

## **The African Court on Human and Peoples' Rights' order in respect of the situation in Libya: A watershed in the regional protection of human rights?**

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### **Summary**

*The article considers the significant features of the order rendered by the African Court on Human and Peoples' Rights in respect of the situation in Libya after protests that began on 16 February 2011. During the first weeks of the unrest, the government of Libya responded to protests across the country in a highhanded and violent manner, further worsening the situation which escalated even further to a more serious level of human rights violations. The applicants – human rights organisations – petitioned the African Commission on Human and Peoples' Rights in respect of the deteriorating circumstances that were unfolding across Libya. The African Commission did not grant provisional measures; instead it referred the matter to the African Court. The Court swiftly responded to the African Commission's petition by granting an order for provisional measures. This note looks at features of the Court's order and reflects on its significance. Beyond this matter, the article looks at the relationship between the Court and the Commission and highlights lessons from the Inter-American regional system from which stakeholders within the African system could draw. It also looks at what the emergence of the African Court means to various stakeholders in the region.*

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## 1 Introduction

On 25 March 2011, the African Court on Human and Peoples' Rights (African Court) granted an order for provisional measures in respect of the situation in Libya. The order was in response to an application filed before the Court by the African Commission on Human and Peoples' Rights (African Commission). The Commission petitioned the Court<sup>1</sup> after having received complaints from five non-governmental organisations (NGOs)<sup>2</sup> regarding the human rights situation in Libya.

In its order, the African Court requested Libya to refrain from action that would result in loss of life or violation of physical integrity and to report within 15 days on measures taken to implement the order. The African Commission's move to refer the matter to the Court is a bold statement to states that have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) and the African Charter on Human and Peoples' Rights (African Charter) that it would react to massive human rights violations in the region. The African Court took an innovative step and speedily granted provisional measures even though the African Commission had not requested these.

The article looks at the significant features of the Court's order and its contribution to the protection of human rights in Africa. It considers the relationship between the Court and the Commission and highlights lessons from the Inter-American regional system that stakeholders within the African system could draw from.

Beyond this case, this note looks at what the emergence of the African Court means for various stakeholders in the region. It concludes by arguing that the Court's order and its advent on the scene is a turning point in the protection of human rights in the region.

## 2 Application and the African Court's order for provisional measures

This matter arose from two applications filed before the African Commission by five NGOs in respect of gross human rights violations taking place in Libya in the wake of protests that had spread across

<sup>1</sup> The African Commission submitted the application pursuant to art 5(1)(a) of the African Court Protocol which lists the Commission as one of the parties entitled to submit cases to the Court. It also submitted the petition in accordance with rule 118(3), which provides that the Commission may submit a matter to the Court in a situation that in its view constitutes serious and massive human rights violations as provided for under art 58 of the African Charter.

<sup>2</sup> The Egyptian Initiative for Personal Rights, Interights and Human Rights Watch jointly filed a complaint to the African Commission. The International Federation of Human Rights and the Libyan League for Human Rights filed the second complaint.

the country.<sup>3</sup> At that point, the situation could not be considered an internal armed conflict. The initial application to the Commission was a request for provisional measures filed jointly by the Egyptian Initiative for Personal Rights, Interights and Human Rights Watch. The applicants requested the Commission to:<sup>4</sup>

- (i) stop and prevent 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;
- (ii) allow people within Libya to air their grievances through peaceful protests;
- (iii) allow the free flow of information, including by permitting international journalists to enter and report freely;
- (iv) open up all forms of communication by restoring full use of the internet, television stations, mobile phones and social networks;
- (v) respect the rights of detainees;
- (vi) ensure that those injured during the protests are permitted access to appropriate medical treatment; and
- (vii) undertake a thorough, impartial and prompt investigation to hold accountable those responsible for these violations.

The second application was jointly filed by the International Federation of Human Rights and the Libyan League for Human Rights. The two organisations requested that the application<sup>5</sup>

be treated with the utmost urgency by the African Commission on Human and Peoples' Rights and that the Commission should refer this application to the African Court on Human and Peoples' Rights considering that the situation brought to its knowledge amounts to serious and massive violation of human rights and that Libya is a state party to the Protocol to the African Charter regarding the African Court on Human and Peoples' Rights.

<sup>3</sup> International human rights organisations have reported extensively on the situation in Libya, See Human Rights Watch 'Security forces fire on day of anger demonstrations' 17 February 2011 <http://www.hrw.org/en/news/2011/02/17/libya-security-forces-fire-day-anger-demonstrations> (accessed 30 September 2011); Amnesty International "Campaign of forced disappearances must end" 29 March 2011 <http://www.amnesty.org/en/news-and-updates/report/libya-campaign-enforced-disappearances-must-end-2011-03-29> (accessed 30 September 2011). See International Federation of Human Rights (FIDH) Alkarama 'At least 250 people disappeared, 70 dead in Al Jabl Al Akhdar region' [http://en.alkarama.org/index.php?option=com\\_content&view=article&id=677:libya-at-least-250-people-disappeared-70-dead-in-al-jabl-al-akhdar-region&catid=27:communiqu&Itemid=138](http://en.alkarama.org/index.php?option=com_content&view=article&id=677:libya-at-least-250-people-disappeared-70-dead-in-al-jabl-al-akhdar-region&catid=27:communiqu&Itemid=138). See Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, Human Rights Council, 1 June 2011 A/HRC/17/44 [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44\\_AUV.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf) (accessed 30 September 2011).

<sup>4</sup> The application for provisional measures is on file with the author.

<sup>5</sup> This application is on file with the author.

The African Commission did not grant provisional measures because 'the chances of such request eliciting a response from the government are very slim taking into consideration the situation in Libya'.<sup>6</sup>

The African Commission seems to have considered the precarious situation in Libya and then it based its decision on whether its intervention would obtain a response from the government. This is an unfortunate approach to interim measures and, more generally, the Commission's communications procedure. It is a regression which takes the Commission steps back in its protection of human rights on the continent. While it can be stated that the Commission's response was understandable given the political situation in Libya, the lack of binding powers and states' attitudes towards the Commission, the Commission's intervention in the form of a decision granting provisional measures in the matter would have sent a strong signal to the Libyan authorities that their actions fell short of their obligations under the African Charter.

Based on the violations in the complaints it had received from civil society organisations, the African Commission shortly after receipt of the applications filed a petition before the African Court.<sup>7</sup> That application alleged serious and massive violations of human rights. The Commission acknowledged that it had received various communications against Libya during its 9th extraordinary session held in Banjul from 23 February to 3 March 2011. In its application, it noted the following:<sup>8</sup>

- Subsequent to the detention of an opposition lawyer, peaceful demonstrations took place on 16 February 2011 in the Eastern Libyan city of Benghazi.
- On 19 February, 2011, there were other demonstrations in Benghazi, Al Baida, Ajdabiya, Zawiya and Derna, which were violently suppressed by the security forces who opened fire at random on the demonstrators, killing and injuring many people.
- Hospital sources reported that on 20 February 2011, they received individuals who had died or had been injured with bullet wounds to the chest, neck and head.
- Security forces had engaged in excessive use of heavy weapons and machine guns against members of the population, including targeted aerial bombardment and all types of attacks.
- The above-mentioned amounts to serious violations of the right to life and to the integrity of persons, freedom of expression, demonstration and assembly, whereas the Commission concluded that

<sup>6</sup> The letter from the Secretariat of the African Commission, on file with the author.

<sup>7</sup> ACHPR/CHAIR/AfCHPR/108.11.

<sup>8</sup> In the matter of *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* Application 004/2011, Order for Provisional Measures, paras 2 & 3 [http://www.african-court.org/fileadmin/documents/Court/Cases/Order\\_for\\_Provisional\\_Measures\\_against.Libya.PDF](http://www.african-court.org/fileadmin/documents/Court/Cases/Order_for_Provisional_Measures_against.Libya.PDF) (accessed 12 June 2011).

these actions amounted to serious and widespread violations of the rights enshrined in articles 1, 2, 4, 5, 9, 11, 12, 13 and 23 of the Charter.

In adopting the order, the African Court held that, in view of the ongoing conflict in Libya that makes it difficult to serve the application timeously on the respondent and to arrange a hearing accordingly, the Court decided to make an order for provisional measures without written or oral hearings,<sup>9</sup> because<sup>10</sup>

there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subject of the application, in particular, in relation to the rights to life and to physical integrity of persons as guaranteed in the Charter.

The African Court specifically ordered the following:<sup>11</sup>

The Great Socialist Libyan Arab Jamahiriya must 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 Charter or of other international human rights instruments to which it is a party.

The Great Socialist Libyan Arab Jamahiriya must report to the Court within a period of fifteen days from the date of receipt of the order, on measures taken to implement this order.

The African Court granted an order for provisional measures<sup>12</sup> nine days after its registry had received the application, even though the African Commission did not request that remedy. The Court's issuance of a remedy that the Commission did not ask for but which it deemed appropriate has been lauded by the applicants and is seen as a positive step. However, it would be problematic if the Court were to give a remedy not requested for or if it gave one with undesirable consequences on a given situation. Such a move would have dire consequences as it would negatively impact on the gains achieved in respect of the protection of specific rights that were the subject of the application. This was not a concern in this matter because the order granted by the Court responded to the situation on the ground in Libya. The swiftness with which the Court reacted is encouraging and a positive sign considering the lengthy delays that are characteristic of the Commission's litigation procedure.<sup>13</sup>

Although provisional measures are partly aimed at upholding the integrity of the body that will take the final decision, they also aim to secure the rights of the individual concerned pending finalisation of the communication. Compliance with provisional measures therefore

<sup>9</sup> n 8 above, para 13 of the Court Order.

<sup>10</sup> n 8 above, para 22 of the Court Order.

<sup>11</sup> n 8 above, para 25 of the Court Order.

<sup>12</sup> Court Order (n 8 above).

<sup>13</sup> The applicant's experience litigating before the African Commission.

shows respect both for the body issuing those measures and for human rights – often the right to life.<sup>14</sup>

The International Court of Justice (ICJ) in the *La Grand* holding indicated that provisional measures under article 41 of the ICJ Statute were after all binding, and that non-compliance with them could give rise to state responsibility.<sup>15</sup>

Within the African system, provisional measures are provided for under the African Commission's Rules of Procedure.<sup>16</sup> While states have at times responded to the Commission's request for provisional measures, they have in certain instances ignored these appeals. In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, even though the Commission had invoked provisional measures, the Nigerian authorities went ahead to execute Ken Saro-Wiwa and his eight co-defendants.<sup>17</sup> In this case, the Commission held that non-compliance by a state party with provisional measures indicated by the Commission constituted a violation of article 1.<sup>18</sup> However, in its consideration of *Interights and Others (on behalf of Bosch) v Botswana*,<sup>19</sup> the African Commission did not find that a failure to abide by provisional measures when the applicant was executed, amounted to a violation of article 1. It is also worth noting that the Commission in the past had not responded to urgent requests for provisional measures.<sup>20</sup> This is a worrying trend as the Commission is the first port of call for civil society organisations in times of crises.

### 3 Procedure in this matter

Upon receipt of the petition from the African Commission, the African Court had regard to article 27(2) of the African Court Protocol and rule 51 of the Rules of Court. Article 27(2) of the Court Protocol provides that 'in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary'. Rule 51 of the Court's rules states that the Court may, at the request of a party, the Commission or of its own accord, prescribe to the parties any interim measure which it deems necessary to adopt in the interest of the parties or of justice.

<sup>14</sup> F Viljoen *International human rights law in Africa* (2007) 326.

<sup>15</sup> *La Grand* case (Germany v USA), ICJ Reports 2001 466 <http://www.icj-cij.org/docket/files/104/7736.pdf> (accessed 30 September 2011).

<sup>16</sup> Rule 98 African Commission's 2010 Rules of Procedure.

<sup>17</sup> (2000) AHRLR 212 (ACHPR 1998) para 10.

<sup>18</sup> As above.

<sup>19</sup> (2003) AHRLR 55 (ACHPR 2003) para 49.

<sup>20</sup> *Law Offices of Ghazi Suleiman v Sudan* Communication 228/98 and more recently in *Redress Trust, SDFC, HRW & Interights v Sudan* in respect of the situation in South Kordofan (not yet decided).

Under rule 35(2)(a), the Court forwarded copies of the application to the respondent state and, as provided for in rule 37, invited it to respond to the application within 60 days. The registry forwarded copies of the application to the complainants in accordance with rule 35(2)(e).

## 4 African Court's consideration of its jurisdiction in this application

Before granting the order, the African Court satisfied itself that it had jurisdiction to deal with the application.

The Court then proceeded to consider article 3 of the African Court Protocol which provides that the jurisdiction of the Court extends to all cases and disputes submitted to it concerning the interpretation and application of the African Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned. Libya has ratified both the African Charter<sup>21</sup> and the African Court Protocol.<sup>22</sup> It also considered article 5(1)(a) of the Court Protocol which lists the African Commission as one of the entities entitled to submit cases to the African Court.

Before it considers the merits of the application, the Court may conduct a preliminary examination of its jurisdiction and the admissibility of the application in accordance with articles 50 and 56 of the African Charter and rule 40 of the Court's rules on conditions of admissibility.<sup>23</sup>

### 4.1 African Court's contentious jurisdiction

The African Commission and the African Court are both at the heart of the African regional human rights system, and have to work together if each mechanism is to carry out its role and achieve its goal. In the instance of this application, the Commission received the application as an impartial arbitrator. However, its role changed when it approached the African Court as a litigant advocating for the applicants. In this matter it wore both the hat of an adjudicator when it received the initial complaint and that of an applicant when it went to the Court. It will be interesting to see how the Commission's relationship with the NGOs that filed the initial complaint before it, presumably one of partnership, unfolds. Over the last few years, as the Commission has taken its role as the key human rights monitoring body on the continent in its stride,

<sup>21</sup> Libya ratified the African Charter on 19 July 1986 and it came into force on 21 October 1986.

<sup>22</sup> Libya ratified the African Court Protocol on 19 November 2003 and it came into force on 25 January 2004.

<sup>23</sup> Rule 39 African Court's Rules.

it has increasingly taken on more work. For it to carry out its new role before the African Court effectively it will require time and resources. These are issues that the Commission needs to think through and work out while the numbers of cases for it to take to the Court are still small.

## 5 Relationship between the African Commission and the African Court

This case was the first in which the relationship between the African Court and the African Commission was tested. The Court 'shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the Commission'.<sup>24</sup> Apart from one of the entities entitled to submit cases to the Court,<sup>25</sup> the Court Protocol further provides that the Court may, when deciding on the admissibility of a case instituted under article 5(3) of this Protocol, request the opinion of the Commission which shall give it as soon as possible and the Court may consider cases or transfer them to the Commission.<sup>26</sup> The rules of both the Court and the Commission do not state how this will be done, so it appears it will be on a case-by-case basis. While this might seem as if it allows some flexibility, this back and forth consideration of the admissibility of a case between the two bodies could prolong the process. It also indicates a measure of uncertainty around the Court's admissibility procedure as, at the moment, applicants are not aware under what circumstances the Court would send cases to the Commission. In recent cases where the Court held that it had no jurisdiction to consider the petition as the respondent states had not made a declaration under article 34(6), it transferred the matter to the African Commission as provided for in article 6(3) in the African Court Protocol.<sup>27</sup> The Court has transferred a matter to the African Commission because an organisation did not have observer status with the Commission as required by article 5(3) of the Court Protocol.<sup>28</sup>

## 6 Lessons from the Inter-American system

Similarities in the set-up of the Inter-American system and the African regional human rights system present good practice that stakeholders

<sup>24</sup> Art 2 African Court Protocol.

<sup>25</sup> Art 5(1) African Court Protocol.

<sup>26</sup> Arts 6(1) & (3) African Court Protocol.

<sup>27</sup> *S Ababou v Algeria* Case 002/2011; *D Amare & Another v Mozambique & Mozambique Airlines* Case 005/2011.

<sup>28</sup> *Association jurists d'Afrique pour la bonne gouvernance v Côte d'Ivoire* Case 006/2011.

from the latter can draw from. In this regard, the experience of the relationship between the Inter-American system with its Court and Commission is instructive. In that system, the co-existence of the two bodies, performing complementary functions, in stages of increasing intensity, encourages states to fulfil their obligations to co-operate in the resolution of a case.<sup>29</sup>

For example, the Inter-American Commission's quasi-judicial proceedings offer states an opportunity to settle the matter before it is brought to the Court while at the same time offering the petitioner the opportunity to obtain an appropriate remedy more quickly and simply than with a long litigation before a tribunal.<sup>30</sup> Before the Inter-American system, the effectiveness of the proceedings before the Commission particularly depends upon the circumstances of each case, the nature of the rights affected, the characteristics of the violations, and the willingness of the government to co-operate and take all necessary steps to bring about the reparation of the violations.<sup>31</sup> In the event a quasi-judicial approach does not work, the next step in this incremental mechanism is to refer the case to the Court.<sup>32</sup> A judge in the Inter-American system has stated that both the Court and the Commission need to regard each other as being partners in the same system, embarked in a joint venture.<sup>33</sup>

Because of its new role, the African Commission's working procedures will inevitably undergo modifications. The Commission needs to adapt to and gracefully accept these changes to ensure that any outcomes strengthen and not inhibit its role before the African Court and its relationship with civil society. The Inter-American Commission needed to reorganise its daily work in order to create the substantial records detailing all the relevant facts and legal arguments. As a result, the Inter-American Commission was forced to make many changes in its daily work. In addition, the experience of the Inter-American system shows that the African Commission and the African Court must use their staff and material resources effectively in the production of evidence and fact finding.<sup>34</sup>

The African Court's credibility in particular is built in part by a solid record that leaves no useful fact out, and the co-operation of the African Commission, the complainants and the state is crucial. To that end, the

29 AE Dulitzky 'The relationship between the African Commission and the African Court: Lessons from the Inter-American system' in 'A Human Rights Court for Africa' (2004) 15 *Interights Bulletin* 10.

30 As above.

31 Inter-American Court of Human Rights, *Velasquez Rodriguez* case, preliminary objections, judgment of 26 June 1989, para 60.

32 Dulitzky (n 29 above) 10.

33 C Medina 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a joint venture' (1990) 4 *Human Rights Quarterly* 439.

34 Dulitzky (n 29 above) 10.

Court has placed a strong burden on the state to produce evidence.<sup>35</sup> Justices are empowered to request and look for documents and records, and to interview witnesses. This dynamic and aggressive search for the truth has benefited the credibility of the Court and made it more effective.<sup>36</sup> While the African Court should not ape the Inter-American Court's mode of operation, there are lessons than can be drawn from the similar set-up of the Inter-American system.

Within the African system, the African Court and the African Commission need each other if they are to achieve the goal of effective human rights protection in the region. Regular meetings and open communication channels between the two bodies on litigation-related issues are key. The Court's rules provide that the Court shall meet with the Commission at least once a year and whenever necessary to ensure a good working relationship between the two institutions<sup>37</sup> and that the Bureau for the Court may meet the Bureau of the Commission as often as necessary.<sup>38</sup> The Court shall also consult with the Commission on any amendment of its rules, and any issues of procedure governing the relationship between the two institutions.<sup>39</sup>

While judges from the African Court have met with commissioners to harmonise their rules of procedures, among other things, it would be interesting to see how the collaboration unfolds in respect of litigation between the institutions, especially as the Court increasingly receives more petitions. The role of the applicants in the process as the Court considers their application and their functional relationship with the African Commission will need to be clarified as the Court receives more cases.

## 7 Implementation of the African Court's orders and judgments

The African Court's rules of procedure make specific provision for both the implementation of interim measures and the Court's judgment. This is a major shift as there is no implementation procedure in respect of provisional measures and decisions rendered by the Commission.

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<sup>35</sup> Eg, Inter-American Court of Human Rights, *Gangaram Panday* case, judgment of 21 January 1994, para 49, stating that in proceedings to determine human rights violations, the state cannot rely on the defence that the complainant has failed to present evidence when it cannot be obtained without the state's co-operation.

<sup>36</sup> Dulitzky (n 29 above) 12.

<sup>37</sup> Rule 29(1)(a) African Court's Rules.

<sup>38</sup> Rule 29(1)(b) African Court's Rules.

<sup>39</sup> Rule 29(2) African Court's Rules.

## 7.1 Interim measures

In this case, what happened after the African Court granted its order for provisional measures? The Libyan authorities made written submissions to the Court. The situation in the country has changed as there is now a new government recognised by the African Union (AU). The Court's rules provide that the Court shall notify the African Commission, the Assembly, the Executive Council and the African Union Commission of the interim measures it has prescribed.<sup>40</sup> In the event of non-compliance with these measures by the state, the Court shall make all such recommendations as it deems appropriate.<sup>41</sup>

## 7.2 Implementation of the African Court's judgments

Beyond this case, the African Court's judgments follow a specific implementation path. The African Court Protocol provides that states shall undertake to comply with its judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.<sup>42</sup> Once the Court renders a decision, the Council of Ministers must be notified of the judgment and will monitor its execution on behalf of the Assembly.<sup>43</sup> The inclusion of this provision in the Protocol means that compliance with the Court's decisions will not depend largely on a state's goodwill as is the case before the African Commission. All parties to the African Court Protocol are obliged to execute its decisions.

According to Kioko, the reason the follow-up activities in relation to the execution of the Court's judgments was left to the Executive Council and not with the Assembly was that it was felt that the latter did not have sufficient time to carry them out, and its working measures were not structured in a manner that would enable it to deal with the nitty-gritty issues relating to the execution of individual cases.<sup>44</sup> It is also significant that the Court's report to the Assembly must specify, in particular, the cases in which a state has not complied with the Court's judgment.<sup>45</sup>

This is a welcome development, considering that the implementation of the African Commission's decisions has been a thorny issue, as states have been reluctant to implement them. Recently, Botswana's Foreign Affairs Minister argued that the government of Botswana would not follow the African Commission's decision because the Commission is

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<sup>40</sup> Rule 51(3) African Court's Rules.

<sup>41</sup> Rule 51(4) African Court's Rules.

<sup>42</sup> Art 30 African Court Protocol.

<sup>43</sup> Art 29 African Court Protocol.

<sup>44</sup> B Kioko 'The African Union and the implementation of the decisions of the African Court on Human and Peoples' Rights' in *Interights Bulletin* (n 29 above) 8.

<sup>45</sup> Art 31 African Court Protocol.

not a court.<sup>46</sup> Will states respond differently when the African Court issues binding judgments? Apart from its binding judgments, the Court's establishment impacts relevant stakeholders in different ways.

## 8 Future role of the African Court

The African system for the protection of human rights will no doubt be strengthened by a strong and effective court whose judgments will presumably be respected and executed by states. The African Court's judgments will have a wider impact, beyond the country against whom an application has been brought. The Court's existence not only adds to the number of regional human rights mechanisms in the region, but it also changes the dynamics within the African human rights system. For example, its existence impacts not only on the role of the African Commission, but it also impacts how states, civil society organisations and individuals interact with it.

### 8.1 For states

The African Court's powers as the main human rights overseer with enormous power is confirmed and clearly illustrated by states' reluctance to make the declaration under article 34(6). Their unwillingness to accept the competence of the African Court to consider individual petitions is testimony to the fact that states are wary of the powers of a strong mechanism that would hold them accountable for human rights violations.

At the AU Summits, state parties will, in addition to considering the African Commission's report, also have the opportunity to discuss the African Court's report. The Court is obliged to report to each regular session of the Assembly on its work and, in doing that, its report will include cases in which a state has not complied with the Court's judgment.

In the last few years, there has been extensive discussion of human rights reports at the AU Assembly with states fully engaging in the debates and being requested to comment on issues related to their countries. While this has led to delays in the adoption of the Assembly's Annual Activity Reports, it indicates a willingness on the part of states to engage with human rights issues. The African Commission's 17th Annual Activity Report of 2004 was adopted much later because the government of Zimbabwe disputed the contents of the African

<sup>46</sup> F Rabkin 'Country reprimanded for denying critic access to court' *Business Day* 12 August 2010. Botswana's Foreign Minister, Phandu Skelemani, responding to the African Commission's decision in *Kenneth Good v Botswana Communication 313/05*, stated: 'We are not going to follow on the recommendation made by the commission; it does not give orders, and it is not a court. We are not going to listen to them.'

Commission's mission report.<sup>47</sup> There was a delay in the adoption of the Commission's 20th Annual Activity Report in 2006 with respect to a number of resolutions adopted on Ethiopia, Sudan, Uganda and Zimbabwe as these states wanted to add their comments to those resolutions and for these to appear in the report.<sup>48</sup> However, this is a sharp contrast to the past. According to Kioko, in those days the following situation prevailed:<sup>49</sup>

The Chairperson of the Commission would present his Annual Activity Report to the Summit, most often at night and, invariably, there would be no takers from the floor when the issue was opened for discussion, even when the report alleged gross and massive violations of human rights. The Report of the Commission submitted to the Summit in 1995 indicated, *inter alia*, those gross and massive human rights violations had been committed in Nigeria and Cameroon. The delegations of Nigeria and Cameroon did not take the floor and there was no debate after the statement of the Chairperson to the Commission.

## 8.2 For the African Commission

Beyond its role as a litigant before the African Court, the African Commission will also have an opportunity to use the Court to deal with the non-implementation of its decisions by recalcitrant states. The Commission's Rules of Procedure provide that if a state is unwilling to comply with the Commission's decision within the period stated in rule 112, the Commission may submit the case to the African Court pursuant to article 5(1)(a) of the Protocol and inform the parties accordingly.<sup>50</sup>

## 8.3 Civil society organisations

Civil society organisations in the region were not only instrumental in lobbying for a court, but they welcomed its establishment as an institution that will offer greater human rights protection. Direct access to the African Court is still limited as only five states have complied with article 34(6), the provision of the African Court Protocol which requires states to make a declaration allowing direct individual access.<sup>51</sup> Efforts by NGOs to encourage the ratification of the Protocol and, importantly, compliance with the requirement under article 34(6), should continue. Applicants from Burkina Faso, Mali, Malawi, Tanzania and Ghana can directly access the Court. It should be recalled that the Court's

<sup>47</sup> See comments by the government of Zimbabwe on the Report of the Fact-Finding Mission 18 [http://www.achpr.org/english/activity\\_reports/activity17\\_en.pdf](http://www.achpr.org/english/activity_reports/activity17_en.pdf) (accessed 22 June 2011).

<sup>48</sup> See Resolutions adopted during the 38th ordinary session and responses from states 38 [http://www.achpr.org/english/activity\\_reports/20th%20Activity%20Report.pdf](http://www.achpr.org/english/activity_reports/20th%20Activity%20Report.pdf) (accessed 22 June 2011).

<sup>49</sup> Kioko (n 44 above) 9-10.

<sup>50</sup> Rule 118(1) African Commission's Rules of Procedure.

<sup>51</sup> Art 34(6) African Court Protocol.

jurisdiction empowers it to consider all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the African Court Protocol and any other relevant human rights instrument ratified by the states concerned.<sup>52</sup>

The emergence of the African Court increases the possibility of forum shopping, particularly in respect of applications from the five countries in compliance with article 34(6). The African Court joins the African Commission and the African Committee of Experts on the Rights and Welfare of the Child as regional bodies which can be seized with cases pertaining to human rights violations.

## 9 Issues of interest to litigants before the African Court

The case section of the African Court's website provides information on how to submit cases to the Court. The downloadable application form is straightforward and requests applicants for a summary, a detailed application and prayers.<sup>53</sup> The case section of the Court's website also includes information on judgments and orders and pending cases.

For a vibrant third party intervener or *amicus curiae* practice to flourish before the African Court, potential interveners have to have information on the nature of cases pending before it.

A lack of legal representation is a key barrier to access to justice in the region. The African Court Protocol provides that any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require.<sup>54</sup> There should be clarity on the criteria that will be used to implement this provision.

### 9.1 Advisory opinions

Civil society organisations can also ask the African Court for advisory opinions.<sup>55</sup> While this procedure is not adjudicatory, it gives the Court an opportunity to contribute to the development of human rights standards by delivering advisory opinions on matters of regional significance.

State parties are presented with the opportunity of ensuring that the Court works and that it increasingly considers cases and renders judgments that they will implement. They can engage with the Court by ratifying the Protocol and allowing direct individual access. They

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<sup>52</sup> Art 3 African Court Protocol.

<sup>53</sup> See the application form at [http://www.african-court.org/fileadmin/documents/Application\\_form.pdf](http://www.african-court.org/fileadmin/documents/Application_form.pdf) (accessed 20 September 2011).

<sup>54</sup> Art 10(2) African Court Protocol.

<sup>55</sup> Rule 68 Rules of Court.

should also consider requesting the Court to give advisory opinions on specific issues as was the case in the Inter-American system in early years.

## 10 Conclusion

Since its establishment, expectations for the African Court to deliver have been high. In this case, the Court's swift response to the African Commission is a good start. It is hoped that the Court will apply its mind to the arguments and evidence submitted by the Commission. The case would in the long term positively influence the lives of the many Libyans who have suffered human rights violations. The Court's decision would hopefully have a ripple effect on the wider region, particularly those countries undergoing similar civil strife.

This case, and generally the Court's arrival on the scene, herald a new era for the African human rights system. Over time, the Court's place in the African human rights system will hopefully help clarify the roles of the quasi-judicial mechanisms that can take cases before it as they progressively appear before it. This is why the support of stakeholders is crucial for the Court to effectively carry out its work. In the words of Dieng, the African Commission lacks neither ambition nor courage, but financial resources; hence it is important to ensure that the Court is spared the ills that plagued the Commission.<sup>56</sup>

One of the issues this matter against Libya raises is whether litigation as a strategy has any impact on situations of civil unrest or war in which serious and massive human rights violations are being committed. There may be no immediate impact of the case on raging civil strife when filed. However, these kinds of petitions not only highlight the issues at hand, but they serve to catalogue key human rights violations and explore appropriate remedies that a state should employ to remedy them.

This is the first case in which the African Court considers serious and massive human rights violations.<sup>57</sup> It is too early to tell what the extent of its impact on the ground will be. Cases of massive human rights situations filed before the African Commission<sup>58</sup> served to highlight

<sup>56</sup> A Dieng 'Introduction to the African Court on Human and Peoples' Rights' *Interights Bulletin* (n 29 above) 6.

<sup>57</sup> Rule 2 of the African Commission's Rules of Procedure states that serious or massive violations refer to grave human rights violations as distinguished by their scale and importance.

<sup>58</sup> *Lawyers Committee for Human Rights v Zaire* (2000) AHRLR 71 (ACHPR 1994); *International Pen v Chad* (2000) AHRLR 66 (ACHPR 1994); *Organisation Mondiale Contre la Torture & Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996); *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998); *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

flagrant violations states have had to face head-on and in most cases are still grappling with.

The African Court's docket is still relatively small but; quite apart from its contribution to the development of human rights jurisprudence, its judgments will be indicators of its potential to offer greater human rights protection in the region. The Court's ability to live up to its mandate is closely linked to whether cases are forwarded to it. One thing that is clear is that for the Court to attain its goal and make its mark as a key player in the regional human rights system, it needs to receive applications.

At the moment, apart from the five countries that have complied with the declaration requirement allowing NGOs and individuals direct access to the African Court, the African Commission's role to supply it with cases is paramount. This may require internal changes, and the re-prioritisation of its activities and resources.