

Recent developments

In default: *African Commission on Human and Peoples' Rights v Libya*

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Summary

This article examines the judgment in the case of African Commission on Human and Peoples' Rights v Libya before the African Court on Human and Peoples' Rights. It argues that as the first judgment to be delivered in default, it serves as an intriguing foundation, and one that will often be revisited as the African Court takes on more and more cases. The article examines the procedures leading to the African Court taking the step of issuing judgment in default, the procedure itself and its future application. The article also examines the nature of the transfer by the African Commission to the African Court and how this may provide guidance in relation to future transfer cases. The article further examines the African Court's findings under article 6 (right to personal liberty and protection from arbitrary arrest) and article 7 (right to a fair trial) of the African Charter.

Key words: *human rights; African Court on Human and Peoples' Rights; African Commission on Human and Peoples' Rights; right to fair trial; right to liberty*

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1 Introduction

This article focuses on the first judgment in default of the African Court on Human and Peoples' Rights (African Court). The article examines the judgment in detail, setting out the reasons for rendering it a default decision and reviewing the unique fact pattern that led to the decision as well as the more general context of judgments in default. The article will seek to draw lessons from this case and examine whether it may be seen as a once-off or may herald more of the same from the African Court.

On 3 June 2016 the African Court handed down judgment in the case of *African Commission on Human and Peoples' Rights v Libya*.¹ The judgment is notable for several reasons: It is the first judgment to be rendered in default pursuant to Rule 55 of the African Court Rules; it raises interesting issues on the transfer of cases between the African Commission on Human and Peoples' Rights (African Commission) and the African Court; and it is the first time the African Court has decided a case brought by the African Commission on its merits. The unique context in which the judgment was rendered also is of note, since behind the rather case-generic name lies the fact that the judgment concerns the detention of Saif al-Islam Kadhafi (Kadhafi) the son of former Libyan leader Muammar Gaddafi.² Over the past few years Kadhafi has been subjected to a game of legal tug-of-war between the International Criminal Court (ICC) and Libya over who should try him for crimes allegedly committed in Libya during his father's rule. This tug-of-war occurred while Kadhafi reportedly languished in the custody of a Libyan armed group not affiliated with, and purportedly out of the reach of, the Libyan government.³ The power play between Libya and the ICC certainly attracted a great deal of interest among

1 App 002/2013 3 June 2016 (Judgment) <http://en.african-court.org/images/Cases/Judgment/Judgment%20Appl%20%20002-2013%20African%20Commission%20v%20Libya-%20Engl%20.pdf> (accessed 30 October 2018). See also separate opinion of Judge Fatsah Ouguergouz on Admissibility of the Application App 002/2013 3 June 2016 (Ouguergouz opinion) <http://en.african-court.org/images/Cases/Dissenting-Separate%20Opinions/Opinion%20Commission%20africaine%20c%20Libye%20dissenting%20opinion%2016%20June%202016.pdf> (accessed 30 October 2018).

2 Saif al-Islam Kadhafi's surname is subject to several iterations, eg, the ICC uses 'Gaddafi'; see <https://www.icc-cpi.int/libya/gaddafi>. The African Court's judgment analysed here uses the spelling 'Kadhafi' which will be adopted throughout the article.

3 The article does not conduct a close examination of the *Kadhafi* case before the ICC, but instead focuses on the African Court judgment. By way of background, in 2013 and 2014 the ICC decided that Kadhafi should be transferred to The Hague, The Netherlands, the seat of the ICC, to be tried on charges of murder and persecution as crimes against humanity relating to the Libyan uprising in 2011. Despite this ruling, at the time of writing Kadhafi has yet to be transferred to the ICC to stand trial. For a detailed review of the *Kadhafi* case before the ICC, see <https://www.icc-cpi.int/libya/gaddafi> (accessed 30 October 2018).

scholars.⁴ This situation has also created most of the headlines in the general media.⁵ However, running in parallel has been the African Court's active engagement over a number of years in the protection of Kadhafi's rights pursuant to the African Charter on Human and Peoples' Rights (African Charter) and the International Covenant on Civil and Political Rights (ICCPR). The judgment analysed in the article is the culmination of this process and points to several issues that may still be live before the African Court as well as the ICC. The article is particularly relevant given the lack of scholarly analysis of the African Court's powers to issue default judgments and its procedure to date. With the African Court receiving an increasing number of applications the likelihood of future scenarios in which its default judgment procedure can be applied will only increase. The case also merits a detailed analysis as, at the time of writing, it is one of only two cases the African Court has accepted resulting from a transfer from the African Commission. Again, the African Court's increasing activity brings a significantly greater possibility of future African Court-African Commission transfers, requiring this case to be examined in detail to assist when dealing with future transfer cases.

The article begins by setting out the background to the case, which is essential to understand the reason why the African Court elected to render a judgment in default. It then examines the preliminary procedure, perhaps best understood as the African Court's attempts to engage Libya. The article will then examine the African Court's judgment in default, assessing the default procedure itself as well as the rest of the judgment on the merits. It finally provides some analysis and conclusions.

2 Background

In February 2011, following similar events across the Middle East and the North African region, civilian demonstrations began in Libya against the regime of Muammar Gaddafi, Saif al-Islam Kadhafi's father. It is alleged that Libyan state policy designed at the highest level was aimed at deterring and quelling demonstrations by any

4 See eg C Stahn 'Libya, the International Criminal Court and complementarity: A test for "shared responsibility"' (2012) 10 *Journal of International Criminal Justice* 325; NN Jurdi 'The complementarity regime of the International Criminal Court in practice: Is it truly serving the purpose? Some lessons from Libya' (2017) 30 *Leiden Journal of International Law* 199; M Ellis 'Beyond a flawed trial: ICC failures to ensure international standards of fairness in the trails of former Libyan regime members' (2017-2018) 33 *American University International Law Review* 75.

5 See eg 'Saif al-Islam Gaddafi case: ICC calls for arrest of ex-Libya leader's son' *BBC News* 14 June 2017 <https://www.bbc.co.uk/news/world-africa-40278385> (accessed 30 October 2018); 'Libya: Gaddafi son Saif al-Islam in contact with ICC' *BBC News* 28 October 2011 <https://www.bbc.co.uk/news/world-africa-15496608> (accessed 30 October 2018).

means, including the use of lethal force.⁶ In furtherance of this policy it is claimed that from 15 February 2011 until at least 28 February 2011 the Libyan security forces carried out attacks throughout Libya against civilians taking part in demonstrations against Muammar Gaddafi's regime, killing and injuring as well as arresting and imprisoning hundreds.⁷ Although not in an official position, Kadhafi was his father's unspoken successor and the most influential person within his inner circle. It is alleged that Kadhafi enjoyed the powers of a *de facto* Prime Minister, exercising control over crucial sectors of Libya's state apparatus, including finances and logistics. It is alleged that Kadhafi, along with his father, conceived a plan to deter and quell civilian demonstrations against the regime by all means, and that both made an essential contribution to implement this plan.⁸ Acting on these allegations the ICC Pre-Trial Chamber issued warrants of arrest against Kadhafi for the crimes of murder and persecution as crimes against humanity.⁹ Kadhafi was arrested in Libya on 19 November 2011 and placed under detention in the city of Zintan.¹⁰ During this detention it was alleged that Kadhafi was kept in isolation, without access to his family, friends or a lawyer.¹¹ It is further alleged that Kadhafi was not charged with an offence or brought before a court.¹² These conditions of detention and the failure of due process formed the basis of Kadhafi's claim before the African Court.

3 Preliminary procedure

The following section on procedure is lengthy, but is necessary in order to demonstrate the attempts made by the African Court to engage with Libya and Libya's non-cooperation that led to judgment in default.

On 2 April 2012 Kadhafi lodged a communication before the African Commission alleging violations of article 6 (Right to personal liberty and protection from arbitrary arrest) and article 7 (Right to a fair trial) of the African Charter.¹³ It appears that on 18 April 2012, as requested by Kadhafi's representatives, the African Commission issued an order for provisional measures pre-empting any irreparable harm

6 See *The Prosecutor v Saif Al-Islam Gaddafi* ICC- 01/11-01/11 ICC, Case Information Sheet, ICC-PIDS-CIS-LIB-01-011/15_Eng (ICC Gaddafi Case Information Sheet) <https://www.icc-cpi.int/libya/gaddafi/Documents/GaddafiEng.pdf> (accessed 30 October 2018).

7 As above. These attacks particularly occurred in Tripoli, Misrata and Benghazi as well as in cities near Benghazi such as Al-Bayda, Derna, Tobruk and Ajdabiya.

8 See ICC Gaddafi Case Information Sheet (n 6).

9 See *Prosecutor v Saif Al-Islam Gaddafi*, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, 10 December 2014, ICC-01/11-01/11 para. 2.

10 Judgment (n 1) para 7.

11 As above.

12 As above.

13 Judgment paras 4 & 9.

to Kadhafi, which Libya ignored despite reminders from the African Court.¹⁴ On 8 January 2013 the African Commission submitted an application to the African Court seeking provisional measures.¹⁵ On 28 February 2013 the African Court was seized of the matter.¹⁶ The timing here is important. It appears that the African Commission applied to the African Court for provisional measures prior to a formal transfer of the case. Although the judgment itself lacks specific detail, it appears that the African Court may have required a formal transfer of the case before it would consider issuing provisional measures, since only on 15 March 2013, two weeks after officially being seized of the case, the African Court ordered provisional measures.¹⁷

The African Court's provisional measures, in effect, appear as another attempt to force Libya to refrain from all judicial proceedings that would impinge on Kadhafi's African Charter rights. These included familiar calls to cease all judicial proceedings, to allow him access to a lawyer of his own choice and visits from family, and to refrain from any action that may affect Kadhafi's physical and mental integrity and health.¹⁸ Libya again ignored the order, failing to report on its compliance within the time allotted.¹⁹

Following the African Court's issuance of provisional measures, numerous attempts were made to cajole Libya into either complying with its provisional measures order or engaging on the merits of the allegations. These attempts included requiring Libya to file its report on compliance, which Libya failed to do.²⁰ The African Court then, *proprio motu*, gave Libya another 15 days in which to comply. Despite

14 Judgment para 8. These provisional measures appear to have been ordered by the African Commission, rather than the African Court, despite the judgment stating that the 'Court' issued the April 2012 provisional orders. This reading is backed up by the African Court's later Order for Provisional Measures which confirms that the African Commission ordered provisional measures in April 2012. See *African Commission on Human and Peoples' Rights v Libya* App 002/2013 Order for Provisional Measures 15 March 2013 para 3 (Provisional Measures Order) http://en.african-court.org/images/Cases/Orders/ORDER%20OF%20PROVISIONAL%20MEASURES_002-2013_English__African_Commission_on_Human_and_Peoples_Rights_v_Libya.pdf (accessed 30 October 2018).

15 Pursuant to art 5(1) of the African Court Protocol, Rule 29(3) of the Rules of the Court and Rule 3 of the Commission's Rule of Procedure. See Judgment para 5. It should be noted that the judgment later refers to the receipt of this application on 31 January 2013 as 'an application from the applicant against the respondent', but this appears to be the order for provisional measures and not the initial application. See Judgment (n 1) para 12.

16 Pursuant to Rule 34 of the African Court Rules. See Judgment (n 1) para 3.

17 Pursuant to art 27(2) of the Protocol and Rule 51(1) of the Court Rules. See Provisional Measures Order (n 14). See also Judgment (n 1) paras 6(i), 10 & 15.

18 See Provisional Measures Order (n 14) para 20.

19 Judgment (n 1) para 17; Provisional Measures Order (n 14) para 20(1). See also Judgment (n 1) para 15. The African Court sent the provisional order to Libya and the Chairperson of the AU Commission pursuant to Rule 51(3) of the Court Rules and gave Libya 15 days to report back.

20 Judgment para 17.

this extension, Libya again failed to comply.²¹ Libya's inaction led the African Court to report Libya to the Assembly of Heads of State and Government of the African Union through the Executive Council pursuant to Rule 51(4) of the Court Rules.²² The Executive Council in turn issued several decisions, urging Libya to work with the African Court and to comply with its orders.²³ Despite getting the Executive Council involved, Libya continued to ignore both the African Court's orders and the Executive Council's decisions.²⁴ This period of attempted engagement by the African Court demonstrates the level to which it engaged with Libya, and is important in understanding the African Court's subsequent decision to render judgment in default.

On 29 May 2013, however, Libya finally responded to the African Court's orders, albeit by addressing a *note verbale* to the Legal Counsel of the African Union, rather than to the African Court itself.²⁵ In this *note verbale* Libya failed to advance a defence of its actions, and instead 'merely forwarded' a number of documents to the African Court and Kadhafi.²⁶ Having finally received a response from Libya the African Court Registrar forwarded the letter of the Legal Counsel of the African Union Commission, including Libya's *note verbale*, to Kadhafi whereupon he was given 30 days to file observations.²⁷ Kadhafi subsequently requested a one-year extension of the deadline to file his brief.²⁸

In a further letter, dated 12 August 2013, Kadhafi's representatives raised the imminent threat of Kadhafi's execution and requested urgent intervention by the African Court.²⁹ In response, the African Court's Registrar granted the request for a one-year extension to respond to the merits of the case 'in view of the nature of the matter and the remedies sought'.³⁰

Moving forward 12 months, on 28 February 2014 Kadhafi filed an 'interlocutory application' regarding Libya's failure to implement the African Court's provisional measures order of 15 March 2013.³¹ On the same day he also submitted an 'application to institute proceedings' which outlined the facts; the nature of the matter; the

21 As above.

22 Judgment para 18. Reports were made at the Executive Council's 24th, 25th, 26th, 27th and 28th ordinary sessions.

23 Judgment para 18. For details of the AU Executive Council's reports and decisions, see Judgment (n 1) fnn 2-7.

24 Judgment para 18.

25 A copy of the *note verbale* was received by Kadhafi on 17 June 2013 and by the African Court on 9 July 2013. See Judgment para 19.

26 Judgment para 19. The documents included comments from Libya and case papers from Kadhafi's case such as pre-trial detention orders; Attorney-General decisions; letters from the prosecution; and minutes of hearings.

27 Judgment para 20.

28 Judgment para 21.

29 Judgment para 22.

30 Judgment para 23.

31 Judgment para 24.

proof of exhaustion of local remedies; the alleged violations; the admissibility of the application; and the remedies sought, stipulating in response to the merits in line with the African Court's 12-month extension.³²

Perhaps surprisingly Libya did respond to this latest round of litigation, affirming that it had submitted its report on the implementation of the 15 March 2013 provisional measures order, and that the Libyan Office of the Public Prosecutor was 'very keen and determined' to ensure that Kadhafi would receive a fair and just trial. Libya stated that it was ready to cooperate with 'any legal institution' on the conditions of Kadhafi's detention, perhaps also in recognition of the ongoing ICC case, and that it would allow trial observation of his case in Libya.³³ What this communication did not contain, however, was any reference to Libya's compliance with the African Court's provisional measures order. Crucially, at its 33rd ordinary session the African Court found that Libya's response did not represent the report on compliance it had requested.³⁴

Following this important decision the African Court Registrar by a *note verbale* dated 6 June 2014 informed Libya that it had noted Libya's failure to respond to the two applications and that, *proprio motu*, it was granting Libya another 15 days to respond to the substantive allegations.³⁵ This communication may be seen as a final effort by the African Court to get Libya to properly engage on the substantive issues in the case. It may also be seen as clear evidence that the African Court was not to be placated through vague assertions and irrelevant information; it required specific submissions from Libya, which it did not receive.

Following these efforts, by a further letter to Libya dated 16 June 2014 the African Court first mooted the possibility of rendering judgment in default. The African Court Registrar specifically made it clear that the African Court had noted that Libya still had not responded to the interlocutory application or the application on the merits at its 33rd ordinary session, and that in the absence of a proper response the African Court would be compelled without further notification to apply the provisions of Rule 55 of the African Court Rules regarding judgment in default.³⁶ The African Court Registrar once again drew Libya's attention to its non-compliance but via a different route, namely, in a letter dated 14 July 2014 to the Deputy Director of Judicial Affairs in the Libyan Ministry of Foreign Affairs and International Cooperation, with copies sent to the Libyan Embassy in

32 Judgment para 25. The African Court's Registry then forwarded copies of both the 'interlocutory application' and the 'application to institute proceedings' to Libya indicating, perhaps rather optimistically, given Libya's conduct thus far, that Libya had 30 days to submit its response. See Judgment (n 1) para 26.

33 Judgment para 27.

34 Judgment para 28.

35 Judgment para 29.

36 As above.

Ethiopia.³⁷ These additional attempts to get Libya to engage once again met with silence.

Moving forward another 12 months, however, by a letter dated 18 March 2015, addressed to Kadhafi and copied to Libya, the African Court Registry confirmed that Libya had not responded to the application on the merits or the interlocutory application, and that at its 36th ordinary session in March 2015 the African Court had pointed Kadhafi to Rule 55 of the Court's Rules, with a view to initiating a procedure in default within 30 days.³⁸ The African Court's approach here is worth noting, since it appears that the African Court wrote to Kadhafi and prompted him to consider a judgment in default.

In a letter dated 16 April 2015 Kadhafi informed the African Court of his intention to initiate judgment in default proceedings.³⁹ By a letter dated 15 May 2016 Kadhafi duly filed an application for judgment in default.⁴⁰ Given the slow pace of the proceedings thus far, the speed with which a judgment in default went from being mooted by the African Court in March 2015 to a formal notice of application of judgment in default being served on Libya in July 2015 may be seen as the African Court finally having lost patience with Libya's inaction.

In July 2015, around the same time the African Court was informing Libya of Kadhafi's application for judgment in default, it was reported that the Assize Court of Tripoli had sentenced Kadhafi to death *in absentia* in spite of the African Court's various orders.⁴¹ 'Highly concerned' about these reports, on 10 August 2015 the African Court issued a second provisional measures order in which it declared that Kadhafi's execution would be a violation of international obligations under the African Charter, the African Court Protocol and other human rights instruments ratified by Libya, and once again the Court ordered Libya to take necessary measures to preserve Kadhafi's life.⁴² The African Court's second provisional measures order also required Libya to ensure that Kadhafi received a fair trial in accordance with internationally-recognised standards, including a trial by an independent judiciary, access to counsel and to allow his family and witnesses to attend the trial.⁴³ The African Court further ordered Libya to arrest and prosecute those illegally holding Kadhafi.⁴⁴

37 Judgment para 31.

38 Judgment para 32.

39 Judgment para 33.

40 Judgment para 34. The African Court Registry responded to this application by sending confirmation in a letter dated 3 July 2015 pursuant to Rule 35(3) of the African Court Rules notifying Libya of Kadhafi's application for judgment in default. See Judgment (n 1) para 35.

41 Judgment para 36.

42 Judgment para 37.

43 As above.

44 As above.

Running in tandem with the Libya-African Court dynamic was the continued role of the African Commission. In particular, the African Commission continued to make further submissions to the African Court, including a 28 February 2014 application urging the African Court to enforce its 15 March 2013 provisional measures order,⁴⁵ and on the same date an application requesting the African Court to rule that Libya had violated articles 6 and 7 of the African Charter.⁴⁶ Later, on 15 May 2015 the African Commission brought a further application requesting the African Court to render judgment in default, coming two months after the African Court had written to Kadhafi raising the possibility of an application for judgment in default.⁴⁷ It is notable that the African Commission's actions appear to occur apart from those of Kadhafi', demonstrating a level of separation between parties which runs throughout the litigation. Nevertheless, Libya's stance, or rather lack of it, at some point had to result in the African Court taking seriously the urgings by the African Commission and Kadhafi to deliver its first ever judgment in default.

This decision may well have been hastened by the news in July 2015 that the Assize Court of Tripoli had sentenced Kadhafi to death *in absentia*. Certainly, the African Court took these reports on the imposition of the death penalty seriously enough to issue a second order for provisional measures. During these extremely lengthy preliminary stages, it is also important to recall that the ICC was attempting to bring Kadhafi to The Hague to stand trial for crimes against humanity. These parallel efforts are of interest in understanding the somewhat confusing situation surrounding Kadhafi's detention, and may have had some, albeit peripheral, effect on the African Court's final decision to render judgment in default. In particular, the ICC's ongoing efforts to secure Kadhafi's presence for trial exposes details of Kadhafi's detention which are at the heart of this case. For example, on 20 August 2015 the Libyan government indicated to the ICC that 'Mr Libya Gaddafi continues to be in custody in Zintan and is presently "unavailable" to the Libyan state'.⁴⁸ Similarly, the ICC Prosecutor argued that Libya confirmed its inability to execute the request for arrest and surrender of Mr Kadhafi, since he remained beyond the reach of the Libyan state, and in the custody of

45 Judgment para 6(i).

46 Judgment para 6(ii).

47 Judgment para 6 (iii). Somewhat bizarrely, it appears that the Registry received this application well over two months after it was dated ('an Application dated 15 March 2015, received at the Registry on 28 May 2015'). It is also worth noting that the judgment states that this application was in fact dated 15 May 2015 (para 11) which would seem to be a more sensible timeline for receipt from the African Court Registry.

48 See *Prosecutor v Saif Al-Islam Gaddafi* Order to the Registrar with respect to the 'Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-'A jami AL-'ATIRI, Commander of the Abu-bakr al-Siddiq Battalion in Zintan, Libya' 2 June 2016 ICC-01/11-01/11 para 1.

'Zintan militia', again appearing to confirm the allegations found in Kadhafi's African Commission application.⁴⁹

4 Judgment in default

4.1 The difficulty of judgment in default

As mentioned above, this complex timeline led to the African Court's first judgment in default. It is worth noting at this stage that the downside to judgments in default perhaps is twofold. First, the sense that in the case of judgment in default the non-engagement of the necessary party leads a court to attempt to render justice in the absence of crucial submissions from one side. Put simply, the natural scenario of 'Applicant v State' becomes either 'Applicant v No One', or 'No One v State'. Therefore, the sense of a court having to balance submissions when there are none from one side is acute.⁵⁰ Second, the necessary absence and non-engagement of a party leaves the implementation of a judgment in default in obvious jeopardy. What are the chances of a judgment being implemented by a party that has failed to engage in any of the pre-judgment phases of a case? However, despite these reservations, the concept of a regional human rights court rendering a judgment in default is not unique to the African Court. For example, the Inter-American Court of Human Rights previously rendered judgments in default.⁵¹ The African Court Rules, however, are unique in their inclusion of detailed provisions on default judgments. The Inter-American Court of Human Rights' Rules of Procedure briefly mention procedure in default, but not judgment in default specifically.⁵² The Rules of the Court of the European Court of Human Rights set out several provisions for non-compliance by

49 Order to the Registrar (n 48) para 3.

50 The role of a court in default cases is discussed by Judge Ouguergouz in his separate opinion. See eg Ouguergouz opinion para 28 (as to how the African Court approached submissions in this default case) and para 30 (as to how the Inter-American Court of Human Rights approached submissions in default cases). Judge Ouguergouz further considered the absence of a party in proceedings in his dissenting opinion in the procedural stages of the *Ingabire Victoire Umuhoza* case. See *Ingabire Victoire Umuhoza v Republic of Rwanda* App 003/2014 18 March 2016 Dissenting Opinion of Judge Fatsah Ouguergouz paras 22, 30, 32 & 33.

51 Eg *Constitutional Court v Peru* IACHR (31 January 2001) Ser C Doc 71 Rev 1 and *Ivcher-Bronstein v Peru* IACHR (6 February 2001) Ser C 74 Rev 1. See Ouguergouz opinion paras 4 & 30 for further discussion of these cases. The International Court of Justice has also on occasion rendered judgment in default pursuant to Rule 53(2) of the Statute of the International Court of Justice.

52 See Rule 27 of the Inter-American Court of Human Rights Rules of Procedure ((1) When a party fails to appear in or continue with a case, the Court shall, on its own motion, take such measures as may be necessary to complete the consideration of the case. (2) When a party enters a case at a later stage of the proceedings, it shall take up the proceedings at that stage.) <http://hrlibrary.umn.edu/iachr/rule1-97.htm> (accessed 30 October 2018).

states, but do not detail judgment in default provisions.⁵³ By contrast, the African Court derives its power to render a judgment in default explicitly from Rule 55 of the African Court Rules. Rule 55 of the African Court Rules states:⁵⁴

Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, pass judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertinent to the proceedings. Before acceding to the application of the party before it, the Court shall satisfy itself that it has jurisdiction in the case, and that the application is admissible and well founded in fact and in law.

In considering the judgment in default, it is worth noting at the outset that the African Commission's application appears to be the same as its application back in 2012, which will be discussed further below. However, to summarise, Kadhafi, and subsequently the African Commission, requested judgment in default, asking the African Court to find that Kadhafi's article 6 and article 7 African Charter rights had been violated, and to grant a series of relief measures, including access to lawyers of his choice and visits by his family.⁵⁵

4.2 Application of Rule 55 of the African Court Rules

In applying Rule 55 of the African Court Rules, the African Court set out a three-limbed test: (i) proper service of all documents; (ii) jurisdiction; and (iii) admissibility of application.⁵⁶ First, in relation to the proper service of documents, the African Court considered that both the African Commission and African Court Registrar had communicated all proceedings to Libya and had made extensive attempts to engage with Libya.⁵⁷ The African Court also found that Libya had 'failed to defend its case' as, whilst it had communicated two *notes verbale*, it had consistently failed to present its defence despite the numerous extensions of deadlines granted by the African Court.⁵⁸

As far as the second limb of jurisdiction is concerned, the African Court went through the familiar personal, material, temporal and territorial jurisdiction issues found in Rule 39(1) of the African Court

53 Eg Rule Rule 44.A.1 (duty to cooperate with the Court Rules); Rule 44.B.1 (failure to comply with an order of the Court); Rule 44.C.2 (failure to participate effectively), European Court of Human Rights Rules of the Court.

54 See Rule 55 of the African Court Rules. See also Judgment (n 1) para 40.

55 Judgment para 38.

56 Compare Ouguerouz opinion.

57 Judgment (n 1) paras 41 & 42.

58 Judgment para 42. These elements are used on a consistent basis by the African Court to assess jurisdiction in all cases. See eg *Ingabire Victoire Umuhoza* (n 50) paras 52-58.

Rules, and conducted an 'exhaustive' examination.⁵⁹ For personal jurisdiction, the African Court noted that the African Commission was one of the institutions that could submit a case to the African Court.⁶⁰ The African Court also confirmed that it had personal jurisdiction over Libya, since Libya had ratified the African Charter and signed the African Court Protocol.⁶¹ Importantly, the African Court spelled out that in instances where a case is transferred between the African Commission and the African Court, the issue of whether a member state has signed the article 34(6) declaration, which allows individuals and non-governmental organisations (NGOs) with observer status direct access to the African Court, does not arise.⁶² This finding confirms a possible alternate route for applicants attempting to bring cases before the African Court where the member state has not signed the article 34(6) declaration. An applicant can submit a case to the African Commission and then request the Commission, or perhaps hope that it elects to transfer the case to the African Court and that the African Court accepts it. What is lacking in the judgment, however, is any discussion on which tests or standards are used by either the African Commission or African Court for transferring cases.⁶³

Also of interest, perhaps forestalling any arguments by Libya that it has no authority or influence over the conditions of Kadhafi's detention, is the fact the African Court recognised that a 'revolutionary brigade' rather than the Libyan government itself had detained Kadhafi.⁶⁴ The African Court, however, held that despite the likelihood that Kadhafi's detention was indeed by a non-governmental authority, Libya nevertheless was responsible for the group's actions and omissions, since Libya remains under a continuing duty to ensure the application of the rights on its territory guaranteed under the African Charter.⁶⁵ Citing the Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, the African Court found that a person's acts in a form of authority shall be considered as an act of state if the group

59 Judgment paras 44-60. The African Court noted that it had determined that it had *prima facie* jurisdiction in March 2013 when it issued provisional measures, but reiterated that this decision did not in any way prejudge its competence to examine the merits of the case at the stage of judgment. See Judgment (n 1) paras 45-46. See also Ouguerougou opinion para 31.

60 Judgment para 47. Pursuant to art 5(1) of the African Court Protocol.

61 Judgment para 48. Libya ratified the African Charter on 19 July 1986, and signed the Protocol on 19 November 2003.

62 Judgment para 51 ('As is clearly shown in that article [article 35(6)] read jointly with article 5(3) of the Protocol, the requisite declaration of acceptance of competence is applicable only where individuals and non-governmental organisations bring cases before the Court').

63 Some insight into the African Court to African Commission transfer procedure may be obtained from the African Court's decision in *Femi Falana v The African Commission on Human and Peoples' Rights* App 019/2015 20 November 2015.

64 Judgment para 49.

65 Judgment para 50.

exercising the rights is in fact exercising elements of governmental authority.⁶⁶ The African Court further recalled that the ICC had already held that the upheavals in Libya following the toppling of the Gaddafi regime could not excuse Libya's obligations to surrender Kadhafi to the ICC.⁶⁷ This decision may well be of significance for future cases. Where AU member states attempt to argue that actions that may violate the African Charter are 'out of their hands', the African Court has made it clear that they remain responsible for the actions of all those within its borders, thus closing a potential culpability vacuum for human rights violations.⁶⁸

On the third limb of admissibility the African Court focused on the common issue of exhaustion of local remedies.⁶⁹ It noted that in failing properly to respond to the allegations, Libya had automatically failed to respond to the issue of exhaustion of local remedies.⁷⁰ The African Court nevertheless applied the familiar 'availability, effectiveness and sufficiency' test in determining whether local remedies had been exhausted. It noted that Libya's Criminal Procedure Code contained several provisions that in principle govern detention, and the procedure for detainees to complain about their detention.⁷¹ The African Commission maintained that the first year of Kadhafi's detention, however, was governed by the laws of the so-called 'People's Court' which was later declared unconstitutional, and that only after that were the laws prescribed in the Libyan Penal Code made available. However, in practice the accessibility and effectiveness of said measures remained questionable.⁷² Recalling that the exhaustion of local remedies primarily is judicial, the African Court noted that local remedies are considered available if a complainant can pursue them without impediment.⁷³ The African Court further recalled that a remedy is 'effective' if it refers to 'that which produces the expected result, and hence, the effectiveness of a remedy is

66 As above.

67 Judgment para 50, referring to *The Prosecutor v Saif Al-Islam Gaddafi* Decision (n 9) para 32.

68 The African Court found that all other elements of jurisdiction had been satisfied, and that it therefore had jurisdiction to examine the allegations. See Judgment (n 1) paras 53-60.

69 Judgment para 65. The African Court found that the other elements of admissibility found in Rule 40 of the Court Rules on identity of the applicants, compatibility with the Constitutive Act of the African Union and the Charter, the language used, the nature of the evidence and the principle of *non bis in idem* were not in dispute. See Judgment (n 1) para 64.

70 Judgment para 65.

71 Judgment para 66. In particular, in its 'application instituting proceedings' the applicant cited arts 33, 176 and 177 of the Libyan Criminal Procedure Code.

72 Judgment para 66.

73 Judgment para 67, referring to *Tanganyika Law Society and the Legal and Human Rights Law Centre v the United Republic of Tanzania* App 009/2011; *Reverend Christopher R Mtikila v United Republic of Tanzania* App 011/2011 14 June 2013 para 82.1.

therefore measured in terms of its ability to solve a problem raised by the applicant'.⁷⁴

Taking this into account, the African Court found it 'obvious' that Kadhafi's secret detention meant that he could not access local remedies, even if theoretically they were available under Libyan law.⁷⁵ In support, the African Court agreed with the African Commission that Kadhafi was first arraigned under a 'People's Court' which later was held to be unconstitutional by the Supreme Court of Libya.⁷⁶ It found that Kadhafi's detention in a secret location, completely isolated from family, friends and access to a lawyer, and sentenced to death *in absentia* all provided grounds to believe that he was prevented from seeking local remedies, and that it therefore was impossible for him to fulfil the usual condition of exhausting local remedies.⁷⁷ The African Court therefore found that the requirement of exhaustion of local remedies was not strictly applicable in the instant case given that local remedies were neither available nor effective, and that even if they were, Kadhafi did not have any possibility of using these remedies and, therefore, could not be expected to exhaust local remedies.⁷⁸

Lastly, with regard to the 'reasonable time' requirement to bring a case before the African Court, it found the period of one year from the 'firm conclusion' that Libya had failed to comply with the provisional measures ordered by the African Commission on 18 April 2012 was a reasonable time for the African Commission to lodge its complaint.⁷⁹ Accordingly,⁸⁰ the African Court found that the matter was admissible.

4.3 Judgment on the merits

Having satisfied itself that all three limbs of Rule 55 of the African Court Rules had been met, the African Court went on to consider the merits of the application. In doing so, the standard applied appears to be that of a 'normal' judgment on the merits, although it is worth recalling that the African Court was considering only the submissions by the African Commission and Kadhafi, since Libya had failed to provide concrete responses.

It is also worth noting that the African Court prefaced its analysis of possible breaches of articles 6 and 7 of the African Charter by accepting that derogation from certain rights can be allowed in certain circumstances, but that despite the 'exceptional' political and

74 Judgment para 67, referring to *The Beneficiaries of the Late Norbert Zongo, Abdoulaye Nikiema alias Abiase, Ernest Zongo and Blaise Ilboudo and the Burkinabe Movement on Human and Peoples' Rights v Burkina Faso* App 013/2011 28 March 2014 para 68.

75 Judgment para 68.

76 Judgment para 69.

77 As above.

78 Judgment para 70.

79 Judgment para 71.

80 Judgment paras 72-73.

security situation faced in Libya, Libya could not use this situation to derogate from Kadhafi's articles 6 and 7 African Charter rights.⁸¹ This decision serves as solid jurisprudence to forestall potential future submissions by AU member states that, given difficult or perhaps extreme circumstances encountered certain rights under the African Charter, such as the right to a fair trial and the right to liberty, may be derogated from.

With regard to article 6 of the African Charter the African Commission argued that Kadhafi was alleged to have been in detention since 19 November 2011 without being brought before any court, putting his life in danger and exposing his physical integrity and health to the risk of irreparable harm.⁸² The African Commission submitted that prolonged secret detention not only constitutes a violation of human rights but also can have a knock-on effect on other violations, such as torture, ill-treatment or interrogation without appropriate protection measures.⁸³ The African Court found that deprivation of liberty can occur only where it conforms to certain recognised international human rights standards, in particular by *proprio motu* looking to article 9 of ICCPR.⁸⁴ Using this provision, the African Court agreed with the African Commission that incommunicado detention was a violation of human rights and could lead to the violation of other human rights. It held that Kadhafi's incommunicado detention, without the assistance of a lawyer to challenge his detention, constituted a violation of his right to liberty, and therefore found a violation of article 6 of the African Charter.⁸⁵

As to article 7 of the African Charter, the African Commission argued that Kadhafi had no access to a lawyer or other form of legal representation.⁸⁶ Consequently, the Commission contended that Kadhafi did not have the 'benefit of any guarantees' during the preliminary proceedings against him, including his interrogation, or the opportunity to gather evidence in rebuttal of the prosecution's case.⁸⁷ The African Commission argued that more than two years had passed and the trial had yet to start. It also submitted that Kadhafi had been unable to see or communicate with his family or the outside world.⁸⁸ The African Court once again *proprio motu* turned to ICCPR, and in particular article 14(1), which provides that all persons shall be equal before the law and shall be entitled to a fair hearing.⁸⁹ The African Court found that Kadhafi was not afforded these minimum fair trial rights at the time of his arrest, during his detention or at the time

81 Judgment paras 76 & 77.

82 Judgment para 79.

83 As above.

84 Judgment para 82.

85 Judgment paras 84 & 85.

86 Judgment para 86.

87 As above.

88 Judgment para 87.

89 Judgment paras 89 & 92.

he was convicted.⁹⁰ To this end, the African Court noted that Kadhafi had been arraigned before a 'People's Court', which was later found to be unconstitutional, and later sentenced to death in absentia.⁹¹ It considered that every individual arrested or detained for a criminal offence should be brought before a judge with a 'minimum delay' and tried 'within a reasonable time or set free'.⁹² It found that in Kadhafi's case he was condemned to death by an 'unknown tribunal', and it was 'quite obvious' that Libya had respected none of the rights set forth in article 7 of the African Charter and, therefore, found Libya in violation.⁹³

5 Analysis and conclusion

As to the importance of this case it is significant that this is the first judgment in default rendered by the African Court.⁹⁴ It should be noted also that this case is called *African Commission v Libya* rather than *Kadhafi v Libya* and, as such, is one of only two cases thus far to be transferred by the African Commission and considered by the African Court.⁹⁵

In terms of the transfer element the reasons the African Commission decided to transfer the case to the African Court are not set out in the judgment. Certainly, Rule 34 of the African Court Rules allows the African Court to accept such cases, but the criteria or analysis of either the African Commission's transfer or the African Court's acceptance of the case remain wanting. It is worth noting, however, that the African Court did confirm that in circumstances where the African Commission brings a case, assessing whether the member state has signed the article 34(6) declaration is not required. This observation could have significant consequences moving forward, as it appears to confirm that applications by individuals or NGOs with observer status before the African Commission from an AU member state that has not signed the article 34(6) declaration can use the African Commission as a route to the African Court, at least in theory. The key question remains of how to persuade the African Commission to transfer the case. What can be derived from this case and the other case involving a transfer from the African Commission to the African Court, *African Commission on Human and Peoples' Rights v Kenya*,⁹⁶ is a lack of engagement by the AU member state petitioned, perhaps leading to the African Commission electing to

90 Judgment para 96.

91 Judgment para 90.

92 Judgment para 91.

93 Judgment para 97.

94 See Ouguergouz opinion para 31.

95 The other transfer case being *African Commission on Human and Peoples' Rights v Republic of Kenya* App 006/2012 26 May 2017 discussed further below.

96 *African Commission on Human and Peoples' Rights v Republic of Kenya* App 006/2012 26 May 2017 (Ogiek case).

move the case on.⁹⁷ What is needed, however, are clear guidelines from either the African Commission, the African Court or ideally both on the test or standard to be applied for the transfer of cases between the two. Without this guidance applicants and member states are very much in the dark about how these transfers occur.

The current African Commission-to-African Court scenario also creates the seemingly confusing situation whereby the 'applicant' is the African Commission rather than Kadhafi. It is not entirely clear from the judgment who is making the submissions concerning the violations. For example, was the African Commission able to take instruction from Kadhafi on his treatment in detention? Given the context of this case, not least Kadhafi being held incommunicado, it seems highly unlikely that the African Commission was able to discuss the case with Kadhafi or his legal representative. This highlights practical issues moving forward with similarly transferred cases. For example, is the African Commission 'acting' for Kadhafi? Does the African Commission 'represent' the complainant, or does the African Commission in effect step away from litigating the case once they have transferred it? Some clues may be gleaned from the *Ogiek* case,⁹⁸ the other transfer from the African Commission to the African Court. However, with a sample size of only two cases, it remains to be seen how exactly the African Commission and African Court will approach these issues in future. Some clarity on transfer cases could be found simply by filing future cases as 'Complainant v Member State', and mentioning the African Commission in the introduction or mentioning it in the case title, for example 'as transferred from the African Commission'. Alternatively, an applicant's name could be included alongside the African Commission, such as *Commission (Kadhafi) v Libya* or *African Commission (on behalf of Kadhafi) v Libya*. Any of these changes at least would help to pre-empt future misperceptions if and when the African Court starts to entertain multiple transfers from the African Commission relating to the same member state.

As to the nature of the default judgment itself, what is clear from this judgment is that African Court observers should not expect a flood of similar judgments in default to flow from the African Court, or for applicants to view judgment in default as potentially an easy route. The judgment does not go into any detail about the African Court's thinking on rendering a judgment in default *per se*, but it does go to great pains to set out the many attempts it made over several years to get Libya to comply or, at the very least, to engage with the case. It should be noted also that a case going to judgment in default does not automatically result in a decision in favour of the applicant.

97 For further discussion on the possible reasons for the African Commission electing to transfer cases to the African Court, see O Windridge 'Necessary check points or immovable roadblocks: Accessing the African Court on Human and Peoples' Rights' (2017) 35 *Wisconsin International Law Journal* 458.

98 *Ogiek* case (n 96). In this case the Ogiek people themselves were heard and allowed to make submissions through their counsel. See paras 14, 27 & 29.

Instead, it serves as the path down which the African Court can go in order to consider jurisdiction, admissibility and then, if applicable, the merits of the case. It is perfectly possible for the African Court to find the three limb test of Rule 55 fulfilled, but still find that an applicant's case fails on the merits. In fact, the judgment in default test looks very similar to that ordinarily employed by the African Court in cases where member states engage in a case. Specifically, the African Court's three-limbed test for judgment in default consists of satisfaction of jurisdiction and admissibility as found in all cases considered by the African Court, going so far as to clarify that the consideration of both should be done *proprio motu* even where the state does not raise objections – which seems the very point in judgments in default. Plus a third limb has been bolted on, that all communications were presented to the respondent state. This approach makes sense, but in effect does not mean that the African Court needs to be satisfied of much more than in an ordinary compliance case.

In addition, it should be highlighted that the African Court forestalled attempts by AU member states in the future from disavowing actions of groups it claims are not under its control but operating in its territory. The African Court in effect found that even where a 'group' may not be under the control of the member state, the member state remains under a duty to ensure compliance with the African Charter across its territory, thereby dismissing any arguments of 'we can't do anything about it'.

Turning to the violations of articles 6 and 7 of the African Charter, it is worth noting that the judgment does not provide a substantial analysis. One explanation is, since the African Court found the allegations of incommunicado detention without access to lawyers, lengthy pre-trial detention and a trial *in absentia* factually correct when assessing whether to enter judgment in default, that these allegations amount to fairly obvious violations of articles 6 and 7 of the African Charter. It is interesting to note, however, that as far as articles 6 and 7 of the African Charter are concerned, the African Court looked to ICCPR even though the African Commission did not rely on this. This behaviour appears to be some *proprio motu* interpretative effort by the African Court by referring to other international human rights instruments in order to interpret the African Charter. Also of interest, at least in highlighting the problematic nature of judgment in default, is the fact that the judgment lays bare the apparent lack of updates from the African Commission. It appears from the summarised arguments of the African Commission in the judgment that the African Court was taking the arguments from the African Commission's original application, for example, the statement that 'over two years have lapsed since his arrest, and his trial is yet to start' is clearly a statement several years out of date. The African Court either failed properly to summarise the African Commission's updated application, or the African Commission failed to update the African Court. If the fault lies with the African Court it would seem careless, but it is even more disappointing if the

African Commission failed properly to update the African Court on the constantly-changing situation since its original application, for example, if Kadhafi's conditions of detention had become worse or indeed if he had been released.

Finally, having delivered judgment in default there seems to be nothing preventing the African Court from now considering the awarding of reparations. Any such reparations ultimately need to be fulfilled by Libya itself, and given its shunning of the African Court so far this may well be very unlikely. However, Libya's approach thus far should not serve as a reason for the African Court to decline to consider the issue of reparations. Certainly, on the basis of the judgment alone, there seems a case for awarding Kadhafi reparations for the time he spent in detention in violation of his African Charter rights.