

Dissenting opinion of Judge Rafaâ Ben Achour

1. I regret not sharing the Court's decision to dismiss the request for indication of provisional measures made by Applicant XYZ in the case between him and the Republic of Benin (Application No. 59/2019).
2. The Applicant's prayer is that the Court should order the Respondent State to:
 - i. suspend the work of the administrative structure called Orientation and Supervisory Council (COS) established by the Constitutional Court on 06 September 2019 and the holding of municipal and local elections pending the decision on the merits of the main application.
 - ii. refrain from any act or action which could cause irreparable damage and which could irreparably prejudice the main application before the Court until it has decided on the said application.
 - iii. send a report to the Court within a time period that the Court may decide”.
3. Before turning to the present case, it is noteworthy that most international jurisdictions are empowered to pronounce provisional or protective measures¹. This was the case with the Permanent Court of International Justice (PCIJ), and is also the case with the International Court of Justice (ICJ)², the European Court of Human Rights (ECHR)³ and the Inter-American Court of Human

¹ Cf. BERNRAHDT (Rudolf, Ed), *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, Springer-Verlag, 1994 ; COLLINS (Lawrence), « Provisional and Protective Measures in International Litigations », *Recueil des Cours de l'Académie de Droit International*, 1992, Vol 234, pp.

² Article 41(1) of the Statute: “The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party”.

³ Rule 99 of the Rules of Court: 1. The chamber or, where appropriate, the president of the section or a duty judge appointed in accordance with paragraph 4 of this article may, either at the request of a party or any other interested person, or *proprio motu*, indicate to the parties any provisional measure they consider necessary to be adopted in the interest of the parties or the proper conduct of the procedure. 2. If necessary, the Committee of Ministers is immediately informed of the measures adopted in a case. 3. The chamber or, where appropriate, the president of the section or a duty judge appointed in accordance with paragraph 4 of this article may invite the parties to provide them with information on any question relating to the implementation of the interim measures indicated. 4. The President of the Court may designate vice-presidents of sections as duty judges to rule on requests for interim measures”.

Rights⁴, the Court of Justice of the European Union (CJEU)⁵, and the Economic Community of West African States - ECOWAS - Community Court of Justice (ECCJ)⁶. This is also the case with “quasi-jurisdictional” bodies such as the Human Rights Committee⁷, the Committee against Torture⁸ and the African Commission on Human and Peoples' Rights⁹.

4. The reference text for this Court in matters of provisional measures is Article 27 § 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights dated 9 June 1998 (hereinafter referred to as “the Protocol”) which provides that:

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

⁴ Article 63 (2) of the Convention: “In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission”.

Article 25 § 1 of the Rules of Procedure: 1. At all stages of the proceedings, in cases of extreme urgency and gravity, and when it becomes necessary to prevent irreparable damage to persons, the Court may order, *proprio motu*, or at the request of a party, under the conditions provided for in article 63.2 of the Convention, the provisional measures it deems relevant. "

⁵ Article 160 of the Rules of Procedure of the Court: “1. An application to suspend the operation of any measure adopted by an institution, made pursuant to Article 278 TFEU or Article 157 TEAEC, shall be admissible only if the applicant has challenged that measure in an action before the Court. 2. An application for the adoption of one of the other interim measures referred to in Article 279 TFEU shall be admissible only if it is made by a party to a case before the Court and relates to that case”.

⁶ Article 79 of the Rules of Procedure: 1. An application under Article 20 of the Protocol shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. 2. The application shall be made by a separate document and in accordance with the provisions of Articles 32 and 33 of these Rules.

⁷ Article 92 of the Rules of Procedure of the Committee: 1 “Before informing the State party concerned of its final views on the communication, the Committee may inform that State of its views on the advisability of taking interim measures to avoid irreparable harm being caused to the victim of the alleged violation. In so doing, the Committee informs the State party that the expression of its views on the adoption of the said interim measures does not imply any decision on the communication on the merits”.

⁸ Article 114 §1 of the Rules of Procedure: 1. “At any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) on new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations.”

⁹ Rule 98 § 1 of the Rules of Procedure of the Commission: “At any stage of the Communication, and before the decision on the merits, the Commission may, on its own initiative or at the request of a party to the Communication, indicate to the State party concerned as soon as the situation requires, the provisional measures to be adopted to prevent irreparable harm from being caused to the victim(s) of the alleged violation.”

5. For its part, Article 51 § 1 of the Rules of Court clarified the foregoing provision of the Protocol in these terms:

“Pursuant to 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.”

6. In the present case, the Applicant criticizes the partisan composition of the Orientation and Supervisory Council (COS), and in view of the imminent electoral deadline, scheduled, in principle, for the first quarter of 2020, he expresses the fear that by the time the Court will examine the case on the merits, it would be too late, that is, the elections would already have taken place.

7. In dismissing the request for provisional measures, the Court considers that the question of stay of the work of COS prejudices the merits of the case and that evidence of the urgency and seriousness of the situation has not been provided by the Applicant:

“23. The Court observes that the application for provisional measures to suspend the functioning of the administrative structure, the COS in question also touches on the question of the merits on which the Court is called upon to rule in due course.

24. The Court also observes that the Applicant does not provide evidence of the nature of the urgent and serious risk of irreparable damage that this administrative structure could cause him, as required by Article 27 of the Protocol.

25. In view of the foregoing, the request for interim measures is rejected.”

8. We do not share the opinion of the majority, as it is apparent to us that the request for provisional measures satisfies the two criteria laid down in Article 27 § 2 of the Protocol, namely, on the one hand, “the extreme gravity or urgency” (I) and, on the other hand, the possibility of “irreparable harm” (II), it being understood that these two criteria are both cumulative and mutually connected. As for the statement that examination of the request for interim measures “also touches on the question of the merits of the matter”, this is self-evident. No examination of a request for provisional measures can disregard the merits of the case, but the decision on provisional measures does not prejudice the merits (III).

I. Extreme gravity or urgency

9. Provisional measures are part of the emergency measures ordered by courts. They have been transposed from internal procedural law to international law. In the international order, they have several similarities with certain internal emergency procedures such as the stay of execution procedure, well known in administrative law. As Justice Cançado Trindade rightly points out, provisional

measures have a "preventive dimension" in the international protection of human rights. He specifies that they "represent today a veritable jurisdictional guarantee of a preventive nature and constitute one of the most gratifying aspects of the international action for safeguard of fundamental human rights"¹⁰.

10. Concerning the powers of the AfCHPR to indicate provisional measures, this character of emergency procedure is highlighted by the text of the Protocol which predicates the exercise of this power on "cases of extreme gravity or urgency". Consequently, the Court must ascertain whether there is urgency, that is, whether there is a real risk that an action prejudicial to the rights of the Applicant will be committed before the Court renders its decision on the merits. The issue is therefore that of parrying as quickly as possible to avoid any complication of the situation.
11. Urgency is obviously not assessed *in abstracto*, but rather on the basis of the facts of the case as they emerge from both the application for provisional measures and from the application regarding the merits. A request for provisional measures cannot be considered by the Court where an application on the merits has not been brought. However, in order to issue provisional measures, the Court does not need to establish the existence of violations of the Charter or any other human rights instrument ratified by the Respondent State, or make a definitive ruling on the facts. Indeed, an Applicant may, within the framework of a request for provisional measures, avail himself of the rights recognized by the Charter, once it has been established that continuation of the impugned State action bears the risk of depriving the Court's judgment on the merits, of all effectiveness, thus rendering the application baseless.
12. In the present case, it is *prima facie* established that the composition of COS poses a problem insofar as no political opposition party is represented therein. Furthermore, the imminent date of the communal, municipal and local elections is a fundamental element which the Court should have taken into account in concluding that the element of urgency is established and in ordering, on this basis, the stay of the pursuit of COS work, all the more so because it is absolutely certain that the Court will not be able to rule on the merits of the case before the said elections.

¹⁰ CACADO TRINDADE (A.A), "Provisional measures in the case-law of the Inter-American Court of Human Rights", Lecture delivered on 2 July 2002 as part of the round table organized in Strasbourg by the International Institute for Human Rights and the University of Paris II.
<http://www.corteidh.or.cr/tablas/r26311.pdf>

II. Irreparable harm

13. The second criterion set out in Article 27 § 2 of the Protocol refers to the notion of "irreparable harm". The aim of the provisional measures which the Court may impose is to "avoid" such irreparable harm to persons.
14. In fact, it is needful to institute provisional measures as soon as the Respondent State's behaviour is such as may cause the Applicant harm which will subsequently be very difficult or impossible to adequately erase or repair. Consequently, the purpose of provisional measures is to avoid aggravating a dispute and allow for proper administration of justice.
15. For example, in the *Lagrand* case, the International Court of Justice on 3 March 1999, issued an order for interim measures by which it required the United States, to *inter alia* "take all the necessary measures to ensure that (the German nationals) were not (executed) until a decision is rendered on the case". The two German nationals were, however, executed by the United States.
16. In the matter of the United States diplomatic and consular staff in Tehran, the ICJ considered that "Whereas continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm", the Court finds that "the circumstances require it to indicate provisional measures, as provided by Article 41 of the Statute of the Court, in order to preserve the rights claimed"¹¹.
17. Thus, and as the ICJ notes, "... the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings before the judge, and that no initiative concerning the disputed measures must anticipate the Court's judgment"¹².
18. In the case law of all international human rights bodies, the irreparable nature of the harm is decisive for indication of provisional measures. This is the case

¹¹ ICJ: United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Order of 15 December 1979, § 42 and 43.

¹² ICJ: *Case concerning jurisdiction over fisheries (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Request for the indication of provisional measures, Order of 17 August 1972

for regional courts¹³ and also for the United Nations treaty committees or for the African Commission on Human and Peoples' Rights. In most cases, provisional measures relate to deportation and extradition orders or death sentences¹⁴.

19. In the present case - *XYZ v. the Republic of Benin* - the Court did not seek to ascertain the date of the elections. It merely stated that "The Court also observes that the Applicant does not provide evidence of the nature of the urgent and serious risk of irreparable damage that this structure could cause him, as required by Article 27 of the Protocol", whereas it is incumbent on the Court itself to do so, pursuant to its investigative power. By virtue of its mission to protect human rights, the Court has the duty to ensure that the alleged violation of a human right is not capable of producing irreparable harm and that the violation would be largely completed at the time the Court examines the merits. By failing to do so, the Court may find itself dealing with an application which has become purposeless. We will again quote Judge Cançado Trindade who fully agreed to this point when he wrote that "the object of prevention or provisional measures in international litigation (under international public law) is well known: it is to preserve the rights claimed by one of the parties as to the merits of the case, thus preventing the case from being devoid of purpose and effectiveness, and the final result of the trial from being frustrated"¹⁵.

III. The interim measures order does not prejudice the merits

20. By definition, the measure ordered by the Court is simply provisional. This means that not only is it not final, but that it is also reviewable or even revocable at any time if, having regard to the circumstances of the case, the Court deems such action necessary. This derives from the very nature of orders for provisional measures and the Court's discretionary power to make a determination.

21. In several of its orders for provisional measures, the Court made clear that its power in such matter can be exercised only in regard to the circumstances of the case. This logically means that it is impossible to consider a request for provisional measures in its self and by itself, while disregarding the elements of

¹³ For example, the ECHR received in 2018 (1,540) requests for provisional measures as against (1,683) in 2017. The Court granted the request in 143 cases (compared to 117 in 2017, an increase of 22%) and rejected the requests in 486 cases (compared to 533 in 2017 - a decrease of 9%). The other requests fell outside the scope of Article 39 of the Regulation.

59% of the requests received concerned deportation or immigration cases. Source: ECHR, 2018 Statistical Analysis. https://www.echr.coe.int/Documents/Stats_analysis_2018_FRA.pdf

¹⁴ OUMBA (Perfect), "International Jurisdictions and Emergency Procedures in Human Rights Matters", African Human Rights Journal (*Cahier africain des droits de l'homme*) 2011, pp. 341-366

¹⁵ CANCADO TRINDADE (A.A). Op. Cit, p. 14

the merits. This, in the present case, would be an impossible exercise. To determine the relevance of a request for provisional measures, the Court must imperatively bear in mind the seriousness of the application on the merits, the nature of the alleged human rights violations, the circumstances of such violations, etc. As stated in several of its subsequent orders, "The Court observes that it is up to it to decide in each particular case whether, in light of the particular circumstances, it must exercise the jurisdiction conferred by the above provisions"¹⁶.

22. Similarly, the Court has always made clear in all its orders that "This order deciding [on] provisional measures remains provisional in nature and does not prejudge the Court's conclusions on the merits of the case "¹⁷ Consequently, in the order at issue, the Court did not have to dismiss the application on the ground that it "also touches on the merits". This is obvious. Any request for provisional measures also touches on the merits, but it never prejudices the merits. It is this nuance that we would have liked to see the Court enshrine in this order.

Rafaâ Ben Achour



A handwritten signature in blue ink, appearing to read "Rafaâ Ben Achour".

¹⁶ *Suy Bi Gohore Emile and Others v. Republic of Côte d'Ivoire*, Application No. 44/2019, Order for provisional measures, 28 November 2019

¹⁷ *Idem*