

policy toward Western Sahara.<sup>20</sup> In other cases involving areas of contested sovereignty such as *Anastasiou*<sup>21</sup> (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.<sup>22</sup> 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,<sup>1</sup> 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).<sup>2</sup> The Commission had alleged that

<sup>20</sup> 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).

<sup>21</sup> 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).

<sup>22</sup> 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).

<sup>1</sup> *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].

<sup>2</sup> 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.

the Libyan government had violated its obligations under the Charter to protect one of its citizens, Saif al-Islam Kadhafi, from incommunicado detention and to provide him access to counsel. When Libya failed to respond to the Commission's complaint and to the Court's order of provisional measures, the Court proceeded to the merits and found Libya in violation of several articles of the Charter. Its decision reflected both a measured approach to the issuance of default judgments and an emphasis on the need for states to comply with their human rights obligations even in situations of exceptional political and security instability.

Saif al-Islam Kadhafi, the second son of the former Libyan President Muammar Kadhafi (the Court also uses "Gadhafi") was detained in November 2011 by a rebel faction based in the southwestern Libyan city of Zintan in the aftermath of the revolution that overthrew his father's regime. In April 2012, a petition was submitted on his behalf to the Commission claiming that he was being held incommunicado in a secret location and without charge, denied access to his family, friends, and legal representation, and had not been brought before a court. That petition alleged that such detention put his life in danger and his physical integrity and health at risk of irreparable harm (para. 7).

In January 2013, the Commission referred the matter to the Court with a request for the indication of provisional measures of protection as authorized by Rule 51(1) of the Rules of the Court.<sup>3</sup> That request was granted in March 2013, when the Court ordered Libya, *inter alia*, to "[r]efrain from all judicial proceedings, investigations or detention that could cause irreparable damage to the Detainee. . ." (para. 15). Libya failed to respond to that order. Over a year later, in May 2014, it finally acknowledged receipt of that order but informed the Court that it intended to institute its own prosecution of Saif al-Islam in Tripoli and invited outside observers (para. 27).

The following May, the Commission asked the Court to deliver a judgment in default against Libya. Specifically, it sought a ruling that Libya had violated and was continuing to violate Saif al-Islam's rights as guaranteed under Articles 6 and 7 of the African Charter<sup>4</sup> and that it had failed to comply with the Court's Order for Provisional Measures (para. 11). It called on the Court to notify the Executive Council of the African Union and to "take such other measures as it may deem appropriate and necessary to secure the rights of [Saif al-Islam] to a fair trial" (*id.*). Despite reminders and extension of deadlines, Libya failed to respond. Accordingly, the Court brought Libya's non-compliance to the attention of the

<sup>3</sup> Under Rule 51(1) of the Rules of the Court, the Court "may, at the request of a party, the Commission or on its own accord, prescribe to the parties, any interim measure which it deems necessary to adopt in the interests of the parties, or of justice."

<sup>4</sup> Article 6 of the Charter provides that "[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." Article 7 provides: "1. Every individual shall have the right to have his cause heard. This comprises: a) [t]he right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; b) [t]he right to be presumed innocent until proved guilty by a competent court or tribunal; c) [t]he right to defense, including the right to be defended by counsel of his choice; d) [t]he right to be tried within a reasonable time by an impartial court or tribunal. 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

Assembly of Heads of States of the African Union, through its Executive Council. The Assembly urged Libya to comply with the Court's Order.<sup>5</sup>

In the same Note Verbale of May 2014 to the Court, Libya advised that, on the determination of its Office of Public Prosecutor, it would ensure that the trial of Saif al-Islam and the other defendants would be fair and just in accordance with relevant legal norms, and showed some readiness to cooperate with any legal institution through a field visit to the location where Saif al-Islam was detained and enable such an institution to verify and confirm the information provided. It would also allow attendance by any legally accredited organizations at the trial sessions of the competent Criminal Chamber of the Tripoli Court of Appeals (para. 27).

Saif al-Islam's captors, however, refused to release him to the government's custody, citing "security issues." The trial in Tripoli nonetheless proceeded before the Tripoli Court of Azzize. In that proceeding, Saif al-Islam and thirty-six other defendants who were former regime officials, were charged with indiscriminate attacks on civilians and other crimes committed during the 2011 revolution. Saif al-Islam took part in the initial sessions of the proceedings by video link, including to hear the charges brought by the Court against him, but did not take part in the sessions of the proceedings that resumed in October 2014.<sup>6</sup> In May 2015, the Tripoli Court of Azzize concluded its public hearings. On July 28, 2015, the Court of Assize issued its verdict, sentencing Saif al-Islam, Abdullah al-Senussi, his father's intelligence chief, and seven other officials to death, eight others to life imprisonment and fifteen to prison sentences of between five and twelve years; and four were acquitted of all charges. The Court also announced that seven of the defendants, including Saif al-Islam, were tried *in absentia*. This verdict raised serious concerns with regard to the right to fair trial and was under review before of the Cassation Chamber of the Supreme Court of Libya.<sup>7</sup>

In June 2016, the Court finally issued its judgment. In accordance with Rule 55 of its Rules of Procedure,<sup>8</sup> it first addressed issues of jurisdiction and admissibility, finding that Libya had been duly notified of the proceedings as the pleadings and other relevant documents had been communicated to it throughout the proceedings. As for jurisdiction *ratione personae*, the Court noted that Libya was a party to both the Charter and the Protocol, and Article 5(1) of the latter gives the Commission *jus standi* before the Court. Because the case put in issue Libya's compliance with the Charter, the requirements *ratione materiae* jurisdiction were satisfied. Similarly, the Court had no difficulty in ascertaining jurisdiction *ratione temporis* and *loci* given that the alleged violations had first occurred in 2011 and had continued thereafter in the territory of Libya.

The Court then turned to the requirement of the exhaustion of local remedies.<sup>9</sup> Libya, it noted, had not formally raised the issue. The Commission, for its part, granted that some

<sup>5</sup> Judgment, *supra* note 1, para. 18.

<sup>6</sup> Report of the Secretary-General on the United Nations Support Mission in Libya to the Security Council, para. 59, UN Doc. S/2015/144 (Feb. 26, 2015).

<sup>7</sup> Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Libya, Including on the Effectiveness of Technical Assistance and Capacity-Building Measures Received by the Government of Libya, paras. 75–76, UN Doc. A/HRC/34/42 (Jan. 13, 2017).

<sup>8</sup> Rule 55 requires the Court to satisfy itself that "the defaulting party has been duly served with the application and all other documents pertinent to the proceedings," that it has jurisdiction in the case, and that the application is admissible.

<sup>9</sup> Rule 40(5) (reflecting article 56(5) of the UN Charter) provides that applications to the Court may properly be "after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged."

provisions of Libya's Criminal Procedure Code of Libya permit a detainee to challenge the legality of his/her detention, but it contended that the relevant laws permitted the state prosecutor unilaterally to extend the period of detention without prior judicial approval, and in any event it questioned the effectiveness and the accessibility of measures authorized by the Libyan Penal Code. The Court agreed. It referred to prior judgments in which it had determined that, to satisfy the requirement, remedies must meet the criteria of availability, effectiveness and sufficiency. An available remedy, it said, is one that "the complainant can pursue . . . without impediment," while an effective remedy is one that "produces the expected result . . ." (para. 67). As to the present case, it said:

[T]he fact that Mr. Gadhafi is being detained in a secret location by a revolutionary brigade and completely isolated from his friends and family, without access to a lawyer of his choice and sentenced to death *in absentia*, constitutes sufficient grounds for the Court to conclude that the Detainee has been prevented from legally seeking local remedies as prescribed by Libyan law and that, consequently, it was impossible for him to fulfil the condition regarding exhaustion of local remedies. (Para. 69)

The Court further held that the reasonable time requirement had been satisfied, as the initial application had been filed one year following the conclusion that Libya had not complied with the Order for provisional measures (para. 71)

Turning to what it described as the "merits of the matter," the Court first addressed the issue of derogation. In exceptional circumstances, it observed, parties to human rights instruments are permitted a limited right of derogation therefrom.<sup>10</sup> But some rights are not subject to such treatment, such as "the right to life, the right not to be subjected [to] torture or to cruel, inhuman and degrading punishment or treatment . . ." (para. 77). These rights, it observed, are "mostly enshrined in Articles 6 and 7 of the African Charter." In consequence, the Court held, "despite the exceptional political and security situation prevailing in Libya since 2011, the Libyan State is internationally responsible for ensuring compliance with and guaranteeing the human rights enshrined" in those articles (*id.*).

The Court held that Libya had violated Saif al-Islam's right to liberty and security, as set forth in Article 6 of the African Charter, because he was detained *incommunicado* without the assistance of a lawyer of his choice to challenge every extension of his detention and numerous extensions had occurred in his absence. The Court noted that deprivation of liberty is permitted only in conformity with domestic legal procedures and must, in turn, be consistent with international human rights standards and meet a number of minimum guarantees, as provided for in Article 9 of the International Covenant on Civil and Political Rights (ICCPR) which, in the opinion of the Court, was also applicable in this instance. Referring to the jurisprudence of the Human Rights Committee, the Court observed that *incommunicado* detention is itself a gross violation of human rights that can lead to other violations.

With regard to Article 7 of the African Charter, the Court found that the minimum guarantees for a fair trial had not been met throughout the different stages of the domestic

<sup>10</sup> Citing, as an example, Article 4(1) of the International Covenant on Civil and Political Rights, which authorizes certain derogations "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed . . ." The Charter itself, of course, does not specifically address the issue of derogation or suspension of rights.

proceedings against Saif al-Islam, including failure to try him within a reasonable time. In particular, the Court noted that he had been denied access to a lawyer, interrogated in the absence of counsel, and denied the opportunity to examine the charges which would be “brought against him at the start of the trial.” Additionally, he had been detained for over two years and had been sentenced to death *in absentia* (paras. 90–97).

In its operative paragraph, the Court unanimously found that Libya had violated, and was continuing to violate, Articles 6 and 7 of the African Charter, and it ordered Libya to terminate the illegal criminal proceedings instituted before its domestic courts. The Court requested information within sixty days on measures by Libya to guarantee the rights of Mr. Kadhafi from the date of the notification of the judgment.

Judge Fatsah Ouguergouz appended a Separate Opinion to the Judgment, concurring in its “operative part” but contending that the Court should have done more to satisfy itself “that the reality of the facts constituting the alleged violations of the Charter has [sic] been established by convincing evidence” (sep. op., para. 15). Under Rule 55(2), he noted, the Court was obliged to satisfy itself that the application was admissible and “well-founded in fact and in law.” Accordingly, the Court should have resorted to “such evidence as it deemed appropriate” to substantiate the Commission’s allegations, including, for example, reports of the International Commission of Inquiry established by the UN Human Rights Council, the UN High Commissioner for Human Rights, and the UN Working Group on Arbitrary Detention (paras. 17–25). In not doing so, he said, “the Court failed to use every available means and method to ensure that the Application was well founded in fact” (sep. op., para. 28). As for determining that the application was well-founded as a matter of law, he contended, the Court should have relied more extensively on the principle *jura novit curia* (“the Court knows the law”)<sup>11</sup> (sep. op., paras. 5–6).

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The decision is noteworthy in several respects. Because this was the first default judgment rendered by the Court, its application of the relevant rules naturally sets the standard for rendering similar judgments in the future. The care it took in establishing that the relevant jurisdictional prerequisites had been fully satisfied was commendable.

The Court’s clear articulation of the fundamental obligations of states to protect the rights persons in detention or facing trial is similarly to be applauded. Not only did the Court adopt a forceful interpretation of Articles 6 and 7 of the Charter itself, it also placed those provisions in the broader context of other relevant international human rights instruments, referring in particular to the ICCPR<sup>12</sup> and the 1988 Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.<sup>13</sup> In this regard, perhaps the most notable aspect of the Judgment is its statement that “deprivation of liberty, regardless of its form, is permitted only when it is in conformity with procedures established by domestic legislation which itself should be consistent with international human rights standards” (para. 80).

<sup>11</sup> Citing to the International Court of Justice’s decision in *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 ICJ Rep. 14 (June 27).

<sup>12</sup> Libya acceded to the Covenant on May 15, 1970.

<sup>13</sup> GA Res. 43/173 (Dec. 9, 1988).

The right of every individual to liberty and the security of the person, as well as to a fair trial, is protected not only by the African Charter, but also by similar provisions in other regional and international instruments. By insisting on scrupulous respect for such rights, including even in highly charged circumstances and times of great political instability, the Court acted consistently with the positions taken by other regional or international human rights bodies. The Court took an appropriately comprehensive approach to the requirements for a fair trial.

For example, the Court emphasized that the right to defense in a criminal trial includes the right to communicate with one's counsel and to have adequate time and facilities to prepare a defense. "The accused or Detainee may not be tried without his or her counsel being notified of the trial date and of the charges levelled against him or her in time to allow for adequate preparation of a defence . . ." (para. 94). Here, the Court referred specifically to relevant decisions of the European Court of Human Rights.<sup>14</sup>

Given the lack of any provisions in the African Charter regarding derogation in times of public emergency, the Court's reference to the rules set forth in the ICCPR limiting the scope of derogations was also a welcome development. Still, the Court missed an opportunity to expand on its reasoning on the issue. It could, for instance, have examined whether the procedural and substantive requirements of ICCPR Article 4 had been met in the case at hand, in light of the Human Rights Committee's General Comment No. 29 (2001).<sup>15</sup> It could also have explained how the non-derogability principle applies to Articles 6 and 7 of the African Charter.

In General Comment 24, the Human Rights Committee set out a number of procedural and substantive conditions under which a state can derogate some rights. Importantly, it has taken the position that rights concerning individual security and liberty, as well as those relating to fair trial, may not be lawfully derogated (despite the fact they are not specifically listed as "non-derogable" in Article 4(2) of the Covenant), including in situations of internal armed conflict where international humanitarian law also applies.<sup>16</sup> Such considerations were recently reaffirmed in the Human Rights Committee's General Comment 35 on Article 9 of the Covenant.<sup>17</sup>

Moreover, as the concurring opinion pointed out, the Court did not explicitly address the issue whether the application in question was actually "well-founded" in fact and in law, and neither did it explain its decision not to discuss that issue. Article 55(2) of the Court's Rules expressly states that "[b]efore acceding to the application of the party before it, the Court shall satisfy itself that it has jurisdiction in the case, and that the application is admissible *and well founded in fact and in law*" (emphasis added). That requirement is of course aimed at safeguarding the rights of a defaulting state in the interests of ensuring the good administration of justice. In this regard, Judge Ouguergouz's observations seem well-founded. The Court should have drawn on the practice of the International Court of Justice and the Inter-American Court of Human Rights to rely on the principle *juria novit curia* in assessing whether the application was well-founded.

<sup>14</sup> See, e.g., Matter of Brusco v. France, App. No. 1466/07 (Eur. Ct. H.R. Oct. 14, 2010).

<sup>15</sup> General Comment No. 29 on Article 4, UN Doc. CCPR/C/21/Rev/Add.11 (*adopted* July 24, 2001).

<sup>16</sup> *Id.*, para. 13.

<sup>17</sup> See General Comment No. 35, Article 9 (Liberty and Security of the Person), paras. 65–66, UN Doc. CCPR/C/GC/35 (Dec. 16, 2014).

As it was its first judgment in default, the Court will undoubtedly take into account the practice and the jurisprudence of other jurisdictions which have already considered cases *in absentia* and build on its own practices on that matter.

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*International dispute settlement—investment arbitration—fair and equitable treatment—corporations as subjects of international law—human right to water and sanitation—rights and obligations of investors*

URBASER S.A. AND CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BISKAIA UR PARTZUERGOA v. THE ARGENTINE REPUBLIC, ICSID Case No. ARB/07/26. At <https://icsid.worldbank.org/en>.

International Center for the Settlement of Disputes, December 8, 2016.

On December 8, 2016, an International Centre for Settlement of Investment Disputes (ICSID) tribunal (the Tribunal) held that international human rights condition the treatment that an investor is entitled to receive from a state and that human rights impose obligations on the investor itself.<sup>1</sup> The Tribunal's explicit recognition of these dual consequences of international human rights law breaks new ground. International investment tribunals have not previously held that human rights obligations have any effect on protections due to investors, much less that international human rights law might establish separate obligations for investors.

The case, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (Urbaser)* arose out of a concession for water and sewage services for the Province of Greater Buenos Aires granted by Argentina in early 2000 to Aguas Del Gran Buenos Aires, S.A. (AGBA), a company established by the Spanish corporations Urbaser and Consorcio de Aguas Bilbao Bizkaia (collectively, Urbaser) (para. 34). A primary purpose of the concession was the "imperative need to expand the drinking water and sewage services" to the impoverished province (paras. 68–69).

The concession soon ran into problems. By mid-2001, Argentina was in the throes of a financial crisis, prompting a series of emergency measures, including "pesification"—the 1:1 conversion of obligations from U.S. dollars into Argentine Pesos while allowing the peso to depreciate dramatically in value (para. 34). At the same time, Argentina's compliance with its safety and health duties deteriorated, eventually leading to a "critical sanitary situation" (para. 71), the result of pervasive poverty, widespread unemployment, and insufficient food and water (para. 74).

<sup>1</sup> Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016). The International Centre for Settlement of Investment Disputes (ICSID) documents cited herein are available on the Centre's website at <https://icsid.worldbank.org/en>.