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

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ABSTRACT

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

INTRODUCTION

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


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

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

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11 African Protocol, supra note 4, art. 27(2).
plagued Africa since its creation almost five years ago. 12 Paradoxically, during this period, the African Union has contemplated granting criminal jurisdiction to the African Court in these situations, a number of which are now the subject of preliminary investigation or trials at the International Criminal Court. 13

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

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


13 See African Union, Decisions Adopted During the 17th African Union Summit (July 1, 2011), http://www.au.int/en/sites/default/files/Assembly_AU_Dec_363-390_(XVII)_E.pdf. It also requesting the African Commission "to reflect on how best Africa’s interests can be fully defended and protected in the international judicial system and to actively pursue the implementation of the Assembly’s Decisions on the African Court of Justice and Human and Peoples’ Rights so that it is empowered to try serious international crimes committed on African soil." Id. See also Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/Dec.213(XII), ¶ 9, 12th Sess. (Feb. 1–3, 2009) (mandating "the Commission [of the African Union], in consultation with the African Commission on Human and Peoples’ Rights, and the African Court on Human and Peoples’ Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010."); see generally Charles Chernor Jalloh, *Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction*, 21 CRIM. L. F. 1 (2010).
United Nations Security Council, the United Nations Human Rights Council, and the International Criminal Court, which are beyond its scope. The third part of the essay examines the system of monitoring the African Court’s judgments through the African Union organs. In concluding, the paper exposes the challenges and opportunities for future orders for provisional measures by the African Court and its future successor.14

COMPLEMENTARITY BETWEEN THE AFRICAN COURT AND AFRICAN COMMISSION

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

14 The African Court on Human and Peoples’ Rights is transitional due to the “merger” of the Court with the African Court of Justice in 2008 via Protocol on the Statute of the African Court of Justice and Human Rights. Protocol on the Statute of the African Court of Justice and Human Rights, 11th Sess., Assembly/AU/Dec.193–207 (XI) (June 30–July 1, 2008) [hereinafter New Protocol]; At the recent AU Heads of State and Government meeting at their 17th Ordinary Session in Malabo (Equatorial Guinea) from 23rd June to 1st July 2011, it was decided that the transitional instruments relating to the merged Court be “finalized.” See Decisions Adopted During the 17th African Union Summit, supra note 13.
16 African Protocol, supra note 4, pmbl.
which has concurrent contentious and advisory jurisdiction, is presupposed as discussed below.

REFERRAL OF CASES BY THE AFRICAN COMMISSION TO THE AFRICAN COURT

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

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19 Id. art. 45(3).
22 African Protocol, supra note 4, art. 2.
23 Id. art. 5(1).
24 Id. arts. 5(3), 34(6). At the time of writing this essay, four states (Burkina Faso, Ghana, Malawi and Mali) have accepted the Court’s jurisdiction unconditionally, whereas Tanzania has accepted the Court’s competence provided only that “all domestic legal remedies have been exhausted and in adherence to the Constitution.” THE UNITED REPUBLIC OF TANZANIA DECLARATION (2010), available at http://www.african-court.org/fileadmin/State_Declarations/Declaration_Tanzania.pdf.
qualified access of individuals and non-governmental organizations, the African Commission is currently the main pathway to the African Court. In the past, it remained unclear at what stage the Commission could refer cases to the Court. However, the revised procedures of the African Commission have now clarified different types of referrals by the Court.

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


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

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

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


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

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

31 Under Rules 112(2) and 118(2) of the Rules of the Commission, state parties have as much as 180 days of being informed of the African Commission’s decision (and the consideration of the Commission’s Activity Report by the African Union Assembly) to inform the Commission of all measures, if any, taken or being taken by the State Party to implement the decision of the Commission. Rules of the Commission, supra note 21, r. 112(2), 118(2).
33 See Rules of the Commission, supra note 21, r. 112. Note that whereas there are timeframes for follow-up procedures, Rule 118 provides none in respect of submitting the case to the Court where there is non-compliance. Id. r. 118. A case may thus be submitted before the follow-up procedures.
34 Id. r. 118(2).
35 Id. r. 98(1). Under Rule 98(1) of the Rules of the Commission, “At any time after the receipt of a Communication and before a determination on the merits, the Commission may, on its initiative or at the request of a party to the Communication, request that the State concerned adopt Provisional Measures to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands.” Id.
Commission if it is not in session. However, the caveats lodged above in relation to the first category of cases, and the history of non-compliance with the African Commission’s interim orders raises doubts whether this second layer of legality, or the bolstering of such orders’ juridical status through the African Court will induce better compliance.

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

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

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

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

39 See infra Part 4.

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

41 Mutua, supra note 6, at 360–61.

42 See Rules of the Commission, supra note 21, r. 84(1) & (2), r. 118(3). However, during the revision of the Rules of the African Commission, there is the possibility of referring cases of serious and massive human rights violations to the court even where “there is no complainant.” See Rule 124(2) of the Interim Rules of the African Commission on Human and Peoples’ Rights (July 15, 2011), http://achpr.org/english/other/Interim%20Rules/Interim%20Rules%20of%20Procedure.pdf.
despite the existence of special mechanisms through which the Commission can conclude the existence of a situation of serious or massive violations of human rights.\footnote{For a discussion of the African Commission’s special mechanisms, see infra note 66.} In all the above categories of cases submitted to the Court, both the Rules of the Court and the Commission suggest that such cases should not necessarily have undergone any proceeding before the Commission, except the first category referred after determination on the merits.\footnote{Communications go through four mains stages at the Commission generally as follows: Seizure, admissibility, merits and remedies. See Frans Viljoen, \textit{Communications under the African Charter: Procedure and Admissibility}, in \textit{THE AFRICAN CHARTER ON HUMAN RIGHTS: THE SYSTEM IN PRACTICE 1986–2006}, supra note 2, at 77. Rules of the Commission, \textit{supra} note 21, r. 124(2); Protocol, \textit{supra} note 4, arts. 5(3), 6(1), 34(6); Rules of the Court, \textit{supra} note 20, r. 33(1)(f).} In particular, the second and third categories may be submitted before the admissibility stage,\footnote{See generally Viljoen, \textit{supra} note 4, at 25–35.} thereby providing a critical frontier for human rights protection. Finally, the Commission could also develop a system of prophylactic remedial action under the second and third categories of cases discussed above, by immediately referring applications or situations to the African Court where the state is not likely to comply with its decisions, based on past patterns.

\textbf{REFERRAL OF CASES BY THE AFRICAN COURT TO THE AFRICAN COMMISSION}

The African Court is competent to request the opinion of the African Commission on admissibility of a case instituted by an individual or a non-governmental organization which has observer status before the Commission.\footnote{Protocol, \textit{supra} note 4, arts. 5(3), 6(1), 34(6); Rules of the Court, \textit{supra} note 20, r. 33(1)(f).} This is a complementary function,\footnote{Rules of the Commission, \textit{supra} note 21, r. 89(1), 117.} under which convergence of practice within the Commission and the Court is also likely to emerge.\footnote{Protocol, \textit{supra} note 4, art. 6(2). There is a requirement under Article 6(2) of the Protocol, and Rules 39 and 40 of the Court, mandating the Court to apply the admissibility norms established in Articles 50 and 56 of the African Charter. Similarly, the African Commission applies these norms under Articles 50 and 56 of the African Charter and Rules 105, 106, 107 and 119(1) of the Rules of the Commission.} In addition to streamlining the admissibility decisions of the African Commission, it could also improve the
Complementarity between the African Court and the African Commission goes beyond the admissibility inquiry. Under Article 6(3) of the Protocol, the African Court may consider a case or transfer it to the African Commission upon the Court’s or the Commission’s determination of the admissibility inquiry. Moreover, a disjunctive reading of the provision from the other clauses of the article means that the Court can transfer any case (at any time, and not necessarily related to an admissibility referral) to the Commission. For instance, the Court could transfer a case to the African Commission— even if such case had been submitted earlier to the Court by the Commission under Article 5(1) of the Protocol— before the merits stage for amicable settlement, or fact-finding.

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

49 Rules of the Commission, supra note 21, r. 89, 107; see generally Viljoen & Louw, supra note 37.
50 Protocol, supra note 4, art. 6(3).
53 See generally Frans Viljoen, Communications under the African Charter: Procedure and Admissibility, in The African Charter on Human Rights: The System in Practice 1986–2006, supra note 2, at 93, for a similar argument in a somewhat different context under the African human rights system. See also Viljoen, supra note 4, at 47.
54 African Protocol, supra note 4, arts. 3(2), 5(3) (relating to jurisdictional questions and cases instituted directly by individuals or non-governmental organizations).
CONSULTATIONS BETWEEN THE AFRICAN COURT AND THE AFRICAN COMMISSION

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

RELATIONS REGARDING ADVISORY OPINIONS

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

55 Rules of the Court, supra note 20, r. 29(4); see id. at r. 33; Rules of the Commission, supra note 21, r. 115(4).
56 Rules of the Commission, supra note 21, r. 115(4).
57 See Rules of the Court, supra note 20, r. 33(1)(b)
58 Protocol, supra note 4, art. 26(1); Rules of the Court, supra note 20, r. 45(3).
59 Protocol, supra note 4, art. 4.
60 African Charter, supra note 3, art. 30; Protocol, supra note 4, art. 4; Rules of the Court, supra note 20, r. 68(3).
competent to refer a request for an advisory opinion to the Court. It also has concurrent, but slightly limited jurisdiction to “interpret all the provisions of the present Charter at the request of a State party, an institution of the AU or an African Organization recognized by the AU.”61 This requires complementarity between the Court and the Commission.

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

INFORMATION SHARING BETWEEN THE COURT AND THE COMMISSION

The African Commission- especially its special mechanisms,66 is the repository of information that accrues from the Commission’s

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

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

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

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

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

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

THE PATHOLOGY OF PROVISIONAL MEASURES BEFORE THE AFRICAN COMMISSION

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

68 Rules of the Court, supra note 20, r. 29(1)–(3) (where the Commission refers a case to the Court, or where the Court refers a case to the Commission for an opinion on admissibility, or for determination, respectively).
69 Rules of the Commission, supra note 21, r. 116(2).
70 Rule 109 of the first Rules of the Court adopted on 13 February 1988, and revised in 1995 as Rule 111, provided in part that the “Commission may” before making its final views known to the Assembly on the communication “inform the State party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation.” See ACHPR, Rules of Procedure of the African Commission on Human and Peoples’ Rights, r. 111 (1995), http://achpr.org/english/info/rules_en.html; Rule 98(1) provides in part that the “Commission may, [at any time after the receipt of a communication and before a determination on the merits], on its initiative or at the request of a party to the Communication, request that the State concerned adopt Provisional Measures to prevent irreparable harm to the victim or victims of the alleged violation.” Rules of the Commission, supra note 21, r. 98(1).
71 On the distinction between express, inherent and implied authority to grant interim measures by international human rights tribunals and quasi-judicial bodies, see Pasqualucci, supra note 9, at 7.
following the receipt of a communication relating to individual complaints. The Commission may adopt such measures *propius motu,* or upon request based on its discretion. 72 The procedure requires further that the respondent state “report back on the implementation of the Provisional Measures requested...within fifteen (15) days of the receipt of the request for Provisional Measure.” 73

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

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72 Rules of the Commission, *supra* note 21, r. 98(1).
73 *Id.* r. 98(4).
A detailed treatment of the practice of provisional measures before the African Commission is neither feasible nor profitable here, but a few cases stand out in particular. In the two and half decades since the inception of the African Commission in 1987, the Commission has issued requests for interim measures in a number of important cases discussed below. The most familiar of these cases involved a series of communications concerning human rights violations occasioned by the unlawful detention and trial of Kenule Beeson Saro-Wiwa and members of an indigenous group living in the oil producing areas of Nigeria.\textsuperscript{79} These communications alleged violations of the rights to personal liberty and security, fair trial, life, freedom of assembly and association, freedom of expression, health and freedom from cruel and degrading treatment.\textsuperscript{80} In the meantime, at the end of October 1995, Saro-Wiwa and a number of other co-defendants were sentenced to death for incitement to violence and murder.\textsuperscript{81}

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

\textsuperscript{80} Id. ¶ 13.
\textsuperscript{81} Id. ¶¶ 2, 4, 7.
\textsuperscript{82} Id. ¶¶ 7–8.
\textsuperscript{83} Id. ¶¶ 9–10.
\textsuperscript{84} Id. at 73.
\textsuperscript{85} African Charter, \textit{supra} note 3, arts. 1, 4, 5, 6, 7(1), 9(2), 10(1), 11, 16, 26.
In a similar case involving a murder convict liable for the death sentence, Botswana failed to comply with the African Commission’s interim orders. The case arose out of a communication brought on behalf of a woman who had been convicted of murder by the High Court of Botswana in December 1999 and subsequently sentenced to death. The complaint alleged violations of the right to life, fair trial, and freedom from inhuman treatment and punishment. Following its receipt of the communication in March 2001, the Commission wrote to Botswana appealing for a stay of execution pending consideration of the communication by the Commission. No response was received by the Commission. Information was received later at the Commission indicating that the execution was undertaken at the end of March 2001. In its decision of November 2003, the Commission, however, found that Botswana had not violated the Charter, since neither violation of substantive provisions nor the provisional measures in the absence of “proof that the fax [containing the request] was indeed received by the President of Botswana.”

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

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87 Id. ¶¶ 1–5, at 94.

88 Id. ¶ 10, at 95.

89 Id. ¶ 11, at 95.

90 Id.

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


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

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

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

95 Seventeenth Annual Activity Report, supra note 88, ¶ 50, at 101.
98 Id. ¶¶ 39, 42.
99 Id. ¶¶ 44, 50, 53, 54.
100 Id. ¶ 39.
102 African Charter, supra note 3, arts. 2, 6, 7(1), 9(2).
communication without charge since September 2001 was a violation of Articles 2, 6, 7(1) and 9(2) of the Charter. In observing that it had made appeals to Eritrea for provisional remedial measures without any response from the State as to whether such had been effected, the Commission urged and recommended that Eritrea order the immediate release of the eleven detainees and their compensation.

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

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

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104 Id. ¶¶ 50–62.
105 Id. postamble
107 Id. ¶¶ 1–21.
108 Id. ¶ 32.
109 Id. ¶ 14.
110 Id.
111 Id. ¶ 43.
century since its inception. It appears, as was in the Saro-Wiwa case, that a key obstacle has been the claim by states that provisional measures are not binding. Yet, as discussed here, inasmuch as the findings of the African Commission may be considered legally binding, so should the provisional measures.

THE AFRICAN COURT’S ORDER FOR PROVISIONAL MEASURES AGAINST LIBYA

THE AFRICAN COURT’S POWER TO ADOPT PROVISIONAL MEASURES

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

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


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

115 For example, in relation to the human rights situation in Kenya on January 2008, the author and two other human rights advocates travelled to the African Commission’s 4th annual extraordinary session in Banjul (The Gambia) between February 17th and February 23rd, 2008, to petition for protective measures in relation to gross human rights violations in the country, but they were denied a formal audience on the grounds that the Kenyan state was not represented at the session. Instead, the Commission discussed the human rights situation in Kenya and adopted a resolution to send a fact-finding mission to Kenya to investigate serious human rights violations that are alleged to have taken place in the country. See Activity Rep. of the Afr. Comm’n on Human and Peoples’ Rights, 13th Sess., June 24–28, 2008, EX.CL/446(XIII) (2008).
the Middle East, metamorphosed into an armed conflict in Libya. The government of Libya responded with brutal force against civilian protesters, in contravention of international human rights and humanitarian law thus prompting international action. Toward the end of February 2011, three non-governmental organizations, the Egyptian Initiative for Personal Rights, Human Rights Watch and INTERIGHTS submitted a request for provisional measures to the African Commission. While noting and condemning the human rights violations in Libya, the Commission did not request any provisional measures, but instead passed a resolution in March 2011, among other things, calling on the responsibility of the African Union to take all the necessary political and legal measures for the protection of the Libyan population. The African Commission also instituted proceedings before the African Court against the Libyan state for “serious and massive violations of human rights guaranteed under the African Charter.” The Court immediately informed Libya, the AU organs, state parties and the complainants of the application, noting that the matter was of “extreme gravity and urgency.”

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


Id. ¶ 8.

African Protocol, supra note 4, art. 27(2).
Following the issuance of an order for provisional measures, the Court is required to notify the parties to the case, the African Commission, the Assembly, the Executive Council and the African Union Commission of the interim measures.

At the end of March 2011, the African Court issued an order for provisional measures against Libya, *proprium motu*. The first since the establishment of the Court, this order lays down in broad strokes the African Court’s tests precedent to ordering provisional measures in grave human rights situations. The first element is the existence of *prima facie* jurisdiction, which provides room for sufficient flexibility in the exercise of the Court’s discretion. The Court’s standard suggests that an order for provisional measures may be made pending determination of inadmissibility or jurisdiction on the merits of a case. The question of jurisdiction, therefore, would be whether the state concerned is party to the African Charter and the Protocol establishing the Court and the competence of the party to institute or refer the case to the Court. The second element is the requirement for “extreme gravity and urgency,” “imminent risk,” and “risk of irreparable harm.” As a subjective test, what constitutes imminence, urgency, gravity, harm and risk will depend on the circumstances of each case. Finally, in stating that the conflict in Libya made it necessary for it to order provisional measures “without
written pleadings or oral hearings” or “without any proceedings,” it seems that the Court has adopted a purposive interpretation of its protective mandate, opening its doors for such requests in future.

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

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

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

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135 See supra notes 79–114 and accompanying text.
137 Rules of the Court, supra note 20, r. 51(3).
138 Id. r. 51(3).
140 See RIETER, supra note 9, at 42; JERZY SZTUCKI, INTERIM MEASURES IN THE HAGUE COURT 93 (1983) (discussing the distinction between orders for provisional measures, “provisional judgments,” “interim judgments” and “final judgments.”).
measures as a judgment attaches a binding effect, given that the African Court delivers judgments which are binding.\footnote{African Protocol, supra note 4, art. 28; Rules of the Court, supra note 20, r. 61.} Although provisional measures neither constitute a prejudgment on the merits of the subject matter as they do not meet the res judicata requirements,\footnote{Retter, supra note 9, at 88; Sztucki, supra note 140, at 179, 262. For an exception where provisional measures have the force of res judicata, see Edward Dumbauld, \textit{Interim Measures of Protection in International Controversies} 163, 4 (1932).} some provisional measures may constitute judgments.\footnote{See HWA Thirlway, The Indication of Provisional Measures by the International Court of Justice, in \textit{Interim Measures Indicated by International Courts} 1, 27 (Rudolf Bernhardt ed., 1994).} In such cases, an order for provisional measures could be binding \textit{qua} judgment.\footnote{African Protocol, supra note 4, art. 28; Rules of the Court, supra note 20, r. 61.}

Another perspective is that the nature of provisional measures, binding or otherwise, is largely a juristic question that implicates the remit of state obligations in international law. It appears that a good faith interpretation of human rights treaty provisions leads to the finding that orders for provisional measures are binding or obligatory.\footnote{Boyce \textit{et al.} v. Barbados, Expansion of Provisional Measures, Order of the Court, ¶ 6 (Inter-Am. Ct. H.R. June 14, 2005), available at http://www.corteidh.or.cr/docs/medidas/boyce_se_02_ing.pdf.} From this functional standpoint, provisional measures advance the object and purpose of human rights treaties, so that even if orders for provisional measures are not judgments \textit{strictu sensu}, they are binding.\footnote{See Viljoen & Louw, supra note 30, at 3 n. 9 (“If the legally binding nature of the eventual findings of the [Court] is accepted, the provisional measures must also be binding.”).} This conclusion is supported by the jurisprudence of the International Court of Justice,\footnote{LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶ 109 (June 27). It should be noted that the ICJ is not a human rights court. See Rosalyn Higgins, \textit{Interim Measures for the Protection of Human Rights}, 36 COLUM. J. TRANSNAT’L L. 91, 91 (1997).} the Inter-American Human Rights Court,\footnote{Constitutional Court v. Peru, Provisional Measures, Order of the Court, “Having Seen,” ¶ 14 (Inter-Am. Ct. H.R. Aug. 14, 2000), available at http://www.worldcourts.com/iaacthr/eng/decisions/2000.03.14_Constitutional_Court_v_Peru.pdf.} and most recently, the European Court on Human Rights.\footnote{Mamatkulov v. Turkey, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, 2003), http://www.echr.coe.int/ECHR/EN/hudoc; see generally Alastair Mowbray, \textit{A New Strasbourg Approach to the Legal Consequences of Interim Measures}, 5 HUM. RTS. L. REV. 377 (2005).} Second, whether or not provisional measures are binding is but the first level of analysis, and the second level must turn on the question of enforcement, which is the locus of the debate in the next part.

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

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

PARADOXES IN LIBYA’S HUMAN RIGHTS RECORD

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

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


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

These phenomena expose Libya’s influence within the international human rights system at a time when its human rights practices remained questionable. What is paradoxical is that during this period in which Libya hosted at least two sessions of the African Commission and led the United Nations Commission on Human Rights, other accounts painted a bleak picture of human rights in Libya. On balance, perhaps such hypocrisies and duplicities exhibited by Libya are by no means its preserve; and they illustrate the...
ambivalence of states toward their own human rights commitments. It is thus not surprising that enforcement of human rights is rather weak, despite the normative evolution of international human rights.

**The African Union’s Responses**

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

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

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166 See Okafor, supra note 37, at 78, 145 (critiquing the incompleteness of this “enforcement-centric” argument).
167 Mutua, supra note 6, at 357–62.
169 African Protocol, supra note 4, art. 29; *Rules of the Court*, supra note 20, r. 64.
170 African Protocol, supra note 4, art. 29; *Rules of the Court*, supra note 20, r. 64.
171 *Rules of the Court*, supra note 20, r. 65.
172 African Protocol, supra note 4, art. 31; *Rules of the Court*, supra note 20, r. 51(4).
173 In the Inter-American human rights system, for instance, it has been noted that it is not necessarily the legal status or the system of enforcement that is determinative. See Conference, *Advocacy Before Regional Human Rights Bodies: A Cross-Regional Agenda*, 59 Am. U. L. REV.
provided for the exercise of the monitoring function by the AU organs, these arrangements are premised on the assumption that these organs “can take additional measures to force compliance, such as passing resolutions urging states to respect the Court’s judgments.” Yet, in reality, these assumptions yield to other considerations and factors, such as political calculus which impede collective enforcement. While a recent study has found that there has been progress over the last decade in the form of elaborate discussion of the African Commission’s annual human rights reports by the AU Executive Council, states still conspire to dilute or obstruct meaningful resolutions during the examination of those reports. The African Court, which relies on this system, faces a similar problem.

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

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

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163, 196 (2009) (“[C]ompliance with friendly settlement agreements is much higher than compliance with merits reports issued by the Inter-American Commission.”).
174 Mutua, supra note 6, at 357.
175 See, e.g., Viljoen and Louw, supra note 37, at 34 (discussing delay of the publication of an investigative mission report on and a decision against Zimbabwe following filibustering by states at the African Union).
example, whether this implies deemphasizing judicial measures, perhaps including the African Court’s decisions. While this is not a suggestion that a political solution is not desirable, the omission to use the human rights mechanisms as central arsenals in the resolution of the Libyan crisis reveals the challenges ahead.

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

CONCLUSION

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

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

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

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