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would be the correct one. Otherwise, the interpretation of the reservation would depend on the construction of external provisions and not its carefully drafted text according to which the Court lacks jurisdiction only when the alternative settlement procedure is exclusive.

The same issue would arise if the judgment were given a broader implication. The Court's reasoning with respect to Part XV of UNCLOS might be applied broadly to other non-exclusive dispute settlement procedures. Thus, the judgment might be used to find that such procedures should be excluded from the scope of application of reservations relating to "other" dispute settlement procedures, especially when they offer no certainty that the dispute be settled. Such non-exclusive dispute settlement procedures may be found in a large number of international treaties, such as human rights conventions, environmental agreements, conventions against terrorism, space law treaties, as well as regional or bilateral treaties. Again, the Court should not lose sight of the need to consider the language of the reservation as reflecting the intent of the depositing party.

Therefore, it is suggested that the new approach of the Court be reconciled with the traditional approach at least when the former does not allow to take duly into account the intent of the depositing party. The ultimate effect of the Court's judgment is to expand its jurisdiction. It would be paradoxical that the decision would in the end prompt states to add further reservations, as recently happened,[14] or even worse to withdraw existing declarations. The interpretation of reservations to optional clause declarations is a particularly delicate issue where the individual interests of the parties are to be balanced with the general interest in the sound administration of justice: if the Court could ensure stability in the interpretation of fundamental aspects, such as the conditions on which rests its jurisdiction, access to the Court would become much more predictable.

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*European Court of Justice—treaty interpretation—territorial scope of treaties—*pacta tertiis *principle—subsequent practice of parties—principle of self-determination—application of agreement between the European Union and the Kingdom of Morocco to Western Sahara*

Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario). Case C-104/16 P. *At* http://curia.europa.eu. European Court of Justice, December 21, 2016

On December 21, 2016, the Grand Chamber of the Court of Justice of the European Union (CJEU) dismissed an action brought by the Front Polisario challenging a decision

[14] See the new declaration deposited by the United Kingdom on February 22, 2017, including a new reservation that further limits the jurisdiction of the Court by requiring the applicant to notify the future respondent of the existence of a dispute between the parties. The new declaration appears to be a response to the Court's requirement that the parties be aware of a dispute in order for the Court to have jurisdiction. *See* Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Preliminary Objections, paras. 46–57 (Int'l Ct. Just. Oct. 5, 2016).

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of the Council of the European Union (EU) approving the conclusion of an agreement between the European Union and the Kingdom Morocco on the reciprocal liberalization of certain agricultural products.[1] The CJEU held, based on the relevant rules of international law applicable between the EU and Morocco, that the agreement did not apply to the territory of Western Sahara. Apart from its obvious political overtones, the judgment is significant in further developing the CJEU's approach to the law of treaties and the principle of self-determination in international law.

Western Sahara is a non-self-governing territory that has been under Moroccan occupation since 1975. Since 1963, it has been on the United Nations' list of "non-self-governing territories" pursuant to Article 73(e) of the UN Charter. The UN General Assembly (UNGA) has affirmed the right of the people of Western Sahara to self-determination on numerous occasions since 1965.[2] However, the area remains in conflict. Morocco claims sovereignty over Western Sahara and occupies most of its territory. The National Liberation Movement for Western Sahara, Front Polisario, formally proclaimed independence as the government-in-exile of the Sahrawi Arab Democratic Republic in 1976. Following a ceasefire in 1991, a UN peacekeeping operation (the United Nations Mission for the Referendum in Western Sahara or MINURSO) was established to promote a peaceful settlement; its mandate was most recently renewed in April 2017.[3]

Western Sahara has also been the subject of an Advisory Opinion of the International Court of Justice (ICJ), in which the ICJ found the ties between Morocco and Western Sahara insufficient to establish the former's territorial sovereignty over the latter, and that the people of Western Sahara had the right to self-determination in relation to the territory.[4]

Neither the EU nor any of its member states officially recognize Morocco's claims to the territory, nor do they recognize the Sahrawi Arab Democratic Republic. At the same time, the EU has entered into several agreements with the Kingdom of Morocco, including the 1996 Euro-Mediterranean Association Agreement (Association Agreement),[5] providing for the liberalization of trade in agricultural and fisheries products, and a 2010 Liberalisation Agreement,[6] which built upon and modified the Association Agreement. These agreements do not specify whether they apply to the territory of Western Sahara, but they have been applied de facto to products originating from the territory in some cases.

[1] Case C-104/16 P, Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario) (Eur. Ct. Justice Dec. 21, 2016) [hereinafter Judgment]. The subject of the challenge was the EU Council's Decision 2012/497/EU of March 8, 2012. Decisions and documents of the Court cited herein are available online at its website, http://eur-lex.europa.eu.

[2] *See, e.g.*, GA Res. 2072 (XX) (Dec. 16, 1965); GA Res. 34/37 (Nov. 21, 1979); GA Res. 35/19 (Nov. 11, 1980).

[3] SC Res. 2351(April 28, 2017).

[4] Western Sahara, Advisory Opinion, 1975 ICJ Rep. 12, paras. 70, 162 (Oct. 16).

[5] Euro-Mediterranean Agreement Establishing an Association Between the European Communities and Their Member States, of the One Part, and the Kingdom of Morocco, of the Other Part, *entered into force* March 1, 2000, 2000 O.J. (L70/2).

[6] Agreement in the Form of an Exchange of Letters Between the European Community and the Kingdom of Morocco Concerning Reciprocal Liberalisation Measures on Agricultural and Products, Processes Agricultural Products, Fish and Fishery Products, the Replacement of Protocols 1, 2, and 3 of their Annexes and Amendments to the Euro-Mediterranean Agreement Establishing an Association Between the European Communities and Their Member States of the One Part, and the Kingdom of Morocco, of the Other Part, *entered into force* October 1, 2012, 2012 O.J. (L241/4) [hereinafter Liberalisation Agreement].

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In November 2012, Front Polisario filed an action to annul the Council Decision on the conclusion of the Liberalisation Agreement, alleging violations of EU law and international law. The case first came before the General Court,[7] which faced two main questions: whether Front Polisario had standing under EU law to challenge the contested decision (admissibility issue); and whether the agreement should be annulled (substantive issues). The substantive issues included alleged violations of both international law (inter alia, the principle of self-determination, international humanitarian law) and EU law (e.g., the failure to state adequate reasons).

Regarding admissibility, the General Court found that the contested decision was of "direct and individual concern" to Front Polisario and thus fulfilled the criteria for instituting proceedings to challenge an act under EU law.[8] This finding turned on the General Court's interpretation of the territorial scope of the Liberalisation Agreement. It found that since the Liberalisation Agreement applied to the territory of Western Sahara, the Agreement produced legal effects, not only for Morocco, but also for Front Polisario.

On the substantive issues, the General Court characterized Front Polisario's application as essentially concerning the argument that the EU was absolutely prohibited from concluding with a third state an agreement which applies to a "disputed territory" (para. 117, General Court Judgment). That prohibition arguably stemmed from customary international law binding upon the EU and its member states (para. 140, General Court Judgment). The General Court reviewed the various grounds upon which the applicant alleged the incompatibility of the decision with "general international law"—arguments based on the right to self-determination, the relative effect of treaties, and the infringement of humanitarian law—and found no prohibition against concluding an agreement that applied to a "disputed territory" (para. 205, General Court Judgment). The General Court did, however, find a violation of EU procedural law: the EU institutions had failed to ensure that the conclusion of an agreement in these circumstances would not infringe the fundamental rights of the persons concerned (para. 228, General Court Judgment). The General Court thus annulled the contested decision insofar as it approved the application of the Liberalisation Agreement to Western Sahara (para. 247, General Court Judgment).

The Council appealed the judgment. On September 13, 2016, Advocate General (AG) Wathelet delivered his Opinion, arguing that the Council Decision should not be annulled.[9] The AG's Opinion turned on a different assessment of the "territorial scope" of the agreement, which was "of paramount importance . . . because it permeates the entire action for annulment" (para. 54, AG Opinion). The AG argued that Front Polisario lacked standing to challenge the decision because the agreement in question did not apply to the territory of Western Sahara. The first reason was based on Western Sahara's status as a non-self-governing territory, as determined by Article 73 of the United Nations Charter. The AG

[7] Case T-512/12, Front Populaire pour la Libération de la Saguia-El-Hamra et du Rio de Oro (Front Polisario) v. Council of the European Union, Judgment (General Court Dec. 10, 2015) [hereinafter General Court Judgment].

[8] Consolidated Version of the Treaty on the Functioning of the European Union, Art. 263, para. 4, Dec. 13, 2007, 2012 O.J. (C 326) [hereinafter TFEU].

[9] Case C-104/16 P, Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et du Rio de Oro (Front Polisario), Opinion of Advocate General Wathelet Delivered on 13 September 2016, Doc. No. 62016CC0104 [hereinafter AG Opinion].

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disagreed with the General Court's description of Western Sahara as a "disputed territory"; rather, he contended, it had a separate and distinct status from the administering state under international law (para. 75, AG Opinion). Accordingly, the Liberalisation Agreement did not apply to Western Sahara without the express extension to that territory at the time of ratification (paras. 75–82, AG Opinion). The AG further relied on arguments based on the relative effect of treaties (para. 109, AG Opinion) and subsequent practice (para. 87, AG Opinion). Thus, while the General Court dismissed arguments based on international law, the AG based his conclusions on the application of international law principles.

On December 21, 2016, the CJEU set aside the judgment of the General Court and dismissed Front Polisario's action as inadmissible. Following the AG's Opinion, it concluded that the Liberalisation Agreement did not apply to the territory of Western Sahara and, since Front Polisario could not therefore be considered a party "affected" by the agreement, it lacked standing to challenge the contested decision.

In order to determine the territorial application of the Liberalisation Agreement, the CJEU employed methods of treaty interpretation set out in the 1969 Vienna Convention on the Law of Treaties (VCLT),[10] which represent customary international law principles binding upon the EU.[11] In particular, it considered Article 31(3)(c), according to which a treaty is to be interpreted taking into account relevant rules of international law applicable between the parties (para. 86). In this regard, the CJEU referred specifically to: (1) the principle of self-determination; (2) the territorial scope of treaties; and (3) the *pact tertiis* principle of the relative effect of treaties.

The CJEU found that self-determination is not only a principle of customary international law but also "a legally enforceable right *erga omnes* and one of the essential principles of international law" (para. 88), which applies in the relations between the EU and Morocco. Referring to numerous international instruments and case law, the CJEU found that the territory of Western Sahara has a "separate and distinct status" (para. 92). Accordingly, the CJEU rejected the Commission's argument that the term "territory of the Kingdom of Morocco" in Article 94 of the Association Agreement should be interpreted to include the territory of Western Sahara (*id.*).

The CJEU also took into account the principle enshrined in VCLT Article 29, which states that "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." The term "territory" in its ordinary meaning applies to geographical space in which a state exercises sovereign powers under international law (para. 95). If a treaty is to be applied beyond the territory of the state party, the CJEU held, that must be expressly provided for in the treaty, or otherwise established (paras. 96–98). Since the Association Agreement did not expressly state that it applied to Western Sahara, the CJEU concluded, it could not be interpreted as applying to a non-self-governing territory.

The CJEU took into account the rule on the relative effect of treaties, expressed in VCLT Article 34, according to which a treaty does not create rights and obligations for a

[10] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331 [hereinafter VCLT]. Morocco has been a party since 1972, but the European Union is not.

[11] *See* Case C-386/08, Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen, Grand Chamber Judgment, para. 42 (Eur. Ct. Justice Feb. 25, 2010) [hereinafter Brita].

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third state without its consent (*pacta tertiis nec nocent nec prosunt*). Because Western Sahara is a non-self-governing territory, the CJEU considered it a "third party" within the meaning of this principle (para. 106). To interpret the Association Agreement as applying to the territory of Western Sahara without its consent would therefore violate the *pacta tertiis* principle (para. 107).

The CJEU did not accept the argument that because the Liberalisation Agreement did not explicitly exclude its application to the territory of Western Sahara, it should be interpreted to apply in that territory. According to that argument, had the Council and Commission opposed the application of the Liberalisation Agreement to the territory of Western Sahara, they would have said as much in the latter agreement. In this regard, the CJEU referred to VCLT Article 30(2), according to which "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." Because the Liberalisation Agreement was designed to amend the earlier Association Agreement, the former was regarded as subordinate to the earlier agreement (para. 112). The provisions of the Association Agreement (including the territorial application clause) had not been amended by the Liberalisation Agreement, and therefore continued to apply. There was no need to include a clause expressly excluding Western Sahara from the scope of the Liberalisation Agreement, because at the time of its conclusion the Association Agreement did not extend to that territory (para. 114).

Lastly, although the EU and Morocco had applied the agreements de facto with respect to the territory of Western Sahara, the CJEU held that this did not count as "subsequent practice in the application of the treaty" within the meaning of VCLT Article 31(3)(b). The practice of the EU and Morocco did not reflect the existence of an agreement to modify the interpretation of the agreements' territorial application (para. 122).

Based on these conclusions, the CJEU found that the Liberalisation Agreement did not apply to the territory of Western Sahara. Accordingly, since the contested decision was not of "direct concern" to Front Polisario, the CJEU set aside the judgment of the General Court and ruled Front Polisario's action as inadmissible.

* * * *

Of the various issues of international law raised by the CJEU's judgment, its interpretation and application of VCLT Article 31(3)(c) is perhaps the most troublesome. Article 31 sets out the general rule of treaty interpretation. No hierarchy exists between the different elements of the rule, and the reference to other relevant rules of international law applicable between the parties (as contemplated in Article 31(3)(c)) is just one of a number of factors to be taken into account in interpretation. Yet the CJEU gave special emphasis to Article 31(3)(c) in order to take account of, and give priority to other principles of international law. In this way, the CJEU has turned treaty interpretation on its head, taking broad principles of international law as the starting point for its analysis rather than the text of the treaty itself.

The first of these principles was the principle of self-determination. Given Western Sahara's "separate and distinct status" from the administering state (Morocco) under international law, the CJEU rejected the argument that "territory of the Kingdom of Morocco" (as used in Article 94 of the Association Agreement) could be interpreted to include the territory of Western Sahara (para. 92). The CJEU did not enquire, however, into what other possible legal consequences might flow from a non-self-governing territory possessing "separate and

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distinct status." In the CJEU's view, it seems, the principle of self-determination was relevant only in regard to interpreting the territorial application of the treaty. Somewhat ironically, the principle of self-determination (which should protect the rights of a non-self-governing territory) is used to find that the decision approving the conclusion of the Liberalisation Agreement was not of "direct concern" to Front Polisario, thus preventing it from challenging an EU act that infringes on that very right.

The second principle was the rule enshrined in VCLT Article 29. According to the CJEU, this rule precludes the application of the agreement to the territory of Western Sahara, unless a different intention is apparent from the treaty or otherwise established. Article 29 was intended merely to set out a general rule that a treaty is to apply with respect to the territories of its parties, and applies where a treaty does not define its territorial application.[12] The CJEU, however, gives much more significance to this provision, interpreting it to mean that a treaty only applies with respect to territory over which a state exercises full sovereign powers, unless there is an express provision providing for its application to other territory.

The third broad principle was the *pacta tertiis* rule. The CJEU previously applied the principle to interpret the EU-Israel Association Agreement in *Brita*,[13] finding that the agreement could not be applied to the territory of the West Bank since doing so would apply a treaty to a third party without its consent. *Brita* was rightly criticized because it resulted in "somewhat stretching the scope of the *pacta tertiis* rule" in order to avoid the politically sensitive question of the territorial limits of Israel.[14] As in *Brita*, the CJEU refers to imposing obligations on "third parties," whereas VCLT Article 34 refers to "third *states*."[15] The provision does not derive its justification from contract law principles (e.g., the principle that agreements neither impose obligations nor confer rights upon third parties) but from the principle of *pacta sunt servanda* and the sovereign equality of states.[16] The CJEU has not explained whether the rule applies to all "third parties" or only third "state-like" entities.

Another problematic application of the VCLT principles on treaty interpretation is the CJEU's analysis of "subsequent practice." The General Court took into account the practice of the EU and Morocco in applying the Association Agreement to interpret the territorial application of the Liberalisation Agreement. The CJEU found that the General Court erred by failing to enquire whether such practice reflected the existence of an agreement between the parties, as required by VCLT Article 31(3)(b) (paras. 120–25). While the agreements had been applied de facto to products originating from the territory of Western Sahara in certain cases, the CJEU found that this practice did not reflect the existence of an agreement between the parties to "amend the interpretation of . . . the Association Agreement" (para. 122). To reach this finding, the CJEU applies some interesting, if tortured, logic. Had the EU intended the agreements to apply to the territory of Western Sahara, it argued, that "would necessarily have entailed conceding that the European

[12] Draft Articles on the Law of Treaties and Commentaries, Commentary to Art. 25, at 213, para 5, *in* Reports of the International Law Commission on the Second Part of Its Seventeenth Session and on Its Eighteenth Session, UN GAOR, 21st Sess., Supp. No. 9, UN Doc. A/6309/Rev.1 (1966) [hereinafter ILC Commentary on Final Draft Articles].

[13] Brita, *supra* note 11.

[14] *See, e.g.*, Helmut Philipp Aust, Alejandro Rodiles & Peter Staubach, *Unity or Uniformity? Domestic Courts and Treaty Interpretation*, 27 LEIDEN J. INT'L L. 1 75, 103 (2014).

[15] Emphasis added. Under Article 2(1)(h) of the VCLT, "Third State" is defined as "a State not a party to the treaty."

[16] ILC Commentary on Final Draft Articles, *supra* note 12, Commentary to Art. 30.

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Union intended to implement those agreements in a manner incompatible with the principles of self-determination and of the relative effect of treaties, even though the European Union repeatedly reiterated the need to comply with those principles, as the Commission points out" (para. 123). The CJEU also referred to "the principle that Treaty obligations must be performed in good faith" (para. 124). The CJEU seems to argue that since the EU institutions profess to respect international law, the Association Agreement must be interpreted in a way that assumes the EU respects principles of international law. The CJEU does not make a convincing distinction between instances of de facto application of the Association Agreement, and "subsequent practice" that would be relevant for the purposes of treaty interpretation.

The *Front Polisario* judgment involves a clear political dimension. The status of Western Sahara is subject to continuing international negotiations and the CJEU was certainly aware that the outcome of the case could impact relations between the EU and Morocco. Indeed, the Council and Commission highlighted the sensitive political dimension of the case, arguing that it called upon the CJEU to make political, rather than legal assessments.[17] Significantly, the judgment confirmed the status of Western Sahara as a non-self-governing territory, not a part of Moroccan territory.

The EU has been criticized for violating the principle of self-determination by entering into such agreements with Morocco.[18] That criticism raises the questions (1) whether the EU is obligated not to recognize as lawful a situation created through a serious breach of peremptory norm of international law and (2) what obligations it has to ensure the respect for human rights of the people in Western Sahara. By denying Front Polisario's standing, the CJEU was able to maintain the appearance of supporting the principle of self-determination and international legality, while at the same time avoiding these more delicate legal and political questions. The CJEU was right to find that the Liberalisation Agreement did not apply to the territory of Western Sahara. Yet this does not necessarily mean that Front Polisario was not "specifically affected" by the Council decision approving the agreement. The CJEU fails to explain why the issue of Front Polisario's standing, an issue of EU procedural law, is dependent entirely on the Agreement's territorial application, an issue of international law. The outcome of this reasoning is that a national liberation movement that represents the Sahrawi in international negotiations (possessing international legal personality) cannot challenge an EU act that clearly affects the rights of, and is of direct concern to, the people of Western Sahara.

Finally, and problematically, the judgment is an example of the CJEU "instrumentalizing" international law. At first glance, the CJEU's reasoning may appear to be a logical and faithful application of international legal principles. Yet the CJEU focused almost entirely on treaty interpretation, in particular on VCLT Article 31(3)(c). It applied principles of international law without taking into account how those principles are actually understood in international law or how they have been applied by other courts and interpretative bodies. The CJEU may thus appear to be committed to "the strict observance and the development of international law" as required by the Treaty on the European Union,[19] but upon closer inspection it has actually employed these principles to avoid enquiring into the legal ramifications the EU's

[17] AG Opinion, *supra* note 9, para. 141.

[18] *See* Sandra Hummelbrunner & Anne-Carlijn Prickartz, *It's Not the Fish that Stinks! EU Trade Relations with Morocco Under the Scrutiny of the General Court of the European Union*, 32(83) Utrecht J. Int'l & Eur. L. 19 (2016).

[19] TFEU, *supra* note 8, Art. 3(5).

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policy toward Western Sahara.[20] In other cases involving areas of contested sovereignty such as *Anastasiou*[21] (Northern Cyprus) and *Brita* (West Bank) the CJEU similarly focused on narrow issues of treaty interpretation without taking into account the broader context of the dispute and other principles of international law.

In *Kadi*, the CJEU held that the EU "must respect international law in the exercise of its powers" and stressed that all EU acts must respect fundamental rights.[22] Yet in *Front Polisario* the CJEU used principles of public international law to avoid review of an EU act that arguably violates the rights of the people of Western Sahara. The CJEU integrates elements of international law into its legal reasoning, but does so only as a subsidiary means of interpreting EU law, further illustrating how the CJEU applies principles of public international law, including the law of treaties, through an EU law lens. Given the political and diplomatic complexities surrounding the EU's policy in this area, it is unsurprising that the Court arrives at such a result.

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African Charter on Human and Peoples' Rights—arbitrary arrest and detention—right to a fair trial—provisional measures—exhaustion of local remedies—derogation—default judgment

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS v. LIBYA. Appl. No. 002/2013. *At* http://www.african-court.org.
African Court of Human and Peoples' Rights, June 3, 2016.

On June 3, 2016, the African Court on Human and People's Rights (the Court) rendered its first default judgment,[1] in a case brought by the African Commission on Human and Peoples' Rights (the Commission) against Libya for alleged violations of the African Charter on Human and Peoples' Rights (the Charter).[2] The Commission had alleged that

[20] This would not be the first time. In *Racke* the Court applied the principle of *rebus sic stantibus* to avoid sensitive questions regarding the conflict in the Balkans. Case C-162/96, A. Racke GmbH & Co. v. Hauptzollamt Mainz, Judgment (Eur. Ct. Justice June 16, 1998).

[21] Case C-432/92, The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd., Judgment (Eur. Ct. Justice July 5, 1994).

[22] Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, Judgment, para. 291 (Eur. Ct. Justice Sept. 3, 2008).

[1] African Commission on Human and Peoples' Rights v. Libya, App. No. 002/2013, Judgment (June 3, 2016), *available at* http://en.african-court.org/index.php/49-41st-ordinary-session/767-appl-no-002-2013-the-african-commission-on-human-and-peoples-rights-v-libya-2 [hereinafter Judgment].

[2] The African Charter on Human and Peoples' Rights (also known as the Banjul Charter), June 27, 1981, 1520 UNTS 217, 21 ILM 58 (1982) (*entered into force* October 21, 1998), *available at* http://www.achpr.org/instruments/achpr. The Commission was established by Part II (Arts. 30–61) of the Charter. The Court was established under the Protocol to the Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol), adopted by member states of what was then the Organization of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998. That Protocol came into force on January 25, 2004. Under Article 5(1) of the Protocol and Rule 33 of the Rules of the Court, the Commission is entitled to submit cases to the Court. Libya ratified the Charter in 1986 and acceded to the Protocol in 2003.

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