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

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

V.

LIBYA

APPLICATION 002/2013

JUDGMENT

Original: French

The Court composed of: Augustino S. L. RAMADHANI - President; Elsie N. THOMPSON - Vice-President; Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, Duncan TAMBALA, Sylvain ORÉ, El Hadji GUISSÉ, Ben KIOKO, Rafâa BEN ACHOUR, Solomy B. BOSSA, and Angelo V. MATUSSE - Judges; and Robert ENO, Registrar,

In the matter of:

African Commission on Human and Peoples' Rights,

represented by:

Soyata MAIGA,
Commissioner at the African Commission on Human and Peoples' Rights,

v.

Libya,

not represented

After deliberation,

delivers the following Judgment in default:

Original: French

I. THE PARTIES

1. The Applicant is the African Commission on Human and Peoples' Rights (hereinafter referred to as the "Commission" or "the Applicant"). The Applicant seised the Court following a communication filed before it on behalf of Saïf Al Islam Kadhafi, a citizen of Libya, detained in a secret location.

2. The Respondent is the State of Libya which ratified the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 19 July 1986, and 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") on 19 November 2003; and acceded to the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR") on 15 May 1970.

II. SUBJECT OF THE APPLICATION

3. The Court was seised of this matter through an Application dated 28 February 2013, brought by the Applicant, pursuant to Rule 34 of the Rules of Court (hereinafter referred to as "the Rules").

4. The Application was filed following a Communication submitted on 2 April 2012 before the African Commission on Human and Peoples'

Rights by Ms Mishana HOSSEINIOUN on behalf of Mr. Saïf Al-Islam KADHAFI (hereinafter referred to as "the Detainee), alleging violation of the rights of the latter by Libya (hereinafter referred to as the "Respondent"), which rights are guaranteed by Articles 6 and 7 of the Charter.

5. Following that Communication, the Applicant submitted an Application to the Court dated 8 January 2013, (received at the Court's Registry on 31 January 2013 and registered as No. 002/2013), seeking provisional measures. The Application is grounded on Article 5 (1) of the Protocol, Rule 29 (3) of the Rules of Court (hereinafter referred to as "the Rules") and Rule 3 of the Rules of Procedure of the African Commission on Human and Peoples' Rights.

6. Subsequently, the Court was seised of other Applications, namely:

i. an Application dated 28 February 2014, received at the Registry on 3 March 2014, bringing to the Court's attention Libya's failure to enforce the Order for Provisional Measures issued by the Commission on 15 March 2013;

ii. an Application referred to as "the motion to institute proceedings" bearing the same date and received at the Registry on 3 March 2014, in which the Applicant "prays the Court to rule that the Respondent State violated Articles 6 and 7 of the Charter;"

iii. lastly, an Application dated 15 March 2015, received at the Registry on 28 May 2015, submitted pursuant to Rule 55 of the Rules praying the Court to "deliver a judgment in default ."

Original: French

A. Facts of the Matter

7. According to the aforementioned Communication, on 19 November 2011, the National Transitional Council which was then recognised as the Government of Libya, arrested the Detainee and kept him in isolation without access to his family, friends or any lawyer. The Detainee who was not charged with any offence and, worse still, was not brought before any court, is reportedly being kept in a secret location. It alleges that "the victim's life is in danger and his physical integrity and health exposed to the risk of irreparable harm".

8. In the circumstances, on 18 April 2012, as requested by the author of the Communication, the Court issued an Order for Provisional Measures to pre-empt any irreparable harm to the Detainee. However, the Respondent State ignored the provisional measures despite reminders addressed to the latter by the Court.

B. Alleged Violations

9. According to the Application, Libya allegedly violated Articles 6 and 7 of the Charter, relating respectively to, the right of every individual to liberty and to the security of his person and the right to have one's cause heard, due to the fact that the Detainee was deprived of his fundamental rights, as he was kept continuously in secret detention since 19

November 2011, without the possibility of getting himself assisted by a counsel of his choice.

10. The Applicant further alleges that Libya violated the rights of the Detainee by failing to comply with the Order for Provisional Measures issued by the Court on 15 March 2013.

C. The Applicant's Prayers

11. In the Application for a judgment in default dated 15 May 2015, the Court is requested to take the following measures:

> "a) pass a judgment in default against Libya pursuant to Rule 55 of the Rules of Court and rule that Libya has violated, and continues to violate, Mr. Gadhafi's rights guaranteed under Articles 6 and 7 of the African Charter on Human and Peoples' Rights (the "Charter");
> b) grant all the reliefs sought under paragraphs 2(4) of the substantive Application filed on 24 February 2014[1];
> c) declare and rule that Libya has failed to comply with the Order for Provisional Measures issued by the Court pursuant to Rule 51(4) of its Rules;
> d) notify the Executive Council and the parties of the above-mentioned Decisions, and publish them pursuant to Rules 51(4), 64(2) and 65 of the Rules of Court;

[1] "Consequent upon the violations, and as effective remedies in the circumstances, the Applicant seeks orders directing the Respondent State to fully secure to Mr. Gadhafi his rights as guaranteed under the Charter by staying the domestic criminal proceedings and immediately ensure:
a) that he retains a lawyer of his choice;
b) that the lawyer of his choice has contact with him in confidence.
c) that the lawyer of his choice is allowed reasonable time to consider the pre-trial steps made so far, and afforded adequate opportunity without hindrances to seek to challenge any or all of such steps;
d) that Mr Gadhafi is visited by his friends and family subject to justifiable security considerations and his wishes;
e) that the lawyer of his choice and witnesses are duly accorded the necessary protection
f) that the Respondent State submits to the Court on the measures it has taken to comply with the Court's Order in this case within sixty (60) days.

e) take such other measures as it may deem appropriate and necessary to secure the rights of Mr. Saif Al-Islam Gadhafi to a fair trial".

III. PROCEDURE BEFORE THE COURT

12. On 31 January 2013, the Court received an Application from the Applicant against the Respondent.

13. Pursuant to Rule 35(2) of its Rules, the Registrar, by letter dated 12 March 2013, addressed to the Ministry of Foreign Affairs of Libya and copied to the Libyan Embassy in Addis Ababa, transmitted a copy of the Application to the Respondent. In the same letter, the Registrar requested the Respondent to indicate within thirty (30) days of receipt of the Application, the names and addresses of its representatives, pursuant to Rule 35(4) of the Rules and to respond to the Application within sixty (60) days, pursuant to Rule 37 of the Rules.

14. Pursuant to Rule 35(3) of the Rules, the Registrar, by letter dated 12 March 2013, transmitted a copy of the aforesaid Application to the Chairperson of African Union Commission, and through her, to the Executive Council of the African Union and other States Parties to the Protocol establishing the Court.

15. Pursuant to Article 27(2) of the Protocol and Rule 51(1) of its Rules, the Court used its discretionary power to issue provisional measures, and by an Order dated 15 March 2013, the Court unanimously ordered the Respondent State to take the following measures:

"1. 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. Allow the Detainee access to a lawyer of his own choosing;

3. Allow the Detainee visits by family members;

4. Refrain from taking any action that may affect the Detainee's physical and mental integrity as well as his health.

5. Report to the Court within fifteen (15) days from the date of receipt, on the measures taken to implement this Order."

16. Pursuant to Rule 51(3) of the Rules, the Order of Provisional Measures was on 15 March 2013, transmitted to the Parties and to the Chairperson of African Union Commission.

17. The Respondent was required to file its report on compliance with the Order not later than 10 April 2013. However, when the Respondent failed to do so, the Court, on 12 April 2013, decided *proprio motu,* to grant the latter additional fifteen (15) days. A letter in this regard was served on the Respondent, through its Embassies in Addis Ababa, Ethiopia, and Dar es-Salaam, United Republic of Tanzania, on 16 and 22 April 2013, respectively. With the extended time limit, the Respondent was required to file its Response, indicating the measures it has taken to implement the Court's Order for Provisional Measures, not later than 30 April 2013. Despite the extension of the time limit, the Respondent failed to file any response.

18. For this reason and pursuant to Rule 51(4) of its Rules, the Court brought the issue of Libya's non-compliance with its Order for provisional measures to the attention of the Assembly of Heads of State and Government of the African Union, through the Executive Council, at the

latter's Twenty-Fourth[2], Twenty-Fifth[3], Twenty-Sixth[4], Twenty-Seventh[5] and Twenty-Eight[6] Ordinary Sessions. In its Decisions, the Executive Council urged Libya to work with the Court and to comply with its Order. Despite all that, the Respondent has continued to ignore the Court's Order and the Decisions of the policy organs of the African Union.

19. On 29 May 2013, that is, beyond the prescribed time limit, the Respondent addressed a *Note Verbale*[7] to the Legal Counsel of the African Union, a copy of which was received by the Applicant on 17 June 2013 and by the Court on 9 July 2013. In the *Note Verbale*, the Respondent did not adduce any defence and merely forwarded the following documents to the Court and to the Applicant:

i) a "Note" comprising two pages of comments;
ii) an undated Note from the Investigation and Review Committee at the Office of the Attorney General of Libya, recommending a joinder of proceedings instituted at domestic level against Mr. Gadhafi with the proceedings against other accused persons in case No. 630/2012;
iii) Order No. 2/1371 of the *Attorney General*, which notes that under Act No. 3/1371 W.R. the Prosecutor's Office may request the Court to extend the period of remand in

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[2] January 2014, see the Report of the Twenty-Fourth Ordinary Session of the Executive Council of the African Union held in Addis Ababa, Ethiopia, from 21 to 28 January 2014, page 38

[3] June 2014, see the Report of the Twenty-Fifth Ordinary Session of the Executive Council of the African Union held in Malabo, Equatorial Guinea, from 20 to 24 June, page 42.

[4] January 2015, see the Report of the Twenty-Sixth Ordinary Session of the Executive Council of the African Union held in Addis Ababa, Ethiopia from 23 to 27 January 2015, page 36

[5] June 2015, see the Report of the Twenty-Seventh Ordinary Session of the Executive Council of the African Union held in Johannesburg, South Africa, from 7 to 12 June 2015, page 34.

[6] January 2016, see the Report of the Twenty-Eighth Ordinary Session of the Executive Council of the African Union held in Addis Ababa, Ethiopia, from 23 to 28 January 2016, page 1

[7] No.2445-2013, the reference number of the Note Verbale of 29 May 2013 addressed to the Legal Counsel of the African Union

custody where the initial period expires before investigations are finalised, provided that the total period of detention does not exceed ninety (90) days. The Order further makes it an obligation for the Attorney General or his Deputy to request for extension of the period of remand in custody;

iv) the Attorney General's Decision No. 03/1435 dated 2 January 2013 mandating Mr. Ibrahim Ashour Al-Ijaili to seek leave of the Appellate Judge at the Court of First Instance to extend the period of detention of the persons accused in the matter being investigated by the Committee established pursuant to Decision No. 98/2011;

v) a letter from the Deputy Prosecutor of the Investigation Committee dated 2 January 2013, forwarding Resolution No. 03/2013 to extend the period of detention of the accused persons in the matter being investigated by the Committee[8];

vi) a letter from the Deputy Prosecutor dated 8 October 2012, addressed to all State Prosecutors directing them to abide by Decision No. 42/2003 relating to the powers of Prosecutors with respect to extension of the period of provisional remand in custody;

vii) a Pre-Trial Detention Order issued for case No. 229-2012, in respect of the charge of "issuing orders with no legal basis" by which a State Counsel in the Attorney General's Office issued a pre-trial detention warrant against Mr. Gadhafi, and the accompanying Report

[8] The Resolution 03/2013 was not attached to the letter

states that "the pre-trial detention period for the accused shall start on 18 June 2012, that is, the date of his acquittal in the case of corruption";

viii) a series of Orders to extend the period of Pre-trial Detention dated, 1 August 2012, 13 September 2012, 30 October 2012, 13 December 2012, 27 January 2013, 26 February 2013, 26 March 2013 and 24 April 2013, all signed by the Attorney General of Libya, and indicating that "the authorization of the judge with jurisdiction" had been obtained;

ix) a series of requests for extension of the period of remand in custody in case No. 299-2012, signed by Mr. Ibrahim Ashour of the Attorney General's Office and addressed to the Appellate Judge of the South Tripoli Court dated 23 January 2013, 25 February 2013, 25 March 2013 and 23 April 2013, all seeking extension of the period of remand in custody on the grounds that investigations are "still ongoing", and so as to "allow the investigation and the review of the exhibits of the case to continue"; and

x) a series of minutes of hearings dated, 1 August 2012, 13 September 2012, 30 October 2012, 13 December 2012, 27 January 2013, 26 February 2013, 26 March 2013 and 24 April 2013 in which the Court decided to extend Mr. Gadhafi's provisional detention[9].

20. By letter dated 2 August 2013, the Registrar forwarded the letter of the Legal Counsel of the African Union Commission dated 29 May 2013 to the Applicant, communicating the Respondent's

[9] The said minutes do not contain any indication that the Detainee has had any form of legal representation at any of the hearings

Original: French

Note Verbale. The Applicant was given thirty (30) days upon receipt of the notification to file its observations.

21. By letter dated 28 July 2013, the Applicant requested for a one (1) year extension of the deadline to file its brief. The letter was sent on the same day to Respondent, through the Libyan Embassy in Addis Ababa, Ethiopia, with copy to the Executive Secretary of the Commission.

22. By letter dated 12 August 2013, addressed to the Registrar, the Applicant, while recalling the terms of the Interim Report by which the AU Executive Council was notified of Libya's non-compliance with the Order for Provisional Measures, attached a letter from the authors of the Communication alleging an imminent threat of execution of the victim and requested urgent intervention by the Court.

23. By letter dated 27 August 2013, to the Applicant and copied to the Embassy of Libya in Addis Ababa, Ethiopia, the Registrar indicated that, following the request by the Applicant for one (1) year extension of the deadline for submission of the observations on the merits of the case, the Court had decided to extend the date of submission of observations to 28 February 2014, in view of the nature of the matter and the remedies sought.

24. By letter dated 28 February 2014, the Applicant filed an "Interlocutory Application" regarding the failure to implement the Court's Order for Provisional Measures of 15 March 2013.

25. On the same date, that is, 28 February, 2014, another document entitled "Application to institute proceedings", was submitted by the Applicant. It outlines the facts, nature of the matter, proof of exhaustion

of local remedies, the alleged violations, admissibility of the application and the remedies sought from the Court.

26. By letter dated 20 March 2014, addressed to the Minister of Foreign Affairs of Libya, the Registry forwarded to the Respondent, copies of the Interlocutory Application as well as the Applicant's submissions on the merits of the matter, indicating that the Respondent had thirty (30) days from the date of notification to submit its Response.

27. By *Note Verbale* dated 16 May 2014,[10] received at the Registry on 17 May 2014, the Respondent affirmed having submitted to the Court a report on the implementation of the Order for Provisional Measures issued by the Court on 15 March 2013. In that *Note* Verbale, the Embassy of Libya in Addis Ababa, Ethiopia and its Permanent Mission to the African Union wrote as follows:

> "The Office of the Public Prosecutor of the State of Libya is very keen and determined to ensure that the trial of Saif al-Islam and the other accused is fair and just, in accordance with the legal norms.
>
> The Office of the Public Prosecutor of the State of Libya is ready to cooperate with any legal institution to satisfy itself, through a field visit to the reform and rehabilitation facility, about the location where he is being kept, as well as enable it to verify and confirm the information provided.
>
> The Office of the Public Prosecutor of the State of Libya is ready to allow any legally accredited organization to attend the trial sessions of Saif Al-Islam Al-Gadhafi before the competent Criminal Chamber of the Tripoli Court of Appeal.
>
> The Office of the Public Prosecutor of the State of Libya reiterates its readiness to respond to any question or inquiry or information request with regard to the information provided."

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[10]Ref. 3/4/548, *Note Verbale* on Libya's response following the Court's request for a report on the measures taken regarding the circumstances of Saïf al Islam Kadhafi's detention.

Original: French

28. At its Thirty-Third Ordinary Session held from 26 May to 13 June 2014, the Court examined the aforementioned *Note Verbale* and found that it did not represent the report on compliance requested by the Court in its Order of 15 March 2013.

29. By *Note Verbale* dated 6 June 2014, copied to the Applicant, the Registrar informed the Respondent that the Court had noted the Respondent's failure to respond to the two Applications and that, of its own motion, it had granted the Respondent an extension of fifteen (15) days within which to submit its response on the substantive and interlocutory Applications. The Respondent was also informed that the response contained in its *Note Verbale* referenced 3/4/548, did not meet the requirements set forth in the Order for Provisional Measures. The Court requested the Respondent to file before it a report on the implementation of the Provisional Measures it had ordered.

30. By letter dated 16 June 2014, addressed to the Minister of Foreign Affairs of the Respondent State, with copies to the Embassy of Libya in Addis Ababa, Ethiopia and to the Executive Secretary of the Commission, the Registrar indicated that, at its Thirty-Third Ordinary Session, the Court had noted that Libya had still not responded to neither the Interlocutory Application nor to the Application on the merits contained in the Application transmitted to the Respondent on 20 March 2014, and that in the absence of such response, the Court would be compelled, without further notification, to apply the provisions of Rule 55 of its Rules relating to the procedure for rendering judgment in default.

31. The Registry once again drew the Respondent's attention to its non-compliance with the Order for Provisional Measures of 15 March 2013,

and this, through *inter alia* a letter dated 14 July 2014 addressed to Mr Salim Maoloud Alfighi, Deputy Director of Judicial Affairs in the Libyan Ministry of Foreign Affairs and International Cooperation with copies to the Applicant, and to the Libyan Embassy in Ethiopia.[11]

32. By letter dated 18 March 2015,[12] addressed to the Applicant and copied to the Respondent, through the Ministry of Foreign Affairs of Libya, and to the Embassies of Libya in Dar-es-Salaam, Tanzania and Addis Ababa, Ethiopia, the Registry confirmed that the Respondent had responded neither to the Application on the merits nor to the Interlocutory Application; and that the Court, at its 36th Ordinary Session held from 9 to 27 March 2015, had instructed it to draw the Applicant's attention to the relevant provisions of Rule 55 of the Rules with a view to initiating a procedure in default within thirty (30) days of receipt.

33. By letter dated 16 April 2015, the Applicant informed the Court of its intention to initiate proceedings, pursuant to Rule 55 of the Rules, and that an Application to that effect would be filed within thirty (30) days.

34. By letter dated 15 May 2015, the Applicant filed at the Court an Application for judgment in default.

35. By letter dated 3 July 2015, and pursuant to Rule 35(3) of the Rules, the Registry notified the Respondent of the filing of the

[11] FEDEX/Arusha indicated that the letter could not be delivered to its addressee because of the events at Tripoli International Airport on that date The Registry therefore redirected the letter to the Libyan Embassy in Ethiopia where it was duly receipted on 18 August 2014 at 14.00 hours

[12] Referenced AFCHPR/Reg /APPL/002/2013/022

aforementioned Application and transmitted to the latter the Application, its annexes as well as the Charter, the Protocol, the Rules and the Practice Directions of the Court.

36. However, in July 2015, it was reported that the Assize Court of Tripoli, Libya, had sentenced the Detainee to death *in absentia*, in spite of the Order of the Court.

37. Highly concerned by the said reports, the Court on 10 August 2015, and pursuant to Article 27 (2) of the Protocol and Rule 51(1) of its Rules, issued a second Order in which it:

> "Notes that the execution of capital punishment by the Libyan Government would be a violation of its international obligations under the Charter, the Protocol and other Human Rights instruments it has ratified." (§ 10) and:
>
> i – Orders Libya to take all necessary measures to preserve the life of Mr. Saïf Gadhafi and refrain from taking any action that may cause irreparable harm to the accused and jeopardize the matter pending before the Court;
>
> ii - Orders Libya to ensure that the accused is given fair trial in accordance with internationally recognized fair trial standards, including the independence of the judiciary and impartial proceedings as well as the possibility for counsel for the accused, his family or witnesses, if any, to attend the hearing;
>
> iii - Orders Libya to take urgent steps to arrest and prosecute those illegally holding Mr. Saïf Gadhafi; and
>
> iv - Orders Libya to submit a report to the Court within fifteen (15) days of receipt of the Order on the measures it has taken to implement it."

IV. MERITS OF THE APPLICATION TO ENTER A JUDGMENT IN DEFAULT

38. The Applicant prays the Court to:

> "Render a judgment in default against Libya under Article 55 of the Rules of Court and notes that Libya has violated and continues to violate Mr Gadhafi's rights guaranteed by Articles 6 and 7 of the African Charter on Human and Peoples' Rights (the "Charter")."

39. In addressing the Applicant's request, the Court recalls the relevant provisions of Rule 55 of its Rules regarding "judgment in default" and must ascertain whether all the requirements of this Rule have been met in the case before it.

40. Rule 55 of the Rules provides that:

> "Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, pass judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertinent to the proceedings. Before acceding to the application of the party before it, the Court shall satisfy itself that it has jurisdiction in the case, and that the application is admissible and well founded in fact and in law."

41. Regarding the requirement of ascertaining "that the defaulting party has been duly served with the application and all other documents pertinent to the proceedings"; it appears from the account of the different stages of the aforesaid proceedings that both the Applicant and Registry communicated all the pleadings to the Respondent, including the request for provisional measures dated 8 January 2013, and received at the Court on 31 January

2013, the interlocutory motion of 28 February 2013, praying the Court to note the failure by the Respondent to implement the Court Order, the "motion to institute proceedings" of 28 February 2013, and finally the motion for a judgment in default; as well as two orders issued by the Court, on 15 March 2013 and 10 August 2015, respectively.

42. The Court therefore holds that the first condition for the passing of a "judgment in default" has been met. Not only had all the pleadings been served on the Respondent, but the latter, while it sent the Court two *Notes Verbale* in response to the Order of 15 March 2013, consistently failed to present its defence, despite the extension of the deadline accorded.

43. The Court will therefore proceed to examine compliance with the other requirements of Rule 55 of its Rules to satisfy itself that it has jurisdiction and that the application is admissible.

V. THE COURT'S JURISDICTION

44. Under Rule 39(1) of its Rules, the Court has to conduct preliminary examination of its jurisdiction. In that regard, the Court notes that even where the Respondent has not raised preliminary objections to its jurisdiction, the Court should *proprio motu,* ensure that it has personal (*ratione personae*), material (*ratione materiae*), temporal (*ratione temporis)* and territorial (*ratione loci*) jurisdiction to hear the case.

45. The Court recalls that, in its Order for Provisional Measures dated 15 March 2013, it had declared that it had *prima facie* jurisdiction to examine the Application and consequently ordered the provisional measures requested.

46. However, the Order for Provisional Measures issued by the Court does not in any way prejudge its competence to examine the merits of the case. The Court will now proceed to conduct an exhaustive examination of its jurisdiction.

A. PERSONAL JURISDICTION

47. In the instant case, the Applicant is, as earlier indicated, the African Commission on Human and Peoples' Rights. Under Article 5 (1) of the Protocol, the Commission is one of the entities/institutions entitled to submit cases to the Court. Consequently, the Court has personal jurisdiction vis-á-vis the Applicant to hear the case.

48. As has also been indicated above, the Respondent in the instant case is Libya, a State which ratified the Charter on 19 July 1986, and the Protocol on 19 November 2003, both texts of which are in force with respect to Libya. According to Article 3(1) of the Protocol, "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument *ratified by the States concerned*" (italics added). Consequently, the Court has personal jurisdiction, vis-á-vis the Respondent, to hear the instant case.

Original: French

49. It is clear from the Application that Saïf Al-Islam Kadhafi is detained in Libya by a "revolutionary brigade". That notwithstanding, the Court holds the view that 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.

50. As provided for in the Draft Articles of the International Law Commission of the United Nations on the responsibility of States for internationally wrongful[13] acts: "Every internationally wrongful act of a State entails the international responsibility of that State". According to Article 9 of these same Draft Articles: "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". It is incumbent on "the State responsible for the internationally wrongful act...to put an end to such acts...." The International Criminal Court (ICC) adopted the same position as this Court when it held that the upheavals affecting Libya cannot exonerate the Respondent from its obligation to cooperate with the ICC in surrendering Saif Al-Islam Kadhafi to it. The Pre-trial Chamber I affirmed that: " The Chamber is aware of the volatile political and security situation in Libya and is sensitive to the serious difficulties that its authorities are currently facing as well as the need on their part to focus efforts and resources on restoring stability and order, as submitted by Libya. Nonetheless, the Chamber cannot ignore its own responsibilities

[13] Document annexed to United Nations General Assembly Resolution 56/83 of 12 December 2001.

in the proceedings and its duty to deploy all efforts to protect the rights of the parties and the interests of victims"[14]

51 The Court notes, in this regard, that when the Commission brings a case before it pursuant to Article 5 (1) of the Protocol, the question as to whether the Respondent must have made the declaration accepting the competence of the Court as required under Article 34 (6) of the said Protocol[15], does not arise. As is clearly shown in that Article read jointly with Article 5 (3) of the Protocol[16], the requisite declaration of acceptance of competence is applicable only where individuals and non-governmental organisations to bring cases before the Court.

52. In view of the foregoing considerations, the Court is competent *ratione personae* to hear the instant case.

B. MATERIAL JURISDICTION

53. With respect to the Court's material jurisdiction (*ratione materiae)*, 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 and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned."

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[14] (ICC-01/11-01/11 Date : 10 December 2014) (https://www.icc-cpi.int/CourtRecords/CR2014_09999.PDF) para 32.

[15] Article 34(6) of the Protocol provides that "At the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration."

[16] Article 5.3 of the Protocol stipulates that "The Court may entitle relevant Non-Governmental organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol".

54. In the instant case, the Applicant alleges violation of Articles 6 and 7 of the Charter by the Respondent. As such, the matter submitted by the Applicant falls within the material jurisdiction of the Court, and the issue at stake actually concerns the application of the relevant provisions of the Charter to which Libya is a Party.

C. TEMPORAL JURISDICTION

55. As regards jurisdiction *ratione temporis*, the Court notes that, in the instant case, the relevant dates to be considered are those of the entry into force of the Charter with respect to the Respondent (26 March 1987) and the Protocol (8 December 2003).

56. The Court notes that, according to the Application, the alleged violation of the Charter occurred for the first time in 2011 and has continued to this day.

57. Consequently, and since the purported facts occurred after the entry into force of the Protocol, the Court finds that it has temporal jurisdiction to examine the alleged violation of the right to liberty and the right to a fair trial raised in this case.

D. TERRITORIAL JURISDICTION

58. Lastly, the Court notes that with regard to territorial jurisdiction *(ratione loci)*, there is no shadow of doubt that the facts of the case occurred in the territory under the authority of Libya.

Original: French

59. The Court therefore finds that at the time of occurrence of the facts of this matter and up to this date, Libya being a Party to the Charter and to the Protocol, both instruments are in force with respect to Libya and on its territory; and that the Court's territorial jurisdiction has consequently been established.

60. It therefore follows from the above considerations that the Court has jurisdiction to examine the human rights violations alleged by the Applicant.

VI. ADMISSIBILITY OF THE APPLICATION

61. The Court recalls that under Rule 39 of its Rules: "The Court shall conduct preliminary examination of its jurisdiction and the admissibility of the application in accordance with Articles 50 and 56 of the Charter and Rule 40 of these Rules".

62. According to Article 6(2) of the Protocol: "The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

63. Rule 40 of the Rules of Court, which in substance restates the content of Article 56 of the Charter, provides that:

> "Pursuant to the provisions of article 56 of the Charter to which article 6 (2) refers, applications to the Court shall comply with the following conditions:"
>
> "1. Indicate their authors even if the latter requests anonymity;
> 2. Are compatible with the Charter of the Organization of African Unity or with the present Charter;
> 3. Are not written in disparaging or insulting language;

4. Are not based exclusively on news disseminated through the mass media;
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter; and
7. Do not deal with cases which have been settled by the States involved in accordance with the principles of the Charter of the United Nations or the Charter of the Organization of African Unity or the provisions of the present Charter."

64. The Court notes that the conditions regarding the identity of Applicants, the Application's compatibility with the Constitutive Act of the African Union and the Charter, the language used in the Application, the nature of the evidence and the principle of *non bis in idem,* (sub-rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules of Court), are not in dispute. The Court also notes that nothing in the records submitted by the Parties suggests that any of the conditions has not been met in the instant case.

65. Furthermore in the instant case and as the Court has indicated (*supra*, paragraph 41), by failing to reply to the Application addressed to it and despite extensions of the allowed time limit, the Respondent State did not submit any observations on the question of exhaustion of local remedies and on the time line for seizure of the Court.

66. As regards the exhaustion of local remedies, the Applicant maintains that Libya's Criminal Procedure Code contains several provisions "which in principle govern detention, and make it a right for a Detainee to complain about his/her detention". In particular, in

the Application instituting proceedings, it cites Articles 33, 176 and 177. The Applicant further maintains that the first year of Mr. Kadhafi's detention was governed by the laws in force before the people's court which were declared unconstitutional. According to the said laws, the State Prosecutor could unilaterally extend the period of detention without the prior authorisation of a judge. It was only after a year in detention that the laws prescribed in the Libyan Penal Code were made available. However, in practice, the accessibility and effectiveness of the said measures were questionable.

67. In paragraph 82.1 of its Judgment of 14 June 2013, in the Matter of *Consolidated Applications 009/2011 Tanganyika Law Society and the Legal and Human Rights Centre and 011/2011 Reverend Christopher R. Mtikila v. The United Republic of Tanzania,* the Court held that the local remedies to be exhausted prior to bringing a case before it are primarily judicial remedies which are the only ones that meet the criteria of availability, effectiveness and sufficiency. Furthermore, "a remedy is considered available if the complainant can pursue it without impediment." In the same vein, in the *Matter of Application 013/2011 the Beneficiaries of Late Norbert Zongo and Others v. Burkina Faso,* Judgment of 28 March 2014, paragraph 68, the Court held that an effective remedy refers to "that which produces the expected result, and hence, the effectiveness of a remedy is therefore measured in terms of its ability to solve a problem raised by the Applicant".

68. It is obvious from the facts of the case that the secret detention, isolation by the revolutionary brigade, the fact of not having access to a counsel or to a judge during the procedures for extension of his detention

were such that Mr. Gadhafi could not use the provisions applicable in seeking a remedy. Besides, the documents adduced by the Applicant show that the Detainee was unable to avail himself of the said remedies even when they were available.

69. Indeed, he was first arraigned before a special court called the "*People's Court*" which on 23 December 2012, was declared unconstitutional by the Supreme Court of Libya. Despite that, the fact that Mr. Gadhafi is being detained in a secret location by a revolutionary brigade and completely isolated from his friends and family, without access to a lawyer of his choice and sentenced to death *in absentia,* constitutes sufficient grounds for the Court to conclude that the Detainee has been prevented from legally seeking local remedies as prescribed by Libyan law and that, consequently, it was impossible for him to fulfil the condition regarding exhaustion of local remedies.

70. In view of the aforesaid, the Court finds that the requirement to exhaust local remedies is not strictly applicable in the instant case given that such local remedies are not available and are not effective; and even if they were, Mr. Gadhafi has not had and does not have the possibility of using the said remedies. Consequently, the Applicant cannot be expected to exercise such a remedy before bringing the case before the Court.

71. As regards the reasonable time requirement, the initial Application was filed before the Court on 31 January 2013 that is, one year following the firm conclusion that the Respondent State has not complied with the Provisional Measures ordered by the Commission on 18 April 2012. This Application limits

itself to praying the Court to issue provisional measures against the Respondent. That is a reasonable period of time.

72. The Court therefore notes that the condition set forth in Article 40 (6) of the Rules has been met.

73. It follows from the aforesaid, that all the admissibility conditions set forth in Rule 40 of the Rules of Court have been met.

74. Having ruled that it is competent to hear the case and declared the Application admissible, the Court will now proceed to consider the merits of the matter.

VII. THE MERITS OF THE MATTER

75. In the Application dated 28 February 2014, it is alleged that the Respondent State has violated Articles 6 and 7 of the Charter.

76. The Court finds, as a preliminary remark, that whereas it is accepted under international law that, in exceptional circumstances, States Parties to a human rights instrument such as the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR")[17] have the right of derogation therefrom[18], it is no less recognised that this right

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[17] Concluded in New York on 16 December 1966, entered into force on 25 March 1976 and to which Libya acceded on 15 May 1970

[18] **Article 4 of ICCPR:**

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 I and 2), 11, 15, 16 and 18 may be made under this provision.

has inherent limits in so far as there are rights that cannot not be derogated, regardless of the prevailing situation.

77. This is the case as regards the rights defined by Articles 6 and 7 of the ICCPR, namely: the right to life, the right not be subjected torture or to cruel, inhuman and degrading punishment or treatment – rights mostly enshrined in Articles 6 and 7 of the African Charter on Human and Peoples' Rights. The Court therefore holds that, despite the exceptional political and security situation prevailing in Libya since 2011, the Libyan State is internationally responsible for ensuring compliance with and guaranteeing the human rights enshrined in Articles 6 and 7 of the Charter.

A. Alleged violation of Article 6 of the Charter

78. The Applicant alleges that Mr. Kadhafi who has been in detention since 19 November 2011 has not been brought before any court to contest his detention. It further argues that Mr. Kadhafi's detention was extended several times without a court order; and that his place of detention has remained a secret.

79. Furthermore in its Application, the Commission grounding its submission on its own jurisprudence, noted that the prolonged secret detention constitutes a serious violation of human rights that

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 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

can lead to other violations such as torture, ill-treatment or interrogation without appropriate protection measures[19].

80. The Court is of the opinion that deprivation of liberty, regardless of its form, is permitted only when it is in conformity with procedures established by domestic legislation which itself should be consistent with international human rights standards.

81. Article 6 of the Charter provides that:

> "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained".

82. As such, every deprivation of liberty must meet a number of minimum guarantees commonly enshrined in international human rights instruments, in particular in Article 9 of the ICCPR which is also applicable in the instant case.

83. Under Article 9 of the ICCPR, the aforesaid guarantees are:

> "2- Everyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him"[20].
>
> "3- Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody but release may be subject to guarantees

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[19] African Commission on Human and Peoples' Rights, *Liesbeth Zegveld and Mussie/Eritrea*, Communication 250/02, para. 55

[20] In General Comment No. 8. the Human Rights Committee notes. "in the view of the Committee delays must not exceed a few days".

to appear for trial at any other stage of the judicial proceedings, and should the occasion arise for execution of the judgment".

"4- Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

"5- Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation".

84. Incommunicado detention constitutes in itself a gross violation of human rights that can lead to other violations such as torture, ill treatment or interrogation without appropriate due process safeguards. On this score, the Human Rights Committee notes that "arrest and detention incommunicado for seven days and the restrictions on the exercise of the right of *habeas corpus* constitute violations of article 9 of the Covenant as a whole"[21].

85. It emerges from the foregoing that Mr. Kadhafi's incommunicado detention and in isolation, the numerous extensions of the detention in his absence, and without the assistance of a lawyer of his choice to challenge every extension of that detention, constitute a violation of his right to liberty and to the security of his person as set forth under Article 6 of the Charter.

B. Alleged violation of Article 7 of the Charter

86. The Applicant alleges that the Detainee has no access to a counsel; nor indeed to any form of representation. Consequently, he did not have

[21] Communication No 1126/2002, *Marlem Carranza Alegre v Peru*, 28 October 2005

the benefit of any guarantees during the preliminary proceedings which have been going on up to now, including his interrogation in the absence of a lawyer and the absence of any possibility to rebut the evidence that will be used against him when the trial begins. Moreover, over two (2) years have lapsed since his arrest, and his trial is yet to start.

87. The Applicant further argues that Mr. Kadhafi has no access to any means that would enable him to communicate with his family, friends, lawyers or the outside world.

88. Lastly, the Applicant maintains that these facts are sufficient to establish the violation by the Respondent State of the rights of Mr. Kadhafi as enshrined in Article 7 of the Charter which provides that:

> "1. Every individual shall have the right to have his cause heard. This comprises:
>
> a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs is force;
>
> b) The right to be presumed innocent until proved guilty by a competent Court or tribunal;
>
> c) The right to defence, including the right to be defended by counsel of his choice;
>
> d) The right to be tried within a reasonable time by an impartial court or tribunal.
>
> 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender".

Original: French

89. The Court notes that the right to a fair trial is a fundamental human right. It implies that every individual accused of a crime or an offence shall receive all the guarantees under the procedure and afforded the right of defence. This right is enshrined in all universal and regional human rights instruments. The International Covenant on Civil and Political Rights (ICCPR) in its Article 14(1) provides as follows:

> "All persons shall be equal before the courts and tribunals. ..... Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"....."

90. In the instant case, it is established that the Detainee was not afforded the minimum guarantees of a fair trial at the time of his arrest, during the period of his detention and at the time he was convicted. He was indeed arraigned in the first instance before an extra-ordinary court known as *"The Peoples' Tribunal"* which was on 23 December 2012, declared unconstitutional by the Supreme Court of Libya. He was detained at a secret location, completely isolated from his family and friends without access to a counsel of his choice or to his family and friends. Additionally, he was sentenced to death *in absentia*.

91. It is similarly established that the right to be promptly arraigned before a judicial authority has not been respected. In that regard, every individual arrested or detained for a criminal offence should be brought with minimum delay before a judge or any other authority entitled by law to exercise judicial function, and should be tried within a reasonable time or set free. However, in the instant case, the Detainee was first arraigned before an extra-ordinary Court and subsequently condemned to death by an unknown tribunal.

Original: French

92. Reiterating Article 14 of the ICCPR, Principle No. 11 of the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" adopted by the United Nations General Assembly in Resolution 43/173 of 9 December 1988, provides that:

> "1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.
> 2. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
> 3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention". In the same vein, detention shall be effected in an officially recognised place of detention and under decent human conditions. Detention in a secret location inflicts on the detainee considerable suffering. and as Human Rights Committee pointed out: "the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world"[22].

93. Lastly, in the Application, the Respondent is accused of refusing the Detainee access to a lawyer or to any form of representation, thus depriving him of every guarantee during his detention. Yet, according to Article 7(1) (c) of the Charter, every accused or detained person should be afforded "the right to defence including the right to be assisted by a lawyer of his choice." This right should be exercised at every stage of a criminal procedure especially during investigation, periods of administrative detention and during judgment by a trial and appellate court.

94. The right to defence also implies that the Detainee has the right to communicate with his counsel and have adequate time and facilities to

[22] Communication No. 1640/2007, *El Abani v. Libyan Arab Jamahirya (as it was then)* 26 July 2010

prepare his/her defence. The accused or Detainee may not be tried without his or her counsel being notified of the trial date and of the charges levelled against him or her in time to allow for adequate preparation of a defence. The accused has a right to adequate time for preparation of a defence commensurate with the nature of the proceedings and the factual circumstances of the case. This implies the right to communicate with his lawyer and the right to access the materials required to prepare his defence.

95. The same is the case with other international courts[23], notably the European Court of Human Rights, which. on 14 October 2010 noted that "the person held in custody has the right to be assisted by a lawyer from the outset of such a measure and during interrogations and should be informed by the authorities of his right to remain silent"[24]. In another matter, "the Court recalls that the right of every accused person to be effectively defended by a lawyer, if need be, is at the heart of the notion of fair trial" [25].

96. According to available information, the Detainee has not had access to a lawyer nor was he afforded the assistance of a counsel of his choice. He has therefore not been protected during the different stages of the investigation instituted against him. For example, he was interrogated in the absence of a counsel and was not given the opportunity to examine the charges which would be brought against him at the start of the trial. The Detainee was arrested over two years ago and has been sentenced to death *in absentia*.

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[23] See European Court of Human Rights, *Matter of Brusco v. France*, 14 October 2010 Gaz Pal. 17 October 2010

[24] Idem ECHR

[25] Idem ECHR 13 October 2009, Matter of Dayanan v. Turkey, Application 7377/03, paragraph 30

97. It is quite obvious that none of the rights set forth in Article 7 of the Charter earlier analysed have been respected by the Respondent State with regard to the situation of the Detainee, and consequently, the Respondent has violated Article 7 of the African Charter.

On these grounds,

THE COURT,

Unanimously,

i) *Upholds* its Orders of 15 March 2013 and of 10 August 2015, and *orders* the Respondent State to comply therewith;

ii) *Declares* that, pursuant to Articles 3 and 5(1)(a) of the Protocol, it has jurisdiction to hear the Application filed by the African Commission on Human and Peoples' Rights;

iii) *Declares* the Application admissible;

iv) *Finds* that Libya has violated and continues to violate Articles 6 and 7 of the African Charter on Human and Peoples' Rights;

v) Therefore, o*rders* the Respondent State to protect all the rights of Mr. Kadhafi as defined by the Charter by terminating the illegal criminal procedure instituted before the domestic courts;

vi) *Orders* Libya to submit to the Court a report on the measures taken to guarantee the rights of Mr. Kadhafi within sixty (60) days from the date of notification of this Judgment.

Original: French

Signed:

Augustino S.L. RAMADHANI, President

Elsie N. THOMPSON, Vice-President

Gérard NIYUNGEKO, Judge

Fatsah OUGUERGOUZ, Judge

Duncan TAMBALA, Judge

Sylvain ORÉ, Judge

El Hadji GUISSÉ, Judge

Ben KIOKO, Judge

Rafâa BEN ACHOUR, Judge

Solomy B. BOSSA, Judge

Angelo V. MATUSSE, Judge; and

Robert ENO, Registrar.

Done at Arusha, this 3rd Day of June in the year Two Thousand and Sixteen, in English, French, and Arabic, the French text being authoritative.

Pursuant to Article 28 (7) of the Protocol and Rule 60(5) of the Rules, the individual opinion of Judge Fatsah OUGUERGOUZ is attached hereto.