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The ACJHR's General Jurisdiction for General Affairs

Any Question of International Law? Not Quite

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1. INTRODUCTION

This chapter outlines and analyzes the general jurisdiction for the general affairs section of the proposed African Court of Justice and Human Rights (ACJHR) as set out in the Malabo Protocol on the Statute of the African Court of Justice and Human Rights (The Malabo Protocol). The chapter focuses in particular on the most general clause of this general jurisdiction referencing 'Any question of international law' to examine whether that clause should be read expansively or restrictively in light of the Malabo Protocol especially as regards the 'ultimate objective' of the African Union (AU) which is the ambitious progressive federalization agenda. That is to say the legal implications of progressive Pan-Africanization. The proposed court *could* work in attaining progress towards that ultimate goal but it will take immense collective effort and commitment. This inquiry is important because the general jurisdiction conferred on the General Affairs Section of the Court by necessary implication encompasses all international law matters that are not excluded by either the Human and Peoples' Rights or the International Criminal Law sections of the Court.

The chapter begins by explaining the provision's immediate origins in the two preceding protocols going back to reforming the African Court of Justice. The next two sections go on to examine, first, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, and second, the Protocol on the Statute of the African Court of Justice and Human Rights. The discussion section draws together the insights gleaned earlier to make the preliminary conclusion that the 'any question of international law' clause has to be read in a uniquely restrictive sense in the African context. Having said that, it has the potential scope to be the most litigated clause in the entire instrument given for instance the sheer number, scale and

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variety of treaties and conventions that would require re-examination should and when the United States of Africa comes into being. The overall argument is that the clause should be read not so much as conferring a specific jurisdiction as such but as restating a preference for legality as an approach to resolving disputes over diplomacy and even the use of force. To place this is a continuum between politics and law, the clause indicates a pendulum swing to the legalization of political disputes as opposed to the politicization of legal disputes.

Speaking of the Malabo protocol provisions on the general jurisdiction of the, at the moment, proposed ACJHR is an intriguing prospect. Not least because that protocol, which is not yet in force, amends an earlier protocol which is itself not yet in force, and indeed will never be in force except in the form and content of the new provisions once they enter into force. This renders it necessary to delve into the history of the provisions as well as speculate upon its future application. These are two strikingly different approaches. The first has a trajectory that moves from the present backwards, and the second moves from the present forwards. The first is genealogy while the second is speculation, if you like. Not law as it is nor law as it should be, but law as it *shall* be.

Methodologically, the approach favoured is as a consequence doctrinal – from a comparative and historical perspective. That is to say to compare as well as contrast the proposed court with a similar institution or institutions. As we shall see, these include – in this specific instance – the International Court of Justice (ICJ) and possibly the European Court of Justice (ECJ). The similarities are chiefly along the lines of subject matter jurisdiction as well as certain equivalences in origin. These go beyond the AU matching up semantically with the European Union (EU) and their resultant courts of justice (although these of course cannot be dismissed as merely coincidental), but the history of amendments of the Nice and Lisbon treaties in the case of the ECJ and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights and second the Protocol on the Statute of the African Court of Justice and Human Rights in the case of the ACJHR. Furthermore, the transition from the Permanent Court of International Justice (PCIJ) to the International Court of Justice (ICJ) also has some bearing on the matter. As a consequence, the PCIJ, the ICJ the ECJ could be possible sources among others of persuasive precedent for the ACJHR in interpreting and construing what 'any question of international law' means once the court is established. This court itself would be a mega-court jurisdictionally combining, as it does, the jurisdiction of the ICJ in its General Affairs Section, The European Court of Human Rights (ECHR) in

its Human and Peoples' Rights and the International Criminal Court (ICC) in its International Criminal Law Section. The table below comparing the PCIJ/ICJ, and ACJHR illustrates this point:

TABLE 35.1 *Comparative Chart PCIJ/ICJ, and ACJHR*

Name of Court	Subject-Matter Jurisdiction	International / Regional
PCIJ	Article 36 The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force. The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.	International
ICJ	Article 36 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation;	International

(*continued*)

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Table 35.1 (*continued*)

Name of Court	Subject-Matter Jurisdiction	International / Regional
	d. the nature or extent of the reparation to be made for the breach of an international obligation.	
ACJHR	The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to: (a) the interpretation and application of the Constitutive Act; (b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity; (c) the interpretation and the application of the African Charter~~,~~ (d) any question of international law (e) all acts, decisions, regulations and directives of the organs of the Union; (f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court; (g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; (h) the nature or extent of the reparation to be made for the breach of an international obligation.	Regional

From a historical perspective it is clear too that the evolution of the point was actually intended to encourage the peaceful settlement of disputes through the medium of law as opposed to diplomacy and *a fortiori* the use of military force. The table below demonstrates the gradual development of the clause as progressively encouraging the use of law over diplomacy and even war:

Article 16 1899 Hague Convention for the Pacific Settlement of International Disputes	In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.

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Article 38 1907 Hague Convention for the Pacific Settlement of International Disputes	In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle. Consequently, it would be desirable that, in disputes about the above-mentioned questions, the Contracting Powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit.
Article 13 The Covenant of the League of Nations	The Members of the League agree that whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject matter to arbitration or judicial settlement. Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement. For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them. The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which

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	complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.
Article 36 of the Statute of the International Court of Justice (excerpt)	1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.

The developmental arc ends with judicial settlement of international disputes. The decisions of the ICJ, and in particular the Nicaragua (Merits) Case,[1] then becomes the principal source of law for the ACJHR.

2. PROTOCOL ON AMENDMENTS TO THE PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS (MALABO PROTOCOL) 2014

As is customary, although the preamble does not have the force of law, it nevertheless sets out the background, overall context, and intent of the document. This is important because customary international law is a necessary resource given the varying status of the separate body of documents that

[1] Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States, Merits, Judgment, (1986) ICJ Rep 14.

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make up the relevant body of law, as well as the generality of the statement 'any question of international law' which goes beyond treaty law.

In the preamble the Member States of the African Union whom are the parties to the Constitutive Act of the African Union recall the objectives and principles enunciated in the Constitutive Act that was adopted on 11 July 2000 in Lome, Togo. That rather general statement is linked to a less general one which nevertheless vaguely references the commitment to peaceful settlement of disputes. This reference to 'peaceful settlement of disputes' is key to understanding the genealogy of the phrase 'any question of international law'. It first occurred in the form 'questions of a legal nature' under Article 16 of the 1899 Hague Convention for the Pacific Settlement of International Disputes. It reappeared in identical form in Article 38 of the 1907 Hague Convention for the Pacific Settlement of International Disputes. Its present form first appeared in Article 13 of the Covenant of the League of Nations and then in Article 36 of both the Statute of the International Court of Justice and that of the Permanent Court of International Justice. There is no equivalent clause in either the Treaty on European Union or the Treaty on the functioning of the European Union. This renders their resultant case law not as relevant as, for instance the ICJ, even though the ECJ is, like the ACJHR, also a regional court.

A rather more specific statement on the provisions of the Protocol on the Statute of the African Court of Justice and Human Rights and the Statute annexed immediately follows this recollection to it that was adopted on 1 July 2008 in Sharm El Sheikh, Egypt. The Member States go on to recognize that the Protocol on the Statute of the African Court of Justice and Human Rights had merged the African Court on Human and Peoples Rights and the Court of Justice of the African Union into a single court. Along with this the Member States bear in mind their collective commitment to promote peace, security and stability on the African continent, and likewise to protect human and people's rights in accordance with the African Charter on Human and Peoples Rights and other relevant instruments.

The Member States made a point to acknowledge the pivotal role that the African Court of Justice and Human and Peoples Rights can play in strengthening the commitment of the African Union to promote sustained peace, security, and stability on the Continent, and to promote justice and human and peoples' rights as an aspect of their efforts to promote the objectives of the political and socio-economic integration and development of the Continent with a view to realizing the ultimate objective of a United States of Africa.

There are seventeen new articles inserted by the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights that grant the Court international criminal jurisdiction. However, it is

its general jurisdiction that specifically interests us particularly as spelt out in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights beginning in Article 3 setting out the Court's Jurisdiction as:

1. The Court is vested with an original and appellate jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the provisions of the Statute annexed hereto.
2. The Court has jurisdiction to hear such other matters or appeals as may be referred to it in any other agreements that the Member States or the Regional Economic Communities or other international organizations recognized by the African Union may conclude among themselves, or with the Union.

It is imperative therefore to examine the provisions of the Protocol on the Statute of the African Court of Justice and Human Rights as both protocols have to be read more or less side-by-side to be given both effect and meaning.

3. PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS (SHARM EL SHEIKH PROTOCOL), 2008

The first chapter of the Sharm El Sheikh Protocol merges the African Court On Human and Peoples' Rights with the Court of Justice of The African Union. Article 1 replaces the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted on 10 June 1998 in Ouagadougou, Burkina Faso (entry into force 25 January 2004), and the Protocol of the Court of Justice of the African Union, adopted on 11 July 2003 in Maputo, Mozambique. Article 2 then goes on to establish a single Court, the 'African Court of Justice and Human Rights'. For removal of doubt Article 3 provides that any references made to the 'Court of Justice' in the Constitutive Act of the African Union shall be read as references to the 'African Court of Justice and Human Rights'.

Crucially, in the very first article of the Statute of the African Court of Justice and Human Rights contained in the Annex to the Protocol on the Statute of the African Court of Justice and Human Rights 'Section' has now been sought to be amended to mean either the General Affairs, or Human and Peoples' Rights, or International Criminal Law Section of the Court.

Article 28, which provides the jurisdiction of the court, will as a consequence now have to be read down with the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights in

mind. It is reproduced below with the affected bits of its text either struck out or amended with underlining wherever appears necessary:

> The General Section of the Court shall [with the following exceptions] have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to:
>
> a) the interpretation and application of the Constitutive Act;
> b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity excluding questions of either international criminal law or international human rights law;
> c) ~~the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned;~~
> d) **any question of international law** [excluding questions of either international criminal law or international human rights law];
> e) all acts, decisions, regulations and directives of the organs of the Union [excluding questions of either international criminal law or international human rights law];
> f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court [excluding questions of either international criminal law or international human rights law];
> g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union [excluding questions of either international criminal law or international human rights law];
> h) the nature or extent of the reparation to be made for the breach of an international obligation [excluding questions of either international criminal law or international human rights law].

4. DISCUSSION AND ARGUMENT

The fact that a dispute contains a legal question does not exclude politics. The weight of the authorities both judicial and academic weigh onto the side that a legal question when taken as one that is amenable to legal resolution references the jurisdictional capacity of a judicial organ as opposed to a political organ. Which is to say that just because a question has political aspects that would not preclude a court from making a final determination over the matter.

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Indeed the ICJ noted in the Hostages Case (Merits) 'legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned'.[2]

Hersch Lauterpacht writing in 1933 about the PCIJ made the point that under a clause conferring jurisdiction to decide 'any question of international law' a court of justice was empowered to deal with the customary international law doctrine of *rebus sic stantibus* or a fundamental change of circumstance.[3] This clause includes not just legal interpretation but also the ascertainment as well as consideration of facts. Indeed, for Lauterpacht 'any question of international law' could conceivably cover all possible disputes that states can submit to an international judicial tribunal. He therefore argued against a one-sided or restrictive interpretation. His position of course cannot be applied to the equivalent clause in the ACJHR without qualification principally because both international criminal law questions and international human rights law questions are excluded from the general jurisdiction of the general section of that court. Nevertheless, the question of examining a fundamental change of circumstance rendering a treaty or treaties inapplicable is still a very wide and powerful judicial discretion that deserves further study, and perhaps even invocation, as states are expected to dissolve themselves as independent sovereign entities to a single United States of Africa.

Writing in 1924 of the distinction between legal and political questions, Charles Fenwick expressed the view that legal questions were those governed by a more or less ascertainable rule of law.[4] For him, these were synonymous with justiciable questions, which were those that could be properly submitted to a judicial tribunal.[5] Quincy Wright, in speaking of the same distinction, preferred to look at it in instrumental function in distinguishing 'legal from political questions as those questions in which more interests will be satisfied by a settlement according to law than by some other mode of settlement.'[6]

[2] [1980] ICJ Rep 3, 20 (Judgment of the Court).

[3] H. Lauterpacht, *The Function of Law in the Community*, (1st edition ebook; Oxford: Oxford University Press, 2011), at 281.

[4] C. Fenwick and E. Borchard. 'The Distinction between Legal and Political Questions', vol. 18, *Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969)*, 1924, 44–57, at 44.

[5] Ibid. at 45.

[6] Q. Wright, 'The Distinction between Legal and Political Questions with Special Reference to the Monroe Doctrine', vol. 18, *Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969)*, 1924, 57–83, at 57.

This formulation has the advantage of bringing in the language of the Hague conference.

In the first advisory opinion of the ICJ on the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, The Court found that it could not 'attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision'.[7] Erika de Wet finds that distinguishing between legal and political questions is unimportant when compared to distinguishing between legal and political methods in determining disputes. For her 'a legal dispute implies both a legal and political answer' to the same question.[8] For Lauterpacht, because there was 'no fixed limit to the possibilities of judicial settlement', all international political conflicts were reducible 'to contests of a legal nature', therefore, the 'decisive test' for justiciability of a dispute would the willingness of the parties to submit to legal arbitration.[9] David S. Patterson found that the impetus for a world court came from lawyers who wanted the United States to lead in the quest for pacific alternatives to international violence.[10] Akande elegantly phrases this important point in the double negative: 'The Statute in no way excludes any question of international law from the consideration of the Court in cases in which it has jurisdiction'.[11] For him, as long as the Court has jurisdiction over a legal question before it then it 'has a duty to decide the matter' notwithstanding that another political organ may have the same matter before it.[12] Just because a political institution has been seized of jurisdiction does not preclude the court's jurisdiction over the same matter.[13]

This is why international courts and tribunals could say that:

> The doctrines of 'political questions' and 'non-justiciable disputes' are remnants of the reservations of 'sovereignty', 'national honour', etc., in very old

[7] Article 4 UN Charter.

[8] E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004), at 50.

[9] H. Lauterpacht, *The Function of Law in the International Law* (1933) at 389, cited in *Nicaragua (Merits)* , International Court of Justice, 1986, at 169 (Separate Opinion of Judge Lachs).

[10] D. Patterson, 'The United States and the Origins of the World Court', vol. 91, *Political Science Quarterly*, (Summer, 1976), 279–95, at 295.

[11] Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations', 46 *International and Comparative Law Quarterly*, (1997), 309–43, at 332.

[12] Ibid., at 343.

[13] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, International Court of Justice, 24 May 1980, ICJ Reports 3, at 553–84.

> arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the 'political question' argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well. The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law.[14]
>
> Dissenting and separate opinions 'however political be the question, there is always value in the clarification of the law. It is not ineffective, pointless and inconsequential'[15] '[D]ecision can contribute to the prevention of war by ensuring respect for the law'.[16] The political aspects of the dispute may make legal determination all the more urgent:
>
> Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate.[17]

The ACJHR's General Jurisdiction for General Affairs cannot therefore be an exception to the ever expanding contemporary dynamic of political disputes being rendered amendable to legal adjudication.

[14] *Prosecutor v. Tadic* (Defence Motion for Interlocutory Appeal on Jurisdiction), Case No IT–94–1–AR72 (2 October 1995) [24] ('Tadic').

[15] *Nuclear Weapons Opinion*, International Court of Justice, 1996, ICJ Reports (year), at 226, and 328 (Dissenting Opinion of Judge Weeramantry).

[16] Ibid. (Dissenting Opinion of Judge Koroma).

[17] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 87, para 33.