



## 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 measures<sup>1</sup> 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,

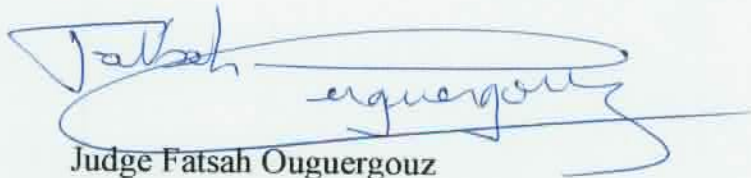
<sup>1</sup> Requested by the Commission, the provisional measures would therefore not be considered to be ordered *suo motu* by the Court, that is to say on its own accord, as stated by the Court in paragraphs 16 and 18 of the Order (see the two alternative options provided for in Rule 51 (1) of the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