The ACJHR's General Jurisdiction for General Affairs: Any question of international law? Not quite

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Introduction

This chapter outlines and analyses the general jurisdiction for the general affairs section of the 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 (Malabo Protocol). The chapter focuses in particular on the clause referencing ‘Any question of international law’ to examine whether that clause should be read expansively or restrictively in light of the Malabo Protocol. This is because the general jurisdiction conferred on the General Affairs Section of the Court encompasses 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 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.

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 earlier protocols, which they themselves are not yet in force and indeed will never be in force, except in the form and content of the new provisions once they come into force. This renders it necessary to delve into the history of the provision under scrutiny as well as speculate upon its future application. These are two strikingly different temporal approaches.

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 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 African Union (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 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 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 once it is established.

Background

The Executive Council of the African Union comprising of Foreign Ministerial level State functionaries met between the 20th and 24th of June 2014 in Malabo, Equatorial Guinea for its twenty fifth ordinary session.¹ At that session they made thirty-eight different decisions however only one made waves in the progressive development of international law. This was the Decision on the Draft Legal Documents. That decision took note of the earlier Draft Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights² and decided to recommend it without amendment to the African Union Assembly, which consists of the Heads of State and Government for its consideration and approval. It is the content sourced from that Draft Protocol that comprises the subject matter of this chapter. Its text was duly adopted by the Specialized Technical Committee on Justice and Legal Affairs during their first meeting held between the 15th and 16th of May 2014 in Addis Ababa, Ethiopia. Out of 54 countries 9 have signed the document. However as of the 1st of April 2016 none is yet to ratify it. The protocol and statute annexed to it shall only enter into force once fifteen member states ratify it.

¹ (EX.CL/Dec.813-850(XXV)

² (STC/Legal/Min/7(I) Rev. 1)

At the outset, there are certain key dates and events that have at least some bearing to the Malabo Protocol. These occurred in the years 1987 the inception of the African Commission of Human and People's rights, 1998 the Protocol to the African Charter on Human and Peoples' Rights relating to the Establishment of an African Court on Human and Peoples' Rights, 2000 the Constitutive Act of the African Union, 2003, the Protocol of the Court of Justice of the African Union, 2008 the Protocol on the Statute of the African Court of Justice and Human Rights (Sharm el Sheikh Protocol), two in 2009 being the Assembly's Decision on the Abuse of the Principle of Universal Jurisdiction and the transformation of the African Union Commission to the African Union Authority, and finally 2014 the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human rights (Malabo Protocol).

The Malabo Protocol amended the 2008 (Sharm el Sheikh) Protocol on the Statute of the African Court of Justice and Human Rights, the earlier protocol (The Sharm el Sheikh Protocol) had been signed by 30 states but ratified by only 5 states. That earlier Protocol was adopted by the Eleventh Ordinary Session of the Assembly of the African Union in Sharm El-Sheikh, Egypt, on 1 July 2008. The African Court of Human and Peoples' Rights established by the Protocol to the African Charter on Human and Peoples' Rights relating to the Establishment of an African Court on Human and Peoples' Rights (1998), *and* the Court of Justice of the African Union established by the Constitutive Act of the African Union, were merged into a single Court and established as 'The African Court of Justice and Human Rights' by the Protocol on the Statute of the African Court of Justice and Human Rights (2008). The Court of Justice is charged with hearing, among other things, all cases relating to the interpretation or application of the Constitutive Act of the African Union or of all

other treaties adopted within the framework of the Union, or any question of international law, while the African Human Rights Court is charged with the protection of human and peoples' rights and other relevant instruments relating to human rights.

The merger was made pursuant to Assembly decisions, Assembly/AU/Dec.45 (III) and Assembly/AU/Dec.83 (V), adopted respectively at its Third Ordinary Session (6-8 July 2004, Addis Ababa, Ethiopia) and Fifth Ordinary Session (4-5 July 2005, Sirte, Libya), respectively, to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into a single Court. The decision to merge the Courts was motivated by the need to ensure adequate resources are available to fund a single effective continental Court and to consequently avoid duplication of functions.

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 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 the other court’s even though the ECJ is also a regional court like the ACJHR.

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 further recognized the efforts and contribution of the African Commission on Human and Peoples Rights in the promotion and protection of human

and peoples rights since its inception in 1987. They also noted in passing the steady growth of the African Court on Human and Peoples Rights since then and its contribution to protecting human and people's rights on the African continent as well as the progress towards the establishment of the African Court of Justice and Human and Peoples Rights. The Member States further bore in mind the complementary relationship between the African Commission on Human and Peoples Rights and the African Court on Human and Peoples Rights, as well as its successor, the African Court of Justice and Human and Peoples Rights.

The Member States also recalled their commitment to the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.

The Member States went on to reiterate their respect for democratic principles, human and people's rights, the rule of law and good governance. The Member States also saw fit to reiterate their respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities, unconstitutional changes of governments and acts of aggression. The Member States also went to further reiterate their commitment to fighting impunity in conformity with the provisions of Article 4(o) of the Constitutive Act of the African Union.

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.

The Member States in the preamble explicitly recalled Assembly Decision Assembly/AU/Dec.213 (XII) adopted by the Twelfth Ordinary Session of the Assembly in Addis Ababa, Federal Democratic Republic of Ethiopia, on 3 February 2009 on the implementation of the Assembly's Decision on the Abuse of the Principle of Universal Jurisdiction. The Member States recalled too Assembly Decision Assembly/AU/Dec.263 (XIII) adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Libya, on 3 July 2009 on the transformation of the African Union Commission to the African Union Authority. Importantly for this chapter, the Member States recognized the need to take the necessary measures to amend the legal instruments of the principal organs of the African Union in the light of the aforementioned Assembly Decisions.

Finally the Member States expressed their conviction that the present Protocol would complement national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples rights in keeping with Article 58 of the Charter and ensuring accountability for them wherever they occur. It was therefore as a consequence of all the above that the Member States agreed to adopt the amendments to the Protocol on the Statute of the African Court of Justice and Human Rights and its Statute which were annexed to the document.

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 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.

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 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].

Discussion and Argument

Hersch Lauterpacht writing in 1933 about the Permanent of Court of International Justice made the point that under 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 of 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.

³ 1933 H. Lauterpacht *The Function of Law in the Community* 281.

Annex I

Comparative Chart PCIJ/ICJ, and ACJHR

Name of Court	Subject /matter Jurisdiction	International /Regional
PCIJ	<p>Article 36</p> <p>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:</p> <p>(a) the interpretation of a treaty;</p> <p>(b) any question of international law;</p> <p>(c) the existence of any fact which, if established, would constitute a breach of an international obligation;</p> <p>(d) the nature or extent of the reparation to be made for</p>	International

	the breach of an international obligation.	
ICJ	<p>Article 36</p> <p>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.</p> <p>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:</p> <p>a. the interpretation of a treaty;</p> <p>b. any question of international law;</p> <p>c. the existence of any fact which, if established, would constitute a breach of an international obligation;</p> <p>d. the nature or extent of the reparation to be made for the breach of an international obligation.</p>	International
ACJHR	<p>The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to:</p> <p>a) the interpretation and application of the Constitutive Act;</p> <p>b) the interpretation, application or validity of other Union Treaties and all subsidiary legal</p>	Regional

	<p>instruments adopted within the framework of the Union or the Organization of African Unity;</p> <p>↻) the interpretation and the application of the African Charter;</p> <p>d) any question of international law</p> <p>e) all acts, decisions, regulations and directives of the organs of the Union;</p> <p>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;</p> <p>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;</p> <p>h) the nature or extent of the reparation to be made for the breach of an international obligation</p>	
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Annex II

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.

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 recognise 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 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.

Article 19 of the Treaty on European Union (excerpt)

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

2. (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of **Union law** or the validity of acts adopted by the institutions;

3. (c) rule in other cases provided for in the Treaties.

Article 256

1. The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding.

Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.

2. The General Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the specialised courts.

Decisions given by the General Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

3. The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute.

Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.