

The advisory jurisdiction of the African Court on Human and Peoples' Rights

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Summary

The entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court of Human and Peoples' Rights on 25 January 2005 came as a huge achievement for the protection of human rights in Africa. The creation of an institution that would deliver binding decisions on human rights issues has evaded the African system since the advent of the African Charter. This article looks critically at the provision of the African Court Protocol, paying particular attention on the Court's competence to give advisory opinions. This is in the light of the fact that access to the Court is limited in that individuals and NGOs do not have direct access thereto. This article argues that individuals and NGOs can have access to the Court via seeking advisory opinions, as the provision dealing with this aspect is broadly worded. It is also observed that in exercising its advisory opinion powers, the Court can be able to address a wide range of human rights issues. In this article, three areas of the Court's advisory competence is looked into: Firstly, who can request an advisory opinion; secondly, what forms the subject matter of a request for an advisory opinion; and thirdly, what is the effect of an advisory opinion on the compatibility of domestic laws with international law. This article contends that due to the limited nature of access to the Court, the Court should adopt a very flexible approach in exercising its powers to enable more accessibility, because in any event the complaints procedure under the African Commission is virtually open to anybody.

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1 Introduction

Although legal commentators have welcomed the creation of the African Court on Human and Peoples' Rights (Court), they have generally been quite sceptical about its added value.¹ The main reason for this concerns the limited accessibility of the Court for individuals. The Court's constituent treaty, the Protocol² to the African Charter on Human and Peoples' Rights³ on the establishment of the African Court on Human and Peoples' Rights, does not even come close to the initial goal of offering Africans 'recourse to judicial process on command'.⁴ It only entitles individuals to institute proceedings if the Court grants them permission to do so and, more troublesome, if the state they accuse of having violated international human rights law has

¹ For comments on (earlier drafts of) the Protocol, see eg AP van der Mei 'The new African Court on Human and Peoples' Rights: Towards an effective human rights protection mechanism for Africa?' (2005) *Leiden Journal of International Law* (forthcoming); J Harrington 'The African Court on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights — The system in practice, 1986-2000*, (2001) 305; A O'Shea 'A critical reflection on the proposed African Court on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 285; N Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45; J Mubangizi & A O'Shea 'An African Court on Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 256; M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342; G Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' 1998 (16) *Netherlands Human Rights Quarterly* 431; A Stemmet 'A future African Court for Human and Peoples' Rights and domestic human rights norms' (1998) 23 *South African Yearbook of International Law* 233; G Naldi & K Magliveras 'The proposed African Court on Human and Peoples' Rights: Evaluation and comparison' (1996) 9 *African Journal of International and Comparative Law* 944.

² Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III), available on <http://www.achpr.org> (accessed 28 February 2005) and reprinted in *inter alia* R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001). The Protocol was signed in June 1998 and, 30 days after the requisite 15th ratification (art 34(3) of the Protocol) by the Union of the Comoros on 26 December 2003, it entered into force on 25 January 2004.

³ The African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3 rev 5-21 (1982) 58 *International Legal Materials*, available on <http://www.achpr.org> (accessed 28 February 2005) and reprinted in *inter alia* Murray & Evans (n 2 above) and C Heyns (ed) *Human rights law in Africa* (2004) 134. On the African Charter, see eg F Ouguergouz *The African Charter on Human and Peoples' Rights — A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003); Evans & Murray (n 1 above) and V Nhemielle *The African human rights system — Its laws, practice and institutions* (2001).

⁴ Nhemielle (n 3 above) 250, quoting the former Secretary-General of the International Commission of Jurists (ICJ), Adama Dieng. NGOs, and the ICJ in particular, were the driving force behind the creation of an African human rights court. For an excellent overview of the role of NGOs in the negotiation process, see Harrington (n 1 above).

accepted the Court's jurisdiction.⁵ So far, only 19 African states⁶ have ratified the Protocol and only one of them has been willing to accept the Court's jurisdiction in cases brought by private parties.⁷ The critics thus have a point when they argue that one should not expect too much from a court that, at least in the near future, will not be directly accessible for the vast majority of those for whom it has been established: the victims of human rights violations.

Fortunately, there are also reasons to be more optimistic. To be successful, international or regional human rights courts do not necessarily have to be accessible for individuals. Firstly, as the Inter-American system⁸ and the former European system⁹ have demonstrated, such courts may contribute to human rights protection where they co-exist with human rights commissions that can receive complaints from individuals and refer cases to the court. The African Charter and the Protocol now provide for such a dual system. The Court has not been established to replace, but to complement and reinforce the African Commission on Human and Peoples' Rights (African Commission or Commission),¹⁰ which enjoys under the Protocol an unconditional right to submit cases to the Court. This right is potentially of great significance. Commission practice shows that many of the cases before it are relatively easy in the sense that they clearly involve human rights violations and that states often wholly disregard the Commission's findings and decisions. Upon the request of parties or its own initiative, the Commission can now refer such 'easy' cases to the Court. The pressure on the Court to admit these cases will be particularly great, and often the Court may have no other choice than to confirm the Commission's conclusions and condemn the state in question. The right to submit cases to the Court may thus enable the Commission to have its own non-binding recommendations transformed into legally binding convictions of the state party involved. For victims this implies that, in spite of the absence

⁵ Art 5(3) *juncto* art 34(6) of the Protocol.

⁶ See further http://www.africa-union.org/Official_Documents/Treaties (accessed 28 February 2005).

⁷ Burkina Faso. This country was the only of the first 15 states that ratified the Protocol that was also willing to accept jurisdiction in cases initiated by private parties. This author has no information on whether or not the four most recent states have been willing to follow the Burkina Faso example.

⁸ See further JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (2003).

⁹ Ie the European system as it existed prior to entry into force of Protocol No 11 on 1 November 1998.

¹⁰ On the Commission, see EA Ankumah *The African Commission on Human and Peoples' Rights — Practice and procedures* (1996); Ouguergouz (n 3 above) and Nhemielle (n 3 above).

of an own right to lodge a case, the Court may constitute a forum where they might be able to obtain, albeit indirectly, justice.¹¹

Secondly, dispute settlement or resolution is not the only function that international oversight organs fulfil.¹² They are also entrusted with the task of interpreting and clarifying the treaties by which they have been created and other instruments.¹³ By developing an international or regional human right jurisprudence, human rights organs are able to assist states in applying and obeying international human rights norms and guide national courts and human rights commissions in resolving human rights disputes. For this purpose, human rights oversight organs usually possess the power to give advisory opinions. This holds true, for example, for the African Commission,¹⁴ the Inter-American Court of Human Rights¹⁵ and the European Court of Human Rights.¹⁶

Advisory opinions lack the legally binding force of judgments in contentious cases, and for this reason they may carry less weight than judgments. However, they may have alternative or additional value. Firstly, in advisory cases, courts are not bound by the specific facts or legal details of the dispute under consideration. This enables them, more than in contentious cases, to clarify or to establish general legal principles or rules that impact upon many more states or other actors than the few parties in a contentious case. Secondly, advisory proceedings are less confrontational than contentious proceedings. States are not placed in the position of the 'accused'. They are not ordered to alter a given rule or behaviour. They are advised and encouraged to do so, and this 'soft' method of promoting respect for human rights norms may sometimes be just as effective as the 'hard' method of condemning states in contentious cases.

¹¹ Much will depend on the answer to the question whether the Commission will see itself as a defender of the rights and interests of individual victims of human rights violations or whether it, like the previous European Commission, will consider its main task to be to act 'in the public interest'. R Murray 'A comparison between the African and European Courts of Human Rights' (2002) 2 *African Human Rights Law Journal* 202.

¹² International human rights oversight organs may fulfil various roles. The first is to provide individual justice. This concerns a retroactive function. The violator is retroactively condemned and the victims may, where necessary and possible, be awarded some kind of reparation. The second function is pro-active and involves the deterrent effect that a judgment in a given case may have on future human rights violators. The third role concerns the interpretation and clarification of human rights instruments. See H Steiner 'Individual claims in a world of massive violations: What role for the Human Rights Committee?' in P Alston & J Crawford *The future of UN human rights treaty monitoring* (1999).

¹³ See further art 3 of the Protocol.

¹⁴ Art 45(3) African Charter.

¹⁵ Art 64 American Convention.

¹⁶ Art 47 European Convention on Human Rights and Fundamental Freedoms.

Viewed from the latter perspective, there is indeed reason to be quite positive about the Protocol. It confers upon the new African Court an advisory competence that seems to be broader than that of any other international human rights tribunal. The relevant provision of the Protocol, article 4, reads as follows:

- 1 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 relating to the Charter or any relevant human rights instruments, provided the subject matter of the opinion is not related to a matter being examined by the Commission.
- 2 The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting opinion.

Of course, this advisory jurisdiction can never fully compensate for the absence of jurisdiction in disputes brought by individuals, and it will remain meaningless if the Court, like the European Court of Human Rights and the African Commission, is never or only rarely consulted. Nonetheless, as in particular the advisory practice of the Inter-American Court of Human Rights has demonstrated, advisory jurisdiction may, if properly used, significantly contribute to human rights protection. This article analyses article 4 of the Protocol and seeks to establish the extent to which the advisory power may enable the Court to strengthen Africa's human rights protection mechanism. Comparisons will be drawn with the advisory practice of the Inter-American Court,¹⁷ with a view to exploring how the African Court's advisory power could be given maximum effect.

Upon completion of this article, it became known that the Assembly of the African Union (AU) has decided that the new human rights court and the Court of Justice of the African Union should be integrated into one court.¹⁸ The details will be worked out in a Protocol on the merger, which had not been adopted at the time this contribution was submitted to the publisher. There are no indications, however, that the new Protocol will introduce significant changes in relation to the advisory jurisdiction of the Court in human rights related matters.¹⁹

¹⁷ See further JM Pasqualucci 'Advisory practice of the Inter-American Court of Human Rights: Contributing to the evolution of international human rights law' (2002) 38 *Stanford Journal of International Law* 241 and T Buergenthal 'The advisory practice of the Inter-American Human Rights Court' (1985) 79 *American Journal of International Law* 1.

¹⁸ Assembly/AU/Dec 45(III).

¹⁹ On the need for such a merger, see F Viljoen & E Baimu 'Courts for Africa: Considering the co-existence of the African Court on Human and Peoples' Rights and the African Court of Justice' (2004) 22 *Netherlands Human Rights Quarterly* 241 and NJ Udombana 'An African Human Rights Court and an African Union Court: A needful duality or a needless duplication' (2003) 28 *Brooklyn Journal of International Law* 811.

2 Scope *ratione personae*: Who can request an advisory opinion?

A first point that will determine the significance of the Court's advisory jurisdiction concerns standing: Who may request an opinion of the Court? Article 4(1) indicates that such a request can be made by the Organisation of African Unity (OAU), OAU member states, OAU organs and African organisations recognised by the OAU. As known, the OAU has now been replaced by the AU,²⁰ and this implies that the references in article 4 to the OAU, its member states and its organs now must be read as references to the AU, AU member states and AU organs.

The scope *ratione personae* of article 4 is broad. It goes further than article 45(3) of the African Charter, which entitles AU member states, AU organs and African organisations recognised by the AU to ask the African Commission to give an interpretation of the Charter. On its face, article 4 of the Protocol also exceeds article 64(1) of the American Convention on Human Rights, which entitles member states of the Organisation of American States (OAS) and, 'within their spheres of competence', OAS organs, to consult the Inter-American Court regarding the interpretation of human rights treaties. The practical significance of differences with the African Commission's and Inter-American Court's advisory powers, however, is likely to be minimal.

That the AU itself can request an advisory opinion is innovative in the sense that neither the OAS nor, to the knowledge of this author, any other international organisation enjoys a comparable right. The added value of the inclusion of the AU in article 4, however, would seem to be minimal, if not zero. By definition, the AU will have to be represented by one of its organs which, in its own right,²¹ enjoys the right to seek advisory opinions from the Court. The drafting history of the Protocol nowhere reveals why the AU has been granted standing and one wonders whether the issue was well thought through.

Comparably, the fact that the Protocol, unlike the American Convention, does not explicitly require from AU organs to act within their sphere of competence is unlikely to have much, if any, practical meaning. Firstly, it can safely be assumed that AU organs, if they were to have the right, will only rarely seek an opinion on an issue falling outside the

²⁰ The Constitutive Act of the AU entered into force on 26 March 2001. The text of the Act is available on <http://www.africa-union.org> (Official Documents) (accessed 28 February 2005). The AU replaces the OAU, which was established in 1963 and formally abolished in 2002. See further C Heyns, E Baimu & M Killander 'The African Union' (2003) 46 *German Yearbook of International Law* 252; C Parker & D Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 365 and NJ Udombana 'The institutional structure of the African Union: A legal analysis' (2002) 33 *California Western Law International Law Journal* 69.

²¹ See, however, nn 29-34 below and accompanying text.

field entrusted to them. Secondly, the fact that the Protocol does not explicitly limit AU organs' right to request opinions to issues they are made responsible for does not imply that they are entitled to do so. In fact, it would seem that they are not. The powers of AU organs are first and foremost conferred, defined and, thus, limited by the Constitutive Act (CA) of the AU. All AU organs may be confronted with human rights issues, but the principle of speciality²² governing the CA would seem to preclude, for example, the AU Specialised Technical Committees²³ from asking the human rights court an opinion on a human rights issue having no connection with the area they work in. Thirdly, the African Court is likely to apply the requirement that AU institutions act within the scope of their powers when asking for an opinion.²⁴ If it would not do so, it would leave it up to the AU organs to determine whether a given AU organ can request an advice. It is, however, a rule of international customary law that international tribunals possess the *compétence de la compétence*: They themselves are empowered to decide whether or not a given matter or actor falls within their jurisdiction.²⁵

If the African Court indeed will apply this requirement, it will have to decide how to establish the contours or limits of the competencies of the AU organs. The Inter-American Court requires from OAS organs a showing of a 'legitimate institutional interest',²⁶ which may vary according to the powers and tasks conferred upon these organs and must be deduced from the legal instruments and norms applicable to them. The Inter-American Court has held that, because of its broad mandate in the human rights field, the Inter-American Human Rights

²² Advisory Opinion of the International Court of Justice of 8 July 1996 concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Reports 1996 84 para 25 ('International organisations are governed by the "principle of speciality", that is to say they are invested by the states which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them').

²³ Art 14 CA.

²⁴ Ouguergouz (n 3 above) 752.

²⁵ Nottebohm (*Liechtenstein v Guatemala*), ICJ Reports 1953 111 paras 119-120 (Preliminary Objections of 18 November). As Judge Cançado Trindade of the Inter-American Court explained: 'Whenever the [Inter-American] Court decides to respond or not to a request for an advisory opinion, it is exercising the power to determine its own competence, derived from a principle of general international law ... Such principle rests on the intrinsic nature of the international judicial organ.' I/A Court HR *Reports of the Inter-American Commission of Human Rights (art 51 of the American Convention of Human Rights)*, Advisory Opinion OC-15/97 of 14 November 1997, Series A No 15, Opinion Judge Cançado, para 27.

²⁶ I/A Court HR *The effect of reservations on the entry into force of the American Convention (arts 74 & 75)*, Advisory Opinion OC-2/82 of 24 September 1982, Series A No 2 para 17 & para 23.

Commission 'unlike some other OAS organs, . . . enjoys, as a practical matter, an absolute right to request advisory opinions'.²⁷ The same has been said to hold true for the OAS General Assembly.²⁸

Assuming that the African Court will follow a comparable approach, it will have to establish AU organs' standing under article 4(1) on the basis of the relevant provisions of the AU Constitutive Act, the Protocols adopted thereunder and, in relation to the African Commission, the African Charter. Looking at the relevant provisions of these documents, AU organs can be divided into three groups.

The first consists of organs that would seem to have a virtually unlimited right to request advisory opinions. It applies next to the Assembly, the Executive Council, the AU Commission, the Pan-African Parliament (PAP) and the Peace and Security Council. Each of these political organs has a particular broad and general mandate, which explicitly includes the promotion and protection of human rights.²⁹ The Court will have to admit any request of these organs, provided it involves a legal matter that is not being examined by the Commission.

The second group includes organs whose mandate covers specific policy areas such as the AU Financial Institutions,³⁰ the Specialised Technical Committees and the Economic, Social and Cultural Council.³¹ The right to request an advisory opinion is limited to human rights matters occurring in the area entrusted to them. On a case-by-case basis, upon examining the relevant provisions of the CA, their rules of procedure and other possible documents governing the functions of these organs, as well as the subject matter of the requests, the Court will have to decide on the admissibility of these organs' requests.

The last group consists of organs that probably do not have the right to consult the Court. This concerns first of all the African Court itself. The Court is an AU organ and, taken literally, this would imply that the Court, on its own motion, might identify issues for interpretation and decide to issue an opinion. If the Court were to have this right, however, then it would, to use the words of a judge of the Inter-American

²⁷ Buergenthal (n 17 above) 4.

²⁸ n 27 above & Pasqualucci (n 17 above) 255.

²⁹ Assembly: art 3 *juncto* art 9 CA, Executive Council: art 13 CA *juncto* art 5 of the Rules of Procedure of the Executive Council (available on <http://www.africa-union.org> (accessed 28 February 2005)), PAP: art 3 CA *juncto* art 17 CA *juncto* art 3(2) of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (available on <http://www.africa-union.org> (accessed 28 February 2005)) and Peace and Security Council: art 5(2) CA *juncto* art 3(f) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (available on <http://www.africa-union.org> (accessed 28 February 2005)).

³⁰ Ie the African Central Bank, the African Monetary Fund and the African Investment Bank; art 19 CA.

³¹ Art 22 CA.

Court, 'be tantamount to transforming itself, *ultra vires*, into an international legislator'.³² The background and text of article 4(1) make it clear that advisory proceedings *motu proprio* were not intended and, indeed, are not provided for. Further, the AU Committee of Permanent Representatives, which is entrusted to prepare and implement the work of the AU Executive Council, probably cannot request advisory opinions.³³ This Committee is meant to be the equivalent of the Committee of Permanent Representatives of the European Union,³⁴ which suggests that the Committee does not occupy an own independent legal position within the AU institutional framework. If this is indeed so, the Committee probably does not have the right to initiate an advisory proceeding before the African Human Rights Court.

All AU member states, that is, all African states, with the exception of Morocco,³⁵ can ask the Court for an advisory opinion. Unlike article 5 on contentious jurisdiction, which only allows state parties to the Protocol to initiate a case against another state party, article 4 does not impose the condition that a state must have ratified the Protocol. The difference makes sense. Article 5 underlies the notion that a state that is unwilling to accept the Court's jurisdiction in cases that might be brought against it, should also not have the right to initiate a case against another state. That rationale does not extend to article 4. The purpose of advisory proceedings is to enable states to obtain a judicial interpretation on human rights matters, which might also assist other states in fulfilling their human rights obligations. If the Protocol would have denied a state the right to request an advisory opinion on the sole ground that it has not ratified the Protocol, it would have done a disservice to other states, including those that have ratified the Protocol.

The potentially most important difference from the American Convention concerns the inclusion in article 4(1) of African organisations recognised by the AU. It is plain that these include governmental organisations, such as the Economic Community of West African States (ECOWAS)³⁶ or the Southern African Development Community (SADC).³⁷ Article 4, however, does not make clear whether non-governmental organisations (NGOs) can be regarded as organisations recognised by the AU. On the one hand, it could be argued that this

³² Advisory Opinion OC-15/97 (n 24 above); concurring Judge Cançado Trindade, para 37.

³³ Art 21 Constitutive Act of the AU.

³⁴ Art 207 Treaty Establishing the European Community.

³⁵ See further http://www.africa-union.org/Official_Documents/Treaties (accessed 28 February 2005).

³⁶ See further <http://www.ecowas.int> (accessed 28 February 2005).

³⁷ See further <http://www.africa-union.org/usefullinks> (accessed 28 February 2005).

provision, unlike article 5 on contentious jurisdiction,³⁸ does not make a distinction between governmental and non-governmental organisations and that the latter therefore have the right to request a legal opinion.³⁹ On the other hand, one could reason that because NGOs in principle have no direct access to the Court in contentious cases,⁴⁰ they (should) have no right to request an opinion, since this would enable them to initiate a disguised contentious case against a member state that has not accepted the Court's jurisdiction in cases brought by private parties. The Court is advised to opt for the first interpretation. Particularly in Africa, NGOs play a very significant role in the promotion of human rights, and without them the African Commission would probably never have evolved into the organ it is today. Due to the limitations on the Court's contentious jurisdiction, NGOs' will, at least in the short term, not be able to make a comparable contribution to the Court, but precisely for this reason it is desirable that they can request advisory opinions. That (some) NGOs might possibly use their right to ask for an advisory opinion to bring a disguised case against a state that has not accepted the Court's jurisdiction cannot, as such, be a reason to deny (all) NGOs the right to request an opinion altogether. Rather, the proper response would be a case-by-case approach according to which the Court, upon examination of the motives for, and the subject matter of, the request, as well as other relevant circumstances, will only decline requests for advisory opinions where it concludes that a specific request in fact constitutes a contentious case.

If the Court indeed were willing to receive requests for advisory opinions from NGOs, it will have to take a position on a number of issues. The first concerns the NGOs that will have standing. Article 4(1) contains the condition that African organisations must be recognised by the AU. This could either be read as to imply a formal recognition by the AU, or that the recognition must be inferred from a *de facto* working relationship between the AU and the NGO involved.⁴¹ Secondly, should NGOs' right to request an opinion be limited to issues falling within their mandate, as defined by their statutes or foundational documents? Whatever the proper answer to these two questions may be, it would make sense if the Court would apply the criterion of having obtained

³⁸ By virtue of art 5(1) of the Protocol, African intergovernmental organisations enjoy an absolute right to submit cases to the Court. From art 5(3) *juncto* art 34(6) of the Protocol, however, it follows that non-governmental organisations only have direct access to the Court when the state in question has made a declaration accepting the Court's jurisdiction.

³⁹ Ouguergouz (n 3 above) 750.

⁴⁰ RW Eno 'The jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 223 227-228.

⁴¹ Ouguergouz (n 3 above) 750.

observer status with the African Commission.⁴² *De facto* this would imply that standing would be limited to NGOs whose objectives and activities are aimed at human rights protection and meet the criteria for observer status.⁴³ Further, the Court will have to determine whether it will admit in principle any request from NGOs having obtained observer status or whether it will be selective. The Court is not obliged to admit any request⁴⁴ and, perhaps depending on the number of NGO requests, the Court could decide to filter these requests and only issue an opinion where the questions raised by the NGOs are novel and significant for human rights law in Africa.

3 Scope *ratione materiae*: Subject matter of advisory opinions

According to article 4(1), the Court may provide an opinion on 'any legal matter relating to the Charter or any relevant human right instruments, provided the subject matter of the opinion is not related to a matter being examined by the Commission'. The substantive scope of the Court's advisory jurisdiction is much broader than that of the African Commission's interpretative power, which is restricted to the Charter.⁴⁵ It also exceeds that of the Inter-American Court, which has jurisdiction over the American Convention and 'other treaties concerning the protection of human rights in the American States'.⁴⁶ Firstly, unlike the American Convention, article 4(1) does not refer to other

⁴² Compare art 5(3) on contentious jurisdiction, which contains this requirement.

⁴³ See further Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human Rights with the African Commission on Human and Peoples' Rights, available on <http://www.ach-pr.org> (accessed 28 February 2005).

⁴⁴ The Court's power is a discretionary one ('may'). This is not to say that the Court is wholly free to either render an advisory opinion or to decline a request. Firstly, in light of the purpose of the advisory power, and the entire Protocol, it may be assumed that the Court has a *prima facie* obligation to give the requested opinion. Drawing inspiration from the Inter-American Court, it would seem that the advisory jurisdiction is 'permissive in character in the sense that it empowers the Court to decide whether the circumstances of a request for an advisory opinion justify a decision rejecting the request' and that the Court 'must have compelling reasons founded in the conviction that the request exceeds the limits of its advisory jurisdiction before it may refrain from complying with a request for an opinion'. See Advisory Opinion OC-1/82, 'Other Treaties' subject to the Consultative Jurisdiction of the Court 9 art 64 of the American Convention on Human Rights, Inter-Am Ct HR (ser A) para 17 & para 23 (24 September 1982). Furthermore, although art 4(2) of the Protocol merely states that the Court must give reasons for its advisory opinions, it may be assumed that is under a similar obligation when it decides to reject a request for opinion.

⁴⁵ Art 45(3) African Charter.

⁴⁶ Art 64(1) American Convention.

treaties but to human rights *instruments*. This could be interpreted to imply that the African Court is also empowered to give interpretations of non-binding instruments such as resolutions or recommendations of relevant bodies.⁴⁷ Secondly, article 4(1) does not formally require that other treaties should protect human rights *in African states*. This suggests that the African Court can also express its view on, for example, questions concerning the diplomatic protection to be offered to Africans in the diaspora or African states' treatment of nationals in exile. However, probably neither one of these differences with the American Convention will have much practical meaning. One may expect that questions concerning resolutions and other non-binding measures or alleged human rights violations outside African soil will not often be referred to the Court.

The notion of 'relevant human rights instruments' needs further clarification. In exploring how it could possibly be construed, it is useful to take a look across the Atlantic and consider how the Inter-American Court in Costa Rica has interpreted the notion of 'other treaties' used in article 64(1) of the American Convention. In the first ever advisory proceeding before this Court, it was suggested that 'other treaties' would refer (a) only to treaties adopted within the context of the inter-American system, (b) to treaties in which only American states are parties, or (c) to all treaties to which one or more American states are parties. The Inter-American Court chose none of these options. It held that 'other treaties' include:⁴⁸

[a]ny provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the purpose of such a treaty, and whether or not non-member states of the inter-American system are or have become parties thereto.

The Inter-American Court can, and is willing to, interpret any treaty provision, the sole condition being that it is 'directly related to the protection of human rights in a member state of the inter-American system'.⁴⁹ In exercising its advisory power, the Court cannot be

⁴⁷ I Österdahl 'The jurisdiction *ratione materiae* of the African Court on Human and Peoples' Rights' (1998) 7 *Revue Africaine des Droits de l'Homme* 132 144. To be sure, this does not imply that the Inter-American Court wholly refuses to interpret instruments other than treaties. For example, the Court interprets the American Declaration of the Rights and Duties of Man, adopted in 1948 in the form of a resolution, when necessary to clarify the OAS Charter or the American Convention. I/A Court HR Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 on the American Convention of Human Rights, Advisory Opinion OC-10/89 of 14 July 1989, Series A No 10 para.44.

⁴⁸ I/A Court HR 'Other Treaties' Subject to the Consultative Jurisdiction of the Court (art 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82 of 24 September 1982, Series A No 1, para 52.

⁴⁹ n 48 above, para 21.

restrained by the fact that the subject matter of a request coincides with that of a case pending before another international court or organ or the possibility that it might interpret a given treaty provision differently than another international organ. The Inter-American Court is an 'autonomous judicial institution',⁵⁰ which considers itself competent to interpret 'other treaties' in the way it deems the most appropriate and does not seem to be very concerned about the possibility of inconsistencies with other oversight organs:⁵¹

[T]he possibility of conflicting interpretations is a phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated. Such courts have jurisdiction to apply and, consequently, interpret the same body of law. Here it is, therefore, not unusual to find that on certain occasions courts reach conflicting or at the least different conclusions in interpreting the same rule of law. Even a restrictive interpretation of article 64 would not avoid the possibility that this type of conflict might arise.

It is submitted that the African Court can and should interpret article 4(1) of the Protocol in a comparably broad manner. One could object. Unlike the American Convention, article 4(1) does not speak of 'treaties concerning the protection of human rights' but of 'human rights instruments', and this, so it could be argued, implies that the Court can only interpret treaties primarily or exclusively adopted to protect human rights. However, the choice of words in article 4 does not seem to reflect a deliberate choice of the drafters⁵² to deny the Court the power to deliver advisory opinions on human rights issues arising within the context of, for example, treaties primarily striving at economic integration.⁵³ The Protocol's objective commands, and the text of article 4(1) leaves room for a broad reading allowing the Court other treaties than 'typical' human rights treaties. Further, it could be argued that the Inter-American Court too easily dismisses concerns about inconsistent interpretations and that the African Court, to avoid legal uncertainty and a 'jurisprudential chaos',⁵⁴ should strive at similar or at least comparable conclusions as

⁵⁰ I/A Court HR The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of 1 October 1999, Series A No 16 para 61.

⁵¹ Advisory Opinion OC-1/82, n 47 above para 50.

⁵² The sole conclusion that can be drawn from the drafting history of the Protocol is that the phrase 'any relevant human rights instruments' was chosen by the drafters to confer upon the Court a broader jurisdiction than the African Commission, which can only be asked to clarify the meaning of the Charter (art 45(3) of the Charter).

⁵³ Compare, in relation to art 3 on contentious jurisdiction, which also uses the term 'human rights instruments', E Quasigah 'The African Court of Human Rights: Prospects, in comparison with the European Court of Human Rights and the Inter-American Court of Human Rights' in: African Society of International and Comparative Law *Proceedings of the Tenth Annual Conference, held in Addis Ababa 3-5 August 1998* 61-62.

⁵⁴ Compare, in relation to art 3 on contentious jurisdiction, C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155 166-168.

other international or regional organs. This author does not support this argument. Fears for a jurisprudential chaos are largely exaggerated. There are simply no indications that the proliferation of international oversight organs in the last decades has led to great or disturbing discrepancies.⁵⁵ Further, differences in interpretation are not necessarily problematic. They are not only inevitable but, especially in relation to non-African courts and organs, they might even be desirable. In interpreting for example the International Covenant on Civil and Political Rights, the African Court ought to consider and follow the views expressed by the United Nations Human Rights Committee, but the possibility to deviate from the reasoning and conclusions of European, Inter-American or other international bodies may enable the African Court to have regard to specific 'African concerns, African traditions and African conditions'.⁵⁶ The Court should not seek originality for originality's sake and follow other non-African jurisprudence where it deems this is in Africa's and Africans' interests. Where, however, it is convinced that human rights protection in Africa demands another interpretation than the one given elsewhere, the Court should not hesitate to do so and even emphasise this.

To sum up, like the Inter-American Court, the African Court is an independent and autonomous organ that is not subordinated to, or formally bound by judgments, decisions or opinions of other regional or international courts or organs. Its powers are conferred by its constituent treaty only and, unless expressly provided otherwise by any other treaty adopted within the framework of the AU, not confined by any other treaty. The Court can, and when asked it should not hesitate to, interpret any universal,⁵⁷ regional⁵⁸ or sub-regional instruments, regardless of their purpose, main subject matter and state parties, for as long as the provision in question has 'bearing upon, affects or is in the interest' of human rights protection in Africa.⁵⁹

The above is not to say that the Court can express its view on any issue concerning these instruments. Article 4 contains two limitations. Firstly, the Court can only give an opinion on legal matters. The Court might be faced with the objection that a question phrased in legal terms is in essence a political matter. The Court is advised to draw inspiration from the International Court of Justice (ICJ). Responding to the argument that the question of whether the threat or use of nuclear weapons is compatible with international law is political rather than legal in nature, the ICJ held that the fact that a question also has 'political aspects, as, in the

⁵⁵ See eg J Charney 'Is international law threatened by multiple international tribunals?' (1998) *Recueil des Cours* 101.

⁵⁶ T van Boven 'The relationship between peoples' rights and human rights in the African Charter' (1986) 7 *Human Rights Law Journal* 183.

⁵⁷ Eg the 1966 International Covenants.

⁵⁸ Eg the African Charter on the Rights and Welfare of the Child.

⁵⁹ Advisory Opinion OC-16/99 (n 50 above) para 72.

nature of things, is the case with so many questions which arise in international life', does not suffice to deprive it of its character as a 'legal question' and to deprive the Court of its competence. According to the ICJ, questions 'framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law . . . [and] appear . . . to be questions of a legal character'.⁶⁰

Secondly, article 4(1) expressly denies the Court the power to give an opinion where the subject matter of the request is related to a matter under examination by the Commission. This institutional conflict rule is designed to prevent the Court from inflicting upon the quasi-judicial function of the Commission and to protect the latter organ's freedom of decision.⁶¹ The Protocol is silent on a possible substantive overlap between a request and a contentious case pending before the Court itself. In such cases the Court is formally entitled to give an opinion, but, where necessary to preserve the integrity of contentious proceedings or to protect human rights, it may decide to decline the request.

4 Advisory opinions on the compatibility of domestic laws with international human rights law

Next to its power to interpret human rights treaties, the Inter-American Court, at the request of an OAS member state, may provide that state with opinions regarding the compatibility of its domestic laws with those treaties.⁶² Such advisory opinions may help states to obey their human rights obligations and incite them to withdraw or not to adopt⁶³ legislation at odds with the American Charter or other instruments. The drafters of the African Protocol had not intended to grant the African Court a comparable power. The wording of article 4(1), however, does not preclude such a power. The provision speaks of legal matters relating to the African Charter and other relevant human rights instruments. There is no doubt that the compatibility or incompatibility of domestic laws with international human rights law constitutes such a matter.

Of course, this does not guarantee that the Court indeed will read article 4(1) as to provide itself the power to give opinions on domestic legislation. It has been suggested that the Court might refuse to do so because of the traditional resistance of African states to interference in their domestic affairs.⁶⁴ This is true, but it is submitted that such poli-

⁶⁰ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of 8 July 1996, ICJ Reports 1996 p 66, para 13.

⁶¹ Ouguergouz (n 3 above) 751.

⁶² Art 64(2) American Convention.

⁶³ n 65 below and accompanying text.

⁶⁴ Naldi & Magliveras (n 1 above 440).

tical resistance should be no reason for the Court to conclude that it lacks the power to give an advice on the legality of domestic laws altogether. In addressing the issue, the Court, arguably, should look at who submits the request.

In case a member state submits a request for an opinion on the compatibility of one of its own domestic laws, there simply is no unwanted intrusion in internal affairs. Denying such a request would imply an unnecessary refusal to provide a service to a state that presumably takes human rights seriously. The Court should respond positively to the request of such a state, unless compelling reasons, whatever they might be, require otherwise.

The Court ought to do the same where the request is submitted by the African Commission, another state party to the Protocol that has previously challenged the domestic law in question before the Commission or a state party whose nationals are affected by that law. These requestors are also entitled to initiate a contentious procedure against a(nother) member state. It is up to them to decide either to follow the path of a confrontational contentious procedure or, in the spirit of amicable settlement or preserving smooth inter-state relations, to initiate an advisory proceeding.

The Court would find itself in a different position when a request for an advice on a domestic law is submitted by AU organs other than the African Commission or AU member states lacking a specific interest in the law in question. Such organs and member states cannot initiate a contentious procedure against the state in question. A request for an advisory opinion on domestic legislation might constitute a disguised attempt to bring that state before the Court. In such cases, the Court would seem to have two options. It could either decide that it has no power to give an opinion on the compatibility of domestic laws or, on a case-to-case basis, decide to decline the request for an opinion.

If the Court were willing to give, as it arguably can and should, opinions on the compatibility of domestic laws with international human rights law relevant to Africa, it is likely to be confronted with various interpretation issues. Two of them are briefly pointed out here. The first involves the question whether the Court can also render an opinion on proposed or draft legislation. The Inter-American Court has been willing to do so, reasoning that the purpose of the advisory function is to assist OAS member states and organs to comply with their international human rights obligations. This purpose would be frustrated if a state could only get an opinion after the law in question has entered into force. The consequence, so the Inter-American Court asserted, would be that a state is forced to violate the American Convention by adopting a law that is or might be incompatible with it, before it can ask clarification of the Court. Such a requirement, the Court concluded, would not give effect to the objective of human rights

protection.⁶⁵ The Court recognised the risk that by granting an opinion on draft national legislation it might be embroiled in internal politics, but it did not consider this a sufficient reason for denying as such advisory jurisdiction over legislation not yet in force. Rather, the Court decided that, looking at the reasons for and the circumstances in which a request is made, it would exercise great care to ensure its advisory jurisdiction will not be resorted to with a view to affecting the outcome of the national legislative process for partisan political ends.⁶⁶ It is submitted that the African Court, if confronted with a question on the compatibility of draft legislation with the African Charter or other treaties, should follow the same or a comparable line of reasoning. African human rights jurisprudence is still comparatively underdeveloped and those responsible for drafting legislation are not always sufficiently trained in human rights law. By accepting advisory jurisdiction on the compatibility of draft legislation with international human rights law, the Court could assist African states in ensuring that their legislation is human rights compatible.

Another question the Court might be faced with is whether national judges may also request advisory opinions on the compatibility of domestic legislation with international human rights law.⁶⁷ This is a potentially very significant point.⁶⁸ Even if the current restrictions on the Court's contentious jurisdiction were eliminated, the application of human rights treaties will first and foremost be the task of national courts. The possibility for these organs to get clarification from the African Court on the compatibility of national rules and measures could contribute to the objective application of human rights treaties in Africa and the development of universal human rights jurisprudence for the African continent. Important lessons could possibly be learnt from the preliminary ruling procedure before the Court of Justice of the European Communities (ECJ).⁶⁹ In all cases where individuals claim that national acts or measures are at odds with European Community law, they will have to bring a case before a national court. When such a court has doubts about the specific meaning of Community law it may, and in some cases must, postpone the proceedings before it and

⁶⁵ I/A Court HR Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, Advisory Opinion OC-4/84 of 19 January 1984, Series A No 4 paras 16-28.

⁶⁶ n 65 above, paras 29-30.

⁶⁷ The American Convention does not allow national judges to request advisory opinions, but calls have been made to amend the Convention to open this possibility. Pasqualucci (n 17 above), 256.

⁶⁸ On the future relationship between the Court and national judiciaries and, more in general, national legal orders, see K Hopkins 'The effect of the African Court on the domestic legal orders of African states' (2002) 2 *African Human Rights Law Journal* 234.

⁶⁹ Art 234 Treaty Establishing the European Community.

refer the matter for clarification to the ECJ in Luxembourg. Upon receipt of the ECJ's preliminary judgment, the national court then settles the dispute in question. Over time, the European preliminary ruling procedure has evolved into a particularly effective multilateral system of judicial protection in which the ECJ, by interpreting Community law, guides national courts in uniformly applying and enforcing that law. This procedure has been crucial to the success of the European Community, especially during times when member states, mainly pushing for their national interests, largely paralysed the Community's legislator. Unlike the preliminary judgments of the ECJ, advisory opinions of the African Court lack binding effect. Therefore, article 4 cannot be regarded as the basis for a fully fledged African system of judicial protection comparable to, and as effective as, that of the European Union. However, if the Court were willing to interpret this provision as to allow national courts to request advisory opinions on international human rights instruments and the compatibility of domestic law with those instruments, it could build up a working relationship with these courts. Much more than politicians, national courts and judges share common values and by involving the latter, the Court could de-politicise human rights protection and lay the foundations for a uniform interpretation and objective application of human rights law in Africa.

5 Conclusion

The debates during the intergovernmental meetings that have ultimately led to the adoption of the Protocol centred on the African Court's contentious jurisdiction and the accessibility of the Court for individuals and NGOs in particular. The negative outcome of this is that, at least in the short term, the doors to contentious procedures will remain closed for the vast majority of Africans. One positive effect, however, of the preoccupation with the Court's contentious jurisdiction was that it shifted the attention away from the proposed provision on advisory jurisdiction, which had been drafted by NGO experts pushing for a strong court. In the shadow of the controversies on contentious jurisdiction, the quite broadly defined advisory jurisdiction could, without extensive debate, be quite easily agreed upon. As a result, the newly created African Court possesses an advisory jurisdiction that exceeds that of any other international human rights organ.

Of course, a power broadly defined on paper is not necessarily a meaningful one in practice. Courts are always dependent on the cases submitted to them and the African Court's power to deliver advisory opinions will remain a dormant one if no or only very few requests for such opinions would be submitted to the Court. At first glance, the experiences of the European Human Rights Court and the African Commission do not stem hopeful: Neither one of these bodies has ever

rendered an advisory opinion.⁷⁰ However, the main reason why these bodies are not asked for advisory opinions would seem to lie in the broad accessibility of their procedures for dispute settlement or resolution. The European Convention is based on a strong preference for contentious procedures. It entitles individuals to submit cases to the Court and only provides for a narrowly defined advisory power.⁷¹ The basic notion seems to be to get answers to human rights questions by forcing parties to use the hard-and-fast judicial channels, rather than the softer, less obliging, channel of advisory opinions.⁷² The individual complaint procedure before the African Commission is open to virtually anybody. Given the fact that human rights questions usually arise in or relate to concrete cases of violation, it may come as no surprise that in practice the complaint rather than the advisory procedure is used. Where, however, contentious procedures are not or hardly open for individuals, advisory jurisdiction becomes more relevant. The experiences of the Inter-American Court are illustrative. This Court can only exercise contentious jurisdiction over states that have accepted its jurisdiction. In the first years after the Court's establishment in 1979, only a few states had accepted this jurisdiction and most of the cases referred to the Court involved requests for advisory opinions. Later, when more states were willing to subject themselves to the Court and the Inter-American Commission started to refer cases to the Court, the Court's contentious gradually overshadowed its advisory jurisdiction. Generally, the practical significance of advisory jurisdiction would, to some ill-defined degree, seem to depend on the accessibility and effectiveness of contentious procedures. As regards the new African Court, one may hope that the African Commission will give impetus to the Court's contentious jurisdiction by making frequent use of its power to submit cases, but given the limited possibilities for individuals to bring states before the Court, there are no reasons to be too optimistic. Particularly during the first years of its existence, the power to deliver advisory

⁷⁰ To be sure, on 2 June 2004 the European Court delivered a decision concerning the first request for an advisory opinion under art 47 of the European Convention ever. The request was submitted by the Council of Europe's Committee of Ministers and involved the co-existence of the Convention on Human Rights of the Commonwealth of Independent States (CIS) and the European Convention. The Court ruled, however, that it had no advisory competence. See further <http://www.echr.coe.int/Eng/EDocs/DecisionAdvisoryOpinionrequest.htm> (accessed 28 February 2005).

⁷¹ The European Court does have advisory jurisdiction, but it is not entitled to deal with any question relating to the content or scope of the rights or freedoms laid down in the European Convention or with any other question which the Court or the Committee of Ministers might have to consider in consequence of proceedings that could be instituted in accordance with the European Convention. Art 47(2) European Convention, as amended by Protocol No 11. Indeed, it is hard to think of a question that the Court could answer. So far the European Court has not received a single request for an advisory opinion.

⁷² Österdahl (n 47 above) 141.

opinions could therefore be a means for the Court to make itself known and its influence felt. The Court could strengthen its own position by interpreting article 4(1) broadly so as to allow, in particular, NGOs and national courts to submit requests for an opinion and by indicating its willingness to interpret any human rights instruments relevant for human rights protection in Africa and to express its view on the compatibility of (proposed) domestic legislation with those instruments. The Court does not have to wait for the first request for an opinion to be submitted to it. It could on its own motion issue a communication or a comparable document indicating how it intends to make use of its advisory competence and invite the various parties to initiate advisory proceedings. Indeed, acting together, the Court and various actors entitled to submit requests could make a success of the advisory jurisdiction.