

## Recent developments

# Form over substance: The African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion

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### Summary

*This article considers the long-awaited decision of the African Court on Human and Peoples' Rights in response to the application brought by the Nigerian NGO, Socio-Economic Rights and Accountability Project (SERAP), which sought guidance on the locus standi of NGOs to seek advisory opinions from the Court on the meaning of certain provisions of the African Charter. The Court's decision endorses the access of the NGO sector in principle, but imposes a stringent procedural precondition of formal observer status accredited by the African Union, rather than a broader test of official status before other relevant bodies, such as the African Commission. The effect of this procedural restriction in practice limits the number of NGOs able to seek Advisory Opinions from the Court to a small subset of the NGOs active in human rights protection in Africa. The article considers whether the Court's approach in adopting this limitation is theoretically coherent and lawful, concluding that it is inconsistent with the proper approach to treaty interpretation at international law. Further, the article considers the broader implications of the Court's decision, and the risk that it will discourage NGOs from using the African Court as the authoritative forum to determine the meaning of the African Charter in favour of other tribunals with less restrictive*

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*standing requirements, raising the potential for the fragmentation of African human rights jurisprudence.*

**Key words:** *African Charter; advisory opinion; standing; treaty interpretation*

## 1 Introduction

On 26 May 2017, the African Court on Human and Peoples' Rights (African Court) delivered its long-awaited Advisory Opinion in response to the application brought by the very active Nigerian non-governmental organisation (NGO), the Socio-Economic Rights and Accountability Project (SERAP).<sup>1</sup> The SERAP application represents the first occasion on which the African Court has set out its thinking on the scope of NGO access to it, despite the fact that the Court has previously dealt with four separate applications from various NGOs in the period since 2012.<sup>2</sup> Since the previous four requests were each struck out on procedural grounds,<sup>3</sup> the 26 May 2017 opinion provides the first window onto the Court's substantive reasoning as to the *locus standi* of NGOs to seek advisory opinions under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).<sup>4</sup> The implications of this first decision are substantial, given that the vast majority of such advisory opinion requests before the Court (five of the eight requests determined and the other three pending)<sup>5</sup> originate from NGOs. The decision confirms that NGOs, in principle, are capable of bringing applications for advisory opinions, but imposes a powerful restriction on the *type* of NGOs which will be eligible. In effect, this prohibits a large category of NGOs, including some of the most active participants in

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1 App 001/2013 *Advisory Opinion on the Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP)* (Advisory Opinion).

2 Aside from the present application made by SERAP, the other applications are App 001/2012 (also made by SERAP); App 002/2012 (made by the Pan African Lawyers' Union and Southern African Litigation Centre); App 001/2014 (made by the Coalition on the International Criminal Court, Legal Defence and Assistance Project, Civil Resource Development and Documentation Centre, and Women Advocates Documentation Centre); and App 001/2015 (made by the Coalition on the International Criminal Court, Legal Defence and Assistance Project, Civil Resource Development and Documentation Centre, and Women Advocates Documentation Centre).

3 See Order of 15 March 2013 in relation to App 001/2012; Order of 15 March 2013 in relation to App 002/2012; Order of 5 June 2015 in relation to App 001/2014; and Order of 29 November 2015 in relation to App 001/2015.

4 OAU Protocol to the African Charter of Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted 10 June 1998, entered into force 25 January 2004.

5 See the listings provided on the Court's website, <http://en.african-court.org/index.php/cases/2016-10-17-16-19-35#finalised-opinions> and <http://en.african-court.org/index.php/cases/2016-10-17-16-19-35#pending-opinions> (accessed 31 May 2017).

strategic litigation on African human rights, from access to the African Court's advisory opinion procedure. As the article sets out, while the *in principle* endorsement of NGO access is to be welcomed, the rest of the Court's decision raises a series of concerns. However, in so far as the Court has failed to live up to its potential as the pre-eminent arbiter of human rights jurisprudence in Africa, other tribunals, such as the Court of Justice of the Economic Community of West African States (ECOWAS Court), are likely to become the favoured venues for determining significant questions on the meaning and scope of the African Charter on Human and Peoples' Rights (African Charter).<sup>6</sup>

## 2 Background to the decision

SERAP brought its application in reliance on article 4 of the Protocol, which provides that the Court may provide an advisory opinion '[a]t the request of a member state of the [African Union], the [African Union], any of its organs, or any African organisation recognised by the [African Union]'.<sup>7</sup> SERAP's argument with respect to its standing was that it came within the scope of the definition of an 'African organisation recognised by the [African Union]' and was therefore entitled to make the instant request.<sup>8</sup>

As for the substance of the request, SERAP sought the Court's opinion on the question of whether 'extreme, systemic and widespread poverty is a violation of certain provisions of the African Charter', and highlighted article 2 (the right to freedom from discrimination on grounds including 'any other status'); article 19 (the right to equal protection of rights); article 21 (the right of states to dispose of natural resources 'in the exclusive interest of the people'); and article 22 (the right of peoples to development, and the duty on states to ensure the same).<sup>9</sup> SERAP sought, by way of the advisory opinion, a ruling on 'whether or not the growing poverty, underdevelopment and grand corruption in Nigeria and elsewhere in Africa amount to violations of the human rights guaranteed under the African Charter'.<sup>10</sup>

Various parties submitted observations on SERAP. The Zambian government, the Cape Verde government, and the Centre for Human Rights at the University of Pretoria supported the position that SERAP

6 African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986 (1982) 21 ILM 58, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 29.

7 Art 4(1) Protocol. It is not in dispute that, following the replacement of the OAU with the AU in July 2002, references in the Protocol to the OAU ought to be read as references to the AU.

8 Para 6 Advisory Opinion (n 1 above).

9 Paras 2 & 3 Advisory Opinion.

10 See the report of the Request's contents in C Jannah 'SERAP loses case seeking to empower citizens to sue corrupt governments in African courts' *Daily Post Nigeria* 4 June 2017.

came within the scope of article 4 of the Protocol as an 'African organisation recognised by the [African Union]'.<sup>11</sup> The Ugandan and Nigerian governments, however, both objected on slightly different grounds. According to Uganda, the barrier to SERAP's request was that SERAP did not at all qualify as an 'organisation' in the relevant sense,<sup>12</sup> whereas the Nigerian government's position was that, while an organisation, it was not an organisation 'recognised by the [African Union]', and that recognition by an *organ* of the AU (namely, the African Commission on Human and Peoples' Rights (African Commission)) was not sufficient. According to Nigeria, 'there is a clear distinction between the AU and an organ of the AU. Recognition by an organ of the AU is not the same as recognition by the AU', and on that basis Nigeria invited the Court to decline jurisdiction.<sup>13</sup>

### 3 African Court's reasoning

#### 3.1 'African organisation'

As a starting point, the African Court rejected the position of the Ugandan government, and concluded that the definition of 'an African organisation' could encompass an NGO, as long as it was duly registered according to the relevant laws in its jurisdiction, headquartered in an African country, and operating within Africa.<sup>14</sup> This clarification that NGOs can be 'organisations' for the purposes of article 4 of the Protocol is clearly correct. Interpreting article 4 in light of the text of the Protocol as a whole (following one of the standard rules of treaty interpretation at international law set out in the Vienna Convention),<sup>15</sup> it is significant that the term 'organisations' occurs elsewhere in the Protocol with the qualifiers 'intergovernmental organisations' (article 5(1)(e)) and 'non-governmental organisations' (article 5(3)). That usage demonstrates both that non-governmental organizations are known to, and contemplated by, the Protocol, and that, when unqualified, the term 'organisations' should embrace those NGOs.<sup>16</sup>

#### 3.2 Recognition

However, the second half of the African Court's reasoning is surprising. The Court was minded to agree with the position

11 Paras 27, 30-31 & 33-36 Advisory Opinion.

12 Paras 25-26 Advisory Opinion.

13 Paras 28-29 Advisory Opinion.

14 Paras 46-51 Advisory Opinion.

15 Arts 33(1)-(2) UN Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980 1155 UNTS 331.

16 This point has been made previously. See F Viljoen *International human rights law in Africa* (2012) 447; F Viljoen 'Communications under the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 130.

advanced by the Nigerian government to the effect that an NGO will only have standing to bring a request for an advisory opinion if that NGO has been granted observer status by the AU.<sup>17</sup> It is only through that process of observer accreditation to the AU, pursuant to the Criteria for Granting Observer Status and for a System of Accreditation within the African Union,<sup>18</sup> that the Court considers that an NGO qualifies as an 'African organisation recognised by the [African Union]' for the purposes of article 4 of the Protocol.

That approach was fatal to SERAP's request since SERAP, while recognised and granted observer status by the African Commission,<sup>19</sup> has *not* obtained accreditation and observer status under the separate AU procedure.

The Court's conclusion was based expressly on a textual analysis. As the Court notes, article 4 'makes reference only to organisations recognised by the African Union and says nothing about those recognised by an organ of the African Union'.<sup>20</sup> The Court contrasted this reference to the AU alone with the fact that, earlier in article 4, reference is made to both the AU itself and 'any of [the African Union's] organs'. According to the Court's reasoning, '[h]ad the authors of the Protocol wanted to also target African organisations recognised by an organ of the African Union, they would certainly not have hesitated to make this clear', and could expressly have referred to organisations with Commission observer status in article 4 if that is what was intended (noting that reference to such organisations is expressly made with respect to standing in relation to contentious cases).<sup>21</sup> The absence of that express reference, according to the Court, obliges the reader to conclude that organisations with observer status to the Commission are intentionally excluded from the list of organisations capable of making a request for an advisory opinion under article 4.<sup>22</sup>

### 3.3 Recalling the background to article 4

However, on further analysis the Court's interpretation of article 4, purportedly based strictly on the words of the Protocol, breaks down. First, while it is a trite observation to make, it is worth noting at the outset that, despite the Court's assertion, it is obvious that whatever the 'authors of the Protocol' in 1998 may have contemplated when referring to recognition by the OAU, it self-evidently cannot have

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17 Para 60 Advisory Opinion.

18 Adopted at the 5th ordinary session of the Assembly of Heads of State and Government of the African Union, by Executive Council Decision EX.CL 195 (VII), Annex V of 1-2 July 2005.

19 Granted at the 43rd ordinary session of the African Commission on Human and Peoples' Rights, 7-22 May 2008.

20 Para 54 Advisory Opinion.

21 See art 5(3) Protocol and para 54 Advisory Opinion.

22 Para 55 Advisory Opinion.

been the procedure for observer accreditation adopted by the OAU's successor body, the AU, in 2005.

At the time of the drafting of the Protocol, systems had, of course, long existed whereby the OAU and the African Commission granted observer status to various NGOs, which entitled those bodies to attend meetings at the periodic sessions and to contribute in various ways to the deliberations of those bodies. Formalised processes for the OAU had been in place since at least 1967,<sup>23</sup> while the African Commission began granting observer status at its 3rd ordinary session in 1988.<sup>24</sup> Therefore, it would be theoretically plausible for the Court to have adopted a reading of article 4 to the effect that it intended to refer to African organisations recognised by the OAU, or its successor, according to the rules granting such recognition in force from time to time.

However, to adopt such an interpretation is to interpret the Protocol in a vacuum. As the recitals in the Preamble to the Protocol make clear, the Protocol was adopted in light of a 'firm conviction' on the part of the state parties 'that the attainment of the objectives of the African Charter ... requires the establishment of an African Court ... to complement and reinforce the functions of the African Commission'. Turning to the African Charter itself, one of the functions of the Commission under article 45, which the Court was intended to 'complement and reinforce' as it took over the judicial role, was to '[i]nterpret all the provisions of the present Charter at the request of a state party, an institution of the OAU or an African organisation recognised by the OAU'.<sup>25</sup> Accordingly, prior to the creation of the African Court, it was within the African Commission's mandate to receive and act upon requests for advisory opinions.

As a matter of fact, the African Commission was never faced with the need to opine on the scope of the term 'African organisation recognised by the OAU' in the African Charter, since only one advisory opinion has ever been requested of, or issued by, the Commission.<sup>26</sup> The limited use of the procedure may be explained by the fact that the Commission's regular meetings provide another forum for clarifying questions as to states' human rights duties by way of the proposal by NGOs of resolutions for decision.<sup>27</sup> Whatever may be the practicalities, as a matter of purposive interpretation, it would indeed

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23 Adopted at the 9th ordinary session by Council of Ministers Decision CM/162/Rev.1, September 1967.

24 With the first organisations recognised being the African Association of International Law, the International Commission of Jurists and Amnesty International.

25 Art 45(3) African Charter.

26 Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples (responding to a request from the Assembly of the African Union) adopted at the 41st ordinary session, 16-30 May 2007.

27 See V Nmeihelle *The African human rights system: Its laws, practice, and institutions* (2001) 181-182.

be peculiar if the Charter, bestowing on the *Commission* the task of receiving requests for advisory opinions from a range of organisations concerned with the protection of human rights in Africa, had the effect of excluding the very organisations which the Commission had recognised as having particular expertise in the field by the grant of observer status. Interpreted in light of the purpose of the African Charter and the context of the pre-existing practice of the African Commission in granting observer status, it is submitted that the better view is that the reference in article 45(3) of the Charter to 'an African Organisation recognised by the OAU' should be interpreted as meaning an African organisation recognised by any of the organs of the OAU, including the African Commission.

Just as that is obviously a sensible purposive reading, it clearly is a reasonable reading of the text. It is a basic legal principle that a body may act through its agents, whether the body is constituted in private law, public law, or acts at the international plane. The International Law Commission, in its Draft Articles on the Responsibility of International Organisations, has reflected this principle in its draft article 6, which provides that '[t]he conduct of an organ or agent of an international organisation in the performance of functions of that organ or agent shall be considered an act of that organisation under international law'.<sup>28</sup> There can be no realistic debate but that the African Commission is an organ of the AU. While the basis of the Commission's authority derives from the African Charter, rather than subsidiary acts of the OAU/AU, the Commission has long operated on a day-to-day basis as the human rights promotion and protection arm of the OAU/AU, and is represented as an organ of the AU on the AU website.<sup>29</sup> Accordingly, the textual reading of the phrase 'African organisation recognised by the OAU' can embrace those organisations granted official recognition (via observer status) with the African Commission (acting on behalf of the OAU/AU). This reinforces the clear purposive sense in that interpretation, which would otherwise have left the Commission in the peculiar situation under the Charter of being disbarred from receiving requests from NGOs it had previously judged best placed to make such requests.

Against that background of the proper meaning of the term 'African organisations recognised by the OAU' in article 45(3) of the African Charter itself, it is simply perverse for the meaning of those same words, when repeated in article 4 of the Protocol, to change in such a way that a whole category of applicable NGOs – those recognised by the African Commission – lose their *locus standi* without any consideration of the issue. The *travaux préparatoires* certainly contain no mention that article 4 was considered to have any such

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28 International Law Commission 'Draft articles on the responsibility of international organisations, with commentaries' (2011) II *Yearbook of the International Law Commission* art 6(1).

29 See <https://www.au.int/web/en/organs/cj> (accessed 7 June 2017).

effect.<sup>30</sup> Such an effect would also appear to frustrate the explicit purpose of the Protocol to 'complement and reinforce the functions of the African Commission' in human rights protection, rather than to retreat from that task.

The African Court's decision on the scope of article 4 of the Protocol, by simply ignoring the legacy of the same advisory opinion provision in the African Charter, is inconsistent with the purpose of the Protocol in building on the Charter, and inconsistent with the long-standing (if, admittedly, little-used) role of the advisory opinion process before the African Commission.

#### 4 Implications for African human rights law

A decision which fails to properly interpret the meaning of the Protocol is *per se* problematic. However, this particular decision of the African Court raises particular concerns given that, by excluding an entire category of NGOs from access to the advisory jurisdiction of the Court, the Court sends a message that NGOs seeking clarification on difficult questions regarding the interpretation of African human rights law ought not to approach the Court.

That incentivises concerned NGOs to bring strategic litigation, or bring requests for advisory opinions in other, more accessible forums. One such forum, to which the African Court appears already to be surrendering control over the development of African human rights law, is the ECOWAS Court. The ECOWAS Court has taken an expansive approach to standing, ensuring that NGOs have access for the purposes of raising matters of public importance, even though the explicit terms of its Supplementary Protocol<sup>31</sup> do not expressly so provide.<sup>32</sup> That, combined with the absence of a requirement for the exhaustion of domestic remedies in human rights claims before the ECOWAS Court,<sup>33</sup> renders it a particularly attractive venue for strategic litigation to raise questions as to the scope and effect of the African Charter.

For the African Court to bar legitimate African NGOs from access to the advisory opinion procedure will only serve to hasten the move towards other tribunals, including the ECOWAS Court, when

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30 The only substantive change to the wording of art 4 of the Protocol during the drafting process being the inclusion of the proviso that requests must not duplicate matters already under examination before the Commission. This proviso was introduced in the Addis Ababa Draft (1997).

31 ECOWAS Supplementary Protocol A/SP.1/01/05 amending the Preamble and arts 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and art 4 para 1 of the English version of the said Protocol.

32 ECW/CCJ/APP/08/09; Ruling ECW/CCJ/APP/07/10 *The Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria* Preliminary Objections Ruling of 10 December 2010 para 61.

33 ECW/CCJ/JUD/07/11 *Ocean King Nigeria Ltd v Senegal* (Judgment of 8 July 2011) para 41.

questions as to the meaning of the African Charter arise. This raises the real prospect of fragmentation of African human rights jurisprudence as between the African Court and the ECOWAS Court, and the undesirable consequence that either two different schools of jurisprudence may emerge as between the two tribunals applying the same Charter, or the AU's apex court loses control over the development of Charter jurisprudence to the ECOWAS Court. Neither outcome would ever have been intended by the authors of the African Charter and the African Court Protocol, but the African Court's misplaced claim of fidelity to the text of article 4 brings them a significant step closer.