouenou* (n 26), paras 22, 38; see also *XYZ v Benin* (057/2019), (2 December 2019), para 25.

and the risk of irreparable harm.¹⁵³ A cursory look at the jurisprudence of the Court clearly shows that it is not sufficient for the Court to make serious allegations in order for the Court to adopt provisional measures. What rather matters most is not the seriousness of the allegations made but the evidence that a party adduces. Accordingly, the Court repeatedly affirmed that a mere allegation of illegality or risk of violation of human rights, however extreme and grave it might be, is insufficient.¹⁵⁴

While generally it behoves the applicants to provide evidence substantiating their request for provisional measures, in some cases, the Court has shifted the burden of proof from the applicant to the respondent state.¹⁵⁵ In the death penalty cases in which the Court often indicates *suo motu* provisional measures, the Court has not even bothered itself to ask for evidence of any sort. It satisfied itself of the existence of urgency and irreparable harm by invoking the serious nature of the death penalty.¹⁵⁶ As was discussed earlier, this is because of the Court's erroneous assumption that all death penalty cases involve urgency, which is not necessarily true.¹⁵⁷ However, whether the Court considers adopting provisional measures on its own initiative or upon a request by a party, the existence of urgency, as that of extreme gravity and irreparable harm, should be sufficiently proved, including in the death penalty cases. In short, if the request for the measures comes from a party, regardless of the kind of harm (be it the death penalty, *incommunicado* detention, torture, among others), that party should in principle shoulder the burden of proof. On the other hand, if the Court seeks to do it on its own volition, it should make its decision on the basis of sufficient evidence by obtaining information from the applicant or other sources or inferring from the circumstances of the case.

Finally, it should be pointed out that there are situations where applicants may be unable to provide any evidence due to their peculiar circumstances. In such situations, it might be improper to apply the stringent principle that the applicants should prove their case. For example, in *Houngue Eric Noudehouenou v Benin*, the applicant

153 In *Noudehouenou* case, the Court took note of the applicant's allegation that he was suffering from serious health problems requiring urgent treatment but denied the request for provisional measures since the applicant did not provide 'any evidence of his poor health other than mere assertions' and therefore, he did not 'sufficiently demonstrated the urgency and irreparable harm he faces, as required by Article 27 of the Protocol'. *Noudehouenou* (n 26), paras 22, 38; see also *XYZ* as above, para 25. Note that the Court has not specified the means or type of information or evidence that the requesting party should produce. However, Direction 52 makes it clear that 'The Court will not consider requests for interim measures that are incomplete, or do not include sufficient information necessary to enable it make a decision', *Practice Directions* (2012).

154 In *Yayi* case (n 51), the Court also refused to indicate provisional measures requiring the release of detained demonstrators claimed to have been arbitrarily arrested by the respondent state, for lack of evidence to justify the existence of a situation of extreme gravity.

155 See *Noudehouenou* (n 26), para 58 (in relation to the applicant's request for expert report).

156 See above (n 84, 85, 87).

157 As above.

claimed that he was suffering from a serious health issue requiring urgent treatment.¹⁵⁸ Oddly, the Court refused to indicate provisional measures stating that the applicant did not provide ‘any evidence of his poor health other than mere assertions’. This was notwithstanding the fact that the respondent state had failed to comply with the Court’s earlier order of provisional measure requiring it to stay the arrest warrant issued against the applicant and as a result, he was in hiding to avoid arrest.¹⁵⁹ The applicant’s particular situation clearly revealed the difficulty that he encountered to adduce evidence and warranted a more lenient approach from the Court.

6 LEGAL EFFECTS OF PROVISIONAL MEASURES

In view of the fact that the adoption of provisional measures is incidental to a tribunal’s competence to rule on a matter, it is intuitive to think that there should not be anything controversial as far as the legal effects of provisional measures are concerned. Nevertheless, the legal consequence of the measures, particularly, their binding nature has been contested ever since international courts started to make recourse to such measures.¹⁶⁰ This is reflected in the common disregard shown by states to orders of provisional measures and the international tribunals’ long reluctance to firmly pronounce themselves on the issue. In cases that appeared before the ICJ, for example, the Court had remained undecided on the issue for over 50 years until it, for the first time, explicitly determined the binding nature of provisional measures in 2001 in the *LaGrand (Germany v US)* case.¹⁶¹ The international human rights bodies also similarly took a clear stance on the matter only very recently. The UN Committee Against Torture was the first body, which held in 1998 that interim measures generate international obligations and state parties have an obligation to comply with them in good faith.¹⁶² Subsequently, the Human Rights Committee¹⁶³ and the Inter-American Court in 2000¹⁶⁴ and the European Court in 2005, affirmed that their respective orders of provisional measures were mandatory.¹⁶⁵ Despite states’ frequent defiance, currently, there is thus a growing jurisprudential consensus

158 *Noudehouenou* (n 26) paras 38-39.

159 As above, para 38.

160 See E Hambro ‘The binding character of the provisional measures of protection indicated by the International Court of Justice’ (1956) 152-171, BH Oxman *Jurisdiction and the power to indicate provisional measures: the International Court of Justice at a crossroads* (1987) 323-354.

161 In response to the alleged violation by the United States of the Court’s Order of provisional measure of 3 March 1999, the Court for the first time held that the ‘Order was not a mere exhortation. It had been adopted pursuant to Article 41 of the Statute. This Order was consequently binding in character and created a legal obligation for the United States’. *LaGrand case (Germany v US)*, ICJ (27 June 2001) (2001), para 110.

162 *Cecilia Rosana Nunez Chipana v Venezuela*, Communication 110/1998 (16 December 1998), para 13.

that provisional measures have a compulsory legal effect on parties. The failure to comply with provisional measures may consequently be equated to 'contempt of court' and engage a state's international responsibility.¹⁶⁶

When we look at the Court's case law, it is more or less aligned with the prevailing position of other judicial and quasi-judicial bodies. The very fact that the Court's power to adopt provisional measures is categorically enshrined in the Protocol implies that its power has a conventional basis. State parties have therefore ratified the Protocol knowing that the Court has such power and that they cannot refuse to comply with its orders of provisional measures. Notwithstanding this, some respondent states have nevertheless challenged the binding nature of the Court's order of provisional measures, openly and others, obliquely by refusing to comply with the order.¹⁶⁷ However, the Court's response has been unequivocally clear, that is, respondent states must comply with the provisional measures and failure to do so constitutes a breach of their international obligation.¹⁶⁸ Accordingly, every time it adopts provisional measures, the Court requires respondent states to report back on the necessary measures that they (should) take to comply with its orders.¹⁶⁹ Where there is non-compliance, the Court reminds the concerned state to comply with its orders, and as part of its Annual Report, notifies the AU Assembly of Heads of state and Government of the nature of the provisional measures it adopted and the lack of compliance.¹⁷⁰ Unfortunately, very rarely has the Executive

- 163 It should be stated that perhaps, by the nature of its mandate and considering the perennial controversy on the compulsory nature of its recommendations, the Committee did not explicitly declare that its interim measures are binding. Instead, the Committee emphasised that a failure to comply with its interim measures is a grave breach of the obligations of state parties in the Covenant. *Piandiong et al v The Philippines*, HRC (19 October 2000), paras 5.1-5.4, see also the earlier case of *Glen Ashby v Trinidad and Tobago*, HRC (26 July 1994), para 6.5 (the Committee expressed its 'deep regrets' on the failure of the respondent state to respect its request for interim actions, and noted that if it had acceded to the request, it 'would have been compatible with the state party's international obligations').
- 164 See the following orders of provisional measures: *Constitutional Court Case*, IACHR (14 August 2000); see also *James and Others v Trinidad and Tobago*, IACHR, (6 August and 24 November 2000, and 3 September 2002) and earlier cases of *Chunimá v Guatemala*, IACHR (1 August 1991), *Loayza Tamayo v Peru*, IACHR (July and 13 September 1996, 11 November 1997).
- 165 *Mamatkulov and Askarov v Turkey* ECHR[GC] (4 February 2005), paras 99-129. See also *Chamaïev and Others v Georgia and Russia*, ECHR (12 April 2005), para 473. *Paladi v Moldova*, ECHR [GC] (10 March 2009), paras 84-106.
- 166 The European Court, for example, finds violation of art 34 of the Convention where a state fails to comply with its order of interim measures. As above. See also *Groni v Albania* ECHR (7 July 2009); *DB v Turkey* ECHR (13 July 2010), see also Hambro (n 154) 153.
- 167 For instance, Tanzania has consistently rejected the Court's provisional measures relating to the death penalty alleging that the Court does not have the power to suspend the implementation of a criminal punishment lawfully imposed on an accused. Interestingly, this was despite the fact that Tanzania was not implementing the death penalty as a result of the *de facto* moratorium it has observed for almost two decades. Similarly, in *Woyome and Ajavon* (n 25) cases, the respondent states also challenged the Court's orders of provisional measures and indicated that they would not comply with the orders.

Council, the organ which is mandated to monitor the implementation of the decisions of the Court on behalf of the Assembly,¹⁷¹ urged member states to comply with the orders.¹⁷² The existing enforcement mechanism is therefore not only ineffective but also a lack of another follow-up simply means that the Court will continue to rely mainly on the will and cooperation of the states for the implementation of its provisional orders. Thus far, it is only Burkina Faso which has implemented the Court's decisions, including its order for provisional measure in the *Konaté* case. This clearly shows the urgent need for a reform and the critical importance of revamping the whole system of enforcement of the Court's decisions in a manner that ensures that non-compliance has consequences, be it political, economic and/or legal.¹⁷³

7 CONCLUSIONS

The African Court has been frequently using its power of indicating provisional measures in cases involving situations of extreme urgency

- 168 In *ACHPR Case*, the Court stated that 'To date, the Libyan Government has still not complied with the Order of the Court, nor has it informed the Court of the measures it has taken or could take to comply with the said Order. Given that an Order of Provisional Measures issued by the Court is binding like any judgment of the Court, the Court notes that an execution of the death sentence by the Libyan government would constitute a violation of its international obligations under the Charter, the Protocol and other human rights instruments that it has duly ratified'. *ACHPR case* (2013) (n 27) para 23. Similarly, in *Noudehouenou* case, the Court stressed that the respondent state 'is obliged to implement' its earlier order of provisional measures. *Noudehouenou* (n 26) para 46.
- 169 See e.g., *Chalula* (n 24) para 20(b) (within sixty (60) days); *Joseph Mukwano v Tanzania* (provisional measures) (2016) 1 AfCLR 655, para 20(b) (within sixty (60) days), *Koutché* (n 34) para 34 (vii) (within fifteen (15) days). The Court's determination of the time limit for reporting is discrepant and appears to be made arbitrarily.
- 170 This is in accordance with art 31 of the Protocol and Rule 59 (3) of the Rules. See *ACHPR v Libya* (merits) (2016) 1 AfCLR 153, paras 17-18. Note that the requirement of notification of political organs exists in all the three, African, Latin America and European human rights systems. Under Rule 77 of its Rules of Procedure, the ICJ is directed to also communicate the provisional measures that it adopted to the Secretary-General for transmission to the Security Council.
- 171 Article 29 (2), the Protocol.
- 172 See Executive Council Decision on the 2016 Activity Report of the African Court on Human and Peoples' Rights Doc.Ex.Cl/999(XXX), Thirtieth Ordinary Session 25 - 27 January 2017, para 4 (the Council 'Calls upon member states to comply with the Orders of [the Court] in accordance with the Protocol of the Court and urges in particular the State of Libya to implement the Order of the Court').
- 173 Rule 81 of the Rules provides the procedure for monitoring compliance with the Court's decisions. It requires that state parties shall submit reports on compliance and that the Court may solicit the opinion of the applicant or obtain information from other sources to verify if the concerned state has implemented its decisions. If need be, the Court may hold a compliance hearing. In accordance with this Rule, the Court is currently in the process of creating a compliance unit, which will monitor the implementation of its decisions. Yet, the Court will have to report to the Assembly its finding of non-compliance with recommendations and its role stops there. By contrast, the European system has a better follow-up mechanism through the Committee of Ministers, which has a clearer mandate and regular sessions to consider cases of compliance pursuant to art 46(2) of the European Human Rights Convention.

and gravity and risks of irreparable harm. A close study of its practice shows that the Court for the most part has been very generous in its approach but also less rigorous in its reasoning. Its understanding and application of the different normative conditions to adopting provisional measures, notably, urgency, necessity and irreparability of harm, lack consistency and conceptual clarity. Looking at its more recent decisions, however, there is also a clear shift in approach to a stricter and more rigorous analysis of these conditions. Yet, as it was attempted to demonstrate in this paper, there is still a need for the Court to maintain consistency and conceptual precision. It is also important to be mindful that, as much as a too liberal or excessive adoption of provisional measures is unnecessary and runs counter to their exceptional nature, a too conservative approach equally defies the very purpose that they are intended to serve. It may also limit the Court's ability to consider and settle human rights disputes and render its proceedings ineffective. There should therefore be a balanced approach with a view to ensuring that the Court's power to indicate provisional measures is congruent with their nature and purpose as well as with the spirit and letter of the provisions of the Protocol and the Rules.