

AFRICAN UNION

الاتحاد الأفريقي



UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

v.

LIBYA

APPLICATION No. 002/2013

ORDER OF PROVISIONAL MEASURES



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The Court composed of: Sophia A.B. AKUFFO, President; Fatsah OUGUERGOUZ, Vice President; Bernard M. NGOEPE, Gérard NIYUNGEKO, Augustino S. L. RAMADHANI, Duncan TAMBALA, Elsie N. THOMPSON, Sylvain ORÉ, Ben KIOKO, El Hadji GUISSSE and Kimelabalou ABA - Judges; and Robert ENO - Registrar,

In the matter of:

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

v.

LIBYA

Whereas,

1. The Court received, on 31 January 2013, an application by the African Commission on Human and Peoples' Rights (hereinafter referred to as the Applicant), instituting proceedings against Libya (hereinafter referred to as the Respondent), alleging violations of the rights of Saif Al-Islam Gaddafi (hereinafter referred to as the Detainee), guaranteed under Articles 6 and 7 of the African Charter on Human and Peoples' Rights (hereinafter referred to as the Charter);
2. The application is brought in terms of Article 5(1)(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as the Protocol), Rule 29(3) of the Rules of Court and Rules 84(2), 118(2) and (3) of the Rules of Procedure of the Applicant;
3. The Applicant submits that, on 2 April 2012, it received a complaint against the Respondent from Ms. Mishana Hosseinioun (hereinafter referred to as the Complainant), on behalf of the Detainee, alleging that:
 - The National Transitional Council, which has been recognized as the Government (the Government) in power in Libya, on 19

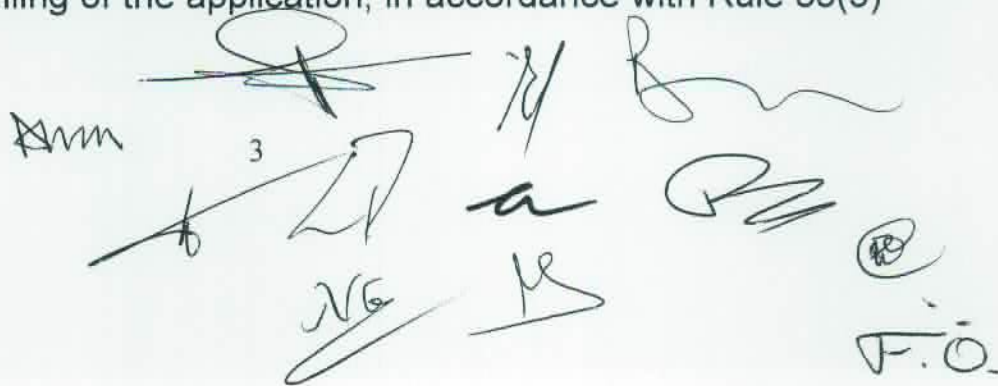
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November 2011, detained the Detainee in isolation and without access to his family, friends or any lawyer;

- The Detainee has not been charged with any offence nor been brought before any court;
 - The address of the detention facility, believed to be in Zintan, a town in Libya, is not known;
 - The Applicant is concerned that the Detainee faces an imminent trial which carries with it the threat of the death penalty, following a period of arbitrary detention based on interrogations carried out in the absence of a lawyer;
 - All these acts amount to a violation of the Detainee's rights under Articles 6 and 7 of the Charter, for which Applicant issued Provisional Measures on 18 April 2012 to stop any irreparable harm to the Detainee, and which provisional measures Respondent has, to date, not responded to;
4. The Applicant concludes by praying the Court to order the Respondent:
- Not to proceed further with any actions concerning the legal proceedings, investigation against, or detention that would cause irreparable harm to the Detainee; and
 - To allow the Detainee access to a lawyer immediately and without further delay;
5. On 22 February 2013, the Registry acknowledged receipt of the application, in accordance with Rule 34(1) of the Rules of Court; and on 12 March 2013, the Registry forwarded copies of the application to the Respondent, in accordance with Rule 35(2) (a) of the Rules of Court, and requested it to indicate, within thirty (30) days of receipt of the application, the names and addresses of its representatives, in accordance with Rule 35(4)(a). Furthermore, the Registry invited the Respondent to respond to the application within sixty (60) days, in accordance with Rule 37 of the Rules;
6. By letter dated 12 March 2013, the Registry informed the Chairperson of the African Union Commission, and through her, the Executive Council of the African Union, and all the other States Parties to the Protocol, of the filing of the application, in accordance with Rule 35(3) of the Rules;

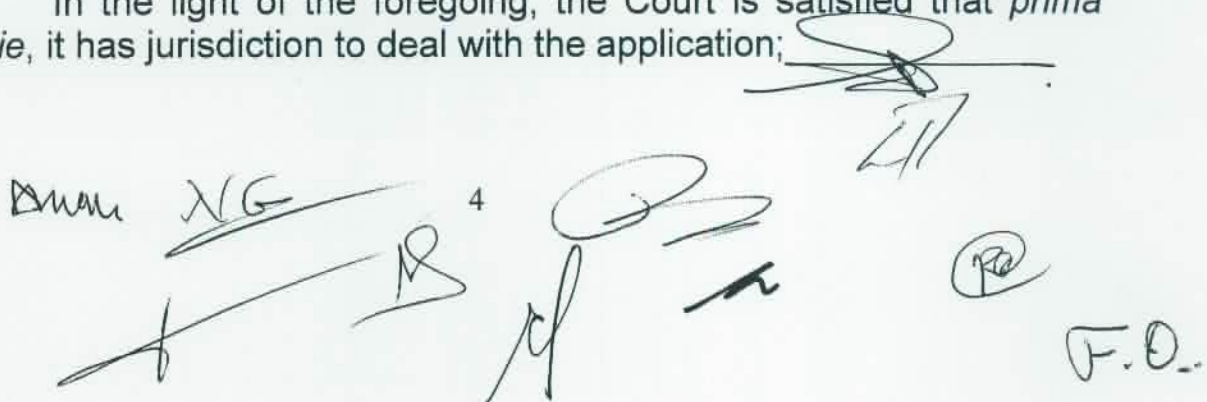
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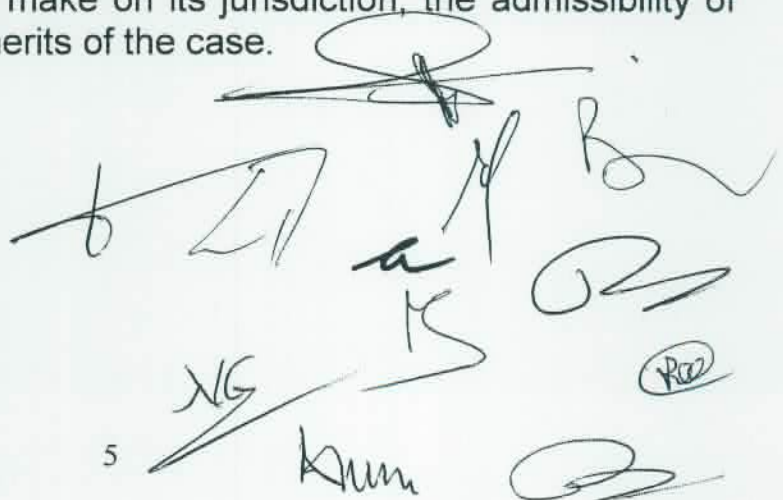


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7. By notice dated 12 March 2013, the Registry informed the parties that, in view of the urgency and gravity of the matter, the Court was considering issuing provisional measures in the matter;
8. The Court notes that the combined reading of Article 27(2) of the Protocol and Rule 51 of the Rules of Court allows it, in cases of extreme gravity and urgency, and to avoid irreparable harm to persons, to adopt such provisional measures as it deems necessary;
9. In dealing with any application, the Court has to ascertain that it has jurisdiction under Articles 3 and 5 of the Protocol;
10. However, before ordering provisional measures, the Court 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;
11. The Court notes that Article 3(1) of the Protocol provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned";
12. The Court further notes that the Respondent ratified the Charter, which came into force on 21 October 1986, on 19 July 1986 and deposited its instruments of ratification on 26 March 1987; and further that the Respondent ratified the Protocol, which came into force on 25 January 2004, on 19 November 2003 and deposited its instruments of ratification on 8 December 2003 and is therefore party to both instruments;
13. The Court acknowledges that Article 5(1)(a) of the Protocol lists the Applicant as one of the entities entitled to submit cases to the Court, and takes judicial notice that provisional measures, may be a consequence of the right to protection under the Charter, not requiring consideration of the substantive issues;
14. In the light of the foregoing, the Court is satisfied that *prima facie*, it has jurisdiction to deal with the application;

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15. The Court notes that the Applicant, in its own request for Provisional Measures, requested the Respondent to:
- ensure that the Detainee has access to his lawyers;
 - ensure that the Detainee can receive visits from family and friends;
 - disclose the location of his detention; and
 - guarantee the integrity of his person and his right to be tried within a reasonable time by an impartial court;
16. In view of the alleged length of detention of the Detainee without access to a lawyer, family or friends; and with due regard to the Respondent's alleged failure to respond to the Provisional Measures requested by the Applicant, and the requirements of the principles of justice that require every accused person to be accorded a fair and just trial, the Court decided to order provisional measures *suo motu*;
17. In the opinion of the Court, there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Detainee;
18. In the light of the foregoing, the Court concludes that, pending its ruling on the main application before it, the circumstances require it to order, as a matter of urgency, provisional measures, *suo motu*, in accordance with Article 27 (2) of the Protocol and Rule 51 of its Rules to preserve the integrity of the person of the Detainee and protect his right to access legal representation and family;
19. The Court notes that the measures it will order will necessarily be provisional in nature and would not in any way prejudice the findings the Court might make on its jurisdiction, the admissibility of the application and the merits of the case.

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20. For these reasons,

THE COURT, unanimously, orders the Respondent:

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 (15) days from the date of receipt of this Order, on the measures taken to implement this Order.

Pursuant to Article 28(7) of the Protocol and Rule 60(5) of the Rules, the individual Opinion of Vice President OUGUERGOUZ is attached to this Order.

Done at Arusha, this fifteenth day of March in the year two thousand and thirteen, in English and French, the English version being authoritative.

Signed:

Sophia A.B. AKUFFO, President



Fatsah OUGUERGOUZ, Vice-President



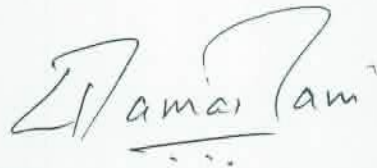
Bernard M. NGOEPE, Judge



Gérard NIYUNGEKO, Judge



Augustino S. L. RAMADHANI, Judge



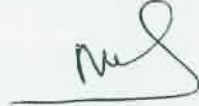
Duncan TAMBALA, Judge



Elsie N. THOMPSON, Judge



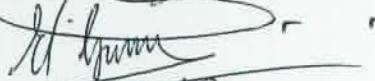
Sylvain ORÉ, Judge,



Ben KIOKO, Judge



El Hadji GUISSSE, Judge



Kimelabalou ABA, Judge; and



Robert ENO, Registrar





SEPARATE OPINION OF VICE-PRESIDENT FATSAH OUGUERGOUZ

1. Although I voted in favour of the provisional measures ordered by the Court in the operative part of its Order, I would like to make my position known with regard to an important aspect of the procedure followed in dealing with the Application brought by the African Commission against the Republic of Libya as well as to some of the reasons for the Order.

2. First of all, on procedure, I would like to point out that the Application by the Commission should as a matter of fact be considered as a request for provisional measures. It is indeed entitled "*Application filed before the African Court on Human and Peoples' Rights on grounds of failure to comply with a request for provisional measures*". It can be summarised as a request made to the Court to issue two provisional measures whose content is mentioned in paragraph 4 of the Order. In its Application, the Commission contends that the facts it alluded to "amount to a violation of the rights of the victim enshrined in Articles 6 and 7 of the African Charter on Human and Peoples' Rights"; in its submission it simply however, "prays the Court to issue an Order calling on the Respondent State to take the following measures (...)". It is clearly therefore a request for provisional measures¹ which the Court should have communicated to the Respondent State immediately after receiving it; in principle, it should equally have invited the latter to communicate any observations it may eventually have on that request, setting a short deadline for that purpose.

3. The Application by the Commission is dated 8 January 2013 and was received at the Registry of the Court on 31 January 2013. It was only on 12 March 2013 that the Registry forwarded a copy of the Application to the Respondent State requesting it *inter alia* to respond within sixty (60) days,

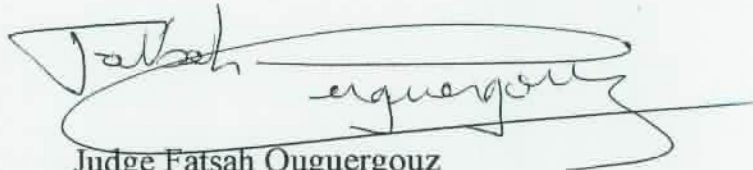
¹ Requested by the Commission, the provisional measures would therefore not be considered to be ordered *suo motu* by the Court, that is to say on its own accord, as stated by the Court in paragraphs 16 and 18 of the Order (see the two alternative options provided for in Rule 51 (1) of the Rules of Court).



pursuant to Rule 37 of the Rules of Court (paragraph 5 of the Order); that same day, the Registry also informed the Parties that “as a result of the extreme gravity and urgency of the situation, the Court was considering issuing provisional measures in the matter” (paragraph 7).

4. Compliance with the adversarial principle (*Audiatur et altera pars*) as well as the urgency which is inherent to the issuing of provisional measures however required that the Application be served on the Respondent State as quickly as possible and the latter be invited, also expeditiously, to submit the observations it might have on the request for provisional measures. In the case of the *African Commission on Human and Peoples Rights v. Kenya* (Application No. 006/2012), the African Commission had filed a request for provisional measures, received at the Registry of the Court on 31 December 2012 and copied by the latter to the Respondent State on 7 January 2013, inviting it to submit the observations it might have in that regard within a period of thirty (30) days; in this matter, the Court issued its Order for provisional measures on the same day as the present Order.
5. In the present case, the Republic of Libya was not placed in a position to respond to the allegations made in the Application of the African Commission. This could have been justified by the extreme urgency of the matter if the Court had ruled on it in a relatively brief period after the filing of the Commission’s request for provisional measures. However, more than two (2) months elapsed between the date of the Application (8 January 2013) and the date of the Court’s Order for provisional measures (15 March 2013). Nothing in the case file can ascertain that, during such a relatively lengthy period, the Respondent State has not yet adopted part or all of the measures sought by the Commission in the present Application to the Court and in the request for provisional measures dated 18 April 2012 sent by the Chairperson of the Commission to the Republic of Libya; the risk is therefore that part or all of the measures ordered by the Court be purposeless. As the Court did with regard to Application No. 006/2012 mentioned above, the Court should have therefore requested the Republic of Libya to submit the observations it may have in order for the Court to ascertain that all or part of the measures to be ordered to the latter have not yet been implemented by the Respondent State; the Court would therefore have been able to decide on the basis of the most recent information possible on the situation for which provisional measures are sought.

6. Now, on the reasons for the Order, the Court dealt with the issue of its *prima facie* jurisdiction at the personal level (*ratione personae*) only (paragraphs 12 to 14) but did not ensure that it also had *prima facie* jurisdiction at the material level (*ratione materiae*), that is, that the rights to which it is necessary to avoid irreparable harm are *prima facie* guaranteed by the legal instruments to which the Respondent State is a party to. It only sufficed for the Court to state that, in the present case, the rights in question are actually guaranteed under Articles 6 and 7 of the African Charter of which the Republic of Libya is party and the violation of which is alleged by the African Commission and thereby conclude that the Court's material jurisdiction is also established *prima facie*.
7. Finally, in paragraph 17 of the Order, the Court is of the opinion that "there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Detainee", without really demonstrating it. Whereas these are important cumulative conditions as provided for in Article 27 (2) of the Protocol and to which more elaborate developments should have been devoted beyond what is stated in paragraph 16 alone.
8. Notwithstanding all the above observations, I fully subscribe to the measures ordered by the Court in favour of Mr. Saïf Al-Islam Gaddafi.


Judge Fatsah Ouguergouz
Vice-President

Dr. Robert Eno
Registrar



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