

Case Summary

By Barrie Sander, 4 January 2012

Application 004/2011 African Commission on Human and Peoples' Rights v. The Great Socialist People's Libyan Arab Jamahiriya

In an unprecedented move, on 25 March 2011 the African Court on Human and Peoples' Rights (the "AfCHPR") ordered provisional measures against Libya in the case of the *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*. In light of subsequent developments in Libya - in particular the overthrow of the regime of Muammar al-Qaddafi in August 2011, against whom the provisional measures were directed - the practical relevance of these measures is now of minimal practical relevance. However, the symbolic impact of the AfCHPR's order cannot be overstated, and provides a useful insight into the AfCHPR's approach to ordering provisional measures and an important indication that the AfCHPR is willing to flex its muscles when it matters.

The Application

On 24 February 2011, against a background of allegations of increasingly serious human rights violations taking place in Libya, in particular the violent repression of ongoing protests that started in Benghazi on 16 February 2011 and which had spread to other major cities and towns including the capital Tripoli, three non-governmental organisations ("NGOs") (the Egyptian Initiative for Personal Rights, Human Rights Watch, and INTERIGHTS) submitted a joint-application to the African Commission on Human and Peoples' Rights (the "African Commission") requesting provisional measures to:

- (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 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.

On 28 February 2011, the same three NGOs submitted a joint complaint against Libya to the African Commission urging it to "*do all in its power to ensure that the Libyan authorities cease the violations including the use of legal force against protesters and infringements of their rights to freedoms of expression and assembly, and take immediate measures to safeguard the protesters' rights as protected under the African Charter*".

After condemning the Libyan government's "*violence and use of force against civilians and suppression of peaceful demonstrators*" on 25 February 2011 and further condemning "*the bloody*

reprisal by the Government of the Great Socialist Peoples' Libyan Arab Jamahiriya against its own population" on 1 March 2011, the African Commission finally instituted proceedings against Libya before the AfCHPR on 3 March 2011 *"for serious and massive violations of human rights guaranteed under the African Charter on Human and Peoples' Rights"*. The application referred to the successive complaints against Libya that had been received by the African Commission, in particular that:

"peaceful demonstrations [...] were violently suppressed by security forces who opened fire at random on demonstrators killing and injuring many people, that [...] security forces engaged in excessive use of heavy weapons and machine guns against the population, including targeted aerial bombardment and all types of attacks, and that these actions amount to serious violations of the right to life and to the integrity of persons, freedom of expression, demonstration and assembly."

The Order

The African Commission's application did not request the AfCHPR to order provisional measures. However, under Article 27(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the "**Protocol**") and Rule 51(1) of the AfCHPR's Rules of Procedure, the AfCHPR is empowered to order provisional measures *proprio motu* *"in cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons"* and *"which it deems necessary to adopt in the interest of the parties or of justice"*.

In considering whether to order provisional measures, the AfCHPR divided its analysis into two parts.

First, the AfCHPR considered whether it had jurisdiction under Articles 3 and 5 of the Protocol. In this regard, the AfCHPR noted that, in the context of an order for provisional measures, it need not finally satisfy itself that it has jurisdiction on the merits of the case, but simply that it has jurisdiction to hear the case. With this in mind, the AfCHPR confirmed that:

- (i) Libya had ratified both the African Charter (on 19 July 1986) and the Protocol (on 19 November 2003), both of which had since entered into force; in this way, Article 3(1) of the Protocol, which extends the jurisdiction of the Court to all cases and disputes submitted concerning the interpretation of the African Charter, the Protocol and any other relevant human rights instrument ratified by the State concerned, was satisfied; and
- (ii) The African Commission, as one of the entities listed in Article 5(1)(a) of the Protocol, was entitled to submit the present case to the AfCHPR.

The AfCHPR then turned to consider whether the circumstances of the case warranted an order of provisional measures. For this purpose, the AfCHPR relied heavily on resolutions and expression of concern in respect of the situation in Libya which had been issued by several international organisations, including the Peace and Security Council of the African Union, the Secretary-General of the Arab League, and the United Nations Security Council, to conclude that the *"there is therefore 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"*.

In this light, the AfCHPR unanimously ordered the following provisional measures:

- (i) 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 of the African Charter or of other international human rights instruments to which it is a party; and
- (ii) That Libya must report to the AfCHPR within a period of 15 days from the date of receipt of the Order, on the measures taken to implement it.

Comment

There are many lessons to take away from the AfCHPR's order for provisional measures.

First, the case demonstrates one of the potential routes by which NGOs and individuals can bring actions before the AfCHPR. Since Libya had not made a declaration under Article 34(6) of the Protocol, NGOs and individuals could not bring direct petitions against Libya. However, as this case illustrates, NGOs and individuals remained free to submit complaints to the African Commission, which could bring an action pursuant to Article 5(1)(a) of the Protocol. Given how few States have made declarations under Article 34(6) of the Protocol, the willingness of the African Commission to act on behalf of NGOs and individuals could prove increasingly important to the future of the AfCHPR's jurisprudence.

Second, the case illustrates that the AfCHPR is willing to flex its muscles when it needs to. In particular, it should be remembered that the African Commission did not request provisional measures; the AfCHPR ordered them of its own accord. This is a positive sign for the legitimacy of the AfCHPR going forward.

Third, the case demonstrates the importance of resolutions and acts of international organisations and evidence collected by NGOs in persuading the AfCHPR to order provisional measures.

Despite all these positives, it should also be remembered that the efficacy of any order of the AfCHPR is ultimately dependent on the political will of the African Union. The AfCHPR lacks an independent enforcement power over its own orders or judgments. Instead, pursuant to Article 31 of the Protocol, the AfCHPR reports annually to the African Union's Assembly of Heads of State and Government (the "Assembly"), specifying which States have failed to comply with its orders or judgments. Pursuant to Article 29 of the Protocol, it is the Council of Ministers of the African Union which is ultimately responsible for monitoring the enforcement of these orders or judgments on behalf of the Assembly.

Given the widely reported divisions within the African Union in respect of its response to the actions of Muammar al-Qaddafi's regime in Libya, perhaps the most concerning lesson to take away from the AfCHPR's first order for provisional measures is that the AfCHPR's ability to make an impact on the ground in cases of urgency could be stifled by political divisions within the African Union, the body ultimately responsible for enforcing the AfCHPR's orders and judgments.