

A critique of the seizure criteria of the African Commission on Human and Peoples' Rights

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Summary: *Seizure of communication is an important stage in litigating before the African Commission on Human and Peoples' Rights. At this stage a complainant is required to disclose a prima facie case, in the absence of which the communication will be refused. The seizure criteria are contained in the African Commission's Rules of Procedure. However, the procedural rules are as important as the substantive rules. Where there are burdensome procedural rules in human rights litigation, it becomes more difficult to gain access to justice. The African Commission's Rules of Procedure 2020 guide the communication proceedings of the Commission. The 2020 Rules have introduced some salient provisions that hitherto were not contained in the Rules. Under the 2020 Rules the Secretary can seize a communication during inter-session on behalf of the African Commission. Efforts have also been made to fully separate admissibility criteria from seizure criteria by deleting the admissibility criteria contained under the seizure criteria in the previous Rules. Consequently, it no longer is a requirement for a communication to pass a preliminary test of the admissibility criteria at the seizure stage. Notwithstanding these changes, the African Commission still applied the jurisprudence of the previous Rules in African Freedom of Expression Exchange & 15 Others (represented by FOI Attorneys) v Algeria & 27 Others (FOI), where the Commission also set a higher prima facie standard.*

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This article critiques the Commission's seizure criteria and procedure. It argues that the 2020 Rules have introduced novel provisions that would necessitate the African Commission to change its seizure jurisprudence. It recommends that the Commission should adopt the 'might' test at the seizure stage rather than the wide prima facie standard it adopted in FOI. In this way the African Commission would have the opportunity to receive more compelling evidence of violation of the African Charter at the merit stage, rather than shutting out communications at a stage where compelling proof is not required.

Key words: *seizure criteria; communication; Rules of Procedure; African Commission; prima facie standard*

1 Introduction

Full 'litigation' before the African Commission on Human and Peoples' Rights (African Commission) generally involves five basic stages, namely, bringing a communication; seizure; admissibility; consideration on merit; and recommendation.¹ Yet, the litigation could be truncated at the seizure stage, where a communication does not fulfil the seizure criteria.² The African Commission in its jurisprudence has espoused the position that the purpose of the seizure procedure is to determine whether a communication discloses a *prima facie* case.³ The seizure procedure enables the Commission to summarily analyse if a communication points 'to the likelihood that a right protected in the African Charter has been violated' and if there is 'a preliminary evidence indicative of a violation'.⁴ At this stage, the respondent state is not informed of the existence of the communication.⁵ Thus, while the seizure stage does not involve the consideration of a communication on its merit, the communication,

1 Media Defence 'Litigating at the African Commission on Human and Peoples' Rights', <https://www.mediadefence.org/ereader/publications/advanced-modules-on-digital-rights-and-freedom-of-expression-online/module-6-litigating-digital-rights-cases-in-africa/litigating-at-the-african-commission-on-human-and-peoples-rights/> (accessed 10 December 2021); S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118.

2 Communication 742/20 *African Freedom of Expression Exchange & 15 Others (Represented by FOI Attorneys) v Algeria & 27 Others (FOI)*; Communication 661/17 *Amir Fam & 141 Others v Egypt (Amir)*; Communication 464/14 *Uhuru Kenyatta and William Ruto (represented by Innocence Project Africa) v Republic of Kenya (Uhuru)*.

3 The African Commission on Human and Peoples' Rights Information Sheet 3 Communication Procedure 4; FOI (n 2) para 42.

4 FOI (n 2) para 42.

5 A state is only informed of the communication after the seizure procedure. See Gumedze (n 1) 126-127.

at least, is expected to raise a rebuttable presumption that a violation has occurred. This article critiques the decisions of the African Commission on what facts disclose a *prima facie* case.

The seizure criteria are provided by the Rules of Procedure of the African Commission.⁶ Although in some decisions of the Commission, for instance, in *Uhuru*,⁷ the Commission 'decided not to be seized of the communication because it does not comply with article 56 of the African Charter and does not fulfil the criteria for seizure provided under Rule 93(2) of the Commission's Rules of Procedure',⁸ article 56 of the African Charter on Human and Peoples' Rights (African Charter) deals with the admissibility requirement, rather than the seizure criteria.⁹ Since its inauguration on 2 November 1987, the African Commission has had four Rules of Procedure. The first was adopted in 1988 during the Commission's second ordinary session. The second was adopted after the eighteenth ordinary session in 1995. The third Rules were adopted at the forty-seventh ordinary session of the Commission in 2010, while the fourth and current Rules were adopted at the twenty-seventh extraordinary session of the Commission held from 19 February to 4 March 2020.¹⁰

Rule 115(2) of the Rules of Procedure 2020 deals with the seizure criteria.¹¹ It provides that 'the Secretary shall ensure that communications addressed to the Commission contain the following information'. The information subsequently listed in sub-paragraphs (a) to (g) then represents the seizure criteria that must be fulfilled before the African Commission is seized of a communication. However, who has the duty to fulfil these criteria under Rule 115(2)? Whereas the Rule states the Secretary, in *FOI*,¹² the African Commission decided not to be seized of the communication as the

6 The African Commission is empowered to make the Rules as per art 42(2) of the African Charter.

7 *Uhuru* (n 2).

8 *Uhuru* (n 2) para 22.

9 Gumedze (n 1) 128-135.

10 'African Commission on Human and Peoples' Rights Rules of Procedure', <https://www.achpr.org/rulesofprocedure> (accessed 10 December 2021).

11 Rule 109 deals with communications between state parties, while Rule 115(2) deals with 'other communications submitted by any natural or legal person'. However, this article focuses on the latter. Only three communications have been received by the African Commission with respect to communications between state parties. These communications are *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004); Communication 422/12 *Sudan v South Sudan*; and Communication 487/14 *Djibouti v Eritrea*. For the Rules of Procedure 2020, see 'African Commission on Human and Peoples' Rights Rules of Procedure', <https://www.achpr.org/rulesofprocedure> (accessed 10 December 2021).

12 *FOI* (n 2).

complainant did not fulfil these seizure criteria in the Rule.¹³ This raises some fundamental questions: If the duty is on the secretary as per Rule 115(2), can the African Commission make a finding of the non-fulfilment of the seizure criteria by the complainant under that Rule as the basis for refusing a communication? Also, does this Rule presuppose that, before submitting a communication to the Commission, the Secretary should, if necessary, work with the complainant to ensure that the communication fulfils the criteria, and that the secretary could, as a matter of inference, and to fulfil their duty under the Rule, reject the communication until it fulfils those conditions? This article critically analyses the provisions of Rule 115 and critiques the case law of the African Commission on the seizure criteria.

2 The African Commission and its communication procedure

The African Commission and the African Court on Human and Peoples' Rights (African Court) represent the two continent-wide platforms for the enforcement of rights contained in the African Charter.¹⁴ Article 30 of the Charter establishes the African Commission as follows: '[A]n African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa.' The African Charter mandates the African Commission to perform four basic functions: to promote human and peoples' rights; to protect human and peoples' rights; to interpret the provisions of the African Charter; and to perform any other tasks that may be entrusted to it by the Assembly of Heads of State and Government.¹⁵

The promotional role of the African Commission may be achieved in different ways. It may be achieved by undertaking research in the field of human rights or identifying human rights problems;¹⁶

13 *FOI* (n 2) para 44. The African Commission held that '[c]onsidering that the complainants have failed to substantiate and adduce evidence in support of the allegations raised against the respondent states, it therefore follows that the complainant does not meet the criteria provided under Rule 93(2) of the Commission's Rules of Procedure (2010)'. However, the African Commission meant Rule 115(2) of the African Commission's Rules of Procedure 2020.

14 IJCR *African Commission on Human and Peoples' Rights*, <https://ijrcenter.org/wp-content/uploads/2020/05/ACHPR-one-pager-2020.pdf> (accessed 13 December 2021).

15 Art 45 African Charter; S Derso 'The role of the African Commission' Institute for Security Studies, June 2008, <https://issafrica.org/chapter-4-role-of-the-african-commission> (accessed 17 December 2021).

16 See eg Resolution 473 where the African Commission recently identified the threat of technology to human rights. To access the Resolution, see <https://>

making recommendations to governments; or lay down principles on human rights upon which African governments may base their legislation.¹⁷ The Commission has promoted human rights on the continent through its 'soft law' instruments, Guidelines, Principles and Declarations, Resolutions and 'other publications'.¹⁸

In its protectional role the African Commission utilises the communication procedure to achieve this mandate.¹⁹ Under the communication procedure a communication may be submitted either by a state party to the African Charter against another state party to the Charter,²⁰ or under the 'other communication' procedure²¹ by 'any natural or legal person'.²² Prior to the African Commission's Rules of Procedure 2010, there were arguments about who might be a complainant under the 'other communication' procedure, with the liberalists arguing that non-governmental organisations (NGOs) without observers status, in addition to individuals, could bring a communication.²³ This is because the text of article 56 of the African Charter mentions the 'author', while the African Commission's earlier Rules of Procedure were not clear: 'The Commission, through the Secretary, may request *the author* of a communication to furnish clarifications on the applicability of the Charter to his/her communication.'²⁴ This was resolved by the African Commission's Rules of Procedure 2010,²⁵ and the extant Rules of Procedure 2020.²⁶ The Rules now are clear that a communication may be submitted by 'any natural or legal person'.

Before considering a communication on its merits, the African Commission has to be seized of and admit such communication. In this regard, such communication must fulfil 14 conditions:²⁷ seven requirements in accordance with Rule 115(2) of the African

www.achpr.org/sessions/resolutions?id=504 (accessed 17 December 2021).

- 17 African Commission on Human and Peoples' Rights (African Lii 10 November 2020), <https://africanlii.org/catalog/52> (accessed 12 December 2021).
- 18 African Commission on Human and Peoples' Rights Resources, <https://www.achpr.org/resources> (accessed 12 December 2021).
- 19 African Commission on Human and Peoples' Rights' Mandate of the Commission, <https://www.achpr.org/mandateofthecommission> (accessed 12 December 2021).
- 20 Arts 47-54 African Charter. There have only been three communications (n 11).
- 21 See arts 55-59 African Charter.
- 22 See Rule 93(1) Rules of Procedure 2010; Rule 115(1) Rules of Procedure 2020.
- 23 Gumedze (n 1) 121.
- 24 Rules of Procedure 1995. To access the Rules, see <http://hrlibrary.umn.edu/africa/rules.htm> (accessed 15 December 2021).
- 25 See Rule 93(1) Rules of Procedure 2010.
- 26 See Rule 115(1) Rules of Procedure 2020.
- 27 See *FOI* (n 2) para 38 where the African Commission held that a communication must fulfil Rule 115(2) of the Rules of Procedure 2020 and art 56 of the African Charter. Both contain seven conditions each.

Commission's Rules of Procedure 2020 for seizure criteria;²⁸ and seven conditions under article 56 of the African Charter for admissibility.²⁹ This article focuses on the seizure criteria for 'other communication' brought by individuals and/or NGOs.³⁰ Although it may seem in some decisions of the African Commission that the seizure criteria and admissibility criteria are interwoven,³¹ the Commission usually considers a communication for seizure criteria and admissibility criteria at different sessions, which may point to the fact that they indeed are different.³² In *Article 19 v Eritrea* the African Commission was seized of the communication at its thirty-third ordinary session,³³ but admitted it at its thirty-sixth ordinary session.³⁴ However, considering the seizure criteria and admissibility criteria at different sessions does not necessarily mean that the Commission solely considers the seizure criteria at the seizure stage. In *Uhuru*, one of the African Commission's *raisons d'être* for refusing seizure was because the 'Commission finds that the complaint contains disparaging and insulting language, in contravention of article 56(3) of the African Charter'.³⁵ Yet, the applicable Rules of Procedure 2010 contain no such requirement.

To be seized of a communication, all that is required by the African Commission is *prima facie* evidence of violation.³⁶ Disclosure of 'a series of serious or massive violations' is not required. It is not even required for the Commission to consider the communication on its merits. The provision of article 58, which had been thought to require 'a series of serious or massive violations' before the Commission, could be seized and admit a communication is erroneous.³⁷ The text itself does not suggest such inference. It reads:

When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.

28 As argued below, the seven requirements under Rule 115(2) Rules of Procedure 2020, in fact, should be fulfilled by the Secretary after consultation with the complainant, except where a doubt exists, which would then be resolved by the African Commission. See Rule 115(7) Rules of Procedure 2020.

29 See *Amir* (n 2) para 24. See also *Open Society Justice Initiative (on behalf of Njawa Noumeni) v Cameroon* (2006) AHRLR 75 (ACHPR 2006) para 45.

30 For the criteria relating to communications brought by states, see Rules 109-114 Rules of Procedure 2020.

31 See *Uhuru* (n 2).

32 Gumedze (n 1) 127.

33 *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) (*Eritrea*) para 11.

34 *Eritrea* (n 33) para 23.

35 *Uhuru* (n 2) para 17.

36 FIDH *Admissibility of complaints before the African Court: Practical guide* (2016), <https://www.refworld.org/pdfid/577cd89d4.pdf> (accessed 15 December 2021).

37 Gumedze (n 1) 124.

This provision merely requires the African Commission to inform the Assembly if a communication discloses ‘a series of serious or massive violations’.³⁸ It does not make it a condition precedent to consider *all* communications, and does not even make it a condition precedent to consider any communication disclosing ‘a series of serious or massive violations’. Thus, the African Commission was in order in *Jawara v The Gambia*³⁹ where it observed:⁴⁰

The position of the Commission has always been that a communication must establish a *prima facie* evidence of violation. It must specify the provisions of the Charter alleged to have been violated. The State also claims that the Commission is allowed under the Charter to take action only on cases which reveal a series of serious or massive violations of human rights. *This is an erroneous proposition.* Apart from Articles 47 and 49 of the Charter, which empower the Commission to consider inter-state complaints, Article 55 of the Charter provides for the consideration of ‘communications other than those of States Parties’. Further to this, Article 56 of the Charter stipulates the conditions for consideration of such communications ... *In any event, the practice of the Commission has been to consider communications even if they do not reveal a series of serious or massive violations. It is out of such useful exercise that the Commission has, over the years, been able to build up its case law and jurisprudence.*

Despite its apparent functions in promoting and protecting human rights in Africa, the African Commission, is faced with certain impediments in the exercise of its mandate. Samb divides these into ‘practical and political matters’.⁴¹ The practical problems relate to funding and support from state parties,⁴² and the Commission has had to institute a resolution on the establishment of a voluntary contributory fund for the African human rights system.⁴³ Dersso sees the problems as ‘legal’ and compliance issues. He states that

according to the African Charter, it [the Commission] is empowered to make only those recommendations it deems useful. From a legal perspective, these recommendations are not binding in the way court

38 DC Turack ‘The African Charter on Human and Peoples’ Rights: Some preliminary thoughts’ (1984) 17 *Akron Law Review* 377.

39 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) (*Jawara*).

40 *Jawara* (n 39) paras 41 & 42 (my emphasis).

41 M Samb ‘Fundamental issues and practical challenges of human rights in the context of the African Union’ (2009) 15 *Annual Survey of International and Comparative Law* 61 68.

42 Some of the African Commission’s projects are being funded by the European Union. See ‘The African Commission on Human and Peoples’ Rights Information Sheet 2 Guidelines for the submission of communications’, https://www.achpr.org/public/Document/file/English/achpr_infosheet_communications_eng.pdf (accessed 20 December 2021).

43 See 96 Resolution on the Establishment of a Voluntary Contribution Fund for the African Human Rights System – ACHPR/Res.96(XXXX)06, <https://www.achpr.org/sessions/resolutions?id=112> (accessed 20 December 2021).

judgments are. Consequently, States comply with its recommendations essentially out of good will, not legal obligation.⁴⁴

These problems still subsist, and while they impede the exercise of the mandate of the African Commission, the Commission has significantly promoted human rights on the continent.⁴⁵

3 Seizure criteria of the African Commission

The extant seizure criteria of the African Commission are contained in Rule 115 of the Commission's Rules of Procedure 2020. The African Charter empowers the Commission to lay down its own rules of procedure.⁴⁶ Pursuant to this, the Commission has had four rules of procedure: in 1988, 1995,⁴⁷ 2010⁴⁸ and 2020.⁴⁹ Rule 115(1) of the 2020 Rules stipulates that any natural or legal person may submit a communication under article 55 to the Chairperson of the African Commission through the Secretary.⁵⁰ When such communication is submitted, the Secretary is mandatorily required to ensure that the communication contains the following:

- (a) the name, nationality and signature of the person or persons filing it or, in cases where the complainant is a non-governmental entity, the name and signature of its legal representative(s);
- (b) whether the complainant wishes that his or her identity be withheld;
- (c) the address for receiving correspondence from the African Commission and, if available, a telephone number, facsimile number and e-mail address;
- (d) an account of the act or situation complained of, specifying the place, date and nature of the alleged violations;
- (e) the name of the victim, in a case where he or she is not the complainant, together with sufficient proof that the victim consents to being represented by the complainant or justification why proof of representation cannot be obtained;
- (f) any public authority that has taken cognisance of the fact or situation alleged; and
- (g) the name of the state(s) alleged to be responsible for the violation of the African Charter, even if no specific reference is made to the article(s) alleged to have been violated.

44 Dersso (n 15).

45 As above.

46 Art 42(2) African Charter.

47 To access the 1995 Rules, see n 24.

48 To access the 2010 Rules, see https://www.achpr.org/public/Document/file/English/Rules_of_Procedure_of_the_African_Commission_on_Human_and_PeoplesRightsof2010_%20Legal%20Instruments%20_%20ACHPR.pdf (accessed 10 December 2021).

49 To access the 2020 Rules, see n 10.

50 The secretary is provided for in Rule 20 Rules of Procedure 2020.

In order to ensure that the Secretary is able to perform their obligation under sub-rule (2), the Rules further mandatorily require the Secretary to request from the complainant information listed in (a) to (g) if the communication does not contain this information⁵¹ or where it is 'manifestly lacking'.⁵² The Rule then empowers the Secretary to seize a communication on behalf of the African Commission where the communication contains the information listed in (a) to (g).⁵³ Thus, whereas only the African Commission hitherto had the power to seize a communication in accordance with the rules of seizure,⁵⁴ the Secretary now can do so, and at each session the Secretary shall inform the Commission of all new communications of which it was seized during the inter-session period.⁵⁵ Under the 2020 Rules, the African Commission only has power to seize a communication in two situations: first, where the communication is declined by the Secretary during the inter-session⁵⁶ (for instance, where the Secretary doubts whether the criteria have been met);⁵⁷ and, second, where the Secretary decides to refer any communication to the African Commission.⁵⁸ It seems that the power given to the Secretary to seize of communications during inter-session is for purposes of quicker dispensation of communications by the African Commission.

4 Seizure criteria of the African Commission: *FOI* as a case study

The African Commission applied its extant Rules of Procedure in *FOI*. Although the Commission frequently referred to its Rules of Procedure 2010 in the decision,⁵⁹ it is apparent that the Commission meant to apply the Rules of Procedure 2020.⁶⁰ In *FOI* the complainants submitted a communication in February 2020 against 28 African states, alleging that each of the respondent states, at least on one occasion, has intentionally disrupted or limited access to telecommunication services, including the internet, for unjustifiable reasons under the African Charter.⁶¹ The complainants

51 Rule 115(4) Rules of Procedure 2020.

52 Rule 115(6) Rules of Procedure 2020.

53 Rule 115(5) Rules of Procedure 2020.

54 See Rule 93(5) Rules of Procedure 2010.

55 Rule 115(9) Rules of Procedure 2020.

56 Rule 115(10) Rules of Procedure 2020.

57 Rule 115(7) Rules of Procedure 2020.

58 Rule 115(10) Rules of Procedure 2020.

59 *FOI* (n 2) paras 42, 44 & 45.

60 The Rules of Procedure 2020 were already in force when the African Commission adopted its decision in *FOI*. The Rules were adopted at the 27th extraordinary session of the Commission held from 19 February to 4 March 2020, whereas the Commission adopted its decision in *FOI* at its 66th ordinary session held between 13 July and 7 August 2020.

61 *FOI* (n 2) para 3.

gave specifics of the disruptions in each of the respondent states.⁶² The complainants requested the African Commission to find that (i) the respondents had violated articles 9, 10 and 11 of the African Charter; and (ii) the shutting down of the internet in the respondent states amounted to unlawful and unjustifiable interference with the rights of the citizens of the affected countries as it was incompatible with the African Charter, and requested the Commission to bring the matter to the attention of the African Union (AU) Assembly.⁶³

Before deciding whether to be seized of the communication, the African Commission rightly considered whether it had jurisdiction to proceed against all the respondents.⁶⁴ The Commission found that two of the respondents were not parties to the African Charter.⁶⁵ The Commission proceeded with its decision on seizure against 26 states. In its decision on seizure the Commission proceeded by espousing that 'Rule 115(2) of the African Commission's Rules of Procedure, 2020 lists requirement to be met prior to seizure of a complaint, including a preliminary assessment of the requirements under Article 56 of the African Charter'.⁶⁶ The Commission then decided not to be seized of the communication as 'it does not fulfil the criteria for seizure provided under Rule 93(2) of the Commission's Rules of Procedure (2010)'.⁶⁷ The reasoning of the Commission is as follows:⁶⁸

The Commission notes the vagueness of the complainants' submissions on the nature of the alleged violations. The complainants contend that the alleged internet disruptions are in violation of Articles 9, 10 and 11 of the African Charter, as they unjustifiably restrict the rights to freedom of expression, access to information and association in the online environment. However, a cursory review of the facts surrounding the complaint reveals that the assertions therein are largely vague, as the submissions reference general allegations attributed to 'the government' of the respondent states without information or evidence on the specific incidents of the alleged violations. A clear example can be seen in the narrative contained in paragraph 18 to 23 above, which excludes information on the authorities/bodies responsible or the consequences and effect of the alleged disruption in each of the respondent states.

62 *FOI* (n 2) paras 4-31.

63 *FOI* (n 2) para 36.

64 *FOI* (n 2) paras 39 & 40.

65 The African Commission found that Somaliland Republic was neither a member of the AU nor a state party to the African Charter; Morocco is not a state party to the African Charter and has neither signed nor ratified the Charter. *FOI* (n 2) paras 39, 40 & 41.

66 *FOI* (n 2) para 38.

67 *FOI* (n 2) para 45. The Commission apparently meant Rule 115(2) of the African Commission's Rules of Procedure 2020. The Commission had earlier cited the Rules of Procedure 2020 in para 38 of the Report. Rule 93(2) of the 2010 rules is the same as Rule 115(2) of the 2020 rules.

68 *FOI* (n 2) para 43.

However, in another part of the decision the Commission observed:⁶⁹

Rule 93(2) of the Commission's Rules of Procedure (2010)⁷⁰ empowers the Commission to seize complaints alleging *prima facie* violations of the African Charter by a state party. The Commission has held in its jurisprudence that *prima facie* is a decision or conclusion that could be reached from preliminary observation of an issue or a case without *deeply* scrutinising or investigating into its validity or *soundness*. In order for the Commission to arrive at a finding of a *prima facie* violation, the complainant is required to submit facts which point to the *likelihood* that a right protected in the African Charter has been violated. In this sense, facts submitted should at least raise a rebuttable presumption that a violation has occurred.

4.1 Is a preliminary assessment of article 56 required for seizure?

In *FOI* the African Commission held that Rule 115(2) of the Commission's Rules of Procedure 2020 lists the requirements to be met prior to seizure of a communication and that the requirements included a preliminary assessment of the requirements under article 56 of the African Charter.⁷¹ The African Commission cited its decision in *Amir*⁷² to buttress this point.⁷³ However, this cannot be correct. Rule 115(2) of the Rules of Procedure 2020 seems to have dispensed with the requirement for a communication to pass a preliminary test of the criteria for admissibility in article 56 of the Charter.

The idea that a preliminary assessment of article 56 is required for seizure was borne out of some of the seizure requirements contained in both the 1995 and 2010 Rules, which required certain criteria contained in article 56 of the African Charter. Under the 1995 Rules, as conditions for seizure, the communication should, among other things, state the measures taken by the author to exhaust local remedies, or provide an explanation of why local remedies will be futile,⁷⁴ and the extent to which the same issue has been settled by another international investigation or settlement body.⁷⁵ Likewise, under the 2010 Rules, in addition to other criteria, the communication should fulfil the following for the African Commission to be seized: (i) compliance with the period prescribed in the African Charter for

69 *FOI* (n 2) para 42.

70 Again, the African Commission meant Rule 115(2) of the Rules of Procedure 2020.

71 *FOI* (n 2) para 38.

72 See *Amir* (n 2) para 24.

73 *FOI* (n 2) para 38.

74 Rule 104(1)(f) Rules of Procedure 1995.

75 Rule 104(1)(g) Rules of Procedure 1995.

submission of the communication;⁷⁶ (ii) any steps taken to exhaust domestic remedies or, if the applicant alleges the impossibility or unavailability of domestic remedies, the grounds in support of such allegation;⁷⁷ and (iii) an indication that the complaint has not been submitted to another international settlement proceeding as provided in article 56(7) of the African Charter.⁷⁸ These requirements are part of the admissibility criteria under article 56 of the African Charter.

The 2020 Rules do not contain the foregoing requirements. The 2020 Rules appear to separate seizure, which had always been interwoven with admissibility, from admissibility. This makes sense because at the seizure stage, the communication is expected to disclose only a *prima facie* case. Requiring an assessment of the article 56 criteria, even though preliminary, at the seizure stage, would stretch the purpose of the seizure stage, which should only be to consider whether a communication reveals a *prima facie* violation. Thus, the 2020 Rules have removed all elements of admissibility in the consideration of whether the African Commission should be seized of a communication.

4.2 Who is to fulfil the seizure criteria in Rule 115(2)?

In *FOI* the African Commission decided not to be seized of the communication as the seizure criteria in Rule 115(2) of the Rules of Procedure 2020 had not been met by the complainant, whereas the Rule explicitly requires the Secretary to fulfil those conditions. The Rule provides that ‘the *Secretary* shall ensure that communications addressed to the Commission contain the following information ...’ This provision itself presupposes certain points. First, it presupposes that if the Secretary is to have the duty of ensuring that a communication addressed to the African Commission fulfils the seizure criteria, they should have certain power – the power to require the complainant to ensure that the communication meets those criteria – and the Rules accordingly give the Secretary this power. Sub-rule (4) gives the Secretary the power to ‘request’ the information if the communication does not contain the seizure criteria; while sub-rule (6) empowers the Secretary to ‘invite’ the complainant to comply if the information on the seizure criteria is manifestly lacking. Although ultimately it is the duty of the complainant to fulfil the seizure criteria, this duty is at the stage before the Secretary decides to be seized of

⁷⁶ Rule 93(2)(h) Rules of Procedure 2010.

⁷⁷ Rule 93(2)(i) Rules of Procedure 2010.

⁷⁸ Rule 93(2)(j) Rules of Procedure 2010.

the communication on behalf of the African Commission.⁷⁹ Where the communication has been considered seized by the Secretary, the Commission cannot reject a complainant's communication under Rule 115(2) because the Secretary fails to ensure compliance.

In the second place, the Rules foresee a situation of doubt as to whether the seizure criteria have been met, in which case the Commission will decide.⁸⁰ Thus, only when a doubt exists, which led to the rejection of the communication by the Secretary during the inter-session or where the Secretary decides not to be seized of a communication, but rather prefers to refer it to the African Commission, can the Commission utilise the seizure criteria in Rule 115(2) as the basis to be seized or otherwise of a communication.

4.3 What *prima facie* standard is required?

The jurisprudence of the African Commission suggests that where a communication meets the seizure criteria, such communication would also have met the *prima facie* standard required.⁸¹ However, in *FOI* the Commission set a higher *prima facie* standard in paragraph 43 of the decision to the extent that a complainant who merely fulfils the seizure criteria in Rule 115(2) of the Rules of Procedure 2020 would not have met the *prima facie* standard. While the African Commission required 'information or evidence on the specific incidents of the alleged violations' such as 'information on the authorities/bodies responsible or the consequences and effect of the alleged disruption in each of the respondent states'⁸² to meet the *prima facie* standard, Rule 115(2) of the Rules of Procedure 2020 merely requires a communication to contain 'the name, nationality and signature of the person or persons filing it; or in cases where the complainant is a non-governmental entity, the name and signature of its legal representative(s)'; 'an account of the act or situation complained of, specifying the place, date and nature of the alleged violations' to meet the seizure criteria.⁸³

From the report of *FOI*, the African Commission at paragraphs 4 to 31 had stated the account of the acts complained of, the place, date and nature of the acts complained of. Yet, the Commission had required more, namely, 'evidence on the specific incidents of the

⁷⁹ Rule 115(5) Rules of Procedure 2020.

⁸⁰ Rule 115(7) Rules of Procedure 2020.

⁸¹ See n 3.

⁸² *FOI* (n 2) para 43.

⁸³ See 9-10 above for other criteria.

alleged violations' such as 'information on the authorities/bodies responsible or *the consequences and effect* of the alleged disruption in each of the respondent states'. It is submitted that this might be going too far for the *prima facie* standard under international law.⁸⁴ Different approaches are taken in different fields of law on the *prima facie* standard. Under refugee law a *wider* approach usually is taken. At the *prima facie* stage, a burden has already been placed on the claimant:⁸⁵

'*Prima facie*' evidence in its usual sense [means] *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence. By providing *prima facie* evidence, the burden of proof 'switches ... from the party who has made the *prima facie* showing to his opponent'.

Rutinwa agrees with this proposition and states that 'the view that *prima facie* recognition is *presumptive but conclusive*, unless the presumption is disproved, more accurately reflects the law'.⁸⁶ The African Commission appears to tilt towards this line of thought in *FOI* by requiring evidence at the seizure stage:⁸⁷

Considering that the *complainants* have failed to substantiate and adduce evidence in support of the allegations raised against the respondent states, it therefore follows that the complainant does not meet the criteria provided under Rule 93(2) of the Commission's Rules of Procedure (2010).

On the other hand, arbitral tribunals have taken a *narrow* approach. They have declined to place any burden on the claimant at the *prima facie* stage. According to Choudhary and Sharpe,

owing to the nature of the '*prima facie*' test, arbitral tribunals generally refrain from imposing the burden of proof on the claimant, considering that the claimant is not required to produce specific evidence at this stage of the procedure. All that the claimant must demonstrate at this stage is that the facts alleged by it are capable of constituting treaty breaches.⁸⁸

84 For a comprehensive discussion, see A Sheppard 'The jurisdictional threshold of a *prima facie* case' in P Muchlinski, F Ortino & C Schreuer (eds) *The Oxford handbook of international investment law* (2008) 932; for meaning under refugee law, see B Rutinwa '*Prima facie* status and refugee protection', <https://www.unhcr.org/3db9636c4.pdf> (accessed 12 December 2021); M Albert '*Prima facie* determination of refugee status: An overview and its legal foundation' Master's thesis, University of Oxford, 2010, <https://www.rsc.ox.ac.uk/files/files-1/wp55-prima-facie-determination-refugee-status-2010.pdf> (accessed 12 December 2022).

85 Albert (n 84) 32.

86 Rutinwa (n 84) 6.

87 *FOI* (n 2) para 44.

88 V Choudhary & J Sharpe 'The jurisdictional threshold of a *prima facie* case', <https://jusmundi.com/en/document/wiki/en-the-jurisdictional-threshold-of-a-prima-facie-case> (accessed 18 December 2021).

This narrow approach accords with the opinion of Higgins J in the *Oil Platform* case of the International Court of Justice.⁸⁹ The Judge reasoned:

‘Plausibility’ was not the test to warrant a conclusion that the claim might be based on the treaty. The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 treaty *is to accept pro tem the facts as alleged by Iran to be true and in that light to interpret Articles 1, IV and X for jurisdictional purposes – that is to say, to see if on the basis of Iran’s claims of fact there could occur a violation of one or more of them.*⁹⁰

In the *Ambatielos* case (1953) the Court rejected the United Kingdom claim that the Court should provisionally accept the facts as asserted by the applicant and establish whether they would constitute a violation of the treaty said to provide the Court with jurisdiction. The Court did this for two reasons: *first, to find that the facts would constitute a violation was to step into the merits;*⁹¹ and, second, the merits in this case had been reserved to a different body, the Commission of Arbitration established under the Protocol of 1886. This constraint does not operate in the present case. It is interesting to note that in the *Mavrommatis* case the Permanent Court stated that, to establish its jurisdiction, it was necessary to see if the Greek claims ‘would’ involve a breach of the provisions of the article. This would seem to go too far. Only at the merits, after deployment of evidence, and possible defences, may ‘could’ be converted to ‘would’. The Court should thus determine if, on the facts as alleged by Iran, the United States actions complained of *might*⁹² violate the treaty articles.

It is submitted that it is safer to adopt the ‘*might test*’ espoused by Higgins J.⁹³ The African Commission itself agreed in *FOI* that ‘the Commission has held in its jurisprudence that *prima facie* is a decision or conclusion that could be reached from preliminary observation of an issue or a case without *deeply* scrutinising or investigating into its validity or *soundness*’.⁹⁴ Yet, in the same sentence the African Commission dug deeper by requiring *evidence on the specific incidents of the alleged violations, consequences and effect* of the alleged disruption.⁹⁵ The seizure procedure is to enable the Commission determine whether it *appears* from the facts alleged that a violation has occurred.⁹⁶ Since the Commission still has to determine the merit

89 See ICJ (6 November 2003) Higgins J’s separate opinion <https://www.icj-cij.org/public/files/case-related/90/090-19961212-JUD-01-03-EN.pdf> (accessed 18 December 2021), paras 32 & 33.

90 My emphasis.

91 My emphasis.

92 My emphasis.

93 It would not be out of place to adopt this principle. See arts 60 & 61 African Charter.

94 *FOI* (n 2) para 42.

95 *FOI* (n 2) para 43.

96 n 89 70.

of a communication after the seizure stage, nothing is put at risk, as Higgins J indicated,⁹⁷ if the Commission limits the communication, during the seizure stage, to a test of whether the facts disclosed *might* reveal a violation of the African Charter.

5 Conclusion and recommendation

The African Commission's extant Rules of Procedure 2020 have introduced novel provisions to the Commission's communication procedure. Under the Rules, the seizure of a communication can now be undertaken by Secretary on behalf of the Commission during inter-session. This is advantageous as it may save the time used in considering communications whereby parties had to wait for the Commission's session to know whether or not a communication would be seized by the Commission. Another notable provision of the 2020 Rules is that they dispense with the requirement for communications to meet certain admissibility criteria, which hitherto were contained in the previous Rules of Procedure of the African Commission. Nevertheless, the 2020 Rules have limited the power of the Commission to seize a communication to two situations, namely, where there is a doubt regarding whether the seizure criteria have been met; or where the Secretary decides not to seize a communication and prefers to refer it to the Commission.

The African Commission did not reflect these new provisions in its decision in *FOI*. Thus, it is recommended that the Commission in its subsequent decisions should reflect the changes in the Rules. First, a preliminary assessment of the admissibility criteria is no longer required for seizure and, as such, the African Commission should not make it a criterion to be seized of a communication. Second, the Commission should not make a finding of non-fulfilment by the complainant of the seizure criteria under Rule 115(2) of the 2020 Rules, except where a doubt exists, in the sense of a difference in the assessment of a communication by the Secretary and an assessment by the complainant on whether the criteria have been met, or where the Secretary refers the communication to the African Commission to decide whether it meets the seizure criteria. Lastly, it is recommended that the Commission should adopt the *might* test at the seizure stage rather than the wide *prima facie* standard it adopted in *FOI*. In this way the African Commission would have the opportunity to receive more compelling evidence of violations of the African Charter at the

⁹⁷ n 89 para 34 57.

merit stage, rather than shutting out communications at a stage where compelling proof is not required.