AFRICAN UNION
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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Application 002/2013

African Commission on Human and Peoples' Rights v. Libya

Separate Opinion of Judge Fatsah Ouguergouz

1. I voted in support of the operative part of the judgment but I consider insufficient the grounds that led the Court to find that "*Libya has violated and continues to violate Articles 6 and 7 of the African Charter on Human and Peoples' Rights"* (paragraph iv) of the operative part).

2. The Applicant having prayed the Court to pass judgment in default against Libya as per Rule 55 of the Rules of Court, it was incumbent on the Court to determine whether all the requirements under the said Rule have been met and, in particular "*satisfy itself that it has jurisdiction in the case, and that the application is admissible and well-founded in fact and in law"*. The Court duly recognized the importance of those requirements in paragraphs 39 and 40 of the judgment and accordingly embarked on a relatively exhaustive consideration of its jurisdiction and the admissibility of the Application;[1] however, it did not, in my view, extend requisite attention to determining whether the submissions of the Applicant were *"founded in fact and in law"*.

3. I would observe in that regard that the phrasing of Rule 55 (2) of the Rules is similar to that of Article 53 (2) of the Statute of the International Court of Justice.[2] The latter has, on several occasions, relied on this provision and

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[1] I would however observe that the Court did not examine the condition laid down in Rule 40 (7) of its Rules that the application does "not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union" (see paragraphs 72 and 73 of the Judgment). The issue could, in particular, be raised with respect to the procedures put in place by the United Nations Human Rights Council and, especially, with respect to the conclusions of the Working Group on Arbitrary Detention, see *infra*, paragraphs 22 and 23.

[2] Article 53 of the Statute of the International Court of Justice provides as follows:

provided quite comprehensive interpretation thereof in its most recent judgment in default, namely, that of 26 June 1986 on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*.[3]

4. The principal judicial organ of the United Nations in particular emphasized the need to give a particular attention to the administration of justice whenever one of the two parties fails to appear[4] and recalled the principles which should guide the Court to ensure that the submissions of the appearing party are founded in fact and in law. The Inter-American Court of Human Rights, for example, expressly made reference to the said guiding principles in its very first two judgments rendered in default;[5] it would have been desirable for this Court to be also guided by these principles in determining whether the Applicant's submissions were well-founded, as it is implicitly authorized by Article 61 of the African Charter.[6]

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"1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and in law". This Article also inspired Article 28 of the Statute of the International Tribunal on the Law of the Sea.

[3] *ICJ Reports 1986*, see pages 23-26, paragraphs 26-31.

[4] "The vigilance which the Court can exercise when aided by the presence of both parties to the proceedings has a counterpart in the special care it has to devote to the proper administration of justice in a case in which only one party is present", *ibid*, p. 26, paragraph 31.

[5] *Case of the Constitutional Court v. Peru (Merits, Reparations and Costs),* Judgment of 31 January 2001, pp. 33-35, paragraphs 58-62, and *Case of Ivcher-Bronstein v. Peru (Merits, Reparations and Costs)*, Judgment of 6 February 2001, pp. 39-41, paragraphs 78-82. Neither the Inter-American Convention nor the Statute of the Inter-American Court contains provision regarding the non-appearance of either party to a case; only the Rules of Procedure of the Inter-American Court makes provision thereof in its Article 29 (1) as follows: "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".

[6] This provision allows *inter alia* the Court "to take into consideration as subsidiary measures to determine the principles of law, other general or special international conventions laying down rules expressly recognized by Member States of the African Union", as well as "general principles of law recognized by African States" and "legal precedents". The Statute of the International Court of Justice, which forms an integral part of the United Nations Charter, is clearly one of these general international conventions; this should encourage the African Court to, as often as possible, draw inspiration from the case-law of the World Court and of the general principles relating to a sound administration of justice to which the latter refers.

5. To satisfy itself that the submissions of the Applicant are founded in law, the Court should have made more extensive use of the powers inherent in its judicial function and decided on the basis of the *jura novit curia* ("the Court knows the law") principle.

6. According to the International Court of Justice, "*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*". It recalls as follows:

> "The Court […], as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court".[7]

7. In paragraphs 81, 82, 83, 88 and 89 of the judgment, the Court makes reference both to Articles 6 and 7 of the African Charter, and to Articles 9 and 14 of the International Covenant on Civil and Political Rights; it is not explicit however as to the nexus it is establishing between those two instruments. Clearly, Articles 9 and 14 of the Covenant are cited solely for the purposes of interpretation of the corresponding Articles of the Charter as implicitly allowed under Articles 60 and 61 of this latter instrument, relating to "Applicable Principles".

8. Under Articles 3 ("Jurisdiction") and 7 ("Sources of Law") of the Protocol, the Court is however authorised to "apply" the abovementioned provisions of the Covenant, same as the relatively detailed clauses of the May 2004 Arab Charter on Human Rights to which Libya is also party since 15 January 2008 (see Articles 12,[8] 13,[9] 14,[10] 16,[11] 20[12] and 23[13]).

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[7] *ICJ Reports 1986*, pp. 24-25, paragraph 29.

[8] "All persons are equal before the courts and tribunals. The States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats. They shall also guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels".

[9] "a) Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights.

b) Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights".

[10] "a) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.
b) No one shall be deprived of-his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.
c) Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him. He shall be entitled to contact his family members.
d) Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.
e) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. His release may be subject to guarantees to appear for trial. Pre-trial detention shall in no case be the general rule.
f) Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.
g) Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation".

[11] "Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgment rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees:
a) The right to be informed promptly, in detail and in a language which he understands, of the charges against him.
b) The right to have adequate time and facilities for the preparation of his defense and to be allowed to communicate with his family.
c) The right to be tried in his presence before an ordinary court and to defend himself in person or through a lawyer of his own choosing with whom he can communicate freely and confidentially.
d) The right to the free assistance of a lawyer who will defend him if he cannot defend himself or if the interests of justice so require, and the right to the free assistance of an interpreter if he cannot understand or does not speak the language used in court.
e) The right to examine or have his lawyer examine the prosecution witnesses and to on defense according to the conditions applied to the prosecution witnesses.
f) The right not to be compelled to testify against himself or to confess guilt.
g) The right, if convicted of the crime, to file an appeal in accordance with the law before a higher tribunal.
h) The right to respect for his security of person and his privacy in all circumstances".

[12] "a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
b) Persons in pre-trial detention shall be separated from convicted persons and shall be treated in a manner consistent with their status as unconvicted persons.
c) The aim of the penitentiary system shall be to reform prisoners and effect their social rehabilitation".

9. Articles 9 and 14 of the Covenant, having been interpreted by the United Nations Human Rights Committee in its general comments,[14] it would also have been useful to refer to the latter so as to shed further light on the guarantees provided in those two Articles.

10. Article 7 of the Charter, for its part, could have been read together with Article 26 of the same instrument requiring States Parties "to guarantee the independence of the Courts". Article 2 (3)[15] of the Covenant should also have been cited alongside Articles 9 and 14 of this latter instrument.

11. Furthermore, the Court should have laid emphasis of the obligations devolving on the Respondent State under Article 1 of the African Charter (paragraphs 49 and 50 of the Judgment). Indeed, according to that provision, States Parties *"shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them"*.[16]

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[13] "Each State party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity".

[14] *General Comments No. 35, Article 9 (Right to Liberty and Security of Person)*, 16 December 2014, United Nations, Doc. CCPR/C/GC/35, 22 pages, and *General Comments No. 32, Article 14 (Right to equality before courts and tribunals and to a fair trial),* 23 August 2007, United Nations, Doc, CCPR/C/GC/32, 24 pages.

[15] Article 2 (3) of the Covenant provides as follows:
"Each State Party to the present Covenant undertakes
a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
c) To ensure that the competent authorities shall enforce such remedies when granted".

[16] Article 2 (1) of the Covenant provides that State Parties, for their part, undertake "to respect and to ensure to all individuals within their territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind […]". The Human Rights Committee indicated that States Parties obligation "to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities**. *There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by***

12. The foregoing provision places States Parties under the obligation to adopt all appropriate measures to ensure the effective protection of the rights of all persons within their territory and hence under their sovereignty. The requisite obligation to implement should be understood both as a negative obligation ("not to do") and as a positive obligation ("to do"); in other words, violation of the African Charter by a State Party may arise from both the latter's actions and its omissions where the State Party for example exhibits lack of diligence.[17] The undertaking of State Parties to "apply" the rights guaranteed by the Charter therefore comprises not only the commitment to "respect" such rights by not infringing themselves on such rights but also the commitment to "protect" them, which includes protection against any possible infringement by non-state actors.

13. Lastly, given the situation of non-international armed conflict prevailing in Libya since 2011 it would have been necessary for the Court to more deeply examine the applicability of the African Charter in the instant case. As the African Charter does not contain any derogation clause, in contrast to the International Covenant (Article 4) and the Arab Human Rights Charter (Article

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such acts by private persons or entities. […] The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power" (emphasis added), *General Comments No. 31 [80] The Nature of the General Obligation Imposed on States Parties to the Covenant,* United Nations, Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, p. 4, paragraph 8.

[17] The Inter-American Court of Human Rights, for example, reached the same conclusion as regards the American Convention in the famous judgment in the matter of *Velasquez-Rodriguez v. Honduras*: "Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. ***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***" (emphasis added), *Case of Velásquez-Rodríguez v. Honduras (Merits),* judgment of 29 July 1988, Ser. C, No. 4, p. 30, paragraph 72.

4),[18] the issue indeed deserved to be raised and a response more elaborate to be received than the response contained in paragraphs 76 and 77 of the judgment.

14. I would at this juncture note that the rights guaranteed under Articles 13, 14 and 20 of the Arab Charter are not likely to be derogated. For their part, the rights guaranteed under Articles 9 and 14 of the Covenant, do not feature among the non-derogable rights contemplated by Article 4, but their fundamental nature may be derived from their possible relationship with non-derogable rights.[19] Whatever the case, Libya has not invoked the right of derogation provided by Article 4 of the Covenant.

15. Having to pronounce itself on allegations of human rights violations, the Court should have examined in greater detail the legal issues mentioned above; it should also have satisfied itself that the reality of the facts constituting the alleged violations of the African Charter has been established by convincing evidence.

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16. It is my view that the Court has not sufficiently demonstrated that the submissions of the Applicant were equally founded in fact. To show the arbitrary nature of the detention of Mr. Saïf Kadhafi and the violation of his right to a fair trial, the Court indeed contents itself with indicating that these are established facts (see paragraphs 85, 90, 91 *(in fine)* and 96 of the judgment).

17. However, it was incumbent on the Court to satisfy itself about the veracity of the Applicant's allegations by resorting to any such evidence as it deemed appropriate. In this regard, it could have used the resources offered by Rules 45

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[18] Article 4 (Derogation): "b) No derogation of the provisions hereunder shall be authorized in the event of exceptional emergency situation: Article 5, Article 8, Article 9, Article 10, Article 13, Article 14, Article 15, Article 18, Article 19, Article 20, Article 22, Article 27, Article 28, Article 29 and Article 30. Furthermore, the judicial guarantees necessary for the protection of these rights shall not be suspended".

[19] The Committee indeed stated as follows as regards this issue; "While article 14 is not included in the list of non-derogable rights of Article 4, paragraph 2, of the Covenant, States derogating from normal procedures required under Article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of Article 14", *General Comment No. 32, op. cit.*, p. 2, paragraph 6. The Committee developed a similar reasoning as regards Article 9 of the Covenant, see G*eneral Comment No. 35. op. cit.*, pp. 20-21, paragraphs 64-67.

("Measures for Taking Evidence") and 46 ("Witnesses, Experts and Other Persons") of its Rules.

18. The International Court of Justice underscored this procedural requirement in unequivocal terms.[20] It indicated for example that "*as to the facts of the case, in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties*", and that where one party is not appearing, *"it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts"*.[21]

19. It however expresses this requirement in relative terms as follows:

> "Nevertheless, the Court cannot by its own enquiries entirely make up for the absence of one of the Parties; that absence, in a case of this kind involving extensive questions of fact, must necessarily limit the extent to which the Court is informed of the facts".[22]

The International Court of Justice had already in 1949 expressed the limits of such a requirement in its judgment in the Corfu Channel case.

> "While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in al1 their details; for this might in certain unopposed cases prove impossible in practice".[23]

20. Even if this Court was not bound to satisfy itself that the submissions of the Applicant are founded in fact with the same degree of certainty as whether the same submissions are founded in law, and this, for reasons of the relative complexity which generally characterizes the establishment of the facts, it was incumbent on the Court to deploy minimum effort to research into this issue.

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[20] "The Court is careful, even where both parties appear, to give each of them the same opportunities and chances to produce their evidence; when the situation is complicated by the non-appearance of one of them, then *a fortiori* the Court regards it as essential to guarantee as perfect equality as possible between the parties. Article 53 of the Statute therefore obliges the Court to employ whatever means and resources may enable it to satisfy itself whether the submissions of the Applicant State are well-founded in fact and law and simultaneously to safeguard the essential principles of the sound administration of justice", *ICJ Reports 1986*, p. 40, paragraph 59.

[21] *Ibid*, p. 25, paragraphs 30-31.

[22] Ibid, p. 25, paragraph 30.

[23] *Corfu Channel*, Judgment of 15 December 1949, *ICJ Report 1949*, p. 248.

21. On 9 July 2013 and 17 May 2014, the Court received a number of documents from the Respondent State (see paragraphs 19 and 27 of the judgment); although it may be considered that the said documents were submitted by channels not prescribed by the Rules, the said documents expressed the views of that Party on the fact of the instant case, and it was incumbent of the Court to examine the documents or at least to mention them in the reasons of the judgment.

22. In like manner, the Court ought to have taken advantage of the reports published by the United Nations such as:

- the final report of the "International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya" established by the UN Human Rights Council[24] (for the overall factual background and on the issue of arbitrary detention until the end of 2011),
- the reports of the High Commissioner for Human Rights of 2014[25] and 2016,[26]
- the compilation[27] and summary[28] prepared by the Office of the High Commissioner for Human Rights for the Universal Periodic Review of Libya held in May 2015, or
- the joint report of the High Commissioner and the UN Support Mission in Libya on deaths in detention.[29]

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[24] *Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya*, United Nations, Doc. A/HRC/17/44, 12 February 2012, 78 pages (on arbitrary detention, see pp. 28-32, paragraphs 90-110).

[25] *Technical Assistance for Libya in the Field of Human Rights,* Report of the UN High Commissioner for Human Rights, Doc. A/HRC/25/42,13 January 2014, 19 pages.

[26] *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya – Report of the UN High Commissioner for Human Rights*, United Nations, Doc. A/HRC/31/47, 15 February 2016, 21 pages (see in particular, pp. 7-8, paragraphs 26-30).

[27] *Compilation prepared by the High Commissioner for Human Rights in accordance with paragraph 15 b) of the annex to resolution 5/1 of the Human Rights Council and paragraph 5 of the Annex to Resolution 16/21 of the Council - Libya*, United Nations, Doc. HRC/WG.6/22/LBY/2, 27 February 2015, pp. 9-12, paragraphs 23-49.

[28] *Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 c) of the annex to Human Rights Council resolution 5/1 of the Human Rights Council and paragraph 5 of the Annex to Resolution 16/21 of the Council - Libya*, United Nations, Doc. HRC/WG.6/22/LBY/3, 23 February 2015, 19 pages (see in particular p. 8, paragraphs 52-53).

[29] *Torture and deaths in detention in Libya, Joint Report,* United Nations Support Mission in Libya and Office of the United Nations High Commissioner for Human Rights, October 2013, 18 pages.

23. The Court should, above all, have drawn from the findings and recommendations on the detention of Mr. Saïf Kadhafi, adopted on 14 November 2013 by the UN Working Group on Arbitrary Detention.[30] The conclusions were as follows:

> "43. In grave violation of his fundamental rights, Mr. Gaddafi has been deprived of liberty for two years, incommunicado, without having been able to appear before the judicial authorities to challenge the legitimacy of the detention, without access to a lawyer, without having any facilities for the preparation of his defence; which detention has been extended far beyond the maximum period of time and in violation of the procedure provided for in Libyan law.
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> 44. The gravity of the violations, their nature in this case, and the Government's inability to rectify the violations, has made it impossible to guarantee Mr. Gaddafi's right to a fair trial in Libya. In this regard, the Working Group concurs with the view that "[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place ... Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial".
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> 45. The Working Group considers that the non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights in the case under consideration, namely article 10 of the Declaration and article 14 of the Covenant, is of such gravity as to give the deprivation of liberty of Mr. Gaddafi an arbitrary character".[31]

24. Consequently, the Working Group *"requests the Government to take the necessary steps to remedy the situation of Mr. Gaddafi and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and holds that the adequate remedy would be both to discontinue the domestic proceedings against Mr. Gaddafi and his detention […]".*[32]

25. The documents listed above prove that there are extensive sources of objective information on which the Court should have relied to satisfy itself that the Applicant's submissions were founded in fact.

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[30] *Opinion No. 41/2013 (Libya), Communication addressed to the Government on 21 August 2013 concerning Saif Al-Islam Gaddafi, Opinion adopted by the Working Group at its sixty-eight session, (13–22 November 2013), Human Rights Council*, United Nations, Doc. A/HRC/WGAD/2013/41, 7 April 2014, 8 pages.

[31] *Ibid,* pp. 7-8.

[32] *Ibid*, p. 8, paragraphs 48-49.

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26. It is undeniable that the non-appearance of one of the parties to a case necessarily has a negative impact on the proper administration of justice and that it substantially complicates the task of this Court in the exercise of its mission. The purport of the requirements set forth in Rule 55 (2) of the Rules of Court is precisely to ensure proper administration of justice in such circumstances. As underscored by the International Court of Justice in regard to Article 53 of its own Rules,

> "The use of the term "satisfy itself" in the English text of the Statute (and in the French text the term "s'assurer") implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence".[33]

27. Rule 55 (2) of the Rules therefore seeks to preserve, to the extent possible, the principle of equality of the parties in adducing evidence of alleged violations through an exhaustive consideration of the facts and of the applicable law. Being bound by this Rule to ensure that the Application is well founded in fact and in law, the Court is obliged to use every means and method at its disposal to achieve that purpose.

28. It is my view that, in the instant case, the Court failed to use every available means and method to ensure that the Application was well founded in fact. The Court considers the alleged facts as established facts without examination of their veracity (see paragraphs 85, 90, 91 (*in fine)* and 96 of the judgment). The Court therefore seems to have purely and simply endorsed the Applicant's submissions in this case, 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 are intended to avoid.[34]

29. I would note in this regard, that the summary motivation of this judgment is in sharp contrast with the very elaborate motivation contained in the three

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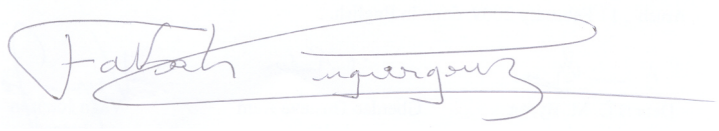
[33] *ICJ Report 1986*, p. 24, paragraph 29.

[34] As indicated by the International Court of Justice "There is however no question of a judgment automatically in favour of the party appearing, since the Court is required, as mentioned above, to "satisfy itself" that that party's claim is well founded in fact and in law", *ICJ Report*, p. 24, paragraph 28.

judgments recently rendered by the Court in cases similarly concerning the right to a fair trial, and in which the two parties participated.[35]

30. In its first two judgments rendered in default, the Inter-American Court of Human Rights, for its part, embarked on a very meticulous evaluation of the evidence adduced by the appearing party regarding violation of the right to a fair trial by the Respondent State.[36] In a recent judgment rendered in default, the Court of Justice of the Economic Community of West African States also gave relatively elaborate reasons before concluding that the Respondent State has violated Article 7 of the African Charter.[37]

31. This judgment being the very first rendered in default by the Court, it would have been desirable, if not necessary, that the Court clearly determined the principles which should guide it in effectively discharging its obligations under Rule 55 of the Rules and that it scrupulously applied the said principles in the instant case.



Fatsah Ouguergouz
Judge

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[35] *Alex Thomas v. United Republic of Tanzania*, Judgment of 20 November 2015 (see pp. 34-54, paragraphs 81-131), *Wilfred Onyango Nganyi & 9 Others v. United Republic of Tanzania*, Judgment of 18 March 2016 (see pp. 36-53, paragraphs 117-184) and *Mohamed Abubakari v. United Republic of Tanzania,* Judgment of 3 June 2016 (see pp. 27-56, paragraphs 95-227).

[36] *Case of the Constitutional Court v. Peru (Merits, Reparations and Costs)*, pp. 19-22, paragraphs 43-55, and pp. 35-42, paragraphs 64-85; see also the analysis of the facts which the Court considers as proven, pp. 22-32, paragraph 56; see also, *Case of Ivcher-Bronstein v. Peru (Merits, Reparations and Costs)*, pp. 27-29, paragraphs 63-75, pp. 30-39, paragraph 76, and pp. 45-49, paragraphs 100-116.

[37] *Mohammed El Tayyib Bah v. Republic of Sierra Leone*, Judgment of 4 May 2015, No. ECW/CCJ/JUD/11/15, pp. 9-18. Article 90 (4) of the 2002 Rules of the ECOWAS Court of Justice provides for proceedings by default in the following terms:
"Before giving judgment by default the Court shall, after considering the circumstances of the case consider:
(a) Whether the application initiating proceedings is admissible,
(b) Whether the appropriate formalities have been complied with, and
(c) Whether the application appears well founded".