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PROTECTIVE MEASURES IN THE AFRICAN UNION

by

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Overview

The African Union is an intergovernmental system of 53 African states established in July 2002 out of the previous Organization of African Unity. The main organs of the AU include: The Assembly of the Union; The Executive Council; The Pan-African Parliament; The Court of Justice; The Commission; The Permanent Representatives Committee; The Specialized Technical Committees; The Economic, Social and Cultural Council; and The Financial Institutions.¹ It is the Commission and Court structure of the African Union which provide for provisional measures that can be utilized in the protection of human rights defenders facing imminent danger. The following discussion will therefore focus on these two bodies.

The Commission

The mandate of the Commission provides for both promotional and protective measures. As part of its promotional function, the Commission's directive includes engaging in research, studies and public discussion, as well as providing principles and rules, "aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation." In fulfilling this mandate, the Commission is not only to cooperate with African and international institutions² in the advancement of human rights, but moreover, NGOs are granted observer status and allowed to actively participate in ordinary sessions where they have met minimum criteria.³ This status is commended as the means through which, "NGOs have urged States to respect and protect human rights defenders, as well as special minorities and high risk groups."⁴

¹ Constitutive Act of the African Union OAU Doc. CAB/LEG/23.15 entered into force May 26, 2001, Art. 5(1)(a)-(h).

² African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, Art. 45(1)(a)-(c)

³ "African Court on Human and Peoples' Rights: Ten years on and still no justice," George Wachira, Minority Rights Group International, 2008 P. 10

⁴ Wachira, p. 10

The protection function of the Commission, on the other hand, is left vague in comparison. It reads only, “Ensure the protection of human and peoples’ rights under conditions laid down by the present Charter.”⁵ Before the creation of the initial Court of Justice, all complaints were dealt with through the Commission, afterward it was the purpose of the Court to complement the protective mandate of the Commission and provide a legal body for decision-making that had a greater ability to enforce recommendations than the quasi-judicial Commission.⁶ Despite this intention it is the Commission which has handled cases involving provisional measures, including those involving human rights defenders, whereas the Court to date, has not.

Standing

The Commission handles both inter-state and individual complaints.⁷ Inter-state complaints require a lengthy process and are not the means through which protection for human rights defenders in imminent danger would seek protection.⁸ Such protection would instead be sought through an individual complaint. One of the most important aspects of individual protective measures, which includes consideration of complaints alleging human rights violations, is that both NGOs and individuals have standing to file a complaint, whether or not they are the direct victims of the alleged violation.⁹ It is this quality which, “makes the African Commission one of the most flexible regional human rights instruments... allowing anyone seized of a human rights complaint to take it to the Commission, has enabled NGOs and activists to take up cases of human rights violations on the continent that would otherwise not have reached the Commission.”¹⁰ An example of the importance of such inherent standing becomes patently clear when one considers that the Commission has on record only one case submitted by

⁵ African Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, AC Art. 45(2)

⁶ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III),

⁷ African Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, Inter-state complaints are dealt with under Articles 47-54 of the African Charter, while individual complaints are addressed under Articles 55 and 56 of the same.

⁸ First the complaint must be registered with the offending State, the offending State then has three months to respond after which the complaint can be filed and dealt with by the Commission. While a State may bypass this process and go directly to the Commission, the Commission can act only if all local remedies have been exhausted, with an exception if local remedies are found to be unduly long. With this criteria met, the Commission ensures it has the required information, and after an effort at amicable solution, “the Commission shall prepare, within a *reasonable* period of time from the notification referred to in Article 48 [a complaint being registered with the commission] a report stating the facts and its findings. Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), See Article 52

⁹ Protocol to the African Charter, Article 5(3)

¹⁰ “African Court on Human and Peoples’ Rights: Ten Years on and still no justice” George Mukundi Wachira, P.9 As part of this comment it is noted that the ability of NGOs and individuals to take up others claims has allowed the protection of minority peoples who may not have otherwise been able to present their case because of lack of resources.

states compared to 355 cases on record as of the 42nd Ordinary Session which had been submitted by NGOs and individuals.”¹¹

In terms of process, individual complaints are received by the Commission and prepared by the Secretary who then presents them to the Members of the Assembly. The Secretariat either waits for a response from a majority of the Members indicating their acceptance of the complaint or if a sufficient number of responses are not received, the communication is presented to all the commissioners at the Commission's next session.¹² At this session, the Commission determines whether the complaint alleged a *prima facie* violation of the Charter and if confirmed by a simple majority the complaint is seized. The Secretariat then informs the complainant and the State concerned that admissibility will be considered at its next session, providing three months for either party to submit comments regarding the same.¹³ An assessment of admissibility is then made based on the criterion provided for in Article 56 of the African Charter on Human and Peoples' Rights.¹⁴ If the complaint does not meet one or more of these criteria it will be found inadmissible and appropriate notification will be made. If, on the other hand, the complaint is found to be admissible, the parties will be informed and requested to send their observations on the merits.

The Commission next attempts to secure an amicable settlement of the dispute. If both parties express willingness in this regard, the Commission will appoint a *rapporteur*, usually the Commissioner who has been handling the case, however, a Commissioner responsible for promotional activities in the State concerned or a group of commissioners may instead be appointed. If a settlement is reached, a report containing the terms of the settlement is presented to the Commission at its session, bringing consideration of the case to an end. On the other hand, if no agreement is reached, a report is submitted to the Commission accordingly by the commissioner(s) concerned and the Commission will take a decision on the merits of the case.

The Commission's final decisions are called recommendations. Recommendations are made after consideration of the facts submitted by the author, his or her complaint, the State

¹¹ Wachira p. 20

¹² In addition to the numerous time lags presented in this process, the speed at which complaints are dealt with is further delayed by the Commission sitting only twice per year, unless a majority of Members or the Chairman requests an Extraordinary session. See Rules of Procedure of the African Commission on Human and Peoples' Rights, Chapter 1, Rules 2 and 3.

¹³ Information Sheet No. 3, Communication Procedure, Organisation of African Unity.

¹⁴ The criterion are as follows: 1. Indicate their authors even if the latter requests anonymity; 2. Are compatible with the Charter of the Organisation of African Unity or with the present Charter; 3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity; 4. Are not based exclusively on news disseminated through the mass media; 5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged; 6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter; and 7. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter. African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986

party's observations (if any) and the issues and proceedings before the Commission. While the Commission is given power under Article 46 to resort to any method of investigation, this ability seems to be rarely, if ever, put into action.¹⁵ Recommendations usually contain the decision on admissibility, an interpretation of the provisions of the Charter invoked by the author, an answer to the question of whether the facts as presented disclose a violation of the Charter, and if a violation is found, the required action to be taken by the State party to remedy the violation. Despite Article 60 providing that the Commission will draw on a large number of international treaties directed at the protection of human rights, decisions generally do not reflect an attempt to apply these instruments and instead provides decisions which are scant in both substance and reasoning.

Provisional Measures

Where the safety of an individual or individuals is in imminent danger, provisional measures are available under Rule 111 of the Commission's Rules of Procedure. These interim measures are intended to prevent irreparable damage to the victim; however, they have been implemented rarely and with little success.¹⁶

Rule 111 - Provisional Measures

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

While the Charter also takes note of emergency situations in Article 58(3) stating, "A case of emergency duly noticed by the Commission shall be submitted by the latter to the

¹⁵ In reviewing the published Communication decisions made by the Commission, there is rarely any attempt by the Commission to investigate the situation beyond the information provided by the complainant and the State.

¹⁶ Please see chart on detailing Provisional Measure cases and decisions attached.

Chairman of the Assembly of Heads of State and Government who may request an in-depth study,” such measures would not amount to immediate protection for individuals in imminent risk.

Enforcement

The very power of the Commission to make binding decisions was questioned by Nigeria when it was found to have violated human rights obligations. As a result, the Commission made the determination that hearing and making recommendations on these claims is well within their legal mandate, however, the ability to enforce these recommendations has certainly been called into question.”¹⁷ Perhaps most significant to the power of these decisions is the lack of procedure to track and ensure the implementation of recommendations.¹⁸ With absolutely no means of enforcing the recommendations of the Commission, the Commission and complainant, rely on the “good will” of the State which has been found to violate their fundamental freedoms.

In addition to lack of enforcement, there is also lack of transparency. Article 59 of the Charter determines that all measures taken within the Commission will remain confidential until such time that the Assembly determines otherwise. In the past, the Commission actually prohibited the publication of its decisions. This started to change with the Seventh Activity Report of the Commission, adopted in June 1994 by the Assembly and to an even greater extent in the Commission’s Eighth and Ninth Annual Activity Reports of the Commission where the Commission went a step further and issued full texts of its final decisions; however, while the decisions may now be published, the Commission continues to require permission from the Assembly. Overall, this system results in insufficient public records of the numbers and types of complaints that have been registered making it difficult to analyze various aspects of the process, including determining which complaints were considered to be worthy of review by the Assembly.

The Courts

There are currently three protocols establishing Courts in the African Union. The longest standing, and most pertinent to provisional measures for human rights defenders at this time, is

¹⁷ P. 11 Wachira, references footnote 118: See ‘Non-compliance of state parties to adopted recommendations of the African Commission: a legal approach’, 24th Ordinary Session, OAU DOC/OS/50b (XXIV), para 2, reprinted in R. Murray and M. Evans (eds), *Documents of the African Commission on Human and Peoples’ Rights*, Oxford, Hart Publishing, 2001, p. 355

¹⁸ The Secretariat does send letters of reminders to States that have been found to violate provisions of the Charter calling upon them to honour their obligations under article 1 of the Charter "... to recognise the rights, duties and freedoms enshrined in this Charter and ... adopt legislative and other measures to give effect to them". The first letters are sent immediately after the adoption of the Commission's Annual Activity Report by the OAU Assembly of Heads of State and Government and subsequent letters are sent as often as necessary. See Information Sheet No. 3, Communication Procedure, P. 9

the Protocol on the Establishment of an African Court on Human and Peoples' Rights¹⁹ adopted June 1998 and entered into force January 25, 2004.²⁰ The second court, the creation of which coincided with the transition from the Organization of African Unity to the African Union, was the Court of Justice of the African Union. The Protocol establishing this court was adopted July 11, 2003 and entered into force in 2009. The third and final court, which merges and replaces the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, was established in the *Protocol on the Statute of the African Court of Justice and Human Rights*. The Protocol, adopted in 2008, has yet to be entered into force. In the meantime, the protocol establishing the African Court on Human and Peoples' Rights was expected to remain in force for a year²¹ to enable the African Court on the Human and Peoples' Rights to implement measures necessary for the transfer of its prerogatives, assets, rights, and obligations to the African Court of Justice and Human Rights.²²

African Court on Human and Peoples' Rights

Standing

As it stands, it is the oldest of the three courts that bears the greatest relevance to the matter of provisional measures for the protection of human rights defenders. Next to the availability and enforceability of provisional measures, it is the issue of standing, or in other words access to the court, that becomes most significant. Under Article 5(3) of its Protocol, the Court is given the power to exercise optional jurisdiction with regard to cases submitted by NGOs and individuals in accordance with Article 34(6) of the same.²³ This Article reads, "At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration." Only two countries, Mali and Burkina Faso, have made

¹⁹ The Court is composed of eleven judges, with recognized human and peoples' rights experience, elected by Assembly heads of state. (Article 11(1)) Judges are elected for a six year term and eligible for re-election only once. (Article 15) These Judges work only part-time (Article 15(4)) and are excluded from hearing any case about a State of which they are a national (Article 12). Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III),

²⁰ Upon ratification by 15 member states. <http://www.pict-pcti.org/courts/ACHPR.html>

²¹ The single Protocol shall enter into force thirty days after the deposit of the instruments of ratification by fifteen member states.

²² Wachuia P. 14

²³ Article 5 provides access to the Court for the following bodies: The Commission, both the State Party which has lodged a complaint with the Commission and against whom a complaint is being lodged; the State Party whose citizen is a victim of a human rights violation and African Intergovernmental Organizations. A State who has an interest in a case may also request to be join the hearing.

declarations allowing these groups access,²⁴ as a result there are no decisions from this court in regards to provisional measures for human rights defenders.

One of the most contentious issues relating to the fused court is the right of individual and NGO access. The draft instrument had originally dispensed with the requirement that states make a declaration in order to allow individuals and NGOs direct access to the African Court of Justice and Human Rights. However, at the meeting of Experts and Ministers of Justice/Attorneys General on Legal Matters of the AU, which took place in April 2008, the Ministers of Justice have reinstated that requirement.²⁵ Unless States make such a declaration, this limitation renders access to justice illusory for human rights victims.

“This development also marks a departure from the practice of African regional and sub-regional human rights mechanisms which have long recognised individual petitions for human rights abuses. The procedures of the African Commission and sub-regional courts such as the Court of Justice of the Economic Community of West African States (ECOWAS), the East African Court of Justice (EACJ), and the Southern African Development Community (SADC) Tribunal clearly demonstrate that victims require direct access to human rights institutions in order to ensure effective protection of human rights in the region.” Moreover, it has been argued that there are possible conflicts of jurisdiction and overlap between the African Court on Human and Peoples’ Rights and the sub-regional courts of justice that have risen recently: Court of Justice of the Economic Community of Western African States (ECOWAS), the East African Court of Justice (EACJ) and the Tribunal of the Southern African Development Community (SADC). These courts are often expressly or implicitly vested with jurisdiction to pronounce on human rights violations, though the AU Charter does not comment on how to address such conflicts. It may be that without NGO and individual standing, access to such regional tribunals may provide greater protection to human rights defenders in imminent danger.

Returning to the Court process as it stands, it is also worth noting that where a case is brought by an NGO or individual in African Court on Human and Peoples’ Rights, the Court has the further option to request the opinion of the Commission as to its admissibility. If the Court chooses to retain this determination, the Court’s decision is based on the same criteria as the Commission as set out in Article 56 of the Charter.²⁶ The ability to transfer cases in at least one way appears undesirable. Unlike Commission hearings which are held in private, Court hearings

²⁴ Wachira P. 13 and p. 20

²⁵ This was subsequently endorsed by AU Heads of States summit in July 2008. Wachira P. 14 Entities that are able to submit cases to the Court include State Parties, the African Commission on Human and Peoples’ Rights, the African Committee of Experts on the Rights and Welfare of the Child, African inter-governmental organisations and African National Human Rights Institutions.

²⁶ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Art. 6(1) and (2) Moreover, the Court may either chose to consider the case or send them to the Commission. Art. 6(3)

are to be conducted in public places.²⁷ Before making its decision the Court hears submissions from all parties, including both written and oral testimony, and may also hear expert testimony before making its decision.²⁸

Unlike the Commission which is not given a timeline for making its recommendations, the Court is to provide a decision, accompanied with its reasoning, within ninety days of the completion of the hearing.²⁹ In making its decisions, the Court is to consider not only the Charter, but also any other relevant human rights instruments ratified by the States involved in the matter.³⁰ Moreover, the decision is both final and not subject to appeal unless fresh evidence is presented which satisfies the conditions set out in the Rules of Procedure. In addition to the issuance of binding decisions, where the Court finds a violation of a human or peoples' right it shall make appropriate orders which will remedy the violation, including the payment of fair compensation or reparations.³¹

Provisional Measures

In cases of “extreme gravity and urgency, and when necessary to avoid irreparable harm to persons,” the Court may order any provisional remedies it deems necessary.³² Such decisions are equally binding and therefore States are expected to adhere to the recommendations.³³ The new African Court of Justice and Human Rights also provides for provisional measures. Article 35(1) of *Protocol on the Statute of the African Court of Justice and Human Rights* states the following, “The Court shall have the power, on its own motion or on application by the parties, to indicate, if it considers that circumstances so require any provisional measures which ought to be taken to preserve the respective rights of the parties.”³⁴ At this time it is hard to determine whether provisional measures will be enacted with any level of frequency by the Court, however, without NGO and individual standing, they will surely not be utilized in instances of human rights violations to the degree they might have otherwise.

²⁷ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Art. 10(1)

²⁸ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Art. 26 inclusive

²⁹ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Art. 28(1)-(3), (6)

³⁰ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Art. 7

³¹ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Art. 27(1)

³² Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Art. 27(2)

³³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Art. 30

³⁴ Article 35(2) of the *Protocol on the Statute of the African Court of Justice and Human Rights* goes on to state, “Pending the final decision, notice of the provisional measures shall forthwith be given to the parties and the Chairperson of the Commission, who shall inform the Assembly.”

Enforcement

The successful enforcement of such measures becomes the final issue to the availability of provisional measures for human rights defenders. Once a decision is made The Council of Ministers are notified and are responsible for monitoring the execution of the recommendations on behalf of the General Assembly.³⁵ Under Article 20, all States signed to the Protocol are to comply with any judgement made by the court. While it is hoped that States would respect the decisions, in cases where States have failed to abide by the African Court's ruling, they will be submitted to the General Assembly which has the power to call upon States to respect decisions of the AU and adopt sanctions.

Conclusion

In creating a Court, it was the intention of the AU to complement the work of the Commission and therefore the two institutions were expected "to deliberate and discuss how to harmonize their mandates in order to avoid possible conflicts and overlaps. However, to this day the two institutions have shied away from jointly discussing that complementarity."³⁶ The failure to ensure such efficiency may be to the benefit of human rights defenders at this time in that by lacking a properly functioning Court,³⁷ NGOs and individuals can continue to seek provisional measures through the Commission at which they still have standing. However, despite the availability of this avenue of protection, the lack of timeliness and enforcement of these measures indicates that we must continue to seek a more durable solution.

African Commission Cases utilizing Rule 111 Provisional Measures

CITATION	YEAR	COUNTRY	DESCRIPTION
137/94, 139/94, 154/96 and 161/97 International Pen, Constitutional Rights Project, Interights on Behalf of Ken Saro-Wiwa Jr. And Civil Liberties Organisation / Nigeria	1994	Nigeria	Concerned the detention and trial of Kenule Beeson Saro-Wiwa, a writer and activist who was president of the Movement for the Survival of the Ogoni People. Saro-Wiwa was arrested on May 22, 1994, after a riot during which four Ogoni leaders were murdered. It was alleged that during his arrest and detention, Saro-Wiwa was severely beaten, held in leg irons and handcuffs for several days, and denied access to a lawyer. It was not until January 28, 1995 that charges, inciting the murder of the four "rival"

³⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Art. 29(2)

³⁶ Wachira P. 15

³⁷ It is worth noting that all expenses and budgetary considerations of the Court are determined and borne by the African Union. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Art. 32

			<p>Ogoni leaders, were laid. Between his arrest and trial, Saro-Wiwa and his co-accused were not allowed to meet with their lawyers, and no information on the charges was provided to defence counsel. Despite a number of allegations made as to irregularities in the trial, such as the harassment of defence counsel and bribery of witnesses, Saro-Wiwa and eight co-defendants were found guilty and sentenced to death. The Constitutional Rights Project then submitted an emergency supplement to its previous complaint to the Commission, requesting the Commission to adopt provisional measures preventing the executions.</p> <p>The Secretariat of the Commission invoked interim measures under revised Rule 111 of the Commission’s Rules of Procedure to the Ministry of Foreign Affairs of Nigeria, the Secretary General of the OAU, the Special Advisor (Legal) to the Head of State, the Ministry of Justice of Nigeria, and the Nigerian High Commission in The Gambia. The note verbale pointed out that as the case of Mr. Saro-Wiwa and the others was already before the Commission, and the government of Nigeria had invited the Commission to undertake a mission to that country, during which mission the communications would be discussed, the executions should be delayed until the Commission had discussed the case with the Nigerian authorities. No response to this communication was received and the executions were carried out.</p>
212/98 Amnesty International/Zambia	1998	Zambia	<p>The complaint was submitted by Amnesty International on behalf of William Steven Banda and John Lyson Chinula, alleging that Zambia had violated the African Charter. Mr. William Steven Banda was served with a deportation order on November 10, 1991. The reason given was that “in my opinion by his presence he (is) likely to be a danger to peace and good order in Zambia”. He contested the order through the courts of Zambia. On October 25, 1994, William Steven Banda was deported</p>

		<p>to Malawi. He alleged that he was blindfolded and drugged, driven by Zambian immigration service and paramilitary police officers. He entered Malawi through Mchinji border post and later dumped at Lilongwe Police station. John Lyson Chinula was removed from his home in Ndola on August 31, 1994. He was driven to Lusaka International Airport with the intention of deporting him. He was served with a deportation order signed by the Minister of Home Affairs alleging that he was a threat to Zambia’s peace and security. He was forcibly sedated and later found himself at Lilongwe Police station in Malawi. His Warrant of Deportation also alleged that he was “by his presence, likely to be a danger to peace and good order in Zambia”. No reason in law or in fact was advanced for this finding. Both complainants were prominent political figures in Zambia. They were leading members of UNIP, the party that had been in power since Independence in 1964. UNIP was defeated by MMD in the first multi-party elections of November 1991. William Steven Banda exhausted all domestic remedies in that, his matter went to the Supreme Court of Zambia. John Lyson Chinula could not effect any remedies through the Zambian courts because he was deported and was given no opportunity to approach the Zambian courts.</p> <p>The Commission requested provisional measures according to Rule 111. Zambia must be required to allow the return of William Steven Banda with a view to making application for citizenship by naturalisation. John Lyson Chinula died in Malawi. His family is requesting the return of his body for burial in Zambia. The Government of Zambia should be required to grant that wish.</p> <p>The Commission requested that provisional measures be adopted by the Government of Zambia, namely to allow the burial of Mr. John L. Chinula, in Zambia and the return of Mr.</p>
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			<p>William S. Banda to his family in Zambia pending the finalization of the matter by the Commission. On July 10, 1998, the Secretariat of the Commission wrote to the Ministry of Foreign Affairs, Zambia, drawing attention to the request for provisional measures to be taken by the government of Zambia. When there was no reply, the Secretariat sent a reminder on September 17, 1998. The Embassy replied on 21 September that the Note Verbale was received but did not enclose the communication referred to. The representative of the Government of Zambia appeared before the Commission on 26th and 27th of October 1998. He presented a statement in response to the communication. The Commission postponed consideration of this for a decision on the merits to the next session. On 26th November 1998, the Secretariat conveyed the decision of the Commission to the parties concerned. The Commission ultimately found Zambia had violated Articles 2, 7(1)(a), 8, 9(2), 10 and 18(1) and (2).</p> <p>The Commission also made important findings regarding “claw back” clauses, stating: “The Government of Zambia relied on the “claw-back” clause of Article 12(2): “This right may only be subject to restrictions, provided for by law for the protection of national security, law or order, public health or morality...” The Commission was of the view that the “claw-back” clauses must not be interpreted against the principles of the Charter. Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter. Secondly, the rules of natural justice must apply. By forcibly expelling the two victims from Zambia, the State has violated their right to enjoyment of all the rights enshrined in the African Charter.”</p>
239/2001 Interights (on behalf of Jose Domingos Sikunda)/Namibia	2001	Namibia	<p>Sometime in 2000, Mr. Sikunda was arrested and detained by Namibian authorities. No reasons were given for his arrest and detention. On October 24, 2000, the high court of Namibia</p>

		<p>ordered the release of Mr. Sikunda but the government of Namibia declined to comply and continued his detention. The complainant alleged there was a pending court order restraining the deportation of Mr. Sikunda which was to lapse February 1, 2001. Further the Namibian authorities were indicating a preparedness to deport Mr. Sikunda to Angola whose government accused Mr. Sikunda of being a UNITA rebel. The Complainant alleged that such an act would put Mr. Sikunda at real risk of torture and extra judicial death. The complaint, which included a request for provisional measures under Rule 111, was received January 31, 2001. The complainant was requested to provide further information and on February 19, 2001, the Commission Chairman wrote to the Minister of Foreign Affairs of the Republic of Namibia expressing concern over the alleged deportation. The government of Namibia responded three days later stating that the actions of the Namibian government were legal and aimed at protecting the security of the country and its citizens. The Commission declared the Communication inadmissible for non-exhaustion of domestic remedies.</p> <p>A special note was provided at the end of the report stating the following: “Following the decision that the Commission has come to, the Commission would like to state that in circumstances where an alleged violation is brought to the attention of the Commission and where it is alleged that irreparable damage may be caused to the victim, the Commission will act expeditiously appealing to the State to desist from taking any action that may cause irreparable damage until after the Commission has had the opportunity to examine the matter fully. In such cases the Commission acts on the facts as presented and it was therefore in this vein that the Commission wrote to the Minister of Foreign Affairs of the Republic of Namibia expressing concern over the alleged deportation</p>
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			of Mr. Sikunda.”
250/2002 – Liesbeth Zegveld and Mussie Ephrem/Eritrea	2002	Eritrea	<p>The Complainants alleged that eleven former Eritrean government officials were illegally arrested in Asmara, Eritrea on September 18 and 19, 2001 in violation of Eritrean laws and the African Charter on Human and Peoples’ Rights. They were part of a group of 15 senior officials of the ruling Peoples Front for Democracy and Justice (PFDJ) who had been openly critical of the Eritrean Government policies. The government subsequently announced that the 11 individuals had been detained “because of crimes against the nation’s security and sovereignty.” Their whereabouts remained unknown, they were reportedly not given access to their families or lawyers, and the Complainants feared for their safety. A request was made by the Complainants for <i>habeas corpus</i> to the Minister of Justice of Eritrea but their claim could not be submitted, as the place of detention was unknown. The Complainants allege that in the <i>habeas corpus</i> the Eritrean authorities were asked, among others, to reveal where the 11 detainees were being held, to either charge and bring them to court or promptly release them, to guarantee that none of them would be ill treated and that they have immediate access to lawyers of their choice, their families and adequate medical care but that no response has been received from the Eritrean authorities.</p> <p>A request for provisional measures under Rule 111 was included in the complaint. On April 19, 2002, the Secretariat acknowledged receipt of the complaint, and informed them that their request for provisional measures was noted and would be acted upon accordingly. On May 3, 2002, the African Commission wrote a letter of appeal to His Excellency Issayas Afewerki, President of the State of Eritrea, respectfully urging an intervention in the matter being</p>

			<p>complained of pending the outcome of the consideration of the complaint before the Commission.</p> <p>The Commission found the State of Eritrea in violation of Articles 2, 6, 7(1) and 9(2) of the African Charter on Human and Peoples' Rights and <i>urged</i> them to order the immediate release of the 11 detainees and recommended that the State of Eritrea compensates the abovementioned persons</p>
256/2002 - Samuel Kofi Woods, II and Kabineh M. Ja'neh/Liberia	2002	Liberia	<p>The Complainants alleged that June 24, 2002, plain clothed state security officers arrested three journalists. No charges were laid as the three remained in detention. It is alleged that a petition was filed with the First Judicial Court which issued a Special Writ of Habeas Corpus. This was allegedly not complied with. The Complainants further alleged that the subsequent announcement by the Liberian Government of its intention to arraign the detained journalist before a military tribunal would restrain, deprive and deny them of their human rights to liberty, freedom and due process of laws. The complainants made a request for provisional measures to the African Commission in accordance with Rule 111. It was found that despite repeated requests, the complainants did not provide submissions on admissibility, particularly in relation to the exhaustion of domestic remedies and so the communication was found inadmissible due to non-exhaustion of local remedies.</p>
283/2003 – B/Kenya	2003	Kenya	<p>It was alleged that September 30, 2003, the Anti-Corruption Committee of Kenya presented a report on corruption in the judiciary to the Chief Justice of Kenya in the presence of the press. The Report revealed endemic corruption in the judiciary and listed names of Judges alleged to have been involved. On October 4, 2003 during a press conference, the Chief Justice without naming the judges is alleged to have given the named judges a two-week ultimatum to resign or face trial. The Complainant claimed that over the following</p>

			<p>several days none of the judges named in the report were informed of their presence on the list nor of the allegations against them. On October 14, 2003 it was reported that the President had appointed two tribunals to investigate the twenty-three judges whose names were announced during the broadcast as well as their suspension. The Complainant asserted that this was the first time that the judges learnt of their presence on the list and of their immediate suspension. The announcement however did not contain details of the allegations made against each judge. The Complainant alleges that as of October 17, 2003, the judges had still not received details of the allegations made against them. The communication was received by the Commission on October 21, 2003, and included a request for provisional measures under Rule 111 to ensure that the process of removing judges did not interfere with the independence of the judiciary and the right to a fair hearing.</p> <p>On October 28, 2003, the Chair of the African Commission advised the matter would be handled as a communication at the African Commission's forthcoming Session and an Appeal Letter should not be sent to the government of Kenya until after the African Commission had examined the matter and determined what course of action to take. The Complainant later informed the Commission that they received information that the Registrar and Chief Justice did not authorise releasing the names of the implicated judges to the press and that this particular matter was now being investigated by the judiciary. Furthermore, the issue of a fair trial in light of the publicity created prior to the suspension of the judges had been raised before the Tribunals and that the matter was being handled and could end up with the Constitutional courts of Kenya. For these reasons the Complainant withdrew their complaint.</p>
269/2003 Interights	2003	Nigeria	The complaint was filed by Interights on behalf

<p>on behalf of Safia Yakubu Husaini and et al/Nigeria</p>			<p>of Safiya Yakubu Husaini and others who were allegedly subjected to gross and systematic violations of fair trial and due process rights in the Sharia Courts in Nigeria. Ms Safiya Hussaini was sentenced to death by stoning by a Sharia Court for an alleged crime of adultery. The Complainant alleges that Safiya's case is only one of the many cases to be decided under the recently introduced pieces of Sharia penal legislation in northern Nigerian States. In its complaints, the complainant also enumerates other similar instances of alleged violations of fair trial, personal dignity and the right to life.</p> <p>The Complainant included a request for provisional measures to the African Commission in accordance with Rule 111. Receipt of the complaint was recognized by the Commission February 5, 2002 and a request was made for further information and evidence regarding the same. On February 6, 2002, the Chairman of the African Commission addressed an Urgent Appeal to His Excellency, President Olusegun Obasanjo of the Federal Republic of Nigeria, respectfully urging him to suspend further implementation of the Sharia Penal Statutes and decisions as well as 3 convictions thereof, including the case of Ms. Safiya. On the same date, the Chairman of the African Commission addressed a similar Urgent Appeal to His Excellency Amara Essy of the African Union, respectfully urging Him to draw the attention of the President of the Federal Republic of Nigeria to the situation.</p> <p>On March 19, 2002, the Director of the Political Affairs Department of the African Union wrote to the Chairman of the African Commission that the Secretary General of the AU had formally taken up the matter at the level of H.E. Chief Olusegun Obasanjo, President of the Federal Republic of Nigeria.</p> <p>On March 21, 2002, the Chief of Staff acknowledged receipt of the Urgent Appeal and</p>
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299/05 - Anuak Justice Council/ Ethiopia	2005	Ethiopia	<p>The complainant states that crimes against humanity, such as extrajudicial killing, torture, and rape, that took place against the Anuak civilians was in violation of international law as well as the African Charter. The Complaint included an urgent request for provisional measures under Rule 111 on the basis that the actions of the Defence Forces of the Federal Democratic Republic of Ethiopia revealed a pattern of serious and massive human and peoples’ rights violations and requesting that the Ethiopian government stop the human rights abuses of the Anuak pending a decision of the African Commission on the concurrent communication.</p> <p>In making a request for provisional measures the complainant noted that while the African Commission had not decided whether grants of Provisional Measures should be binding on State Parties, other international and regional human rights bodies declared that Provisional Measures be binding on States including the European Court of Human Rights, Inter-American Commission, the International Court of Justice and the UN Human Rights Committee.</p> <p>On May 24, 2005, the Secretariat of the African forwarded the complaint to the State with a request for the latter to make its submission on</p>

			<p>the merits within three months of the notification. The respondent State indicated the measures it took to deal with the situation and the legal proceedings being undertaken by those alleged to have committed human rights violations during the incident. The Commission found that these measures demonstrated that the State was not indifferent to the alleged human rights violations that took place and could be said to have exercised due diligence.</p> <p>Important case in defining the exhaustion of local remedies requirement</p> <p>The complainant's submissions demonstrated that it was apprehensive about the success of local remedies either because of fear for the safety of lawyers, the lack of independence of the judiciary or the meagre resources available to the judiciary. The Commission found that the complainant did not provide concrete evidence or demonstrate sufficiently that these apprehensions were founded and may have constituted a barrier to attempting local remedies and therefore found the complaint inadmissible.</p>
322/2006 Tsatsu Tsikata/ Republic of Ghana	2006	Ghana	<p>The complainant, who was in the midst of a trial alleged that the charge on which his trial was based constituted a violation of the right against non-retroactive criminalization under Article 7 (2) of the African Charter. He also contended that the manner in which the trial was being carried out violated Article 7 (1) of the African Charter. He requested that Rule 111 on Provisional measures be invoked such that the Republic of Ghana not proceed further with his trial until his case has been heard by the African Commission. As his case had not been concluded it was found inadmissible because there had not been an exhaustion of local remedies.</p>

February 23, 2011