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Winner of the 2006 UNESCO Prize for Human Rights Education
Lauréat 2006 du Prix UNESCO de l'éducation aux droits de l'homme

Amicus Curiae Submission

presented to

the African Court on Human and Peoples' Rights

by

the Centre for Human Rights, University of Pretoria
under Rule 45(1) of the Rules of the Court

in respect of
the request for an advisory opinion by
Socio-Economic Rights and Accountability Project
(SERAP)
under article 4(1) of the Court Protocol and
Rule 68 of the Rules of Court

19 July 2012

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1 Introduction

1 The Centre for Human Rights (the Centre), University of Pretoria, is an academic department and a non-governmental organization (NGO) established in 1986. The Centre works towards human rights education in Africa, the wide dissemination of publications on human rights in Africa and the improvement of the rights of women, people living with HIV, indigenous peoples and other disadvantaged or marginalised groups across the continent. In 2006, the Centre was awarded the UNESCO Prize for Human Rights Education. The Centre has enjoyed observer status with the African Commission on Human and Peoples' Rights (African Commission) since December 1993.[1]

2 Pursuant to rule 45(1) of the Rules of the Court,[2] the Centre seeks admission in this case as Amicus Curiae to provide the African Court on Human and Peoples' Rights (the Court) with submissions on the advisory jurisdiction of the Court. The Centre's submission seeks to answer the question

> [w]hether the Court has jurisdiction to provide advisory opinions at the request of NGOs such as Socio-Economic Rights and Accountability Project (SERAP) under article 4(1) of the Court Protocol and article 68(1) of the Rules of the Court.

The Centre submits that on the proper interpretation of article 4(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Court Protocol), the Court has jurisdiction to provide advisory opinions upon the request of African NGOs such as SERAP.

2 As an NGO enjoying observer status with the African Commission, SERAP is included within the meaning of article 4(1) of the Court Protocol

3 As regards advisory opinions, article 4(1) of the Court Protocol provides as follows:

> At the request of a member state of the OAU, the OAU, any of its organs, or *any African organization recognized by the OAU*, the Court may provide an opinion on any legal matter

[1] The Centre was granted observer status at the 14th Ordinary Session of the Commission held from 1 to 10 December 1993 in Addis Ababa http://www.achpr.org/network/ngo/133/ (accessed 5 June 2012).

[2] At paras 8-9 of *African Commission on Human and Peoples' Rights v The great Socialist Libyan Peoples' Arab Jamahiriya* application no.004/2011, the Court admitted the Pan African Lawyers' Union (PALU) as amicus curiae based on article 45(1) of the Rules of the Court.

> relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission (emphasis added).

4 On the interpretation of treaties, article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) provides the following:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

5 The International Court of Justice (ICJ) in the *Territorial Dispute* case *(Libya v Chad),*[3] asserted that the above provision of the VCLT constitutes customary international law. An interpretation of the Court Protocol in accordance with the *ordinary meaning* of the terms in article 4(1), in the *context* of the Court Protocol as a whole, and in light of its *object and purpose* leads to the conclusion that the Court has jurisdiction to provide advisory opinions upon the request of African NGOs, such as SERAP, as will be fully argued below. The essence of interpreting treaties by giving effect to the words used in their ordinary meaning, in their context and in light of the object and purpose of the provisions, has been emphasized as appropriate in international law. Indeed, the ICJ in *Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations* held:[4]

> [T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context that is an end of the matter.

6 In determining the ordinary meaning of words in a treaty, the ICJ has often had recourse to the use of dictionaries. In the *Oil Platforms* case,[5] the ICJ for example referred to dictionaries (including the *Oxford English Dictionary*) to ascertain the ordinary meaning of the word 'commerce' in a treaty. Adopting a similar approach, it is argued that the ordinary dictionary or textual meaning of the words 'any African organization' encompasses NGOs. Article 4(1) lists three categories of entities that may approach the Court with a request for an advisory opinion: (1) member states; (2) the OAU (read: AU)

[3] *Territorial Dispute* case *(Libyan Arab Jamahiriya v Chad)* ICJ Report (1994).
[4] ICJ Reports (1950) 8.
[5] *Oil Platforms* case *(Islamic Republic of Iran v United States of America) Preliminary Objection* ICJ Report (2003).

or any of its organs; and (3) 'any African organization recognized by the OAU (read: AU)'. The phrase describing the third category on this list is explained below in its ordinary meaning, in its context, and in accordance with the object and purpose of the Court Protocol.

2.1 'African'

7 The last category of entities listed in article 4(1) that can request advisory opinions from the Court are qualified as 'African' organizations. The *Oxford English Dictionary* defines 'African' as 'relating to Africa'. In accordance with this ordinary meaning, 'African' organizations may relate to the organization's geographical location, that is, to organizations based in African states. The term 'African' may also relate to organizations with a predominantly African management structure even if they are not based in Africa. Finally, 'African' may also relate to international human rights NGOs with an African membership or thematic focus. It is submitted that an 'organization' should qualify as 'African' under article 4(1) if it displays any of the three sets of criteria discussed above. NGOs such as Article 19 and Amnesty International would arguably fit the third set of criteria, and would thus be 'African' on that basis. Although not based in Africa and not working exclusively on African-related issues, both these organizations have been active in bringing cases before the African Commission and have indeed been applauded for their actions under the doctrine of *actio popularis*.[6] Such a broad interpretation would not lead to an uncontrollable influx of advisory opinion requests, as this requirement has to be read together with the further requirement under article 4(1) of recognition by the African Union (AU).

8 SERAP is an organization located in Africa, more specifically, in Lagos, Nigeria.[7] It is also an organization with a predominantly African management structure and membership.[8] SERAP's thematic focus also relates to Africa as it aims to 'promote

[6] See *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) and *Amnesty International v Tunisia* (2000) AHRLR 319 (ACHPR 1994).
[7] http://serap-nigeria.org/who-we-are/ (accessed 5 June 2012).
[8] SERAP's National Advisory Board consist of members who are all African including: Mr. Femi Falana, President West African Bar Association; Mr. Tayo Oyetibo; Professor Oluwole Smith, Dean Faculty of Law, Lagos State University; and Mrs. Ayo Atsenuwa, Professor of Law, University of Lagos.

transparency and accountability in the public and private sectors through human rights'.[9] SERAP therefore qualifies as 'African' in terms of article 4(1).

2.2 'Organization'

9 The *Oxford English Dictionary* defines an 'organization' as 'an organized group of people with a particular purpose'. There can be little doubt that this ordinary definition of the word 'organization' is broad enough to include a non-governmental organization, as it is 'an organized group of people' working towards a 'particular purpose'. Adopting a contextual approach, and looking holistically at the provisions of the Protocol, it is noted that, in addition to article 4(1), the term 'organization' is used on two other occasions: once, qualified by the word 'intergovernmental' ('intergovernmental *organizations*')[10] and once qualified by the word 'non-governmental' ('non-governmental *organizations*).[11] The term 'organization' is therefore used in the Protocol as a generic term, of which the species *includes* entities that may be either intergovernmental or non-governmental.[12] The use of the terms 'intergovernmental organizations' and 'non-governmental organizations' in the Court Protocol further indicates that the use of 'any African organization' in article 4(1) was a deliberate use of the term 'organization' in its generic meaning, with the intention to include the various species of organizations under the umbrella of the generic term 'organization'. Such an interpretation is both in line with the ordinary and contextual meaning of the term 'organization' in the Protocol.

10 The use of 'organizations' in the context of the Court Protocol does not lend itself to an interpretation that excludes NGOs such as SERAP. SERAP as a non-governmental organization is thus an '*organization*' under article 4(1) of the Court Protocol.

2.3 'Recognized by the African Union'

11 With respect to the requirement of 'recognition by the African Union', it is submitted that recognition of an NGO by any of the organs or agencies of the African Union (AU) should suffice as recognition by the principal body: the AU. It is trite in modern international law that an agent is authorized to act on behalf of his principal within the

[9] http://serap-nigeria.org/who-we-are/ (accessed 5 June 2012).
[10] Art 5(1)(e) of the Court Protocol.
[11] Art 5(3) of the Protocol.
[12] F Viljoen *International human rights law in Africa* (2012) 447.

mandate of the agent. The AU has a number of organs and agencies carrying out various mandated functions. Such compartmentalization is necessary for the practical functioning of the AU. It will therefore be logical and practical to consider NGOs which enjoy observer status with AU agencies such as the African Commission, or civil society organizations represented at the AU Economic and Social Cultural Council (ECOSOCC), as being recognized by the AU within the terms of article 4(1).

12 SERAP was granted observer status by the African Commission at its 43rd Ordinary Session held from 7 to 22 May 2008 at Ezulwini, Swaziland. SERAP therefore meets the requirement of recognition by the AU under section 4(1) of the Court Protocol.

2.4 Conclusion: SERAP is an 'African organization recognized by the African Union'

13 The ordinary meaning of the phrase 'any African organization recognized by the OAU', read within the textual context of the Court Protocol as a whole, and in accordance with the object and purpose of the Court Protocol, supports an interpretation of this phrase that would include NGOs. A study of the preparatory work of the Court Protocol also suggests that the use of the phrase 'any African organization' was understood in its ordinary meaning by all participants in the drafting of the Court Protocol as it was present from the original draft by the International Commission of Jurists[13] and was never met with protest or a request for clarification by state delegations. The use of the word 'any' in the phrase 'any African organization' in article 4(1) also indicates an intention to create wide access.[14]

14 The Court therefore has jurisdiction to provide advisory opinions upon the request of NGOs such as SERAP within the meaning of article 4(1). This is because SERAP meets all the three requirements of the third category of entities that may request advisory opinions from the Court, that is, 'any African organization recognized by the OAU'. First, by virtue of its geographical location, its predominantly African management and membership as well as its thematic focus on African issues, SERAP qualifies as

[13] International Commission of Jurists 'Additional Protocol to the African Charter on Human and Peoples' Rights' *Fifth Workshop on NGO participation in the African Commission on Human and Peoples' Rights* (28-30 November 1993) Addis Ababa, Ethiopia, art 28.

[14] The *Oxford English Dictionary* defines 'any' as whichever of a specified class might be chosen. According to the Dictionary, the term is 'used to refer to one or some of a thing or a number of things, no matter how much or how many'.

'African'. Additionally, SERAP qualifies as an 'organization' within the ordinary meaning and context of article 4(1) and finally, SERAP is 'recognized by the OAU', having enjoyed observer status with the African Commission since 2008. SERAP therefore is an 'African organization recognized by the AU' and may request advisory opinions from the Court pursuant to article 4(1) of the Court Protocol.

3 Article 4(1) should be interpreted to reflect the uniqueness of the African Charter and the realities of Africa

15 The African Charter on Human and Peoples' Rights (African Charter) is unique in the substantive rights it provides. It is the only instrument that provides for group rights in addition to individual rights.[15] Collective or peoples' rights reflect the communal way of life and world view of Africans. A purposive reading of the Charter and the Court Protocol calls for generous standing to allow NGOs, as collectives representing the interest of African civil society, to approach the Court. Advisory opinions are aimed at clarifying the content of the Charter, including its uniquely African features. The need for NGOs to be permitted to request advisory opinions from the Court under article 4(1) of the Protocol is heightened because they have such limited standing to approach the Court in contentious cases. There are two ways in which contentious cases may come to the Court: indirectly, when the Commission refers such cases; or directly, when the state has accepted the competence of individuals or NGOs to approach the Court while by-passing the Commission. However, this competence has only been accepted by five states, when they made declarations under article 34(6) of the Protocol. To deny NGOs the opportunity to seek advisory opinions of the Court simply because their governments have not made this declaration will detract from the role of the Court as an *African* Court of Human and Peoples' Rights. The possibility of advisory opinions should be fully explored to provide opportunities to clarify the content of the African Charter as it relates to the lives of Africans. Given the dearth of contentious cases submitted to the Court thus far, it is imperative that the Court be provided with opportunities to clarify aspects of the unique content of the Charter. Allowing NGOs to bring requests for advisory opinions is one way of achieving this aim.

[15] See arts 19 to 25 of the African Charter.

16 The African Court should therefore interpret article 4(1) of the Protocol purposively, to allow NGOs such as SERAP to make requests for advisory opinions, in order to provide opportunities for the full understanding of the African Charter to the benefit of all Africans.

4 Article 4(1) should be interpreted in line with the trend to expand access to the advisory jurisdiction before regional human rights courts

17 The other two major regional human rights courts in the world, the European Court of Human Rights (European Court) and the Inter-American Court of Human Rights (Inter-American Court) are also endowed with the competence to adopt advisory opinions. However, the legal provisions allowing such requests are markedly different from article 4(1) of the African Court Protocol. In respect of the European Court, only the Committee of Ministers may approach the Court with such a request. Under the Inter-American human rights system, the Inter-American Commission, and organs of the Organization of American States (OAS), and any state party may make such a request. Given that the African Court Protocol adds another category, namely 'any African organization recognized by the OAU/AU', the specific wording or list of entities in the other two regional human rights systems is of limited relevance to the interpretation in article 4(1). However, we argue that the experience of the other two regional systems is relevant in two respects.

18 First, it should be noted that the list of entities allowed to request advisory opinions is more restrictive in the other two systems than in the African. By adding a new category of entities allowed to bring requests, article 4(1) is clearly more expansive than the other two regimes.

19 Second, although neither of the two systems provides that non-governmental organizations may request advisory opinions, there has been a very significant progression from the initial position, under the European Convention (of 1950), to the later position in the American Convention (of 1969). Initially, the European Convention did not foresee the possibility of advisory opinions at all. Only in 1963, through Protocol

No 2 to the Convention, did this possibility arise for the first time.[16] Under this Protocol, only the Committee of Ministers of the Council of Europe may approach the Court with request for an advisory opinion. Due to this limitation, this competence has been used very rarely, on only two occasions. When the American Convention was adopted in 1969, this competence was included in the treaty itself.[17] The entities entitled to request advisory opinions were also extended dramatically, to include member states and the OAS organs, including the Inter-American Commission. Article 4(1) of the Protocol is thus part of a trend of increasing expanding access to the advisory jurisdiction of the courts within regional human rights systems.

20 An interpretation of article 4(1) allowing NGOs access to the advisory jurisdiction of the Court will therefore be in line with the trend within regional human rights systems of expanding the list of entities allowed to request advisory opinions.

5 Article 4(1) should be interpreted in line with developments under international law to acknowledge NGOs as active participants

21 An interpretation of article 4(1) allowing NGOs to request advisory opinions from the Court is in line with the trend under international law, generally, and international human rights law, specifically, to provide an active role to individuals and NGOs before quasi-judicial and judicial bodies. As seen in the *Reparations* case,[18] the statist view of international law that regarded states as the only subjects of international law has now been rejected in favor of a view that reflects the reality of individuals and NGOs as key actors in international law. Rebasti and Vierucci observe that the nature of international trials is changing even in the most conservative of international courts with more cases addressing issues of a collective or public nature.[19] They refer to ICJ cases such as the

[16] Protocol No. 2 to the European Convention Conferring upon the European Court of Human Rights Competence to give Advisory Opinions, 1963.
[17] Art 64(1) of the American Convention.
[18] *Reparations for Injuries Suffered in the Service of the United Nations* ICJ Reports (1949).
[19] E Rebasti & L Vierucci *A Legal Status for NGOs in Contemporary International Law* (2009) 13. http://users.unimi.it/sociv/documenti/report.doc. See also P Kooijmans 'The Role of Non-State Actors and International Dispute Settlement' in WP Heere *From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal System* (2004) 23.

East Timor case[20] and the *Gabcikovo-Nagymaros* case,[21] which demonstrate the growing importance vested upon non-state actors in international law.

22 Individuals and NGOs are crucial to the functioning of the international human rights regime. Since the adoption of the Convention on the Elimination of All Forms of Racial Discrimination in 1965, international human rights law witnessed the growth of the competence of individuals and NGOs to bring communications to UN human rights treaty bodies. Today, individuals and NGOs may submit such complaints to no less than six UN treaty bodies.[22] The role of NGOs in this procedure is very significant because of their ability to follow human rights situations in various countries.[23] The procedures which allow communications by individuals and NGOs have been relatively successful while procedures for inter-state complaints are yet to yield any major result.[24] There is no doubt that NGOs play a great role in the advancement of human rights also in Africa. To deny them access to the Court in respect of advisory opinions would therefore be against the progressive development of international law especially considering the huge challenges involved in the protection of human rights in Africa.

6 Conclusion

23 Article 4(1) of the Court Protocol sets out three requirements with respect to the last category of entities that may request advisory opinions from the Court:

a) They must be African;

b) They must qualify as organizations; and

c) They must be recognized by the AU.

[20] ICJ Reports (1995).
[21] ICJ Reports (1997).
[22] Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR); Committee on the Elimination of Discrimination Against Women under the Optional Protocol to the Convention on the Elimination of Discrimination Against Women (CEDAW); Committee Against Torture under article 22 of the Convention Against Torture (CAT); Committee on the Elimination of Racial Discrimination under article 14 of the Convention on the Elimination of Racial Discrimination (CERD); Committee on the Rights of People with Disability under the Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD); Committee on Migrant Workers under article 77 of the Convention on Migrant Workers (CMW).
[23] A Subian *Human Rights Complaints Systems: International and Regional* (2003) 31.
[24] A Cassese *International law* (2005) 387.

SERAP meets all the three requirements. First, its geographical location in Africa, its predominantly African management and membership as well as its thematic focus on African issues qualifies it as 'African' or 'relating to Africa'. Second, SERAP qualifies as an organization within the ordinary meaning and context of article 4(1). Third, SERAP is recognized by the AU, having enjoyed observer status with the African Commission since 1998. SERAP therefore is an 'African organization recognized by the AU' and therefore may request advisory opinions from the Court pursuant to article 4(1) of the Court protocol.

24 Article 4(1) of the Court Protocol provides a wide advisory jurisdiction for the Court which covers requests by NGOs. This provision has a clear textual difference from the corresponding provisions of other international courts which exclude NGOs and therefore must be interpreted differently. An interpretation of article 4(1) that includes NGOs is in line with the peculiarities of the African Charter and realities of human rights in Africa for a meaningful application of group rights in the African Charter. Such an interpretation would be in line with the trend of expanding access to the advisory jurisdiction of regional human rights courts. Finally, an interpretation of article 4(1) that allows for NGOs to request advisory opinions rightly reflects the increasing importance of NGOs in international human rights law. The Court therefore has jurisdiction to provide advisory opinions upon the request of NGOs such as SERAP.