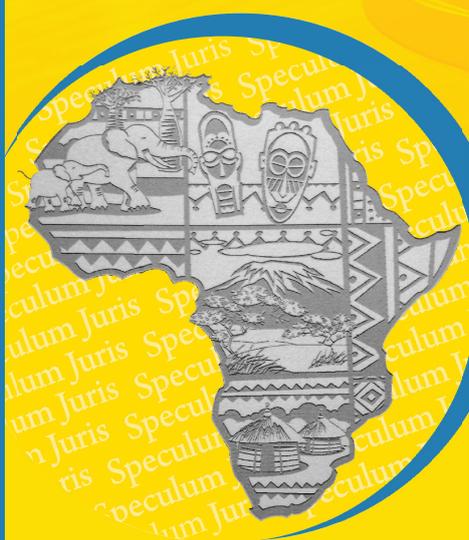


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## "Recognition" by the African Union as a *locus standi* requirement in advisory opinions before the African Court: An analysis of NGOs' access to justice under the African regional human rights system

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### Abstract

*The contributions of civil society, through public interest litigation, is an important mechanism to protect, promote and fulfil the rights elaborated upon in the proliferation of Bills of Rights in African constitutions as well as in regional human rights instruments. Used to advocate for social justice and social change, public interest litigation often advances the cause of disadvantaged groups without the capacity to challenge the injustice done to them. Therefore, it is an essential component of the right of access to justice, both domestically and regionally. This chapter focuses on how Non-Governmental Organisation (NGO) participation at the African Court on Human and Peoples' Rights (Court or African Court) has been diminished by narrowly interpreting the locus standi requirement of NGOs to hinge on the recognition by the African Union (AU) Commission; importantly, as argued in this chapter, relocating a principally legal issue to a political entity namely the AU Executive Council. This analysis furthermore relates to the broader question of whether the AU, through its member states, is currently attempting to dismantle its human rights-related accountability mechanisms altogether.*

*Against the backdrop of the austere conditions laid down in articles 5(3) and 34(6) of the Court Protocol, barring most NGOs from directly approaching the African Court in contentious matters, the main objective of this chapter is to analyse the premises on which the African Court based its decisions in the Request for Advisory Opinion by Socio-Economic Rights and Accountability Project (SERAP) and the Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition*

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of African Lesbians (Coalition of African Lesbians) to deny access to the advisory process. To this end, this chapter aims to explore the nature 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 and its relation to the rules and practices of the AU Commission. To provide some context the chapter offers a brief insight into the importance of public interest litigation on the regional level and the centrality of NGO participation in this regard. The chapter further sets out the feasibility of public interest litigation before the African Court by interrogating different ways of accessing the court, expressly focusing on the advisory jurisdiction and the outcomes in *SERAP* and *Coalition of African Lesbians*.

**Keywords:** Public interest litigation; *locus standi*; advisory opinion; access to justice; African Court on Human and Peoples' Rights; African Union Commission; African Commission on Human and Peoples' Rights

## 1 INTRODUCTION

In May 2017, the African Court on Human and Peoples' Rights (Court or African Court) denied a request for an advisory opinion submitted by *SERAP*, a Nigerian Non-Governmental Organisation (NGO). In the *Request for Advisory Opinion by Socio-Economic Rights and Accountability Project (SERAP)*,<sup>1</sup> the African Court concluded that it lacked jurisdiction *ratione personae* to hear the request, as the NGO lacked observer status before the African Union Commission (AU Commission).<sup>2</sup> Based on its conclusion in *SERAP*, the African Court, during September 2017, delivered another four separate decisions on requests for advisory opinions, submitted by nine NGOs altogether. The African Court, as a response to these requests, similarly concluded that it could not give the advisory opinions requested because the NGOs did not possess the relevant *locus standi* and therefore the court lacked jurisdiction *ratione personae*. The *locus standi*, as indicated by the African Court, was directly linked, as in *SERAP*, to the recognition of the NGO, by the AU.<sup>3</sup>

*SERAP* and the application of the procedure developed in *SERAP* in the following four cases denotes the African Court's first engagement with NGOs requesting access under Article 4(1) of the Protocol to the African Charter on Human and Peoples' Rights (ACHPR) on the Establishment of an African Court on Human and Peoples' Rights<sup>4</sup> (Court Protocol). As suggested by Jones:

The decision [referring to *SERAP*] 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 strategic litigation on African human rights, from access to the African Court's Advisory Opinion procedure.<sup>5</sup>

Furthermore, in his Separate Opinion in *SERAP*, Achour J refers to the specific terms of the Court Protocol in combination with the practice of the AU Commission as the prerequisites for *locus standi*. He argues that "[t]he Court had no choice ... [i]ts hands were "tied" by the explicit terms of Article 4(1) of its Protocol and by the restrictive practice of the [African] Union

1 Application No. 001/2013, Advisory Opinion 26 May 2017.

2 *Ibid* para 65.

3 Request for Advisory Opinion by L'Association Africaine de Défense des Droits de l'Homme, Advisory Opinion 002/2016 (28 September 2017) (*ASADHO*) paras 30–35; Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria, the Federation of Women Lawyers Kenya, the Women's Legal Centre and Women Advocates Research and Documentation Centre and Zimbabwe Women Lawyers Association, Advisory Opinion 001/2016 (28 September 2017) (*Women's Legal Centre*) paras 44–49; Request For Advisory Opinion by Rencontre Africain Pour La Defense Des Droits De L'Homme, Advisory Opinion 002/2014 (28 September 2017) (*RADDHO*) paras 33–38; and Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians, Advisory Opinion 002/2015 (28 September 2017) (*Coalition of African Lesbians*) paras 52–57.

4 Adopted on 10 June 1998.

5 Jones "Form over substance: The African Court's restrictive approach to NGO standing in the *SERAP* Advisory Opinion" 2017 *African Human Right Law Journal* 321 322.

in matters of granting observer status to NGOs".<sup>6</sup>

Given opportunity and access, NGOs such as the Socio-Economic Rights and Accountability Project and the Coalition of African Lesbians (CAL) can arguably be key actors in holding states accountable for human rights violations under regional human rights law. In the Cotonou Declaration, the African Commission recommended that the AU should "[r]ecognise the critical role of human rights defenders in promoting human rights, democracy, the rule of law and sustainable development in Africa".<sup>7</sup> However, the space on the continent where human rights defending NGOs can freely and safely operate to execute their mandates is diminishing. This, as suggested in this chapter, is not only due to state actions on the domestic level where states like Burundi,<sup>8</sup> Zimbabwe,<sup>9</sup> and Tanzania<sup>10</sup> from time to time ban, restrict and/or harass NGOs which either, in the minds of these states, interfere with domestic politics or represent views that are contrary to the moral values of the state. As is further highlighted in this chapter, the AU is also obstructing NGO participation in human rights adjudication, limiting the impact of public interest litigation on the regional level and as such lessening the accountability for the human rights violations that occur.

This chapter focuses on how NGO participation at the African Court has been diminished by narrowly interpreting the *locus standi* requirement of NGOs to hinge on AU recognition; importantly, as argued in this chapter, relocating a principally legal decision to a political entity: the AU Executive Council. This analysis relates to the broader question of whether the AU, through its member states, is currently attempting to dismantle its human rights-related accountability mechanisms altogether.

Against the backdrop of the austere conditions laid down in articles 5(3) and 34(6) of the Court Protocol, barring most NGOs from directly approaching the Court in contentious matters, the main objective of this chapter is to analyse the premises on which the African Court based its decisions in *SERAP* and *Coalition of African Lesbians* to deny access to the advisory process. To this end, this chapter aims to explore the nature of Article 4(1) of the Court Protocol and its relation to the rules and practices of the AU Commission. To provide some context, part two offers a brief insight into the importance of public interest litigation on the regional level and the centrality of NGO participation in this regard. Part three sets out the feasibility of public interest litigation before the African Court by interrogating different ways of accessing the court, expressly focusing on the outcomes in *SERAP* and *Coalition of African Lesbians*. Part four highlights the findings under part three and presents some concluding remarks relating to possible measures that could be taken, on the regional level, to promote access of NGOs to regional justice mechanisms.

## 2 PUBLIC INTEREST LITIGATION

Public interest litigation (or *actio popularis* as this concept is referred to under the African human rights system), is the use of the law to advance the human rights of a cluster of individuals to raise issues of broad public concern. Used to advocate for social justice and social change, public interest litigation often advances the cause of disadvantaged groups without the capacity to challenge the injustice done to them. Therefore, it is an essential component of the right of access to justice, both domestically and regionally.

The main vehicle for public interest litigation is, more often than not local, regional or

<sup>6</sup> Separate Opinion of Achour J as attached to the Advisory Opinions in *ASADHO*, *Women's Legal Centre*, *RADDOH* and *Coalition of African Lesbians*. Achour J furthermore presented a dissenting opinion in *SERAP* focusing on the reasons for the majority not to grant the Socio-Economic Rights and Accountability Project access to the African Court. In *SERAP* the majority came to the conclusion that it had no jurisdiction *ratione personae* to issue the Advisory Opinion sought, while the African Court, in the four latter requests concluded that it could not issue the Advisory Opinion requested of it as the NGOs requesting them had no right to do so.

<sup>7</sup> African Commission, Cotonou Declaration on strengthening and expanding the protection of all Human Rights Defenders in Africa (Cotonou Declaration), adopted at the 2nd International Symposium on Human Rights Defenders in Africa, 27 March – 1 April 2017, Cotonou, Benin para 5.

<sup>8</sup> "Burundi bans international NGOs" *Civicus* (8 October 2018) <https://www.civicus.org/index.php/media-resources/news/interviews/3540-burundi-bans-international-ngos> (accessed 04-11-2020).

<sup>9</sup> "NGOs not welcome in Zimbabwe, says Mugabe's wife Grace" *News24* (3 June 2017) <https://www.news24.com/Africa/Zimbabwe/ngos-not-welcome-in-zimbabwe-says-first-lady-grace-mugabe-20170603> (accessed 04-11-2020).

<sup>10</sup> "Tanzania suspends NGO for 'promotion' of gay marriage" *News24* (21 October 2017) <https://www.news24.com/Africa/News/tanzania-suspends-ngo-for-promotion-of-gay-marriage-20171021> (accessed 04-11-2020).

international NGOs, possessing the expertise and resources. Procedurally, and in general terms, an *actio popularis* rests on three pillars. First, a broader interest of the matter at hand. Secondly, the recognition, by the adjudicating body, of the legal ability of a party or entity other than the victim to represent the claim (often referred to as a relaxed victim requirement). Thirdly, the ability of the party or entity (other than the victim) to gain standing before the court that is, the acceptance of its *locus standi*. In other words, a liberal approach to *locus standi* is a precondition of an *actio popularis*, which by its very nature generally serves a broader purpose in law.

The recognition of the legal capacity, to act on behalf of a specified or unspecified group, is the procedural foundation for public interest litigation as it allows for, for example, NGOs to bring forward petitions without necessarily having any affiliation with the victims of the human rights violation or without being able to account for every victims' identity. NGO representation of victims of human rights violations is not always pursued with a public interest focus. However, there is generally great overlap between the two.

Public interest litigation is an important mechanism in protecting, promoting, and fulfilling the rights elaborated upon in the proliferation of Bills of Rights in African constitutions as well as in regional human rights instruments. In terms of the latter, this is especially true with regard to the categories of right holders elaborated on in the ACHPR<sup>11</sup> which refers to "every individual", "human beings" and "all peoples" instead of "victim" or "victims". As concluded by Chiduzo and Makiwane "[l]ocus standi may be regarded as an essential tool for the realisation of human rights".<sup>12</sup> In many early constitutions in the post-colonial era, personal, direct, or substantial interest in a matter was required for a domestic court to recognise standing.<sup>13</sup> However, some African states have increasingly begun to recognise the importance of broader rules of *locus standi*, to enable public interest litigation.<sup>14</sup> The objective of the following sections is to scrutinise what approach has been followed on the regional level.

### 3 AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

#### 3.1 *Locus standi* of NGOs (contentious cases)

The African Court was established under the Court Protocol as per Article 66 of the ACHPR. The Protocol sets out the *locus standi* of individuals and NGOs in articles 5(3) and 34(6). It allows "individuals" and "NGOs with observer status before the African Commission" to institute cases directly before it. As no victim requirement is stipulated, the Court, by indirect reference, recognises the *actio popularis*.<sup>15</sup> A further reading of the Final Rules of the Court especially rules 33(1)(f) and 34(4) and (5), gives at hand that the complainant is referred to as the "Applicant" and not the "Victim".<sup>16</sup> Furthermore, "any" Applicant can act "on behalf of the victim".<sup>17</sup> This is ostensibly in line with the pathos of the ACHPR to foster "peoples' rights". It is furthermore supporting the idea, as expressed by the Economic Community of West African States (ECOWAS) Court, in the *Socio-Economic Rights and Accountability Project v Federal Republic of Nigeria Preliminary Objections Ruling* that there is a "need to reinforce the access to justice for the protection of human and people rights in the African context".<sup>18</sup> The African Court in *Actions Pour la Protection des Droits de l'homme (APDH) v Republic of Cote d'Ivoire*

11 Adopted 27 June 1981, entered into force 21 October 1986, OAU Doc CAB/LEG/67/3/Rev.5.

12 Chiduzo and Makiwane "Strengthening Locus Standi in Human Rights Litigation in Zimbabwe: An analysis of the Provisions in the New Zimbabwean Constitution" 2016 *Potchefstroom Electronic Law Journal* 3.

13 See s 24(1) of the Lancaster house Constitution 1979, stipulating that an individual must have a "personal, direct or substantial interest" in a matter to have standing.

14 See s 38 of the Constitution of the Republic of South Africa, 1996; ss 22 and 258 of the Kenyan Constitution of 2010; s 85 of the Zimbabwean Constitution of 2013; and ss 50(2) and 137(3) of the Ugandan Constitution of 1995.

15 Viljoen *International Human Rights Law in Africa* 2 ed (2012) 430.

16 Compare the preamble of the OP ICCPR "in order further to achieve the purposes of the International Covenant on Civil and Political Rights and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in part IV of the Covenant to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant [emphasis added]".

17 Rule 34(5) of the Final Rules of the Court.

18 ECW/CCJ/APP/08/09; Ruling ECW/CCJ/APP/07/10 of 10 December 2010 para 61.

(*APDH*) confirmed this approach.<sup>19</sup>

However, two factors compound the recognition of the standing of NGOs bringing claims based on an *actio popularis*. First, the well-established fact that in contentious cases the *locus standi* of an NGO is only recognised if the state party, in which it is legally constituted, has made a declaration that it accepts the jurisdiction *ratione personae* of the African Court in accordance with articles 5(3) and 34(6) of the Protocol. The strict application of this test is evident in *APDH* where the Court did not explore the ties between the NGO and the material issues but rather confirmed that it was an Ivorian NGO and that Côte d'Ivoire had made a declaration under Article 34(6).<sup>20</sup> Secondly, in contentious cases, the NGO has to be accredited before the African Commission in accordance with Resolution 361.<sup>21</sup> The rigorous application of this criterion is manifested in *Convention Nationale des Syndicats du Secteur Education v Republic of Gabon*.<sup>22</sup>

Furthermore, in the case of *African Commission on Human and Peoples' Rights v Republic of Kenya* the Applicant (the African Commission), citing its own jurisprudence, submitted that it had adopted the *actio popularis* doctrine which allows anyone to file a complaint before it on behalf of victims, without necessarily getting the consent of the victims.<sup>23</sup> For this reason, it was seized with the communication by two of the complainants, The Centre for Minority Rights Development (CEMIRIDE) and the Ogiek Peoples' Development Program (OPDP), both NGOs, registered in Kenya. To justify the *actio popularis* the African Commission referred only to the fact that the OPDP worked specifically to promote the rights of the victims (the Ogieks) while CEMIRIDE had obtained observer status before the African Commission. Based on this, it considered them both to be competent to invoke the jurisdiction of the African Commission, through an *actio popularis*, and in extension the jurisdiction of the African Court. The African Court, in this case, did not comment on the position of the NGOs or their capacity to invoke the jurisdiction of the African Commission but was satisfied with the fact that the African Commission *per se* had standing to present the case under Article 5(1)(a) of the Protocol. This in itself, arguably, strengthens the *actio popularis* actioned by an NGO, but only in so far as the case materialises through the conduit of the African Commission. Both CEMIRIDE and OPDP would have been barred from directly accessing the African Court due to the fact that Kenya has not made a declaration under Article 34(6) of the Court Protocol; and in addition, in relation to OPDP, its lack of observer status before the African Commission.

### 3.2 *Locus standi* of NGOs (advisory opinions)

Whereas access to the African Court in contentious cases is limited by the restrictions set out in the Court Protocol, as discussed above under part 3.1, the request for an advisory opinion appears, at first glance, to be less restricted. Article 4(1) of the Court Protocol stipulates that "[a]t 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 [emphasis added]". The reference to "any African organization recognized by the OAU [read AU]" had the potential of creating, as is further argued in this chapter, an essential remedy for NGOs seeking advice on the interpretation and/or implementation of the human rights treaties under the African Court's jurisdiction. The wording of this provision, saw a number of NGOs "take the gap" and approach the African Court, relying on a more relaxed approach to the *locus standi*

<sup>19</sup> Application No. 001/2014 paras 43–46.

<sup>20</sup> *APDH v Republic of Cote d'Ivoire* para 45.

<sup>21</sup> African Commission Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples' Rights in Africa ACHPR/Res.361(LIX)2016 (Resolution 361); African Commission Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples' Rights ACHPR/Res.33(XXV) 99 (Resolution 33).

<sup>22</sup> Application No. 012/2011 para 10. Applying the criteria set out in Resolution 33 above.

<sup>23</sup> Application No. 006/2012 para 57.

requirement than what is generally found in comparable international law.<sup>24</sup> It was, therefore, both expected and unexpected that the African Court adhered to a restrictive interpretation of Article 4(1). Expected, as referred to above, because of the position of comparable regional courts and the restrictive approach in most African jurisdictions.<sup>25</sup> Unexpected, as the Court, a human rights forum, arguably, as is further substantiated below, had enough scope in the text to allow for a broad, novel approach to access.

Even though an advisory opinion does not render a binding instruction, such requests could nevertheless have very important practical legal consequences. This is evident in *SERAP*, *Coalition of African Lesbians* (as discussed in more detail below), *ASADHO*, *Women's Law Centre* and *RADDHO*; where the requests all presented issues of broad public concern.<sup>26</sup> The inability of the African Court, in this regard, to deal with essential human rights issues is well described by Achour J in his dissenting opinions. He concludes that the African Court found itself, "unable to address the four requests for Advisory Opinion and [was] constrained to not respond to the legal issues of utmost significance raised by the NGOs in regard to the interpretation of the African Charter on Human and Peoples' Rights".<sup>27</sup> The following discussion focuses on the procedural and material aspects of *SERAP* and *Coalition of African Lesbians* further detailing the inconsistencies in the African Court's approach to its jurisdiction *ratione personae*.

### 3 2 1 *SERAP* and *Coalition of African Lesbians* - the legal options available to the parties

As a point of departure, it is important to reflect on the legal options available to the NGOs involved and whether they would have been able to utilise other avenues in approaching the African Court or approach other sub-regional courts. In *SERAP*, the Socio-Economic Rights and Accountability Project would have been able to present a contentious case before the ECOWAS Court, as Nigeria is a member of the Revised Treaty of the Economic Community

24 Protocol No 2 to the European Convention for the Protection of Human Rights and Fundamental Freedoms conferring upon the European Court of Human Rights competence to give advisory opinions ETS No 044 at the request of the Committee of Ministers of the Council of Europe on legal questions concerning the interpretation of the convention and its protocols. The American Convention on Human Rights confers the competence to give advisory opinions on the Inter-American Court of Human Rights. In accordance with article 64 of the American Convention on Human Rights and article 51 of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, member states of the OAS; the General Assembly; the Meeting of Consultation of Ministers of Foreign Affairs; the Councils; the Inter-American Juridical Committee; the Inter-American Commission on Human Rights; the General Secretariat; the Specialized Conferences; and the Specialized Organizations can request an advisory opinion.

25 Regarding the latter, in most African domestic systems, requests for Advisory Opinions are not recognised and in the rare occasion that they are such requests are severely restricted, compared to contentious cases. As an example, section 163(6) of the Kenyan Constitution allows for an advisory opinion by the Supreme Court to be sought by: the national government; any State organ; or any county government with respect to any matter concerning county government. The South African Constitutional Court has rejected the idea of an advisory opinion, see *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 21 where the Constitutional Court notes that "a case is not justiciable if it no longer presents an existing or live controversy which should exist if a court is to avoid giving advisory opinions on abstract propositions of law".

26 In *SERAP*, the question posed was whether rampant and uncontrolled poverty linked with high levels of corruption on behalf of the Nigerian state would constitute a breach of the ACHPR. In *ASADHO*, the NGO requested the Court to confirm whether the Draft Model Law on Mining on Community Land in Africa was consistent with the provisions of the ACHPR. *ASADHO* wanted the Court to clarify whether negative impacts of mining activities were to be considered tantamount to breaches of the fundamental rights set out in the ACHPR in relation to members of the communities affected by mineral extraction. In *Women's Law Centre*, the five NGOs (with confirmed observer status before the African Commission) represented, requested the Court to interpret Article 6(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the obligations of member states under this provision. The Applicants submitted that unrecorded and unregistered marriages were common in Africa and that the issue of non-registration and non-recording of marriages rendered women particularly vulnerable. In *RADDHO* (with confirmed observer status before the African Commission) the request was based on issues related to whether it would be possible to institute legal action before the African Commission or the Court against a state following an unconstitutional change of government, based on the ACHPR. The Applicant furthermore asked the African Court to clarify the meaning of the expression "serious or massive violations of human and peoples' rights", referred to in article 58(1) of the ACHPR. In *Coalition of African Lesbians*, the independence of the African Commission was questioned after the interference of the Executive Council of the AU in its decision.

27 Individual Opinion of Judge Achour as attached to the Advisory Opinions in *ASADHO*, *Women's Legal Centre*, *RADDHO* and *Coalition of African Lesbians*.

of West African States<sup>28</sup> (Revised Treaty). However, having due regard of the nature of the legal question posed in *SERAP* it is evident that the issue, at least in the initial phase, was of an interpretive nature rather than a direct complaint.<sup>29</sup> It is thus far unclear whether the Socio-Economic Rights and Accountability Project would have been able to request an advisory opinion of the ECOWAS Court under the 1991 Protocol<sup>30</sup> and the 2005 Supplementary Protocol.<sup>31</sup> Thus far, the ECOWAS Court has only delivered two advisory opinions after the request by the ECOWAS Commission, classified as an institution of ECOWAS.<sup>32</sup> Therefore, there is no further guidance on the interpretation of "any other institution of the Community" beyond the access of the Commission and whether ECOWAS Court would approach its advisory jurisdiction in the same, "relaxed" manner it approaches its contentious jurisdiction.<sup>33</sup> Moreover, as Nigeria has not made a declaration under Article 34(6) of the Court Protocol, the Socio-Economic Rights and Accountability Project did not have direct access to the African Court.

In *Coalition of African Lesbians*, the Applicants<sup>34</sup> were not in a position to approach the African Court directly, for two different reasons. First, South Africa has similarly not made a declaration under Article 34(6) of the Court Protocol. Therefore, outside the scope of the request for an advisory opinion the parties could only have reached the African Court through the conduit of the Commission. Secondly, the African Court has pointed out that it will only extend its jurisdiction over a "state party" that has ratified the Court Protocol.<sup>35</sup> In *Coalition of African Lesbians*, the legal questions raised (as is further discussed in section 3.2.2 below) by necessity addresses the authority and decisions of the AU Executive Council. Therefore, the African Court would likely have declined a contentious case based on the nature of the Respondent, as it did in *Falana* and *Atemnkeng*, where the Respondent was listed as the "AU".<sup>36</sup>

### 3.2.2 Coalition of African Lesbians – the merits of the request

In terms of *Coalition of African Lesbians*, the merits of the request further highlight the precarious position of some human rights defending NGOs serving in the regional human rights system. This request further shines a light on the dangers of blurring the line between the "judiciary" and the "executive". The point of contention, in his case, referred to two decisions by the AU Executive Council instructing the African Commission to alter two decisions referred to in its 37th and 38th Activity Reports.<sup>37</sup> The decisions of the African Commission were taken under the mandate set out in Article 45 of the ACHPR; and referred to the AU Executive Council with reference to Article 59(3) of the ACHPR.

In the first instance, the instruction was for the African Commission to delete the parts of the 37th Activity Report that refers to the individual communications in *Uwimana-Nkusi*

28 Economic Community of West African States (ECOWAS), Revised Treaty of the Economic Community of West African States (ECOWAS), 24 July 1993 <https://www.refworld.org/docid/492182d92.html> [(accessed 15-11-2020)].

29 *SERAP* paras 7–12.

30 Protocol A/P.1/7/91 on the Community Court of Justice, July 6, 1991 (1991 Protocol). Articles 7 and 10 of the 1991 Protocol authorises the ECOWAS Court to issue Advisory Opinions concerning the Revised Treaty.

31 Supplementary Protocol A/Sp.1/01/05 (2005 Protocol), amending the preamble and articles 1, 2, 9 and 30 of the 1991 Protocol.

32 Request for Advisory Opinion by the ECOWAS Commission, ECW/CCJ/ADV:OPN/01/08; Request for Advisory Opinion by ECOWAS Commission ECW/CCJ/ADV:OPN/01/05.

33 The ECOWAS Court has dispensed with the common requirement, in international law, of exhausting domestic remedies and it has accepted the *Actio Popularis*. See *Ocean King Nigeria Ltd v Republic of Senegal* ECW/CCJ/JUD/07/11 para 41; *The registered trustees of the Socio-Economic Rights and Accountability Project v the Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/08/08 para 32. See also, Enabulele "Sailing against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice" 2012 *Journal of African Law* 268.

34 The Centre for Human Rights at the University of Pretoria and CAL. Both applicants are instituted under South African Law, and CAL is a registered NGO in South Africa.

35 *Femi Falana v African Union (Falana)* Application No. 001/2011 paras 63, 67 and 71.

36 See also *Atabong Denis Atemnkeng v African Union (Atemnkeng)* Application No. 014/2011 paras 38–40. In *Atemnkeng* the AU was listed as the Respondent.

37 African Commission 37th Activity Report, June to December 2014, 16th Extraordinary Session Rwanda, Kigali 20 – 29 July 2014 (37th Activity Report); and African Commission 38th Activity Report, January 2015 – May 2015, 56th Ordinary Session Gambia, Banjul 21 April – 7 May 2015 (38th Activity Report).

and *Mukakibibi v Rwanda*<sup>38</sup> and *Theogene Muhayyezu v Rwanda*.<sup>39 40</sup> In the second instance, referring to its 38th Activity Report, to withdraw the observer status of CAL, as granted by the African Commission.<sup>41</sup> The legal questions posed by the Applicants were first, for the Court to clarify the meaning of "consider" as stipulated in Article 59(3), and secondly whether the AU Executive Council had "exceeded the reasonable limits of their powers to 'consider' the Activity Report of the Commission".<sup>42</sup>

The decisions relating to Rwanda and CAL both raises sensitive political issues. In terms of Rwanda, the two cases referred to above related to the 1994 Rwandan Genocide and the alleged arbitrary detention and imprisonment of individuals on purported politically motivated charges. Rwanda raised its concerns over the African Commission's involvement in these matters in different AU fora. It further, in 2016, withdrew the declaration made under Article 34(6) of the Court Protocol, on the basis that it wanted to prevent individuals, who took part in the 1994 genocide, from "exploiting" the court contentious procedure for purposes which, in its opinion, are contrary to the intention behind its making.<sup>43</sup>

In *Coalition of African Lesbians*, the contested issue of non-heteronormative sexual orientation featured as a backdrop to the decision to grant CAL observer status before the African Commission. CAL submitted its first application to obtain observer status in 2008. This application was rejected by the African Commission because CAL, in its opinion, did not promote or protect any of the rights enumerated in the ACHPR.<sup>44</sup> CAL submitted a renewed application in 2014; the same year in which the African Commission presented Resolution 275 condemning violence and discrimination on the basis of sexual orientation and gender identity.<sup>45</sup> CAL narrowly obtained observer status at the 56<sup>th</sup> Ordinary Session of the African Commission.<sup>46</sup> When presented with this decision, the AU Executive Council, at its 2015 meeting in Johannesburg, South Africa, requested the African Commission to "take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values".<sup>47</sup> In its 43rd Activity Report, presented to the Heads of State and Government of the AU in January 2018 (covering the period from June to 15 November 2017), the African Commission openly questioned the 2015 decision of the AU Executive Council to request the African Commission to withdraw CAL's observer status. It stated the following:

The decision on the grant of the Observer Status was properly taken in terms of the Commission's established processes and criteria ... The Commission is mandated to give effect to the African Charter under which everyone is entitled to the rights and subject to the duties spelt out in the Charter, and it is the duty of the Commission to protect those rights in line with the mandate entrusted to it under Article 45 of the Charter, without any discrimination because of status or other circumstances.<sup>48</sup>

The African Commission further acknowledged that the African Court had, at this point in

38 African Commission, Communication 426/12.

39 African Commission, Communication 392/10.

40 Decision of the AU Executive Council on the 37th Activity Report of the African Commission, EX.CL/Dec.864 (XXVI) para 8 stating: "As regards Communications 426/12 and 392/10 concerning the government of Rwanda, Council REQUESTS that the cases in question be expunged from the report of the African Commission for the period June–December 2014 until Rwanda is offered the opportunity of oral hearing on the two cases, as requested through various correspondence to the ACHPR", in EX.CL/Dec.851–872 (XXVI) 26th Ordinary Session 23 – 27 January 2015, Addis Ababa, Ethiopia.

41 Decision of the AU Executive Council on the 38th Activity Report of the African Commission, EX.CL/Dec.887 (XXVII) para 7, in EX.CL/Dec.873–897(XXVII), 27th Ordinary Session 7–12 June 2015, Johannesburg South Africa.

42 *Coalition of African Lesbians* para 8.

43 Umugiraneza "Rwandan Ministry of Justice – Clarification" 2016. [http://www.minijust.gov.rw/fileadmin/Documents/Photo\\_News\\_2016/Clarification2.pdf](http://www.minijust.gov.rw/fileadmin/Documents/Photo_News_2016/Clarification2.pdf) (accessed 1-11-2020).

44 African Commission 28th Activity Report, November 2009 – May 2010, 17th Ordinary Session Kampala, Uganda 19 – 23 July 2010, para 33.

45 African Commission, Resolution 275: on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity (Resolution 275) ACHPR/Res.275(LV)2014.

46 African Commission 37th Activity Report para 14.

47 Decision of the AU Executive Council on the 38th Activity Report of the African Commission (n 41 above) para 7.

48 African Commission 43rd Activity Report (43rd Activity Report), June to November 15, 2017, 22nd Extraordinary Session Senegal, Dakar 29 July – 7 August 2017 para 51.

time, dispensed of the request for an advisory opinion, without granting access based on CAL's observer status before the African Commission. However, the AU Executive Council was neither satisfied with the finality of the matter before the African Court nor the position of the African Commission in pursuing the matter. In June 2018, based on its 2015 request, it again ordered the African Commission to withdraw CAL's observer status – and this time it set a deadline: the withdrawal had to be effected before the end of 2018.<sup>49</sup> Following this request, the African Commission withdrew CAL's observer status on 8 August 2018.<sup>50</sup>

### 3.2.3 African Organisations "recognised" by the AU

In returning to the argument in *SERAP* and *Coalition of African Lesbians*, the African Court set out two main legal questions that would determine its mandate to provide the requested advisory opinions. First, whether the Socio-Economic Rights and Accountability Project and CAL were "African Organisations". Secondly, whether the AU had recognised them. In terms of the latter condition the African Court referred to the Criteria for Granting Observer Status and System of Accreditation within the AU<sup>51</sup> (AU Criteria for Granting Observer Status) in defining what would qualify as an "African Organisation" and as "recognition" by the AU. In *SERAP* the Court concluded that the Socio-Economic Rights and Accountability Project was an "African Organisation" and that if the drafters of the Protocol had intended to limit the phrase "African Organisations" as used in Article 4(1) of the Court Protocol to African Inter-governmental Organizations they would explicitly have done so.<sup>52</sup> In determining the meaning of "African Organisations" the Court stipulated that the AU defines an organisation as "a regional integration or international organisation, including sub-regional, regional or inter-African organisation that is not recognised as Regional Economic Communities".<sup>53</sup> In this regard, the African Court came to the conclusion that the Socio-Economic Rights and Accountability Project qualified as "African Organisation".

Considering this conclusion, the Court proceeded to examine the phrase "recognized by the OAU [read AU]" as related to African Organisation" in Article 4(1). It is important to note that the Socio-Economic Rights and Accountability Project argued that its observer status with the African Commission rendered them status as "recognised" by the AU. The NGOs in *ASADHO*, *Women's Legal Centre*, *RADDHO* and *Coalition of African Lesbians* used the same approach. In further engaging with the "recognition" in Article 4(1), the African Court did not agree with the Applicants that substantiating observer status before the African Commission would equate to being recognised by the AU. Instead, the African Court, in explaining the process of "recognition" referred to a system of recognition, separate from the system used by the African Commission. As indicated above, the African Court referred to the AU Criteria for Granting Observer Status, stipulating that the AU had not only set up specific criteria to be used to define an "African organisation" but had also constituted a specific procedure to this end where an NGO could either apply for observer status or sign a memorandum of understanding with the AU.<sup>54</sup>

As set out in the AU Criteria for Granting Observer Status, a request for observer status must be submitted to the AU Commission, which submits it to the AU Executive Council through the Permanent Representatives Committee (PRC). As quoted by the Court, "the granting, suspension and withdrawal of observer status of an NGO, are the prerogative of the African Union".<sup>55</sup> In this regard, it is pertinent to note the following: First, that the AU Criteria for Granting Observer Status was not, at the time these cases were finalised, available to the public. The Criteria for Granting Observer Status was referenced in the Report of the Executive Council Seventh Ordinary Session, but the annex mentioned in this report was not available in

49 Decision of the AU Executive Council decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission, EX.CL/Dec.1015(XXXIII), para 8(vii), in DOC. EX.CL/1089(XXXIII) I, 33rd Ordinary Session 28–29 June 2018 Nouakchott, Mauritania.

50 CAL "Women and Sexual Minorities Denied a Seat at the Table by the African Commission on Human and Peoples' Rights" <http://www.cal.org.za/2018/08/17/women-and-sexual-minorities-denied-a-seat-at-the-table-by-the-african-commission-on-human-and-peoples-rights/> (accessed 02-11-2020).

51 Decision of the AU Executive Council on the Criteria for Granting Observer Status and System of Accreditation within the AU (AU Criteria for Granting Observer Status) Doc. EX.CL/195(V), EX.CL/Dec. 230 (VII), in EX.CL/Dec.192–235 (VII), 7th Ordinary Session 28 June – 2 July 2005, Sirte, Libya.

52 *SERAP* para 47.

53 *SERAP* para 44.

54 *SERAP* para 61.

55 *SERAP* para 61.

the report at the time.<sup>56</sup> This is further supported by CAL, which issued the following statement shortly after the decision on its request for an advisory opinion was handed down:

The opinion refers to AU Executive Council decision EX.CL 195 (VII) "Criteria for Granting Observer Status and for a System of Accreditation within the African Union" and yet this document has not been made available to us, despite request for such and also extensive internet research.<sup>57</sup>

It is notable that the African Court decided to deny access based on a document that the Applicant did not have access to and had repeatedly asked for.<sup>58</sup>

Secondly, there are no public records of NGOs that have been granted observer status by the AU Commission based on the AU Criteria for Granting Observer Status. As stated by CAL in the aftermath of the court's refusal to grant their request for an advisory opinion, "there is no public record of organisations that have secured observer status with the AU or who have memorandums of understanding with the AU".<sup>59</sup> In contrast, the African Commission makes the names of the affiliated NGOs available on its homepage.<sup>60</sup> In the 2018 AU Handbook (2018 Handbook) it is stated that "[n]on-governmental organisations ... can apply for observer status or accreditation to the AU".<sup>61</sup> To this end, the 2018 Handbook importantly refers to the "[p]artnerships chapter" for a list of non-African states and *organisations* accredited to the AU.<sup>62</sup> The section on partnerships refers to four different types of partnerships: (i) United Nations (UN) and UN-affiliated organs; (ii) the African Development Bank Group, (iii) Other Partnerships;<sup>63</sup> and (iv) Non-African states, regional integration and international organisations accredited to the AU.<sup>64</sup> As indicated in the 2018 Handbook, it is within the last category that reference to accredited (non-governmental) "organisations" would be made.<sup>65</sup> However, the AU Commission Protocol Services Directorate's list of non-African Member States and Organisations accredited to the AU as of 17 February 2017, does not list any NGOs.<sup>66</sup>

56 Decision of the AU Executive Council on the AU Criteria for Granting Observer Status (n 51 above) para 3. The document does not contain any annexures.

57 CAL "The African Court denies civil society access to justice and fails to pronounce on the independence of the African Commission on Human and Peoples' Rights" <http://www.cal.org.za/2017/09/28/the-african-court-denies-civil-society-access-to-justice-and-fails-to-pronounce-on-the-independence-of-the-african-commission-on-human-and-peoples-rights/> (accessed 04-11-2020).

58 Since the decision in *Coalition of African Lesbians* the Draft Criteria for Granting Observer Status and the related decision of the Executive Council have been made available online: Draft Criteria for Granting Observer Status and for a System of Accreditation Within the AU, EX.CL/195 (VII), Annex IV, May 2005, in Draft Report of the Meeting of the Permanent Representatives Committee and Legal Experts on Legal Matters, PRC/Leg. Expt/Legal Matters/Draft/Rpt, 29 March – 1 April 2005, Addis Ababa, Ethiopia, available at African Union Peace and Security <http://www.peaceau.org/uploads/ex-cl-195-vii-e.pdf> (accessed 04-11-2020).

59 CAL "The African Court denies civil society access to justice and fails to pronounce on the independence of the African Commission on Human and Peoples' Rights" <http://www.cal.org.za/2017/09/28/the-african-court-denies-civil-society-access-to-justice-and-fails-to-pronounce-on-the-independence-of-the-african-commission-on-human-and-peoples-rights/> (accessed 04-11-2020).

60 African Commission "NGOs by name" <http://www.achpr.org/network/ngo/by-name> (accessed 04-11-2020). See also International Justice Resource Centre "African Commission Bows to Political Pressure, withdraws NGO's Observer Status" <https://ijrcenter.org/2018/08/28/achpr-strips-the-coalition-of-african-lesbians-of-its-observer-status/> (accessed 04-11-2020). It is notable that even though CAL was granted observer status on the 25th of April 2015 it did not appear on the list until January 2018.

61 AU Commission and the Ministry of Foreign Affairs and Trade of New Zealand *African Union Handbook* (2018) [https://au.int/sites/default/files/pages/31829-file-african\\_union\\_handbook\\_2018\\_english-2.pdf](https://au.int/sites/default/files/pages/31829-file-african_union_handbook_2018_english-2.pdf) 19 17.

62 African Union Handbook 17, 180–188.

63 Covers external partnerships where there are formal agreements between the AU and a partner organisation, region, or country. This section lists the following partners: Africa–League of Arab States, Africa–European Union Partnership, Africa–South America Cooperation Forum, AU Commission – United States of America High Level Dialogue Partnership, China–Africa Cooperation Forum, Tokyo International Conference on African Development, Africa–India Partnership; Africa–Turkey Partnership; Africa–Korea.

64 AU Commission and the Ministry of Foreign Affairs and Trade of New Zealand *African Union Handbook* 180–188.

65 AU Commission and the Ministry of Foreign Affairs and Trade of New Zealand *African Union Handbook* 17, 185.

66 AU Commission and the Ministry of Foreign Affairs and Trade of New Zealand *African Union Handbook* 178. Lists 22 Intergovernmental Organisations, 83 states and one religious order.

Based on the above, it is fair to conclude that the court's finding in *SERAP*, that the AU has "established criteria" and "applies a recognised procedure" for granting observer status to NGOs is not accurate as the criteria have, to date, never been officially recorded.<sup>67</sup> As averred by CAL, "[u]nder these circumstances, the process or criteria for obtaining AU observer status are opaque and thus the ability for NGOs to request advisory requests from the African Court is de facto denied".<sup>68</sup> This is further highlighted in the Separate Opinion by Achour J where he refers to the "restrictive practice of the Union in matters of granting observer status to NGOs".<sup>69</sup>

The position of the Court was moreover criticised by some member states. In its submissions in *RADDHO Kenya* evoked the provisions of articles 5(3) and 34(6) of the Court Protocol, arguing that the seizure of the African Court by individuals and NGOs is contemplated in the texts, and as such, it did not contest RADDHOs entitlement to bring the request for an advisory opinion before the Court.<sup>70</sup> This matter is further discussed by Achour J, in his Separate Opinion, where he reflects on the fact that the criteria for seeking an advisory opinion under Article 4(1) of the Protocol is "paradoxically more restrictive" than the criteria set out in Article 5(3) referring to NGOs entitled to refer cases to the African Court.<sup>71</sup> While Article 4(1) provides that "[a]t the request ... of any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instrument", Article 5(3) of the Protocol conditions that the Court "may entitle relevant NGOs with observer status before the Commission ... to institute cases directly before it, in accordance with Article 34(6) of this Protocol".<sup>72</sup> Achour J offers the conclusion that in the case of NGOs, "referrals in contentious matters are less restrictive than in matters of advisory opinion" which as indicated above is generally the standard in domestic systems, such as the Kenyan, that recognise advisory opinions, as well as in the other regional human rights systems.<sup>73</sup>

If viewed in isolation the NGO, in a contentious matter merely needs to prove its observer status before the African Commission, whereas in terms of advisory opinions and NGO needs to be "recognised" by the AU. This opinion, importantly, does not take the "optionality" of Article 34(6) into consideration. However, it highlights the unreasonably high threshold created for NGOs' *locus standi* before the African Court. It is furthermore important to acknowledge, as Jones stipulates, that:

[W]hatever the "authors of the Protocol" in 1998 may have contemplated when referring to recognition by the OAU, it self-evidently cannot have been the procedure for observer accreditation adopted by the OAU's successor body, the AU, in 2005.<sup>74</sup>

This is so for the simple reason that the AU Criteria for Granting Observer Status was only established in 2005, seven years after the Protocol was concluded. Based on this fact it was unexpected that the African Court referred only to the AU Criteria for Granting Observer Status to reach its conclusion in *SERAP*. The provision in Article 4(1) is arguably not clear-cut, referring to "any African organization recognized by the OAU [emphasis added]". Based on a more comprehensive and purposive interpretation, the African Court's statement in *SERAP* that this provision "makes reference *only* to organizations recognized by the African Union and says nothing about those recognized by any organ of the African Union [emphasis added]" is nonsensical.<sup>75</sup> This position does not only, as Jones points out, completely disregard the principle of complementarity, set to guide the relationship between the African Court and the African Commission;<sup>76</sup> but it also ignores the glaring similarities, in the criteria upon which NGOs are granted observer status, as is further discussed in the following section.

<sup>67</sup> *SERAP* para 60.

<sup>68</sup> "The African Court denies civil society access to justice and fails to pronounce on the independence of the African Commission on Human and Peoples' Rights" <http://www.cal.org.za/2017/09/28/the-african-court-denies-civil-society-access-to-justice-and-fails-to-pronounce-on-the-independence-of-the-african-commission-on-human-and-peoples-rights/> (accessed 04-11-2020).

<sup>69</sup> Separate Opinion of Judge Achour para 4.

<sup>70</sup> *RADDHO* para 26.

<sup>71</sup> Separate Opinion of Judge Achour para 6.

<sup>72</sup> Separate Opinion of Judge Achour para 6.

<sup>73</sup> Separate Opinion of Judge Achour para 7.

<sup>74</sup> Jones 2017 *African Human Right Law Journal* 326.

<sup>75</sup> *SERAP* para 54.

<sup>76</sup> Jones 2017 *African Human Right Law Journal* 326.

### 3 2 4 Criteria for granting observer status

The similarities in criteria applied by the African Commission and the AU Commission have become even more striking after the African Commission acted on the AU Executive Council's request<sup>77</sup> to clarify its standards for observer status as set out in Resolution 33.<sup>78</sup> The African Commission provided its response to this request in Resolution 361, issued in November 2016.<sup>79</sup> From this point of departure, it is interesting to note the decision of the AU Executive Council, in June 2018, to request that the African Commission again submit revised criteria for granting and withdrawing observer status for NGOs. Such criteria should, according to the AU Executive Council be in line with the already existing AU Criteria for Granting Observer Status.<sup>80</sup> At the time of writing this chapter, the African Commission had published no such renewed criteria.

The Socio-Economic Rights and Accountability Project and CAL were both granted observer status under Resolution 33. Therefore, based on the weight that the court attached to the fact that the AU Criteria for Granting Observer Status had not been applied *vis-à-vis* these NGOs it is of interest to explore whether there are any essential differences between the three sets of standards: Resolution 33, Resolution 361 and the AU Criteria for Granting Observer Status.

In comparison, in terms of first, the "objectives" of the NGO applying for observer status before the African Commission such objectives and activities have to be "in consonance with the fundamental principles and objectives enunciated in the OAU Charter and in the African Charter on Human and Peoples' Rights".<sup>81</sup> These objectives were extended through Resolution 361, now referring to the AU Constitutive Act, the preamble to the ACHPR and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. In terms of the AU Criteria for Granting Observer Status the aims and purposes (objectives) of NGOs requesting observer status must be in conformity with the "spirit, objectives and principles of the Constitutive Act of the African Union".<sup>82</sup> After the revisions in 2016, there is arguably substantial overlap between these instruments in terms of the objectives and principles referred to.

Secondly, Resolution 361 stipulates that an NGO applying for observer status must be an organisation "working in the field of human rights".<sup>83</sup> Whereas the scope of the AU Criteria for Granting Observer Status is both broader and more restrictive indicating that "[t]he NGO shall be of recognised standing within the particular field of its competence".<sup>84</sup> The broader criteria before the AU would arguably subsume "organisations working in the field of human rights"; but the reference to "recognised standing" arguably constricts the AU's procedure. In this regard it is interesting to once again consider the request of the AU Executive Council, to revise the 2016 criteria for granting and *withdrawing* observer status for NGOs which should take into account "African values and traditions".<sup>85</sup> Resolutions 33 and 361 neither make provision for "traditional values" to be considered nor for the "withdrawal" of observer status. Resolution 33 refers, in the title, to "granting and enjoying" observer status; while Resolution 361 in the same vein refers to "granting and maintaining" observer status.<sup>86</sup> It is clear that the African Commission did not head the call of the Executive Council, in 2015, to align its criteria

77 Decision of the AU Executive Council on the 38th Activity Report of the African Commission (n 41 above) para 7, which requested the Commission "to take into account the fundamental African values, identity and good traditions, and to ... review its criteria for granting Observer Status to NGOs". See also Decision of the AU Executive Council on the 39th Activity Report of the African Commission, EX.CL/Dec.902(XXVIII) para 7, in EX.CL/Dec.898-918(XXVIII)Rev.1, 28th Ordinary Session, 23 – 28 January 2016, Addis Ababa, Ethiopia, which requested the African Commission "to review the criteria for ... representation before the ACHPR by non-African individuals and groups".

78 Resolution 33.

79 Resolution 361.

80 Decision of the AU Executive Council decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission (n 49 above) para iv.

81 Resolution 361, Annex Chapter I, para 2(a).

82 Draft Criteria for Granting Observer Status and for a System of Accreditation Within the AU (n 58 above), Part I, Section I, para 1.

83 Resolution 361, Annex Chapter I, para 2(b).

84 Draft Criteria for Granting Observer Status and for a System of Accreditation Within the AU (n 58 above), Part I, Section I, para 4.

85 Decision of the AU Executive Council decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission para iv.

86 Resolutions 33 and 361.

with "African values". However, in its 43rd Activity report, it indicated that it would "continue to scrutinize the notion of 'African Values' within the framework of its mandate to interpret the ACHPR".<sup>87</sup>

Thirdly, under Resolutions 33 and 361, an NGO has to "[d]eclare [its] financial resources" and provide "statutes, proof of its legal existence, a list of its members, its constituent organs, its sources of funding, its last financial statement, as well as a statement on its activities". Resolution 361 has expanded on these criteria to add a more detailed reference to the list of board members serving on the board of the NGO. In terms of the financing of the NGO, the AU Criteria for Granting Observer Status importantly stipulates that:

The basic resources of such an NGO shall substantially, at least two thirds, be derived from contributions of its members. Where external voluntary contributions have been received, their amounts and donors shall be faithfully revealed in the application for membership. Any financial or other support or contribution, direct or indirect, from a government to the NGO shall be declared and fully recorded in its financial records [emphasis added].<sup>88</sup>

The latter criteria are arguably more detailed but it is possible to assume that once "financial resources are declared" and the information stipulated has been provided, the criteria set out in AU Criteria for Granting Observer Status would be substantially fulfilled. However, the most conspicuous difference in this regard, is the reference, as emphasised in the quote above, to the two-thirds of the funding that must be derived from contributions of the members of the NGO. On a continent where resources are scarce, most if not all NGOs are dependent on donor funding. The introduction of this criteria, before the African Commission, as seems to be the desire of the AU Executive Council, in combination with the use of this criteria before the AU will prove to be detrimental to the application of most regional and domestic African NGOs. Based on the above reflection the main difference between the criteria applied by the African Commission and the AU Commission (and in extension the AU Executive Council) is the "funding" criteria. Beyond this criterion the sets are for all intents and purposes similar, yet not identical.

#### 4 CONCLUSION

The objective of this chapter was to analyse the premises on which the African Court based its decision in *SERAP* (as applied in *Coalition of African Lesbians*) and to critique the (perceived) narrow approach to *locus standi* taken by the African Court. To offer different perspectives, the discussion above provided an analysis of the African Court's approach in the relevant cases, highlighting particularly the approach in *SERAP* and the additional political or moral dimensions of *Coalition of African Lesbians*.

In light of the decisions of the African Court, discussed in this chapter, and reaffirming the views of Achour J in his Separate Opinion, for change to take place the AU member states will have to either amend Article 4(1) of the Court Protocol in order for NGOs like *SERAP* to be able to have their requests for advisory opinions accepted; or, they will have to extend the AU Criteria for Granting Observer Status to include NGOs with similar status before the African Commission.<sup>89</sup> Considering the nature of the requests that have been made, and denied, before the court, it is unrealistic to think that member states would either amend Article 4(1) of the Court Protocol or agree to broaden the AU Criteria for Granting Observer Status to include NGOs with similar status before the African Commission.

In maintaining the *status quo* it is, however, important to remind states of some of the principles on which the AU is founded, for example, the "respect for democratic principles, human rights, the rule of law and good governance".<sup>90</sup> It is also relevant to ask, states, based on these principles, whether it is appropriate that a political body, such as the AU Executive Council, has the sole authority to both grant observer status to NGOs enabling them to, amongst other things, request advisory opinions before the African Court, and to prescribe to the African Commission how it should formulate its criteria for the granting and *withdrawing* of observer status before it. Without intervention, the AU Executive Council has a firming grip

<sup>87</sup> 43rd Activity Report para 51(d).

<sup>88</sup> Draft Criteria for Granting Observer Status and for a System of Accreditation Within the AU, Part I, Section I, para 7.

<sup>89</sup> Separate Opinion of Judge Achour para 14.

<sup>90</sup> Article 4(m) of the AU Constitutive Act.

on the access of NGOs to the African Court, both through the method of access set out in articles 5(3) and 34(6) (contentious cases) and through the method of access set out in Article 4(1) (advisory opinions) as analysed in this chapter.

In conclusion, it will furthermore be of value to consider, in terms of substance, whether it is acceptable that "financial contributions" from individual members of NGOs located in impoverished nations and "African values" be the main determinants of observer status; and as such the main determinants of access to the main regional justice mechanism. In this regard, it is important to finally note that the AU itself depends largely on donor funding for its activities, despite recent efforts to ensure the financial independence and viability of the Union.<sup>91</sup> An entity that itself largely depends on foreign support should arguably be more sympathetic to NGOs receiving funds from similar sources.

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<sup>91</sup> Declaration on Self-Reliance, Assembly/AU/Decl.5(XXV), 25th Ordinary Session 14–15 June 2015 Johannesburg, South Africa