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I. AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS V GREAT SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, ORDER FOR PROVISIONAL MEASURES 25 MARCH 2011

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CURRENT DEVELOPMENTS

INTERNATIONAL COURTS AND TRIBUNALS

Edited by Craig Barker

I. AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, *AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS V GREAT SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, ORDER FOR PROVISIONAL MEASURES 25 MARCH 2011*

A. Introduction

Africa has been struggling for years to establish a mechanism of human rights protection comparable to other international and regional mechanisms. Illiteracy and the low standards of economic development and social welfare, especially in rural areas, as well as the absence of financial resources were certainly not the best grounds to build on. Moreover, as Nmehielle notes, the creation of a human rights mechanism in Africa was equally hinged on other questions, more controversial ones, such as the existence of the concept of 'law' and 'rights' in pre-colonial Africa.¹ In this respect, a Western-style mechanism of human rights protection would be naturally perceived with suspicion, as a form of foreign intervention.

However, several organizations and individuals, most notably, influential jurists such as Kéba M'Baye, supported the idea of a human rights court, firmly believing that Africa could, and should, benefit from a regional human rights protection mechanism. Hence, the objections of many States were overcome² and the Additional Protocol³ to the African Charter (known as the Banjul Charter)⁴ was finally signed. The African Court on Human and Peoples' Rights (hereinafter: the Court) was officially established in 1998, giving hope to many scholars and academics.⁵

Nevertheless, despite the evident progress over the years, the African system of protection is still considered to be one of the weakest regional mechanisms. Compared

¹ VO Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions* (Martinus Nijhoff, The Hague, 2001) 1–17.

² See analytically G Bekker, 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States' (2007) 51 *J AfrL* 1, 151–72.

³ Signed 9 June 1998 during the Assembly of Heads of States of the Organisation of African Unity (Summit of Ouagadougou) and entered into force upon signature by the required (art 30 of the Protocol) 15 Member States of the African Union, with the fifteenth being State of the Comoros 25 January 2004, see OAU Doc. (1998) OAU/LEG/EXP/AFCHPR/PROT (III).

⁴ Signed 27 June 1981, OAU doc (1982) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 and entered into force 21 October 1986.

⁵ A Stemmet, 'A Future African Court for Human and Peoples' Rights and Domestic Human Rights Norms' (1998) 23 *SAfrYIL* 233. K Magliveras and G Naldi, 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *NQHR* 4, 431–56. See also G Naldi and K Magliveras, 'The Proposed African Court on Human and Peoples' Rights: Evaluation and Comparison', (1995) 9 *AfrJIntl&CompL* 944.

to the much more consolidated European Court of Human Rights or the Inter-American Court, the success of the African Court has been limited up to now. The difficulty of providing justice in a continent that has witnessed many of the world's worst atrocities and crimes against humanity, as well as the numerous 'clawback' clauses of the Banjul Charter,⁶ are only some of the reasons that could explain the system's lack of authority. The latter is equally triggered by some functional problems, such as the slowness of procedures⁷ and the impossibility of individual petitions in most of the signatory States of the Protocol,⁸ as well as individuals' lack of awareness of the Court's existence in many cases. Furthermore, the African Union members have already signed the Protocol of Sharm El-Sheikh, which envisages the merging of this Court with the African Court of Justice, provided that the Protocol obtains the required 15 ratifications.⁹ This means that an already weak and rather slow mechanism of human rights protection is soon going to be replaced, resulting in additional instability.

For these reasons, it is only a positive surprise that on 25 March 2011 the Court issued its second decision, the *African Commission v Libyan Arab Jamahiriya*.¹⁰ It is a *prima facie* optimistic moment in the field of human rights protection: the decision was adopted by a Court in transition and at a time where the late General Muammar Gaddafi was issuing threats against all, warning that 'those leading the protesters will be hunted down door to door and executed'.¹¹

The present paper will analyse the order for provisional measures, highlighting its powerful aspects. Moreover, it will discuss the frivolous impact that such a judgment

⁶ See VO Orlu Nmehielle (n 1) 165ff; G Bekker, 'Recent Developments in the African Human Rights System 2008–09' (2009) 9 HRLRev 668.

⁷ See AP van der Mei, 'The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa?' (2005) 18 LJIL 113–29; also GM Wachira, *African Court on Human and Peoples' Rights: Ten years on and still no justice* (UNHCR, London, 2008) available on the website of the UN High Commissioner for Refugees <www.unhcr.org/refworld/pdfid/48e4763c2.pdf> accessed 5 October 2011.

⁸ See F Ouguerouz, *The African Charter of Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff, The Hague, 1993) 715ff. At present, unfortunately, only Mali, Burkina Faso, Malawi, Tanzania and Ghana allow petitions by individuals and NGOs before the Court under art 5(3) of the Protocol that provides that '[t]he Court may entitle relevant NGOs with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol' and this is one of the dark spots in the Court's functioning. Further, in the meeting of 18 April 2008, the Ministers of Justice of the States of the African Union clarified that individuals would be allowed to lodge applications before the Court only in the case that the State party had previously an explicit statement that it allows applications. Complaints about violations of applications in the rest of the States are thus transferred to the Court by the African Commission, whilst art 5(1) of the Protocol, which allows, nevertheless intergovernmental organizations to lodge applications, as well as Inter-State petitions, has until now, not been applied.

⁹ Protocol to the summit of representatives of the African Union, Sharm El-Sheikh, Egypt, 1 July 2008. For these new developments, see mainly the article of the Judge and former President of the Court G Niyungeko, 'La Cour africaine des droits de l'homme et des peuples: défis et perspectives', (2009) 79 Revue Trimestrielle des Droits de l'Homme 171 (in French).

¹⁰ *African Commission of Human and Peoples' Rights v Great Socialist Libyan Arab Jamahiriya*, Order for Provisional Measures, 25 March 2011, App no 004/2011, para 1.

¹¹ S Nakhoul, 'Analysis: Gaddafi collapse will embolden Arab rebels', *Reuters*, 22 August 2011 at <<http://www.reuters.com/article/2011/08/22/us-libya-gaddafi-arab-idUSTRE77LITX20110822>> accessed 25 September 2011.

could have on the international scene of human rights protection, *vis-à-vis* the tremendously volatile political context.

B. The Background

In its ninth extra-ordinary session, which took place on 24 February 2011 at its headquarters in Banjul, Gambia, the African Commission on Human and Peoples' Rights (hereinafter the 'Commission') received many complaints about the situation in Libya from dozens of local and international non-governmental organizations (NGOs). Three of them (Human Rights Watch, Interights and the Egyptian Initiative for Personal Rights) decided to submit a complaint to the Secretariat of the Commission on 28 February 2011, in order to convey their grievances to the African Court.¹²

The complaint was lodged by email and described the atrocities committed by Gaddafi's forces at the time: notably the infringement of Articles 1, 4, 9(2) and 10 of the African Charter (namely, the right to life, to safety, to freedom of expression and assembly). The applicants required immediately a 'thorough and impartial' investigation to be undertaken in Libya, in order to punish the perpetrators of the violations and to force both sides' forces to immediately refrain from human rights abuses. The report also stipulated the need to ensure that appropriate mechanisms were in place for the elimination of arbitrary or abusive use of force by Libyan police and that the latter would be punished as a criminal offence under Libyan law. Moreover, it suggested that the law should be amended in order to provide for a fair compensation for protesters who got injured or died during the demonstrations.¹³

On 3 March 2011, the Commission forwarded these complaints to the Court, requesting Libya's condemnation of serious and massive human rights violations under the Banjul Charter.¹⁴ The Commission's report to the Court stated that special forces of the Libyan government had used deadly violence while suppressing the peaceful demonstrations taking place in various cities, especially during those that occurred on 20 February 2011 in the city of Benghazi (the second largest city of Libya and the centre of the revolution), where many people were found to have been shot in the head and the chest.¹⁵ The complaint also noted that the Libyan forces made excessive use of heavy weapons against the population, including aerial bombardments. According to the Commission, these facts involved grave and massive violations of human rights.¹⁶

¹² The complaint was based on arts 55 and 56 of the African Charter and art 102 of the Code of Justice. The full version is available at <<http://www.interights.org/news/4/index.html>> accessed 25 September 2011. In the same session, which took place in Banjul, Gambia, on the 1 March 2011, the Commission condemned among others 'the divisionist speeches of the Head of State, Mouammar El Gaddafi, and the bloody reprisal by the Government ... against its own population' and called upon the African Union and the international community to assume its responsibility. See ACHPR/RES.181(EXT.OS/IX)2011: Resolution on the human rights situation in The Great Socialist Peoples' Libyan Arab Jamahiriya, CADHP/RES.181(EXT.OS/IX)2011, available at <<http://www.achpr.org/sessions/9th-ecj/resolutions/181/>> accessed 25 September 2011.

¹³ *ibid* 7–8.

¹⁴ *African Commission v Libya, Provisional Measures*, para 1.

¹⁵ Demonstrations took place also in other cities of Libya: Al-Baida, Ajdabiya, Zayiwa and Derna in the eastern part of Libya.

¹⁶ *ibid* para 3.

The Court's decision on provisional measures was taken unanimously on the 25 March 2011 by the 11 judges of the Court, chaired by Mr Gérard Niyungeko.¹⁷ In many respects the decision reiterates in substance the report of the Commission,¹⁸ stating in conclusion that a violation of Articles 1, 2, 4, 5, 9, 11, 12, 13 and 23 of the African Charter had occurred.¹⁹ The reasoning of the Court was relatively short. Having said that it notified the application to the respondent State (since the latter is a member of the African Union and has signed the Banjul charter),²⁰ the Court placed great emphasis on the fact that, given the gravity of the situation and according to Article 27(2) of the African Charter and Article 51 of the Rules of the Court itself, it was self-authorized (*proprio motu*) to order interim measures without the Commission's request²¹ and further, to do this without delay (this is to say, without a hearing).²² The decision also stated that there was no need to ascertain at this stage whether the Court had jurisdiction or not to discuss the merits of the case. It merely accepted a *prima facie* (formal) authority, since Libya had signed the Protocol to the African Charter and since human rights issues were at stake.²³

As to the merits, the Court contented itself with recognizing the urgency of the case.²⁴ It relied on three documents in this regard: first, the 23 February 2011 Resolution of the Peace and Security Council of the African Union,²⁵ second, the 21 February 2011 call of the Secretary General of the Arab League to end the violence,²⁶ and third, the UN Security Council Resolution 1973 that had ordered that the case be referred to the International Criminal Court (ICC), imposing an arms embargo and an assets freezing order on the Libyan leaders.²⁷

The Court decided unanimously, first, that Libya '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 the Charter or of other International human rights to which it is a party'²⁸ and secondly, that Libya should report to the Court within 15 days of the day of receipt, on the measures taken to implement the Court's order.²⁹ As to formalities, it ordered the Libyan authorities to indicate the names of its representatives to the Court within 30 days and to respond to the application in writing within 60 days.

¹⁷ The judges sitting at the Court at that time were: Dr. Gérard Niyungeko (Burundi, President of the Court), Sophia AB Akuffo (Vice President, Ghana), Jean Mutsinzi (Rwanda), Bernard Makgabo Ngoepe (South Africa), Modibo Tounty Guindo (Mali), Fatsah Ouguerouz (Algeria), Joseph Mulenga, Augustino Ramadhani (Tanzania), Duncan Tambala (Malawi), Elsie Thompson (Nigeria) and Sylvain Oré (Ivory Coast).

¹⁸ *African Commission v Libya, Provisional Measures* para 2.

¹⁹ *ibid* para 3; see also n 13.

²⁰ *ibid* paras 4–7.

²¹ *ibid* paras 8–12. Art 27(2) 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.'

²² *ibid* para 13.

²³ *ibid* paras 15–19.

²⁴ *ibid* paras 20, 22.

²⁵ *ibid* para 21. See the press release of February 23, available in English and French on the African Union website at <<http://www.au.int/fr/content/communiqu%C3%A9-du-cps-sur-la-situation-en-libye>> accessed 25 September 2011.

²⁶ *ibid*. 'La Ligue arabe appelle l'ONU à autoriser une zone d'exclusion aérienne en Libye', *Le Monde*, 12 March 2011 <http://www.lemonde.fr/proche-orient/article/2011/03/12/libye-le-regime-maintient-la-pression-la-ligue-arabe-reunie-au-caire_1492097_3218.html> accessed 5 October 2011. It should be also noted that Libya is a member of both the Arab League and the Organization of the Islamic Cooperation.

²⁷ *ibid*. UN SC Res 1973 (26 February 2011).

²⁸ *ibid*.

²⁹ *ibid* para 25.

C. *The Positive Aspects of the Decision*

The decision is noteworthy for many reasons. One of the most important features of the decision concerned the involvement of local and international NGOs, something that reveals the increasingly active involvement of civil society in the protection of human rights in Africa.³⁰ This observation is not without legal significance. The involvement of the latter is legally entrenched, not only in regional instruments which provide for specific roles for NGOs,³¹ but also in international declarations: for instance, at a meeting in Paris in 1992, the ‘principle of interaction’ of all national, regional and international bodies and the pluralist representation of social forces was proclaimed, including NGOs, trade unions, institutes, universities and individuals had been formulated by the former Commission on human rights.³²

Furthermore, one should not overlook that NGOs have had a pre-eminent role to play in the formation of the mechanism of human rights protection in Africa and particularly in the genesis of the Banjul Charter,³³ while some of them have also had specific experience in the prosecution of African Heads of States such as the prosecution of the former dictator of Chad, Hissène Habré, whose government had committed most atrocious crimes against humanity.³⁴

Today, in the absence of individual petition before the African Court, it is the NGOs, along with regional HR Committees who essentially bring individual human rights violations to light.³⁵ Furthermore, NGOs have a pre-eminent role as intermediaries and purveyors of information on human rights issues.³⁶ Bearing in mind that the latter are the initiators of many procedures for the new merged Pan-African Court,³⁷ one would

³⁰ This case had enormous participation of NGOs and the mechanism of protection of rights was initiated in large part thanks to them via lobbying strategies and the order against the Libyan Jamahiriya was understandably seen by NGOs as great success. For example, Clive Baldwin, counsel of the organization Human Rights Watch said this was a ‘key decision’ for the protection of Human Rights; Rebecca Wright, from the Egyptian Association for the Protection of Human Rights stressed that this was an extremely important development for the African system of the protection of rights, while Joanne Sawyer from Interights, also described the decision as a ‘very positive step’. See the website of the NGO Interights: <<http://www.interights.org/news/4/index.html>> accessed 25 September 2011.

³¹ See art 5(3) of the Banjul charter (n 8); art 6(1) of the Nouakchott draft protocol which states that the Court may entitle NGOs with an Observer Status before the African Commission. See also F Ouguergouz, (n 8) 513–14 for the number of NGOs who are granted observer status (the author submits that in May 2001, this number was as high as 258) and the subsequent problems, *idem*, 514 note 1775.

³² Paris Principles of 1992, Resolution 1992/54 of the Commission on Human Rights and Resolution A/RES/48/134 of 20 December 1993 UN General Assembly. See also recent academic initiatives to highlight the role of organizations in human rights protection, for instance the Colloquium *Actors, Collective Strategies and the European Field of Human Rights* (Council of Europe, Strasbourg, 21–22 June 2010).

³³ See F Ouguergouz, (n 8) 20–5.

³⁴ Habré was qualified as the ‘Pinochet africain’ and the only hope to give justice to his victims today remains with the NGOs who advocate his extradition to Belgium; see <<http://www.rmw.nl/international-justice/article/african-union-press-senegal-extradite-habr%C3%A9>> accessed 5 October 2011. See T Ondo, ‘*Réflexions sur la responsabilité pénale internationale du Chef d’Etat africain*’ (2007) 1 *Revue Trimestrielle des droits de l’Homme*, 153–209 and (n 43).

³⁵ As it has been the case in the past with many trials, detentions, tortures etc. In the field of freedom of expression for instance, see *International Pen and Others v Nigeria*, African Commission on Human and Peoples’ Rights, Comm nos 137/94, 139/94, 154/96 and 161/97 (1998).

³⁶ See F Ouguergouz, (n 8) 513ff.

³⁷ *ie*, the ‘Coalition for an Effective African Court’ network.

hope that the active civil society involvement will also have an impact on the inclusion of an individual petition before it and the jurisdiction *ratione personae*.

Another feature of the decision concerns the speed and dynamism with which the Court acted. The disputed facts in relation to which the Commission's intervention was requested took place from mid-February to early March 2011. The first NGO's complaint to the African Commission was submitted on 29 February and the request was tabled by the Commission in Court as early as 3 March. It arrived at the Court Registry on 16 March and the Court called for Libya's response within 60 days.³⁸ Nevertheless, given the urgency of the situation, the Court adopted an enforceable decision requiring the taking of provisional measures on 25 March, a mere ten days after receipt of the complaint.³⁹

The Court appeared in this case particularly dynamic, accepting *prima facie* (and *proprio motu*) jurisdiction to hear the case. This dynamism is by no means self-evident. The Court certainly has jurisdiction to deal with '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'.⁴⁰ However, since its establishment, its activities on the international scale have been of rather minor importance and the procedures before it have usually been thwarted by considerable bureaucratic obstacles.⁴¹ Only in 2006 were the first 11 judges elected in accordance with Article 11 of Protocol (of which four were replaced in July 2009);⁴² only in June 2006 were the internal rules of procedure adopted and it was not until 2008 that the Court finally opened its doors. Since then the Court had issued only one judgment, the notorious *Michelot Yogogombaye v the Republic of Senegal* decision delivered in December 2009.⁴³ In contrast to this earlier conservative stance, the Court's reaction to the referral of the situation to the Court is significant and praiseworthy.

It should equally be noted that the dynamism of the Court reflects a more generalized attitude towards a more effective implementation of human rights in Africa, both from an institutional and a judicial point of view. On the one hand, there have been several voluntary governance and self-monitoring systems promoting human rights recently, such as the NEPAD Framework Document (2005) or the African Peer Review Mechanism (which was set up under the AU but operates as part of the

³⁸ *African Commission v Libya, provisional measures*, para 2. Article 37 of the Interim Rules of the Court provides that '[t]he State Party against which an application has been filed shall respond thereto within sixty (60) days provided that the Court may, if the need arises, grant an extension of time.'

³⁹ *ibid* para 2: 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons'.

⁴⁰ Protocol of the Banjul Charter, art 3.

⁴¹ A good illustration of these obstacles is the procedure of the establishment of the Court itself. Indeed, the idea of establishing the Court goes back to 1961: promoted initially with enthusiasm by the Geneva-based International Jurists Commission during an international meeting (held in Lagos, Nigeria), no further actions were undertaken. See International Jurists Commission, 'African Conference on the Rule of Law', Lagos, 3–7 January 1961, *Proceedings of the Meeting* (1961). See also generally Kéba M'Baye, *Droits de l'Homme et des peuples en Afrique et la Charte africaine*, (Éditions de la Commission Internationale des Juristes, Geneva, 1986); F Ouguergouz (n 8) 19–48.

⁴² From the Assembly of the African Union held in Khartoum in January 2006.

⁴³ *Yogogombaye c. République du Sénégal*, n°001/2008, 15 December 2009 and (n 34).

NEPAD), which focus on democracy, good governance and human rights, but also development.⁴⁴ On the other hand, there is an obvious amelioration in the procedures under the auspices of the African Commission, especially in the examination of State reports.⁴⁵

Thus, it seems that even at its last moments, *vis-à-vis* its impending merging, the Court is trying in some way to redeem itself for its previous inaction and be seen as a dynamic institution, in a case which apparently involved issues far beyond legal requirements. This observation is also consistent with the significant increase of activities over the last two years of the Court aiming at raising awareness for the protection of human rights, particularly under the auspices of the present Vice-President Sophia Akuffo⁴⁶ and mainly in southern and south-west Africa.⁴⁷ It is subsequently essential therein to stress that the Court, even provisionally, accepted its authority to order provisional measures.

D. The Turbulent Political Context and Difficult Areas of Decision

The limited role of the Court *in casu* is due not only to the turbulent political context but also to the international aspects of the case, lying far beyond the Court's role as the guarantor of human rights. Accordingly, in assessing the overall value of this decision we should equally bear in mind the corresponding movements in the international arena for the 'smoothing' of the situation in Libya.

First, it should be taken into account that many international institutions—each for its own reasons—had already begun to openly condemn Libya. These forums comprise not only the UN General Assembly and Security Council,⁴⁸ but also the African Union⁴⁹ (although it had kept a rather neutral position, given that Libya is a member and Gaddafi in person was its President in 2009), and the League of Arab States.⁵⁰ Two days before the aforementioned decision, even the Organization of Islamic Cooperation (of which Libya is also a member) invited through its Secretary General 'all parties to exercise great restraint', stressing, however, 'the need for taking precautions for the "acquisitions" of the Libyan people'.⁵¹ It is equally interesting

⁴⁴ See for instance S McInerney-Lankford, 'Human Rights and Development: a Comment on Challenges and Opportunities from a Legal Perspective' (2009) 1 *Journal of Human Rights Practice* 1, 51–82.

⁴⁵ See the status on submission of State initial/periodic reports to the African Commission in May 2010, available at <<http://www.achpr.org/states/reports-and-concluding-observations/>> accessed 10 October 2011.

⁴⁶ See the final statement of the 49th cycle of meetings of the Commission in Banjul 28 April–12 May 2011.

⁴⁷ See ie the events organized in the Republic of Mozambique in August 2011; the lectures in Kampala, Uganda, in July 2011; the lecture of the Court's President Mr. Niyungeko in Pretoria in July 2011; the Conference on promotion of the Court in collaboration with the Government of the Republic of Malawi in March 2011, etc. See for additional information and details on the Commission's website <http://www.nanhri.org/index.php?option=com_content&task=view&id=7&Itemid=2> accessed 5 October 2011.

⁴⁸ UN Doc A/RES/65/265 (3 March 2011) (n 27).

⁴⁹ See n 25.

⁵⁰ See n 26.

⁵¹ See also the Press Release of the Organisation of Islamic States available on <http://www.oic-oci.org/topic_detail.asp?t_id=5090&x_key=> accessed 5 October 2011: ... «*tout en préservant les potentialités et les acquis du peuple libyen*» (in French).

that the case had given rise to the international prosecution brought by the Prosecutor of the ICC on 15 February 2011 against the late Muammar Gaddafi, personally, his son Saif Al-Islam Gaddafi and the Libyan spy Abdullal al-Senousi, especially since the African Union has repeatedly criticized the ICC as an institution that serves Western interests.⁵²

Moreover, it is important to question whether the decision had or had not a real prospect of enforcement. A close scrutiny reveals that there was no such prospect. First, the Court did not require direct action from the respondent State, even though it ordered provisional measures. More precisely, the latter set a delay of 60 days to receive an answer from the former Libyan Jamahiriya, while it was evident that the process would suffer delays thereafter.⁵³ This was also evident in the subsequent decision, taken at the next regular meeting of the Court on 16 June 2011, which merely prolonged the period allowed to Libya to list the names and addresses of its representatives and does not mention the cessation of violence.⁵⁴ Secondly, the Court remains an organ of the African Union: it receives funding from it and is in many regards liable to it.⁵⁵ Of particular relevance to this case is the fact that the implementation of an order against an African Union member is improbable if it is not endorsed by other organs of the African Union. The Court, therefore, had every reason to make an interim decision criticizing the Libyan Jamahiriya, in order to gain independence and distinguish itself from the highly politicized organs of the African Union.

E. Conclusions

This decision is not without merit. Perhaps due to the 'heavy' political climate, the African Court demonstrated rapidity and dynamism, in contrast to its usual slow-moving attitude, given the numerous obstacles of the human rights protection mechanism in the African continent. The decision was important because it was a unique opportunity for demonstrating—at least at a theoretical level—the universality of human rights, especially the enshrinement of the absolute right to life during international and civil conflicts. Moreover, the decision was also an attempt by the Court to distinguish its role from the much more politicized role of the African Union, which oscillates depending on the interests at stake. However, in the view of the author, it was taken from a 'safe' standpoint; it costs nothing to issue a decision that has no real effect or prospect of being implemented.

⁵² See on the case and three warrants of 27 June 2011, the ICC's internet site <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>> (accessed 5 October 2011).

⁵³ See R Murray, 'The African Court on Human and Peoples' Rights' Order for Provisional Measures against Libya: Greater Promise for Implementation of Human Rights in Africa?' (2011) 4 EHRLR 464.

⁵⁴ *African Commission of Human and Peoples' Rights v Great Socialist Libyan Arab Jamahiriya*, order, App No 004/2011, judgment 16 June 2011, 4, para 10.

⁵⁵ It is required under art 32 of the Protocol that 'expenses of the Court, emoluments and allowances for judges and the budget of its registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the Court'. Equally, art 33 of the Banjul Charter establishes that the Commissioners 'are elected by the Assembly of Heads of State and Government of the Organisation of African Unity'.

The hope is that the future merged African Court will continue to envisage an even more dynamic role for itself including in relation to the acceptance of its competence to judge. The recurrence of the positive steps taken *in casu* which this paper has highlighted (ie dynamism, autonomy, rapidity, acceptance of the universality of human rights and NGOs involvement) is crucial to the improvement of human rights standards in Africa.

ELENI POLYMEÑOPOULOU*

II. INTERNATIONAL COURT OF JUSTICE, *APPLICATION OF THE INTERIM ACCORD OF 13 SEPTEMBER 1995 (THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA V GREECE)*
JUDGMENT OF 5 DECEMBER 2011¹

A. Introduction

The former Yugoslav Republic of Macedonia (FYROM) on 17 November 2008 filed in the Registry of the International Court of Justice an application instituting proceedings against Greece in respect of a dispute concerning the interpretation and implementation of the so-called Interim Accord of 13 September 1995 (IA). FYROM's NATO candidacy had been considered at the Bucharest Summit on 2–3 April 2008. FYROM was, however, not invited to begin talks on accession to the organization. It sought, in particular, to establish that Greece had objected to its admission to NATO (ultimately preventing the formation of the necessary consensus for the invitation to be extended) and therefore violated Article 11(1) IA.

Under the first clause of that provision, Greece agreed 'not to object' to FYROM's admission to international or regional organizations of which Greece is a member. In the second clause, however, Greece reserved the right to object to such admission if and to the extent that FYROM was to be referred to in those organizations differently than in Paragraph 2 of United Nations Security Council Resolution 817 (1993). This resolution recommends that FYROM be admitted to membership in the United Nations, being 'provisionally referred to for all purposes within the United Nations as "the former Yugoslav Republic of Macedonia" pending settlement of the difference that has arisen over the name of the State'.

The IA, a *modus vivendi*,² aimed precisely at keeping the discontent relating to the name dispute from tainting the international relations between the signatories, setting a comprehensive set of mutual commitments, collateral to their pledge 'to continue negotiations under the auspices of the Secretary-General of the United Nations . . . with a view to reaching agreement on the difference [about the name]' (Article 5(1) IA).

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¹ ICJ General List No 142.

² This source is a temporary arrangement in force pending the solution of a dispute, intended to be replaced subsequently. As far as other matters than the dispute at issue are concerned, it is tantamount to a treaty. See for a discussion WM Reisman, 'Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions' (2002) 3 VandJTransnatL 738ff.