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## The case law of the African Court on Human and Peoples' Rights in Libya following the Arab uprisings: Lessons learned for the consolidation and legitimation of the Court

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**Summary:** *This article examines the two cases brought before the African Court on Human and Peoples' Rights following the Libyan uprising in 2011: African Commission on Human and Peoples' Rights (Benghazi) v Libya and African Commission (Saif al-Islam Gaddafi) v Libya. These two cases mark three 'firsts': the first time for the African Commission to transfer a case to the African Court; the first order for provisional measures by the Court; and the first time the Court rendered a judgment by default. This study reveals that although the Court has taken significant steps in terms of its consolidation and legitimation, substantive and procedural challenges in its functioning remain. Moreover, the authors argue that the political divisions within the African Union diminished the Court's potential impact on the Libyan crisis.*

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## 1 Introduction

In 1981 the African regional human rights system was established under the auspices of the predecessor to the African Union (AU), the Organisation of African Unity (OAU), through the adoption of the African Charter on Human and Peoples' Rights (African Charter). However, the system did not include the creation of a judicial body. It took African leaders 17 years to agree on the creation of the African Court on Human and Peoples' Rights (African Court), when the AU Assembly of Heads of State and Government in 1998 adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court (African Court Protocol). Since then, things initially moved slowly. The Court Protocol entered into force in 2004, its first judges were elected in 2006 and only in 2008 did the Court adopt its Rules of Procedure.

After having adopted only a few decisions, and even prior to issuing a judgment on the merits of a case, the African Court had to deal with the dramatic situation that emerged in Libya after a mass civilian uprising. This uprising – against the dictator Muammar Gaddafi – started in Tunisia, later on emerged in Egypt, and in February 2011 spread to Libya. In this context, two cases of paramount importance to the development of the African Court's jurisprudence were brought before the Court. The first is the case of *African Commission on Human and Peoples' Rights (Benghazi) v Libya*, which has to be contextualised at the very beginning of the Libyan uprising when the Gaddafi regime used disproportionate and lethal force against protesters.<sup>1</sup> The second case, *African Commission (Saif al-Islam Gaddafi) v Libya*, is imbedded in the chaotic situation that followed the 2011 Libyan civil war, during which a rebel militia captured and detained the second son of Gaddafi, Saif al-Islam Gaddafi.<sup>2</sup>

1 *African Commission on Human and Peoples' Rights (Benghazi) v Libya* App 4/2011 25 March 2011 (Order for Provisional Measures), (2011) 1 AfCLR 17; [http://www.worldcourts.com/acthpr/eng/decisions/2013.03.15\\_ACMHPR\\_v\\_Libya\\_2.pdf](http://www.worldcourts.com/acthpr/eng/decisions/2013.03.15_ACMHPR_v_Libya_2.pdf) (accessed 27 April 2018).

2 *African Commission (Saif al-Islam Gaddafi) v Libya* App 2/2013 15 March 2013 (Order for Provisional Measures), (2013) 1 AfCLR 145; <http://en.african-court.org/index.php/55-finalised-cases-details/856-app-no-002-2013-the-african-commission-on-human-and-peoples-rights-v-libya-detals> (accessed 27 April 2018).

These two cases represent a turning point in the consolidation and legitimation of the African Court. However, some legal and political issues still represent key challenges in this process. For the purpose of this article, the notion of 'consolidation' and 'legitimation' is clarified: By consolidation, the article refers to the ability of the Court to become consistent and effective in its role of delivering judgments. The notion of legitimation or legitimacy could be defined according to different approaches. The first is the empirical or sociological approach, which inquires whether a court or institution is perceived as legitimate by relevant constituencies.<sup>3</sup> The second is the normative approach, which analyses whether the court or institution possesses justified authority in terms of law or expertise.<sup>4</sup> According to Land, '[a]lthough empirical and normative approaches to legitimacy are different ... they are complementary because normative and sociological legitimacy can be understood as different ways to measure justified authority'.<sup>5</sup> For these reasons the article acknowledges both conceptions of legitimacy and legitimation in order to assess the jurisprudence of the African Court.

The article analyses the two cases taking into consideration their procedural background and the decision on the merits (part 2). In this regard, the article examines the shortfalls and successes of these cases and the way in which the African Court handled them (part 3). This part specifically considers the legal and political issues that deserve the attention of the Court. Moreover, the article provides lessons learned and recommendations for the future work of the Court (part 4). The last part presents some concluding remarks.

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3 Y Shany *Assessing the effectiveness of international courts* (2014) 138.

4 D Bodansky 'The concept of legitimacy in international law' in R Wolfrum & V Röben (eds) *Legitimacy in international law* (2008) 313; R Wolfrum 'Legitimacy in international law from a legal perspective: Some introductory considerations' in R Wolfrum & V Röben (eds) *Legitimacy in international law* 6.

5 MK Land 'Justice as legitimacy in the European Court of Human Rights' in N Grossman, HG Cohen, A Follesdal & G Ulfstein *Legitimacy and international courts* (2018) 85. See also M Loth 'Courts in a quest for legitimacy: A comparative approach' in N Huls, J Bomhoff & M Adams (eds) *The legitimacy of highest courts' rulings: Judicial deliberations and beyond* (2009) 268-269.

## 2 *African Commission on Human and Peoples' Rights (Benghazi) v Libya*

### 2.1 Order for provisional measures

The mass civilian uprising that started in Tunisia<sup>6</sup> and later appeared in Egypt<sup>7</sup> spread to Libya in February 2011 against the dictator Muammar Mohammed Abu Minyar Gaddafi who came to power following a *coup d'état* in 1969.<sup>8</sup> This civilian uprising turned into an armed conflict, with the Libyan government reacting by using lethal and disproportionate force against protesters in violation of international humanitarian and human rights law. At the end of that month a body of anti-Gaddafi forces, the National Transitional Council (NTC), was established to act as the 'political face of the revolution'.<sup>9</sup> The situation escalated to such an extent that some weeks later the United Nations (UN) Security Council (UNSC) adopted Resolution 1973 (2011) authorising 'all necessary measures' to protect civilians, imposing a no-fly zone over Libya<sup>10</sup> and legitimising the subsequent North Atlantic Treaty Organization (NATO) military intervention.<sup>11</sup> According to the analyst Bhardwaj:<sup>12</sup>

Gaddafi's harsh and repressive regime, territorial division of Libya into NTC and loyalist strongholds, coalition rebel forces, along with the influence of the UN, NATO intervention and the Arab League, jointly propelled Libya's conflict inexorably from peaceful protest to bloody civil war.

6 In this regard, see eg M Khan & K Mezran 'Tunisia: The last Arab Spring country' (2015) *Rafik Hariri Centre For The Middle East*, Atlantic Council 1-12.

7 See, eg, T Povey 'The Arab Spring in Egypt: Revolution and beyond' (2013) 25 *Journal of African Cultural Studies* 364-366.

8 In this regard, see eg E Oliveri 'Libya before and after Gaddafi: An international law analysis', PhD thesis, Ca' Foscari University of Venice, 2012.

9 RB St John *Libya: Continuity and change* (2015) 364.

10 UN Security Council Resolution 1973 (2011) 6498th meeting 17 March 2011, <https://www.un.org/sc/suborg/en/s/res/1973-%282011%29> (accessed 27 April 2020).

11 It is worth mentioning that five days before the adoption of Resolution 1973 (2011), the Arab league called on the UN Security Council 'to bear its responsibilities towards the deteriorating situation in Libya, and to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation'. See Decision of the Council of the League of Arab States on 12 March 2011, [http://responsibilitytoprotect.org/Arab%20League%20Ministerial%20level%20statement%2012%20march%202011%20-%20english\(1\).pdf](http://responsibilitytoprotect.org/Arab%20League%20Ministerial%20level%20statement%2012%20march%202011%20-%20english(1).pdf) (accessed 27 April 2020). On the role of the Arab League after the Libyan uprising, see eg R Alaaldin 'The role and impact on the Arab League' in D Henriksen & AK Larssen (ed) *Political rationale and international consequences of the war in Libya* (2016).

12 M Bhardwaj 'Development of conflict in Arab Spring Libya and Syria: From revolution to civil war' (2012) 1 *Washington University Law Review* 81.

Unlike the Arab League, which asked the UNSC to impose a no-flight zone over Libya and decided to suspend its membership, the AU played a secondary role in order to solve the Libyan crisis, largely because of the political division among AU member states. Initially, the AU Peace and Security Council of the AU (PSC) established a High-Level *Ad Hoc* Committee on Libya<sup>13</sup> and proposed a road map as a solution to the crisis,<sup>14</sup> which was rejected by both the Gaddafi government and the NTC.<sup>15</sup> As a result of the NATO military intervention, the AU remained paralysed and, therefore, marginalised in the management of the conflict. In particular, the AU had to face the dilemma of not undermining Libya's sovereignty and supporting the Gaddafi regime – one of the main drivers of the continental organisation – or protecting the civilian population from mass atrocities as provided for in article 4(h) of the Constitutive Act of the AU.<sup>16</sup>

Even though the AU political institutions have remained paralysed, the African Commission on Human and Peoples' Rights (African Commission) and the African Court have played a significant role following the Libyan uprising. In this regard, on 24 February 2011 three non-governmental organisations (NGOs) (Human Rights Watch, the Egyptian Initiative for Personal Rights and INTERIGHTS) jointly submitted an application to the African Commission requesting the adoption of provisional measures in order to stop and prevent

13 The Committee was composed of the Heads of State and Government of Mauritania, Mali, South Africa, Uganda and Congo, alongside the AU Commission Chairperson. In this regard, see D Kuwali 'From stopping to preventing atrocities. Actualisation of article 4(h)' (2015) 1 *African Security Review* 260.

14 The roadmap consisted of a five-point plan of which objectives were 'the protection of civilians and the cessation of hostilities; the humanitarian assistance to affected populations both Libyans and foreign migrant workers, particularly those from Africa; the initiation of political dialogue between the Libyan parties in order to reach an agreement on the modalities for ending the crisis; the establishment and management of an inclusive transitional period; the adoption and implementation of political reforms necessary to meet the aspirations of the Libyan people'. See C Ekwealor & U Okeke-Uzodike 'The African Union interventions in African conflicts: Unity and leadership conundrum on Libya' (2016) 5 *Journal of African Union Studies* 69.

15 A Abass 'The African Union's response to the Libyan crisis: A plea for objectivity' (2014) 7 *African Journal of Legal Studies* 137.

16 As an example of such paralysis and political division, despite the fact that three African states – Gabon, Nigeria and South Africa – voted in favour of UNSC Resolution 1973 (2011), various AU organs later spoke out against a foreign military intervention in Libya. In this regard, according to a significant number of authors 'the AU should have participated in the implementation of the responsibility to protect the civilian population from mass atrocities, including support for the implementation of a no-fly zone ... the inaction of the AU Assembly regarding Libya illustrates the tense and potentially-contradictory relationship between what is stated in article 4(h) and political factors (*realpolitik* considerations)'. See J Perez Leon Acevedo 'Stopping mass atrocities in Africa and the Pretoria Principles: Triggering military intervention in Darfur (Sudan) and Libya under article 4(h) of the Constitutive Act of the African Union' (2016) 16 *African Human Rights Law Journal* 498.

the use of unjustified lethal force against protesters; to allow people in Libya to air their grievances through peaceful protests; and to undertake a thorough, impartial and prompt investigation in order to hold accountable those responsible for these violations, among other demands.<sup>17</sup>

However, the African Commission did not order the provisional measures requested,<sup>18</sup> but instead transferred the case to the African Court alleging ‘serious and massive violation of human rights guaranteed under the African Charter’.<sup>19</sup> In addition, the African Commission adopted a resolution calling on the responsibility of the AU, the PSC and the international community ‘to take all the necessary political and legal measures for the protection of the Libyan population and for the establishment of genuine democratic governance in the State Party’.<sup>20</sup>

Nine days after having received such application, the African Court, for the very first time, granted an order for provisional measures taking into consideration the gravity and urgency of the matter.<sup>21</sup> The order was not adopted at the request of the Commission but by the African Court *proprio motu*.<sup>22</sup> In its decision the judicial institution

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- 17 J Oder ‘The African Court on Human and Peoples’ Rights’ order in respect of the situation in Libya: A watershed in the regional protection of human rights?’ (2011) 11 *African Human Rights Law Journal* 497. A second application was submitted to the Commission by two NGOs (the Libyan League for Human Rights and the International Federation of Human Rights) requesting to refer such application to the African Court ‘considering that the situation brought to its knowledge amounts to serious and massive violations of human rights and that Libya is a state party to the Protocol to the African Charter regarding the African Court on Human and Peoples’ Rights’; see Oder (above) 497.
- 18 The African Commission decided not to order provisional measures due to the fact that ‘the chances of such request eliciting a response from the government [were] very slim taking into consideration the situation in Libya’; Oder (n 17) 498. On the other hand, it is worth mentioning that the Libyan state ratified the Court Protocol in 2003. Nonetheless, it has not made the necessary declaration allowing NGOs and individuals direct access before the Court. For this reason, both cases regarding Libya – the only cases that have been heard to date by the Court concerning Arab African countries – were transferred by the Commission to the African Court.
- 19 *African Commission on Human and Peoples’ Rights (Benghazi) v Libya* App 4/2011 25 March 2011 (Order for Provisional Measures), [http://www.worldcourts.com/acthpr/eng/decisions/2013.03.15\\_AcmHPR\\_v\\_Libya\\_2.pdf](http://www.worldcourts.com/acthpr/eng/decisions/2013.03.15_AcmHPR_v_Libya_2.pdf) (accessed 27 April 2020).
- 20 Resolution on the Human Rights Situation in the Great Socialist Peoples’ Libyan Arab Jamahiriya, ACHPR/RES.181(EXT.OS/IX) March 2011, <http://www.refworld.org/docid/4d8863f82.html> (accessed 27 April 2020).
- 21 Resolution (n 20) para 8. In this regard it is worth mentioning that, as noted earlier, pursuant to art 27(2) of the Court Protocol ‘in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary’.
- 22 When submitting the application the Commission alleged ‘(1) that following the detention of an opposition lawyer, peaceful demonstrations took place on the 16th of February 2011 in the Eastern Libyan city of Benghazi; (2) that on the 19th of February 2011, there were other demonstrations in Benghazi, A1 Baida, Ajdabiya, Zayiwa and Derna, which were violently suppressed by security forces

considered whether it had jurisdiction to order such interim measures. The Court concluded that it had such jurisdiction<sup>23</sup> because, first, Libya had ratified the African Charter and the Court Protocol<sup>24</sup> and, second, the Commission is one of the parties entitled to submit cases to the Court without the need for the special declaration provided for in articles 5(3) and 34(6) of the Protocol.<sup>25</sup>

The Court subsequently turned to consider whether there were suitable conditions – namely, ‘cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons’<sup>26</sup> – for the Court to adopt provisional measures. In this respect, the African Court, relying on the 23 February 2011 Resolution of the Peace and Security Council of the AU,<sup>27</sup> the 21 February 2011 Resolution of the Arab League,<sup>28</sup> and UN Security Council Resolution 1970 (2011),<sup>29</sup> noted that such circumstances were present in the case at issue and decided to grant an order for provisional measures against Libya.<sup>30</sup>

## 2.2 Decision on merits

Due to the fact that the African Commission, acting as prosecutor, was not able to continue investigating the situation and collecting the necessary testimony and evidence, the African Court decided

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who opened fire at random on the demonstrators killing and injuring many people; (3) that hospital sources reported that on the 20 of February 2011 they received individuals who had died or been injured with bullet wounds in the chest, neck and head; (4) that Libyan security forces engaged in excessive use of heavy weapons and machine guns against the population, including targeted aerial bombardment and all types of attacks; and (5) that these amount to serious violations of the right to life and to the integrity of persons, freedom of expression, demonstration and assembly’. Taking all this into consideration the Commission concluded ‘that these actions amount to serious and widespread violations of the rights enshrined in Articles 1, 2, 4, 5, 9, 11, 12, 13 and 23 of the Charter’. Resolution (n 20) para 2.

23 Order for Provisional Measures (n 19) para 19.

24 Order for Provisional Measures paras 16-17.

25 Order for Provisional Measures para 18.

26 African Court Protocol, art 27(2).

27 AU Peace and Security Council, Communiqué, Peace and Security Council, 261st meeting, Addis Ababa, Ethiopia, PSC/PR/COMM (CCLXI) 23 February 2011, <http://www.peaceau.org/uploads/psc-communication-on-the-situation-in-libya.pdf> (accessed 27 April 2020).

28 In the resolution the Arab League requested ‘an end to violence, stating that the demands of Arab people for change are legitimate’. See Resolution on the Human Rights Situation in the Great Socialist Peoples’ Libyan Arab Jamahiriya (n 20) para 21.

29 UN Security Council Resolution 1970, 6491st meeting, 26 February 2011, [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/RES/1970%20%282011%29](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1970%20%282011%29) (accessed 27 April 2020). By such resolution the UNSC ‘decided to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court’.

30 Resolution (n 20) para 21.

to strike out the application.<sup>31</sup> Notwithstanding this, as will be discussed in the next part, both the opening of the proceeding and the provisional measures ordered have been significant in terms of the Court's consolidation and legitimation.<sup>32</sup>

### 3 African Commission (*Saif al-Islam Gaddafi*) v Libya

#### 3.1 Order for provisional measures

Some weeks after the death of Muammar Gaddafi, his second son and former *de facto* Prime Minister, Saif al-Islam Gaddafi, was detained by a rebel militia based in the Libyan city of Zintan. On 2 April 2012 the African Commission received a complaint on his behalf alleging that Saif al-Islam Gaddafi had been detained in an unknown location without access to his family or to a lawyer and that he had not been brought before a court.<sup>33</sup> According to the complaint, these acts constituted a violation of article 6 (the right to personal liberty and protection from arbitrary arrest) and article 7 (the right to a fair trial) of the African Charter.

In January 2013 the Commission submitted the case to the African Court along with a request for provisional measures.<sup>34</sup> Similarly to the previous case, the judicial institution first considered whether it had jurisdiction to order such interim measures,<sup>35</sup> indicating that it indeed had such jurisdiction for the same reasons as stated above (Libya being a state party to the African Charter and the African Court Protocol and the competence of the African Commission to submit cases to the African Court). Likewise, the judicial institution concluded that there was 'a situation of extreme gravity and urgency,

31 *African Commission on Human and Peoples' Rights (Benghazi) v Libya* App 4/2011 15 March 2013 (Order on Merits of the Application), [http://en.african-court.org/images/Cases/Decision/DECISION\\_-\\_Application\\_004-2011\\_African\\_Commission\\_v\\_Libya\\_Struck\\_outEngl.pdf](http://en.african-court.org/images/Cases/Decision/DECISION_-_Application_004-2011_African_Commission_v_Libya_Struck_outEngl.pdf) (accessed 27 April 2020).

32 See part 5.

33 *African Commission (Saif al-Islam Gaddafi) v Libya* App 2/2013 15 March 2013 (Order for Provisional Measures) para 3, <http://en.african-court.org/index.php/55-finalised-cases-details/856-app-no-002-2013-the-african-commission-on-human-and-peoples-rights-v-libya-detals> (accessed 27 April 2020).

34 Due to the fact that the Libyan state did not comply with the provisional measures requested by the African Commission, based on Rule 118(2) of the Rules of the Commission, the Commission brought the case before the African Court and, in turn, requested the Court to adopt new provisional measures. See Rules of Procedure of the African Commission on Human and Peoples' Rights of 2010 (Rules of the Commission) Rule 118(2), <http://www.achpr.org/instruments/rules-of-procedure-2010/> (accessed 25 April 2020).

35 In line with its case law, the Court considered that in order to adopt provisional measures, 'it need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to ensure that it has *prima facie* jurisdiction'. See Order for Provisional Measures (n 33) para 10.



as well as a risk of irreparable harm to the detainee'.<sup>36</sup> On this basis, the African Court unanimously ordered Libya:

- (1) to refrain from all judicial proceedings, investigations or detention, that could cause irreparable damage to the detainee, in violation of the Charter or any other international instruments to which Libya is a party;
- (2) to allow the detainee access to a lawyer of his own choosing;
- (3) to allow the detainee visits by family members;
- (4) to refrain from taking any action that may affect the detainee's physical and mental integrity as well as his health;
- (5) to report to the Court within fifteen days from the date of receipt of this Order, on the measures taken to implement this Order.

Fatsah Ouguergouz J delivered a separate opinion in which he concurred with the African Court's decision of adopting an order for provisional measures but remarked that, on procedure, the Court seemed to have forgotten that the application should have been considered as a request by the African Commission for provisional measures. Therefore, in his view the Court did not follow the procedure that the Protocol provided for this purpose.<sup>37</sup> Moreover, according to Ouguergouz J, bearing in mind that two months had elapsed between the date of the application and the date of the Court's order, 'the Court should have therefore requested Libya to submit the observations it may have in order for the Court to ... decide on the basis of the most recent information possible on the situation for which provisional measures are sought'.<sup>38</sup>

Despite an extension of 15 additional days granted by the Court, Libya failed to file any response.<sup>39</sup> It was not until July 2013 that the Court received a *note verbale* in which Libya adduced no defence but advised that an investigation had been opened in Libya against Saif al-Islam Gaddafi, and that 'a Court with jurisdiction' had authorised an extension of his period of pre-trial detention.<sup>40</sup> Accordingly, the African Court decided to submit to the Assembly, through

<sup>36</sup> Order for Provisional Measures (n 33) para 17.

<sup>37</sup> *African Commission (Saif al-Islam Gaddafi) v Libya* App 2/2013 15 March 2013, Separate Opinion of Fatsah Ouguergouz J on Order for Provisional Measures para 2, <http://en.african-court.org/index.php/55-finalised-cases-details/856-app-no-002-2013-the-african-commission-on-human-and-peoples-rights-v-libya-detals> (accessed 27 April 2020).

<sup>38</sup> Separate Opinion (n 37) para 5.

<sup>39</sup> *African Commission (Saif al-Islam Gaddafi) v Libya* App 2/2013 3 June 2016 (Judgment on Merits), (2016) 1 AfCLR 153, para 17, <http://en.african-court.org/index.php/55-finalised-cases-details/856-app-no-002-2013-the-african-commission-on-human-and-peoples-rights-v-libya-detals> (accessed 27 April 2020).

<sup>40</sup> As above.

the Executive Council, Libya's non-compliance with its order for provisional measures.<sup>41</sup>

In May 2014 the Court received a new *note verbale* in which Libya stated that the trial that was taking place in Libya was fair and just, and that the Libyan authorities had agreed to invite external observers in order to monitor the process. The African Court emphasised that the response in the *note verbale* did not constitute compliance with its order.<sup>42</sup> Taking into account the continued inadequate responses of Libya, in March 2015 the African Commission requested the Court to deliver a judgment by default.<sup>43</sup>

Events accelerated after July 2015, the month in which it was announced that the Assize Court of Tripoli had sentenced Saif al-Islam Gaddafi to death *in absentia*.<sup>44</sup> As a result, the Court issued a new order for provisional measures noting that Libya should 'take all necessary measures to preserve the life of Mr Gaddafi, ensure that he is given a fair trial in accordance with internationally recognised standards, arrest and prosecute those illegally holding Mr Gaddafi', as well as to submit a report to the Court on the measures taken by Libya within 15 days.<sup>45</sup> In the absence of an answer from the respondent, the Court decided to initiate a proceeding under Rule 55(1) of the Rules of Court, which provided the legal basis for the Court to adopt a judgment by default.

### 3.2 Decision on admissibility and merits

Pursuant to Rule 55(1) of the Rules of the Court, the Court must satisfy a three-limb test prior to considering the merits of the matter. It must establish (i) 'that the defaulting party has been duly served with the application and all other documents pertinent to the proceedings'; (ii) 'that it has jurisdiction in the case'; and (iii) 'that the application is admissible and well founded in fact and in law'.<sup>46</sup>

41 Judgment on Merits (n 39) para 18. In this regard, the Executive Council adopted a decision urging Libya 'to work with the Court and to comply with its Order'.

42 Judgment on Merits (n 39) para 28.

43 Judgment on Merits para 34.

44 Saif al-Islam was sentenced *in absentia* due to the fact that his captors 'refused to release him to the government's custody citing security issues'. See MJ Ayissi 'African Commission on Human and Peoples' Rights v Libya' (2017) 111 *American Journal of International Law* 740.

45 Judgment on Merits (n 39) para 17.

46 Rules of the African Court on Human and Peoples' Rights (Rules of Court) 55. New Rules of Procedure were adopted on 2 June 2010 in order to harmonise the Rules of the Court and the Rules of Procedure of the African Commission, <http://www.african-court.org> (accessed 27 April 2020).

With regard to the first limb, the African Court noted that both the applicant and court registry had communicated all the pleadings to the respondent and consequently that such condition had been met.<sup>47</sup> As far as the second limb was concerned, the judicial body addressed the issue of whether it had material, territorial, temporal and personal jurisdiction to hear the case. As far as substantive jurisdiction was concerned, the applicant alleged a violation of articles 6 and 7 of the African Charter, and argued that the Court therefore had jurisdiction.<sup>48</sup> Because the alleged violations took place in the territory of Libya after it had ratified the African Court Protocol and the African Charter, the requirements of territorial and temporal jurisdiction had been satisfied.<sup>49</sup>

As for its personal jurisdiction, the Court noted that the African Commission was one of the entities entitled to submit cases to the Court as provided for in article 5(1) of the Court Protocol. With regard to the respondent, the judicial institution again recalled that Libya had ratified both the Court Protocol and the African Charter and held that, despite the detention of Saif Gaddafi by a 'revolutionary brigade', based on the Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, 'the respondent is responsible for the latter's action as well as its acts of omission ... the State is indeed under the obligation to take measures to ensure, in its territory, the application of the laws guaranteed under the Charter'.<sup>50</sup>

As far as the third limb was concerned, that of admissibility, the Court addressed the issue of exhaustion of local remedies. In this regard the Court considered that it was evident from the facts that Saif Gaddafi had been detained in an unknown location without access to a lawyer and sentenced to death *in absentia*, with the result that he could not have had access to effective, sufficient and available local remedies.<sup>51</sup> As for the reasonable time requirement, the Court regarded as 'reasonable' the period of just over one year between

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47 Judgment on Merits (n 39) paras 41-43.

48 Judgment on Merits paras 53-54.

49 Judgment on Merits paras 55-60.

50 Judgment on Merits paras 47-52. In support of its view the Court cited art 9 of the Draft Articles of the Internal Law Commission on the Responsibility of States for Internationally Wrongful Acts which provides that 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority'.

51 Judgment on Merits (n 39) paras 66-70.

the conclusion that Libya had not complied with the provisional measures requested and the submission of the application.<sup>52</sup>

After having considered the requirements of jurisdiction and admissibility, the Court turned to examine the merits of the matter. In this regard, the Court first addressed the issue of derogation of rights, noting that

whereas it is accepted under international law that, in exceptional circumstances, States Parties to a human rights instrument have the right of derogation therefrom, it is no less recognised that ... there are rights that cannot be derogated, regardless of the prevailing situation.<sup>53</sup>

Among them, in the Court's view, these are the rights enshrined in articles 6 and 7 of the African Charter. Thus, the Court held that, in spite of the exceptional situation that had since 2011 prevailed in Libya, 'the Libyan State is internationally responsible for ensuring compliance with and guaranteeing such rights'.<sup>54</sup>

As far as article 6 of the African Charter is concerned, the Court, in line with its case law, noted that 'deprivation of liberty is permitted only when it is in conformity with procedures established by domestic legislation which itself should be consistent with international human rights standards'. In this context, the Court referred to article 9 of the International Covenant on Civil and Political Rights (ICCPR) and to the jurisprudence of the UN Human Rights Committee on this matter, according to which 'arrest and detention incommunicado for seven days and the restrictions on the exercise of the right of habeas corpus constitute a violation of article 9 of the Covenant as a whole'.<sup>55</sup> Likewise, in line with the arguments relied on by the African Commission as applicant, the Court noted that the incommunicado detention could lead to other violations such as ill-treatment and torture.<sup>56</sup> On the basis of the foregoing, the Court concluded that the detention of Saif al-Islam Gaddafi since November 2011 without access to a lawyer constituted a violation of his right to personal liberty, protection from arbitrary arrest and security of his person as set forth in article 6 of the African Charter.<sup>57</sup>

52 Judgment on Merits paras 71-73. According to Rule 40(6) of the Rules of Court 'applications to the Court shall be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter'.

53 Judgment on Merits (n 39) paras 76-77. Regarding this matter, as an example, the Court referred to art 4 of the International Covenant on Civil and Political Rights.

54 Judgment on Merits (n 39) para 77.

55 Judgment on Merits para 84.

56 As above.

57 Judgment on Merits (n 39) para 85.

With regard to article 7 of the Charter, the Court stressed that the right to a fair trial was a 'fundamental human right' recognised in all human rights treaties,<sup>58</sup> and 'implied that every individual accused of a crime or an offence shall receive all the guarantees under the procedure and afforded the right of defence'.<sup>59</sup> Saif al-Islam Gaddafi was detained incommunicado in a secret location without access to either his family or to a lawyer or any form of representation, arraigned before an extraordinary court called 'the People's Tribunal' – which was declared unconstitutional by the Supreme Court of Libya – and then sentenced to death *in absentia* by the Tripoli Court of Azzize. Consequently, the Court concluded that the Libyan state had violated and continued to violate articles 6 and 7 of the African Charter, and ordered Libya 'to terminating the illegal criminal procedure instituted before the domestic courts' as well as 'to submit to the Court a report on the measures taken to guarantee the rights of Mr Gaddafi within sixty days from the date of notification of this judgment'.<sup>60</sup>

In a separate opinion, Ouguergouz J concurred that Libya had violated articles 6 and 7 of the African Charter, but argued that, first, the Court had failed to verify that the application was well founded in fact, and that, second, it should have analysed more thoroughly some legal issues. With regard to the former, according to Ouguergouz J, in his separate opinion, the Court 'seems to have purely and simply endorsed the Applicant's submissions, and by so doing, apparently pronounced itself automatically in favour of the Applicant, which is precisely what the prescriptions of Rule 55 of the Rules of the Court intended to avoid'.<sup>61</sup> As for the latter, in his view the Court should have placed the emphasis on the issue of derogation of rights in other international and regional human rights instruments applicable to the case, as well as on the obligations that article 1 of the African Charter imposes on those states that have ratified the treaty.<sup>62</sup>

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58 As an example, the Court cited art 14 of ICCPR as well as the case law of the European Court of Human Rights. Judgment on Merits (n 39) paras 89 & 95.

59 Judgment on Merits (n 39) para 89.

60 Judgment on Merits para 97.

61 Separate Opinion of Ouguergouz J on Admissibility of the Application 3 June 2016, para 28, <http://en.african-court.org/index.php/55-finalised-cases-details/856-app-no-002-2013-the-african-commission-on-human-and-peoples-rights-v-libya-detals> (accessed 27 April 2020).

62 Separate Opinion (n 61) paras 3-14.

## 4 Lights and shadows of the Court's decisions

The two decisions under discussion are noteworthy in several respects. These cases are of particular interest since the African Commission for the first time transferred a case to the African Court, and the Court granted its first orders for provisional measures and rendered its first judgment by default. These cases also illustrate the route by which individuals and NGOs with observer status before the African Commission may submit an application to the Court – indirectly, by the Commission transferring a matter submitted to it to the Court. Since Libya has not made the special declaration under article 34(6) of the Court Protocol allowing the Court to receive applications directly from individuals and NGOs,<sup>63</sup> direct access to the Court was not a possibility. Moreover, both cases demonstrate the importance of local and international NGOs in collecting evidence and persuading the African institutions to protect human rights. In this regard, it is also worth mentioning the accommodating approach adopted by the Court allowing the Pan African Lawyers' Union (PALU) to participate as *amicus curiae* in the case of *African Commission on Human and Peoples' Rights (Benghazi) v Libya*. It is of considerable relevance because, as Viljoen points out, access to *amici curiae* 'enhances the quality of a court's judgments and serves to make the court proceedings more democratically legitimate'.<sup>64</sup> These elements together with additional legal and procedural issues are considered separately in the following parts.

### 4.1 The exceptional dynamism between the African Commission and the African Court

Both the Commission and the Court appeared notably dynamic in the cases where, as noted above, for the first time the Commission transferred a case to the Court and the Court *proprio motu* granted its first orders for provisional measures. In the same way, the effort of both institutions to encourage Libya to comply with the decisions should be noted. Regarding the issuance of provisional measures, the Court strongly relied on the evidence of human rights violations gathered by NGOs, which initially were submitted to the

63 See O Windridge 'In default: *African Commission on Human and Peoples' Rights v Libya*' *The ACtHPR Monitor*, August 2016, <http://www.acthprmonitor.org/in-default-african-commission-on-human-and-peoples-rights-v-libya/> (accessed 3 May 2020).

64 F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 95.

Commission.<sup>65</sup> In particular, the senior legal adviser of the Egyptian Initiative for Personal Rights (EIPR) affirmed that '[t]his is an important development within the African human rights system, demonstrating how the African Commission and Court can cooperate in taking action against massive human rights violations'.<sup>66</sup> In particular, the case of the *African Commission (Saif Al-Islam Kadhafi) v Libya* exemplifies indirect access to the Court through the referral by the Commission of unimplemented provisional measures. As indicated by Viljoen, this indirect access would require two cumulative elements: the non-compliance by the respondent state; and the referral of the case by the Commission at its discretion.<sup>67</sup> This possibility has been explicitly contemplated in Rule 118(2) of the 2010 Rules of Procedure of the African Commission.<sup>68</sup> Since then, there has been only one additional decision that made use of this provision: the *African Commission (Ogiek) v Kenya* case.<sup>69</sup>

The decision in *African Commission (Saif Al-Islam Kadhafi) v Libya* also represents the first time the Court rendered a judgment by default. In arguing in favour of the application of Rule 55 of the Rules of the Court regarding judgments by default, the decision emphasised the continuous attempts made by both the Commission and the Court to compel Libya to comply or get involved in the case. In this regard, according to Ayissi, the Court's decision reflected 'both a measured approach to the issuance of default judgments and an emphasis on the need for states to comply with their human rights obligations even in situations of exceptional political and security instability'.<sup>70</sup> This decision opens the door for potential judgments by default in cases where the respondent state fails to become engaged in the procedure. Taking into consideration the growing number of applications received by the African Court, the possibility of future judgments by default will also increase, although it needs to be noted that 'a case going to judgment in default does not automatically result in a decision in favour of the applicant'.<sup>71</sup>

65 See A Dolidze 'African Court on Human Rights and Peoples' Rights – Response to the situation in Libya' (2011) 15 *Insights American Society of International Law*, <https://www.asil.org/insights/volume/15/issue/20/african-court-human-and-peoples'-rights---response-situation-libya> (accessed 10 April 2020).

66 Human Rights Watch 'Libya: African Rights Court issues first ruling against a state' 30 March 2011, <https://www.hrw.org/news/2011/03/30/libya-african-rights-court-issues-first-ruling-against-state> (accessed 4 May 2020).

67 Viljoen (n 64) 75.

68 See Rules of Procedure of the African Commission on Human and Peoples' Rights, approved by the African Commission on Human and Peoples' Rights during its 47th ordinary session held in Banjul, The Gambia, 12-26 May 2010.

69 *African Commission (Ogiek) v Kenya* App 6/2012, Order for Provisional Measures 15 March 2013.

70 Ayissi (n 44) 738.

71 O Windridge 'In default: *African Commission on Human and Peoples' Rights v Libya*' (2018) 18 *African Human Rights Law Journal* 774.

Nevertheless, these cases also highlight the fact that greater clarity is needed in the relationship between the African Court and the African Commission. For instance, in the *African Commission (Saif al-Islam Gaddafi) v Libya* case the Court appeared to ignore that it was the Commission that decided to issue an order for provisional measures in the first place, which was not complied with by the Libyan state<sup>72</sup> and, thus, decided to submit the case to the Court. In so doing, the Court failed to follow the proceeding provided for in Rule 51 of the Rules of Court.<sup>73</sup> Furthermore, as noted by Windridge,

the current Commission-then-Court scenario also creates the seemingly confusing situation whereby the ‘Applicant’ is the Commission rather than Gaddafi ... This raises practical issues moving forward with similar transferred cases. Is the Commission ‘acting’ for the complainant? Does the Commission ‘represent’ the complainant, or do they in effect step away from litigating the case once they have transferred it?<sup>74</sup>

Another point to consider when examining the *African Commission on Human and Peoples’ Rights (Benghazi) v Libya* decision is that the legal basis for transferring the case was not specified either by the Commission or by the Court. In this case, the legal basis appears to be Rule 118(3) of the 2010 Rules of Procedure of the African Commission. This question is of great relevance for the proceedings and should be specified in the decision, especially since the situation constitutes one of serious and massive violations of human rights.<sup>75</sup> The need for clarity is all the more pertinent because the four scenarios provided for in Rule 118 (in particular Rule 118(4) and its relationship with the other aspects of Rule 118) are not particularly clear and require further interpretation. In the same vein, the Court in neither case checked the veracity of the facts detailed in the Commission’s applications,<sup>76</sup> and did not satisfy the *jura novit curia* principle,<sup>77</sup> which led Ouguergouz J to hold in a separate judgment that the Court had failed to ensure that the applications were well founded in fact and in law.<sup>78</sup> This issue is also discussed in the following part.

72 Separate Opinion of Fatsah Ouguergouz J on Order for Provisional Measures para 2; Order for Provisional Measures (n 33) para 2, in relation with Rule 118.2 Rules of Procedure of the African Commission.

73 See Windridge (n 71).

74 Windridge (n 71).

75 Order for Provisional Measures (n 19) 2.

76 One of the negative consequences of this situation is the fact that the information on which the Court based its decisions clearly was not updated.

77 As stated by the International Court of Justice in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ 27 June 1986 (Decisions on Merits) para 29, ‘the *jura novit curia* principle signifies that, to decide whether submissions are founded in law, the Court is not solely dependent on the arguments of the parties before it with respect to the applicable law’.

78 Separate Opinion of Ouguergouz J on Admissibility of the Application (n 61) paras 4-6 & 16-31. .



## 4.2 Lack of application of Rules 45 and 46 by the Court

Another procedural aspect to be examined was the fact that the Court did not apply Rules 45 (Measures for Taking Evidence) and 46 (Witnesses, Experts and Other Persons) of the Rules of Court, especially regarding the first case, with a view to compelling the AU Assembly and the PSC to adopt a more active role in the Libyan crisis. Perez-Leon Acevedo maintains the view that the fact-finding powers of the African Commission and the Court should not be constrained by the political decisions taken by the AU Assembly.<sup>79</sup> In particular, he states that the African Commission only implemented limited fact-finding capacities regarding the atrocities committed in Libya in comparison to the work performed by UN mechanisms, such as the International Commission of Inquiry into Libya.<sup>80</sup>

In this sense, the fact-finding powers of the African Court could have been reinforced if it had made use of the mechanisms provided for in Rules 45 and 46. These mechanisms allow the Court to obtain any evidence that may provide clarification of the facts of the case, including hearing the declarations of witnesses, experts or other relevant persons. Moreover, it is argued that the fact-finding powers of the African Commission and the Court would have been of paramount importance in the process of informing the AU Assembly and the PSC in the case of authorising a military intervention. Strengthening these procedural capacities could have led to increasing evidence in order to make these institutions react and engage in the Libyan crisis.

## 4.3 Use of additional human rights instruments by the African Court

Turning to the violations of the African Charter, the African Court adopted a comprehensive approach to the right to a fair trial, holding that such right includes the right to be promptly 'arraigned before a judicial authority';<sup>81</sup> the right to 'be notified of the trial date and of the charges levelled against the accused';<sup>82</sup> the right to 'be assisted by a lawyer of his/her own choosing';<sup>83</sup> and the right to 'communicate with his/her counsel and have adequate time and facilities to prepare the defence'.<sup>84</sup> However, the Court seemed to

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79 Perez-Leon Acevedo (n 16) 498.

80 Perez-Leon Acevedo 495.

81 Judgment on Merits (n 39) para 91.

82 Judgment on Merits para 94.

83 Judgment on Merits para 93.

84 Judgment on Merits para 94.

forget that, according to article 3 (Jurisdiction) and article 7 (Sources of Law) of the Court Protocol, it is entitled to apply any other relevant human rights instruments ratified by Libya, not only for the purposes of interpretation of the corresponding articles of the African Charter, but also, as noted by Ouguergouz J, with the same legal force as the African Charter and its Protocols.<sup>85</sup>

Accordingly, the Court should have carried out a more detailed analysis of the violations of articles 6 and 7 of the African Charter referring to other relevant human rights instruments. In this regard, in the *African Commission (Saif al-Islam Gaddafi) v Libya* case the Court referred to articles 9 and 14 of ICCPR, but it would also have been useful to refer, for instance, to article 2(3) (the right to an effective remedy) and article 6 (the right not to be arbitrarily deprived of one's life) of ICCPR. It could also, as interpretive guide, have drawn more from the 1988 Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment in connection with the case in question. Furthermore, the African Commission also in 2003 adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa which further developed articles 5, 6, 7 and 26 of the African Charter.<sup>86</sup> The decision of the African Court could have been more coherent and consistent if the African Commission's Principles had been quoted by the Court bringing together international and regional human rights instruments in its argumentation.

With regard to the issue of derogation, and taking into account the situation of non-international armed conflict in Libya since 2011,<sup>87</sup> it is to be welcomed that, despite the lack of any article in the African Charter regarding derogation in times of public emergency, the Court referred to article 4 of ICCPR.<sup>88</sup> The Court only briefly

85 Separate Opinion of Ouguergouz J on Admissibility of the Application (n 61) para 8.

86 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and Peoples' Rights in May 2003 in Niamey, Niger.

87 In this regard, see eg I Fuente Cobo 'Libia, la guerra del General Jalifa Haftar' (2017) 70 *Instituto Español de Estudios Estratégicos* 1.

88 Art 4 of ICCPR provides that '(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. (2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision. (3) Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated

mentioned the application of this article indicating that the right of derogation of state parties 'has inherent limits in so far as there are rights that cannot be derogated, regardless of the prevailing situation'.<sup>89</sup> Nevertheless, it did not further elaborate on those limits or other key issues regarding the application of this article, such as the procedural and substantive elements. This was also noted by Ayissi, who explains:<sup>90</sup>

The Court missed an opportunity to expand on its reasoning on the issue. It could, for instance, have examined whether the procedural and substantive requirements of ICCPR Article 4 had been met in the case at hand, in light of the Human Rights Committee's General Comment No 29 (2001). It could also have explained how the non-derogability principle applies to Articles 6 and 7 of the African Charter.

On a positive note, it is worth noting that the Court referred to the jurisprudence of the European Court of Human Rights in relation to the right to be assisted by a lawyer as derived from article 6 of the European Convention on Human Rights.<sup>91</sup> In particular, the Court mentioned the cases of *Brusco v France* and *Dayanan v Turkey*.<sup>92</sup> This demonstrates the importance of the so-called 'dialogue' between international and regional courts in the interpretation of human rights provisions.<sup>93</sup>

#### 4.4 International responsibility of the Libyan state

In *African Commission (Saif al-Islam Gaddafi) v Libya* the African Court stressed the international responsibility of the Libyan state for ensuring compliance with articles 6 and 7 of the African Charter with respect to the conduct of a 'revolutionary brigade'. As argued by Windridge, 'the Court forestalled future attempts by member states to disavow actions of groups it claims are not under its control but operating on in its territory ... thereby dismissing any arguments by member states that 'we can't do anything about it'.<sup>94</sup> Nonetheless, since it was the first time that this issue was addressed by the Court, this was an opportunity for the Court to thoroughly examine the cases in which the state is responsible for acts committed by a person

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and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.'

89 Judgment on Merits (n 39) para 76.

90 Ayissi (n 44) 743.

91 Judgment on Merits (n 39) para 95.

92 See European Court of Human Rights *Brusco v France*, 14 October 2010; European Court of Human Rights, *Dayanan v Turkey*, 13 October 2009.

93 See FJ Ansuátegui Roig 'Human rights and judicial dialogue between America and Europe: Toward a new model of law? (2016) 6 *The Age of Human Rights Journal* 24.

94 Windridge (n 71).

or group of persons. In particular, although the Court referred to article 9 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, it did not examine the three conditions that must be met for conduct to be considered directly imputable to the state.<sup>95</sup> Article 9 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts establishes three conditions that must be met in order for conduct to be attributable to the state: First, the conduct must effectively relate to the exercise of elements of the governmental authority; second, the conduct must have been carried out in the absence or default of the official authorities; and third, the circumstances must have been such as to call for the exercise of those elements of authority.<sup>96</sup> These conditions were not specifically evaluated by the Court in the current case.

It is also worth mentioning that, in contrast to what the Court did, in his separate opinion Ouguergouz J highlighted the detailed analysis carried out in the *Velasquez Rodriguez v Honduras* case by the Inter-American Court of Human Rights in addressing the topic of the international responsibility of states and linking it with the due diligence principle.<sup>97</sup> In this case the Inter-American Court of Human Rights held: <sup>98</sup>

An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

This means that the international responsibility of a state can be triggered not only for its own violation of international obligations but for its lack of due diligence in preventing, responding or investigating such violation committed in its territory by a private person or a group of persons. As a consequence, the African Court should have offered a more solid argumentation regarding the due diligence obligations of the Libyan state. On this particular aspect, the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights could serve as valuable interpretative materials for the African Court.

95 Judgment on Merits (n 39) para 50.

96 See art 9 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) adopted by the International Law Commission at its 53rd session; *Yearbook of the International Law Commission* (2001) Vol II, Part II 49.

97 Separate Opinion of Ouguergouz J on Admissibility of the Application (n 61) para 12 fn 17.

98 See *Velasquez Rodríguez v Honduras* IACHR 29 July 1988 (Judgment) para 72.

#### 4.5 Political will of the African Union policy organs

Finally, it needs to be pointed out that the outcome of these cases has been subordinated to the political decisions of the AU policy organs and the existing divisions among its member states. As stated by Sander, 'the efficacy of any order of the Court is ultimately dependent on the political will of the African Union'.<sup>99</sup> In fact, there is no independent body in charge of the enforcement of the Court's orders. According to article 31 of the Court Protocol, these enforcement powers specifically rely on active engagement by the AU Executive Council.

In the aforementioned cases there were strong divisions among AU member states in relation to the decision as to how to deal with the Libyan crisis, particularly between the group led by Nigeria and that led by South Africa and Zimbabwe. According to Ekwealor and Okeke-Uzodike,

while Nigeria's position on the regime in Libya, that includes the formation of a new inclusive government which allows for the participation of the Transitional National Council (TNC), was supported by another 34 African States, South Africa and Zimbabwe were adamant that Gaddafi should remain at the helm.<sup>100</sup>

Due to this lack of agreement, the AU not only failed to implement a common agenda but also to protect human rights in such a pressing situation. Consequently, these cases show that the potential positive impact of the African Court in cases of imminent human rights violations can be undermined by the political divisions within the AU.

### 5 Moving forward: Lessons learned and recommendations for the future work of the Court

The two cases analysed above are for several reasons considered of paramount importance for the consolidation and legitimation of the African Court. As was explained in the introduction, for the purposes of this article 'consolidation' means the consistency and effectiveness of the Court in delivering judgments. 'Legitimation' here refers to the perceived legitimacy by relevant constituencies (empirical legitimacy) and the justified authority in terms of law or

<sup>99</sup> B Sander 'Case summary, Application 004/2011 *African Commission on Human and Peoples' Rights v The Great Socialist People's Libyan Arab Jamahiriya*' 4 January 2012, <http://arcproject.co.uk/wp-content/uploads/2013/04/CSW-004-2011.pdf> (accessed 4 May 2018).

<sup>100</sup> See Ekwealor & Okeke-Uzodike (n 14) 76.

expertise (normative legitimacy). In terms of its consolidation, the Court acted in an effective way because, for the first time, it made use of important procedural mechanisms at its disposal in cases of extreme gravity and massive violations of human rights, namely, the issuance of provisional measures and the adoption of a judgment by default. Moreover, these cases represent the only cases that have to date been heard by the Court concerning Arab African countries.<sup>101</sup>

These cases have opened the door for the future use of these procedural mechanisms. Since then the Court has issued 39 additional orders for provisional measures in very different circumstances, the last being on 22 April 2020 against Côte d'Ivoire.<sup>102</sup> The Libyan decisions have been quoted subsequently by the Court with regard to the fact that the Court does not need to justify that it has jurisdiction on the merits of the case when ordering provisional measures.<sup>103</sup> As for the possibility of rendering judgments by default, the Court also set a legal precedent that could be applied to similar cases where the respondent fails to appear or defend its case. In the matter concerning Saif al-Islam Gaddafi, the Court considered that notwithstanding the fact that the respondent sent two *notes verbale*, it 'consistently failed to present its defence, despite the extension of the deadline accorded'.<sup>104</sup> Therefore, *notes verbale* do not necessarily in themselves serve the purpose of demonstrating adequate state engaging in the implementation process.

In terms of the legitimation of the African Court, NGOs and international lawyers applauded the decision in *African Commission on Human and Peoples' Rights (Benghazi) v Libya* for being the first ruling against a state considering the situation of exceptional insecurity in Libya.<sup>105</sup> The Court stressed the international responsibility of the Libyan state for failing to comply with articles 6 and 7 of the African Charter. In addition, as far as its justified legal argumentation, particularly in relation to the *African Commission (Saif al-Islam Gaddafi) v Libya* case, is concerned, the decision was regarded as

101 Largely because among them only Tunisia has recently signed the declaration under art 34(6) of the African Court Protocol.

102 See the list of cases where provisional orders have been issued at <https://en.african-court.org/index.php/59-list-of-cases-with-provisional-measures/1037-list-of-cases-where-orders-for-provisional-measures-have-been-issued> (accessed 10 April 2020).

103 Eg, see *Armand Guehi v United Republic of Tanzania* 18 March 2016 3; *Dexter Eddie Johnson v Republic of Ghana* 28 September 2017 4; *Sébastien Germain Ajavon v Republic of Benin* 5 December 2018 6.

104 Judgment on Merits (n 39) para 42.

105 See International Federation for Human Rights 'The African Court on Human and Peoples' Rights seized of a case against Libya' 15 April 2011, <https://www.fidh.org/en/region/north-africa-middle-east/libya/9527-the-african-court-on-human-and-peoples-rights-seized-of-a-case-against>; see also Human Rights Watch (n 66).

'solid jurisprudence' for potential submissions by AU member states that may in extreme circumstances derogate the right to a fair trial or the right to liberty.<sup>106</sup>

Nonetheless, following these decisions a number of recommendations for the better functioning of the Court are suggested, both at the procedural and the substantive level. First, the article argues that more clarity is needed in respect of the relationship between the African Court and the African Commission, especially when a case is or can potentially be transferred to the African Court. In particular, it is not clear how the four scenarios provided for in the Commission's 2010 Rules of Procedure (in Rule 118) should be applied and whether the Commission is 'acting' or 'representing' the complainant.<sup>107</sup> Moreover, the Court is required to investigate the veracity of the facts detailed in the Commission's applications and when necessary update them. Second, and in the same vein, the Court should make use of all the procedural tools at its disposal when investigating serious and massive violations of human rights, for instance, bringing into play Rules 45 and 46 of the Rules of the Court and hearing witnesses and other experts in the field.<sup>108</sup> In this way, facts will be supported with stronger and more consistent evidence.

At the substantive level of the examination of the merits of the case, it is argued that the Court should use additional UN and AU instruments in the interpretation of human rights provisions.<sup>109</sup> Although the Court considered ICCPR as one of the legal bases for the interpretation of the right to liberty and the right to a fair trial, it neither further elaborated on the 1988 Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, nor did it cite the 2003 African Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. Bringing together additional international human rights instruments could lead to a richer and more detailed analysis of the alleged violations. Finally, when deciding about key legal issues that have never been examined by the African Court, it is recommended that the Court explore the jurisprudence of other regional human rights courts, such as the Inter-American Court of Human Rights or the European Court of Human Rights.<sup>110</sup> For example, topics such as the issue of derogation of rights or the due diligence principle for state responsibility have

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<sup>106</sup> Windridge (n 71) 772.

<sup>107</sup> See part 4.1 of this article.

<sup>108</sup> See part 4.2 of this article.

<sup>109</sup> See part 4.3 of this article.

<sup>110</sup> See part 4.4 of this article.

been extensively discussed by these courts.<sup>111</sup> In this regard, it is to be welcomed that since these two judgments the African Court indeed has included more references to the case law of these tribunals in its decisions.<sup>112</sup>

## 6 Concluding remarks

Libya ratified the African Charter in 1986 and the African Court Protocol in 2003.<sup>113</sup> However, it has not made the declaration allowing individuals and NGOs to directly access the Court. Despite the lack of direct access by individuals and NGOs, the above cases reached the African Court. This was only possible through the referral of the decisions by the African Commission, establishing an alternative route to the Court. This indirect access could have relevant significance in the future due to the withdrawals of four states of their special declarations allowing direct access to the Court.<sup>114</sup> Remarkably, since the *African Commission (Ogiek) v Kenya* case, this indirect access route has not again been taken. Clearly, a higher level of activity by the African Commission is required to properly assess whether this path actually proves effective.

As explained in this article, these decisions have been essential for the consolidation and legitimation of the African Court, representing the first decisions in condemning an AU member state, the first adoption of provisional measures and the first judgment by default. Nonetheless, both cases also reflect that certain areas urgently need to be improved. In particular, some procedural and legal issues should have been examined in greater detail by the Court so as to offer a more consistent and elaborate argumentation. An even more serious concern is the fact that none of the decisions adopted by the Court has been enforced by the relevant AU institutions. Therefore,

111 Regarding the derogation of rights, see J Allain 'Derogations from the European Convention of Human Rights in light of other obligations under international law' (2005) 11 *European Human Rights Law Review* 480. On the due diligence principle and state responsibility, see JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (2013) 184-187.

112 Eg, see *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* 18 November 2016 paras 64, 95, 134 & 148.

113 See Ratification Table of the African Charter on Human and Peoples' Rights, <https://www.achpr.org/ratificationtable?id=49>; Ratification List of the Court's Protocol, [https://au.int/sites/default/files/treaties/36393-sl-protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoplesrights\\_on\\_the\\_estab.pdf](https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf) (accessed 20 May 2020).

114 See T Davi & E Amani 'Another one bites the dust: Côte d'Ivoire to end individual and NGO access to the African Court' EJIL:Talk! Blog of the *European Journal of International Law* 19 May 2020, [https://www.ejiltalk.org/another-one-bites-the-dust-cote-divoire-to-end-individual-and-ngo-access-to-the-african-court/?fbclid=IwAR3ZTiOoYtiybJz\\_-WJGs24dYtDFvvsqRrSOWAMYyNtPVhNciQvoAybPFQ](https://www.ejiltalk.org/another-one-bites-the-dust-cote-divoire-to-end-individual-and-ngo-access-to-the-african-court/?fbclid=IwAR3ZTiOoYtiybJz_-WJGs24dYtDFvvsqRrSOWAMYyNtPVhNciQvoAybPFQ) (accessed 20 May 2020).



the AU not only failed to implement a common agenda but also to protect human rights in such a pressing situation. The AU must leave behind the current political rhetoric and bear in mind that one of its main goals is to promote, protect and guarantee human rights under a just rule of law, as provided for in article 3 of the AU's Constitutive Act.<sup>115</sup> Only under these conditions is the end to impunity ever to be achieved.

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<sup>115</sup> Constitutive Act of the African Union adopted on 11 July 2003 at Lomé, Togo.