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African Court on Human and Peoples' Rights – Response to the Situation in Libya

By Anna Dolidze



Introduction

On March 25, 2011, for the first time in its history, the African Court on Human and Peoples' Rights ("African Human Rights Court") ordered provisional measures against Libya in the case *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*. The provisional

measures require that Libya "immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the African Charter on Human and Peoples' Rights or of other international human rights instruments to which it is a party."^[1] In addition, the African Human Rights Court ordered Libya to report to the Court within fifteen days on the steps taken in response to the Order. The Libyan government has ignored the Order.

The African Human Rights Court's action paralleled that of the International Criminal Court ("ICC"). On February 26, 2011, the United Nations Security Council decided to refer the conflict in Libya to the ICC Prosecutor. A few days later, on March 3, 2011, the ICC Prosecutor announced that he would open an investigation.^[2] On May 16, 2011, he requested arrest warrants for Muammar Qadhafi, his son Seif al-Islam, and Abdullah Sanussi for crimes against humanity.^[3] On June 26, 2011, Pre-Trial Chamber I granted the Prosecutor's request and issued the arrest warrants for the three persons.^[4]

This *Insight* highlights the relationships, dynamics, and cooperation that led to the African Human Rights Court's Order. In particular, it emphasizes the complex relationship between the African Union, the African Commission on Human and Peoples' Rights ("African Human Rights Commission"), the African Human Rights Court, and non-governmental organizations ("NGOs").

Background to the African Union, Commission, and Human Rights Court

The African Union's predecessor, the Organization of African Unity ("OAU"), was founded in Addis Ababa in 1963 in the wake of decolonization. On September 9, 1999, the Heads of State and Government of the OAU adopted the Sirte Declaration calling for the establishment of the African Union ("AU"),^[5] with increased emphasis on democratic governance and human rights.

The AU's chief organs include the Assembly of the Union, the Executive Council, the African

Human Rights Commission, and the African Human Rights Court. The African Human Rights Commission had been created by the African Charter on Human and Peoples' Rights, adopted in 1981 by the Assembly of Heads of State and Government of the OAU. The Charter, known as the "Banjul Charter," came into force on October 21, 1986, and enjoys universal participation by all fifty-three AU members.

The African Human Rights Commission is an autonomous, quasi-judicial treaty body within the AU, which focuses on promotion and protection of human rights in Africa^[6] and on the interpretation of the provisions of the Charter.^[7] The AU exercises important leverage in relation to the Commission. First, the African Human Rights Commission's eleven members are elected by the AU's Assembly of Heads of State and Government.^[8] Second, the AU exercises the "power of the purse" over the African Human Rights Commission: the finances and the budget of the African Commission are apportioned by the African Union in consultation with the Commission.^[9] Moreover, the Commission must inform the AU of funds from other donors.^[10] Third, the Commission does not have an independent power to implement its decisions.^[11] In accordance with the Article 54 of the African Charter, the Commission must ask the Assembly of States Parties of the AU to take specific and necessary measures for the implementation of its decisions.^[12]

The African Court on Human and Peoples' Rights was established by a protocol to the African Charter "to complement the protective mandate" of the African Human Rights Commission.^[13] The Protocol was adopted by the OAU in Ouagadougou, Burkina Faso, on June 10, 1998; it came into force on January 25, 2004. The Court became operational about two years after its first judges were sworn in.^[14] Its permanent seat is in Arusha, Tanzania.^[15] As of March 11, 2011, twenty six of the fifty-three members of the AU have ratified the Protocol. The Court was ready to receive cases after it finalized its rules of procedure with the African Commission,^[16] and rendered its first judgment in the case of *Michelot Yogogombaye v. Republic of Senegal* on December 15, 2009.^[17]

The relationship between the African Human Rights Commission and the Court is governed by the principle of complementarity, requiring general ongoing cooperation and consultation between the two bodies. In particular, according to Articles 5 and 34 (6) of the Protocol, the Commission has standing to bring cases before the Court.

The relationship between the African Court and the AU is similar to the relationship between the African Human Rights Commission and the AU. First, the judges of the African Court are elected from among the nationals of member states to the Protocol by the Assembly of the AU.^[18] Second, as with the African Commission, it is the AU that determines the budget and bears the expenses of the Court in accordance with the criteria previously laid down in consultation with the Court.^[19] Third, the Court does not have independent enforcement power of its own orders or judgments. The Court reports annually to the Assembly, specifying the states that did not comply with its judgments.^[20] The AU Executive Council monitors the enforcement of the African Court's judgments on behalf of the Assembly.^[21]

Ultimately, the African Union can impose sanctions on a member state for its failure to comply with its decisions and policies. Sanctions may be of a political or economic nature, including the denial of transport and communication links with other Member States.^[22]

The entities that can make submissions of cases before the Court are: the African Commission, any state party (either as Applicant or Respondent), any state party whose citizen is a victim of a human rights violation, African intergovernmental organizations, and, with the Court's permission, non-governmental organizations with observer status and individuals.^[23] It should be noted that the Court does not provide for the direct right of individual petition, a hallmark of the European system of human rights protection. Individuals and organizations that have observer status before the African Human Rights Commission acquire standing before the Court only after a state party delivers a specific declaration recognizing their capacity to do so.^[24] The Protocol to the Charter specifically prohibits the

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ORGANIZATIONS OF NOTE

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INTERIGHTS

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Court from receiving petitions in the absence of such a declaration.[25] So far, only five countries—Ghana, Burkina Faso, Malawi, Mali, and Tanzania—have made such declarations.[26]

Parties to a case, the African Human Rights Commission, or the Court *proprio motu* can order interim measures “in the interest of the parties or of justice.”[27] The Court may ask the parties to provide it with information on issues relating to the implementation of the requested measure.[28] In the event of noncompliance with the measure, the Court may put forward specific recommendations in the annual report that it presents to the AU Assembly.[29]

Libyan Conflict and Non-Governmental Organizations

Libya is signatory to the Banjul Charter and a party to the Protocol establishing the Court. However, as Libya has not made a declaration under Article 34 (6) of the latter, NGOs and individuals cannot file petitions against Libya. Consequently, NGOs acting in response to the Libyan crisis turned to the African Human Rights Commission.

On February 24, 2011, three non-governmental organizations—the Egyptian Initiative for Personal Rights (“EIPR”), Human Rights Watch, and INTERIGHTS—submitted a joint request for provisional measures to the African Human Rights Commission. EIPR is an organization active in Egypt, while the latter two are international human rights organizations based in New York and London, respectively. In the request, the applicants asked the Commission to order Libya to undertake a number of actions, including stopping and preventing “the use of unjustified lethal force against protesters, whether by the security forces, mercenaries or other bodies or individuals acting on behalf of the State.”[30]

On February 25, 2011, the African Commission made a statement on the human rights situation in North Africa, urging the government of Libya to “immediately end the violence against civilians.”[31] Three days later, the organizations also submitted a joint complaint against Libya to the Commission, urging it to “respond to the grave and urgent situation” in Libya.[32] Both the request for provisional measures and the complaint chronicled the violent repression of civilian protestors from February 17, 2011.

Subsequently, on March 1, 2011, the Commission condemned the actions of the Libyan government,[33] and on March 3, 2011, the Commission instituted proceedings against Libya in the Court for “serious and massive violations of human rights guaranteed under the African Charter on Human and Peoples’ Rights.”[34] In the application, the Commission specifically referred to the complaints of human rights violations received during its preceding session.[35]

Although the African Commission did not request indication of provisional measures, the Court decided to order provisional measures *proprio motu*. Article 27(2) of the Protocol allows the Court to order provisional measures on its own volition in case of “extreme gravity and urgency” and “when necessary to avoid irreparable harm to persons.”[36] As the Court ascertained the presence of all three criteria in the case of Libya, it ordered Libya to refrain from activities that would result in violation of rights under the Charter or other international instruments. Moreover, the Court ordered Libya to report to it within fifteen days on its progress in implementing the order.[37]

The NGOs initially involved in triggering the litigation issued a subsequent press release, hailing the Order by the Court and urging Libya to enforce it.[38]

Nevertheless, the Libyan government ignored the Order. As its Order was not complied with, in accordance with the Rules, the Court should report the lack of compliance to the Assembly of the AU and to the Council of Ministers. It will be up to the Council and/or the Assembly of the Union, both political bodies, to adopt measures in response to Libya’s non-compliance.

Conclusion

The case suggests a number of preliminary observations. First, evidenced by the language of the Order, the situation of “extreme gravity and urgency” as well as the risk of “irreparable harm to persons” prompted the Court to order provisional measures of its own volition without a request by the Commission.^[39] Second, the Court emphasized the consensus formed among international organizations on the gravity of the human rights situation in Libya. For this purpose the Court referenced the acts by the Peace and Security Council of the African Union, the Secretary-General of the Arab League, and the United Nations Security Council.^[40] Third, the Court stated that it relied heavily on the evidence of human rights violations gathered and submitted by international NGOs initially to the African Commission.^[41] This indicates that in the urgency of armed conflict, which does not allow for extensive periods for collecting evidence, the experience and resources of NGOs in quickly gathering relevant evidence proved to be highly important and valuable.

Fourth, it should be noted that the African Charter contains a provision prohibiting forum shopping by states parties. A complaint cannot be submitted to any other procedure of international investigation or settlement.^[42] Founding documents of other international human rights bodies, where the individual complaints mentioned in the Commission’s application could potentially end up (for instance, the UN Human Rights Committee) contain the same limitation.^[43] It is possible therefore that adjudication of these human rights claims on the international level has been halted until a political outcome is found to the situation through the organs of the AU. The Court’s involvement in the matter cannot bring the desired outcome of halting human rights violations in Libya without adequate backing from the political organs of the AU.

Last but not least, the degree of effectiveness of the ICC in the prosecution of Libyan leaders will provide an indication of the compatibility and conflict between international criminal law and international human rights mechanisms. The influence and positive change that involvement of the International Criminal Court will bring to the Libyan situation will certainly be subject to further examination and debate.

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Endnotes:

[1] Press Release, Af. Ct. Human & Peoples’ Rights, Order for Provisional Measures Against Libya (Mar. 30, 2011), *available at* <http://www.african-court.org/en/news/record/datum/2011/03/30/communique-de-presse-ordonnance-prescrivaint-des-mesures-provisoires-a-lencontre-de-la-libye/>.

[2] THE INTERNATIONAL CRIMINAL COURT, SITUATIONS AND CASES, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>.

[3] Press Release, Int’l Crim. Ct., ICC Prosecutor: Qaddafi Used His Absolute Authority to Commit Crimes in Libya (May 16, 2011), *available at* <http://www.icc-cpi.int/NR/exeres/1365E3B7-8152-4456-942C-A5CD5A51E829.htm>.

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[5] Constitutive Act of the African Union, July 11, 2000 (adopted July 11, 2011), *available at* http://www.au2002.gov.za/docs/key_ou/au_act.htm.

[6] Rules of Procedure of the African Commission on Human and People’s Rights rule 3, *available at* <http://www.achpr.org/english/ROP/Rules%20of%20Procedure.pdf> [hereinafter Rules of Procedure].

[7] African Charter on Human and People's Rights art. 45, available at http://www.achpr.org/english/_info/charter_en.html [hereafter African Charter].

[8] *Id.* arts. 31, 33. African Commission members serve for six years and are eligible for reelection. See Rules of Procedure, *supra* note 6, rule 5.

[9] Rules of Procedure, *supra* note 6, rule 19.

[10] *Id.* rule 66.

[11] See African Charter, *supra* note 7, art. 54.

[12] Rules of Procedure, *supra* note 6, rule 125.

[13] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 2, available at http://www.achpr.org/english/_info/court_en.html [hereinafter Protocol to the African Charter]. On July 1, 2008, the AU adopted a protocol to the African Charter merging the African Human Rights Court with the Court of Justice of the African Union into one Court, "The African Court of Justice and Human Rights." The change will become effective when fifteen states deposit their instruments of ratification.

[14] See Scott Lyons, *The African Court on Human and Peoples' Rights*, 10 ASIL INSIGHTS 24 (Sept. 19, 2006), available at <http://www.asil.org/insights060919.cfm>.

[15] See AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, HISTORY, <http://www.african-court.org/en/court/history/>.

[16] *Id.*

[17] David J. Bederman & Charles Chernor Jalloh, *International Decisions: Michelot Yogogombaye v. Republic of Senegal*, 104 Am. J. Int'l L. 620, 620-28 (2010).

[18] Protocol to the African Charter, *supra* note 13, arts. 13, 14.

[19] *Id.* art. 23.

[20] *Id.* art. 31.

[21] *Id.* art. 29.

[22] *Id.* art. 23.

[23] *Id.* arts. 5, 34.

[24] *Id.* arts. 5, 34 (6).

[25] *Id.* art. 34 (6).

[26] LIST OF COUNTRIES WHICH HAVE SIGNED, ACCEDED TO, RATIFIED THE PROTOCOL, <http://www.au.int/en/sites/default/files/992achpr.pdf>.

[27] African Court of Human and Peoples' Rights, Rules of the Court rule 51, available at http://www.african-court.org/fileadmin/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf [hereinafter Rules of the Court]. Protocol to the African Charter, *supra* note 13, art. 27 (2).

[28] Rules of the Court, *supra* note 27, rule 51 (5).

[29] *Id.* 51(4).

[30] Int'l Ctr. for the Legal Protection of Human Rights, *Request for Provisional Measures to the African Commission on Human and Peoples' Rights*, <http://www.interights.org/view-document/index.htm?id=614>.

[31] African Union, African Commission, Press Statement on the Human Rights Situation in North Africa (Feb. 25, 2011), http://www.achpr.org/english/Press%20Release/Statement_north%20africa.pdf.

[32] *Id.*

[33] Resolution on the Human Rights Situation in the Great Socialist Peoples' Libyan Arab Jamahiriya, ACHPR/RES.181(EXT.OS/IX)201, available at http://www.achpr.org/english/resolutions/9eos_resolution%20%20Libya.pdf.

[34] In the Matter of African Commission on Human and People's Rights v. Great Socialist People's Libyan Arab Jamahiriya, Order for Provisional Measures, 2, App. No. 004/2011 (Mar. 25, 2011), available at http://www.african-court.org/fileadmin/documents/Court/Cases/Order_for_Provisinal_Measures_against_Libya.PDF [hereinafter Order for Provisional Measures].

[35] *Id.* ¶¶ 1, 2.

[36] Article 27(2), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

[37] Order for Provisional Matters, *supra* note 34, ¶ 25.

[38] Int'l Ctr. for the Legal Protection of Human Rights, INTERIGHTS, HRW and EIPR Press Release 31 March 2011 (Mar. 31, 2011), <http://www.interights.org/view-document/index.htm?id=623>

[39] Order for Provisional Matters, *supra* note 34, ¶ 20.

[40] *Id.* ¶ 21.

[41] *Id.* ¶ 2.

[42] African Charter, *supra* note 7, art. 56 (7).

[43] Optional Protocol International Covenant on Civil and Political Rights art. 5(2a), 999 U.N.T.S. 302, (entered into force Mar. 23, 1976).