

**African Court on Human and Peoples' Rights**

**Order for Provisional Measures**

**Dexter Eddie Johnson v. Republic of Ghana**

**Application 016/2017**

**(PARTLY) DISSENTING OPINION OF JUDGES**

**GÉRARD NIYUNGEKO AND RAFÅA BEN ACHOUR**

1. We voted for the provisional measure to "refrain from executing the death penalty against the Applicant until the Application is heard and determined"<sup>1</sup>. This is because we are convinced about the absolute necessity and urgency of such an order. The Court did well, and on this, we are in perfect agreement that the "situation raised in the present Application is of extreme gravity and represents a risk of irreparable<sup>2</sup> harm" if no action is taken to preserve the *status quo*.

2. That said, we do not share the decision to grant the Respondent State sixty (60) days to report to the Court on the measures taken to implement its decision<sup>3</sup>. In our understanding, this too long time limit is not reasonably defensible, and the inconsistency of such a time limit cannot be justified.

3. We note straight away, that the Application was received at the Court Registry on 26 May 2017, and that, unlike other Applications by persons on the death row, it was the Applicant himself who requested an order for provisional measures. In actual fact, unlike other cases, the Court did not take the initiative to pronounce provisional measures on its own accord as authorized by Article 27 (2) of the Protocol and Rule 51 (1) of its Rules. Upon receipt of the Application, the Court gave the Respondent State sixty (60) days within which to respond to the Application. The latter did not react.

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<sup>1</sup> § (a) of the operative provisions

<sup>2</sup> (§18)

<sup>3</sup> § (b) of the operative provisions



4. Our opinion is presented from two perspectives: firstly, we shall explain why the sixty (60) days' time limit is not logical and reasonable (I); and secondly, we shall point to the Court's unwarranted inconsistency with regard to time limits when it comes to implementing Rule 51 (5) of our Rules (II).

#### **I. Unreasonable time limit**

5. To start with, it should be made clear that any such time limit is always counted from the date of receipt of the Court's Order by the Respondent State, rather than from the date of delivery of the said Order by the Court, a provision which protects the Respondent State from any surprises.

6. It should also be emphasized that, by definition, the provisional measures concerned are emergency measures which must be taken quite speedily. This places the Respondent State in a situation whereby it has to give priority to implementation of the measures in question; measures which must be taken as quickly as possible.

7. Having said that, the question as to how much time a Respondent State should be allowed to report on the measures taken to comply with an Order of Court has to be considered on a case by case basis.

8. In deciding to issue an Order for Provisional Measures either in the interest of the Parties or in the interest of justice, the Court must do so with firmness to avoid criticism regarding the immediate and urgent applicability of such measures. Firmness is all the more necessary when it comes to measures aimed at protecting the fundamental right to life<sup>4</sup>, as in this case, to prevent the Applicant subject to capital punishment, from being executed even when the proceedings are pending before the Court.

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<sup>4</sup> A right protected by Article 4 of the Charter: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right", and by Article 6 of the International Covenant on Civil and Political Rights:

"1. Every human being has the Inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention



9. In general, however, it may be said that in granting such a time limit to the Respondent State, the Court's main objective is to give the latter time to put the appropriate measures in place.

10. With regard to this objective, the extent of the time limit will certainly depend on the nature of the measures expected. If, for example, the time is intended for the Respondent State to initiate a legislative process or other similar process, it is obvious that the Respondent State will need a relatively long time to complete the process. If, on the other hand, it is simply a matter of refraining from doing something or of doing something easy, such as allowing the Applicant access to medical care or a lawyer or to receive visits from members of his family, then the Respondent State does not need much time to comply with the Court Order.

11. In the instant case, the Court did not order the Respondent State to urgently enact a law for retroactive abolition of the death penalty or to retry the Applicant, which would have required much time. All that the Court orders is for the Respondent State to temporarily suspend execution of the death sentence imposed on the Applicant by the domestic court, pending the Court's decision on its jurisdiction, admissibility of the Application and on the merits of the case.

12. To ensure that the sixty (60) days' time limit granted meets the logic inherent in the urgency of the provisional measures, it was necessary to take into account the means which the Respondent State must deploy to stay execution of a person under death sentence who, besides, is "on the death row awaiting execution".

13. In this respect, it seems judicious to recall that, in this matter, the principle is that of immediate stay of execution and to the minute, and that no derogation is effective. By way of illustration, the European Court of Human Rights, in a Judgment issuing provisional measures, strongly reaffirmed that when life and health are at stake, even "*diplomatic assurances*" are ineffective and application of the provisional measure is immediate, urgent and to the minute<sup>5</sup>.

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and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court."

<sup>5</sup> *Othman v. United Kingdom* ECHR, Fourth Section, 17 January 2012, No. 8139/09, (paragraphs 148, 151, 170 and 180). See also *Marcellus S. Williams, Petitioner v. Cindy Griffith, Warden* Supreme Court of the United States, decision suspending execution of the death penalty was followed with immediate



14. Admittedly, under the procedure before this Court and by virtue of Rule 37 of its Rules, the Respondent State has sixty (60) days to respond to an Application filed against it; but to give the same *quantum* when it comes to informing the Court of the execution of measures to prevent occurrence of unforeseeable, extremely serious violations with irreparable consequences, does not seem logical to us.

15. If in the first case (filing of the Response to the Application) the Respondent State must have sixty (60) days to investigate the case, search for, collect and establish the evidence for its claims, this is not the case with regard to this Order.

16. For these reasons, it is our view that the decision to grant the party performing the provisional measure sixty (60) days is neither logical nor reasonable.

## II. Unwarranted Inconsistency of time limits

17. A global overview of the provisional measures so far issued by the Court reveals that, while the legitimacy of the said measures does not call for comment on our part, justification of the *quantum* of the time limits allowed for the State to submit its report suffers from an unjustified variation.

18. It is noteworthy that the said time limits oscillate between fifteen (15)<sup>6</sup>, thirty (30)<sup>7</sup> and sixty (60) days as in the instant case. Admittedly, the Judge has in this domain a broad power of evaluation in as much as Rule 51 of the Rules in paragraphs 1 and 5 does not spell out cases of necessity, nor does it prescribe a particular time limit. The Rule in question confines itself to stating that: "the Court may...prescribe to the parties any interim measures which it deems necessary to adopt in the interest of the parties or of justice" and that it may, in addition, "invite the parties to provide it with information on any issue relating to implementation of the interim measures adopted by it".

19. In light of the foregoing provisions, we believe that in determining the time limit contemplated in paragraph 5 of Rule 51, the Court should take into account certain parameters, including *inter alia*, the very nature of the measure, the degree of implementation or the imminence of the irreparable harm, the attitude of the party

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effect even though execution of the convict was already scheduled for the very evening of the day of the delivery of stay of execution decision and a report thereon followed.

<sup>6</sup> See Order of 25 March 2011, *African Commission on Human and Peoples' Rights v. Great Libyan Arab Jamahirliya*; Order of 15 March 2013, *African Commission on Human and Peoples' Rights v Republic of Kenya*

<sup>7</sup> See Order of 18 March 2016, *Armand Guehi v. United Republic of Tanzania*



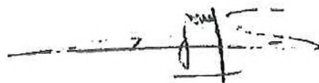
performing the provisional measure and the degree of the latter's cooperation in moving forward the procedure<sup>8</sup>.

20. Also to be taken into account is whether or not implementation of the provisional measure requires involvement of other third parties or whether the implementation involves outside elements, etc.

21. All in all, do the fluctuations of time limits really take into account all the endogenous and exogenous elements inherent in the implementation of the measure dictated by the Court? If not, how does one understand the sixty (60) days' time limit decided in the instant Order?

22. In this case, it must also be said that the Order does not take into account the interest of justice and the need for the performing party to maintain the *status quo* until the conclusion of the proceedings pending before the Court. This is so because the Court's interest in monitoring execution of its decision is emptied of all its substance. The time limit lacks proportionality because it diminishes the State's obligation to report back to the Court. Moreover, it deprives the Court of the opportunity to keep a watchful eye on the rights of which it has the mandate to protect.

23. It is the foregoing reasons that led us to vote against paragraph (b) of the operative part of the Order. We hope the Court will adopt a consistent course of action in this area and be extremely demanding, as soon as the right to life comes under threat.



Judge Rafaâ Ben Achour



Judge Gérard Niyungeko

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<sup>8</sup> When it is established that the performing party is not inclined to full cooperation, the Court should give extremely short time limit, followed by repeated reminders if need be.