

# When to push the envelope? Corruption, human rights and the request for an advisory opinion by the SERAP to the African Court

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**ABSTRACT:** The debate on whether corruption is a violation of human rights has been raging unabated in academic and policy circles for far too long. Attempts to have the matter settled judicially have so far been ineffectual. Using the request by the Socio-Economic Rights and Accountability Project (SERAP) to the African Court on Human and Peoples' Rights as well as other cases that have been filed with regional courts and quasi-judicial bodies, this case note attempts to contemplate the path human rights-corruption jurisprudence will take by analysing the influence of past decisions by other bodies on the Court. In terms of methodology, the article turns to artificial intelligence citation analysis for an in-depth discussion.

## TITRE ET RÉSUMÉ EN FRANCAIS:

### Quand repousser les limites? Corruption, droits de l'homme et demande d'avis consultatif du SERAP à la Cour africaine

**RÉSUMÉ:** La corruption comme violation des droits de l'homme a fait débat depuis trop longtemps dans les cercles universitaires et politiques. Les tentatives d'une solution judiciaire à la question ont jusqu'à présent été vaines. En utilisant la demande d'avis consultatif introduite par *Socio-Economic Rights and Accountability Project* (SERAP) devant la Cour africaine des droits de l'homme et des peuples ainsi que d'autres affaires portées devant des juridictions régionales et des organes quasi judiciaires, cet article tente de prédire la direction que prendra la jurisprudence relative aux droits de l'homme et à la corruption en analysant l'influence sur la Cour, des décisions antérieures prises par d'autres. En termes de méthodologie, l'article se tourne vers l'analyse des citations par intelligence artificielle pour une discussion approfondie.

**KEY WORDS:** African Court on Human and Peoples' Rights, complementarity, corruption, case citation networks, human rights, SERAP request

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**1 INTRODUCTION**

The Socio-Economic Rights and Accountability Project (SERAP) approached the African Court on Human and Peoples' Rights (Court) for an advisory opinion as to whether extreme, systemic and widespread poverty is a violation of certain provisions of the African Charter of Human and Peoples Rights (Charter).<sup>1</sup> SERAP sought, by this request, a ruling on whether or not poverty, under-development and institutionalised *corruption* in Nigeria and elsewhere in Africa amount to violations of the human rights guaranteed under the Charter.<sup>2</sup>

The Court delivered an inadmissibility decision on the request on the basis that SERAP lacked legal standing, without considering the substantive question.<sup>3</sup> However, this decision leaves the door open for future requests, should an applicant with the requisite legal standing approach the Court. It is, therefore, intellectually rewarding to contemplate the Court's opinion on the topic, which has remained unresolved despite being raised several times in the original supervisory body under the Charter, the African Commission on Human and Peoples' Rights (Commission). In this context, it is therefore all the more important to discuss in this comment the trend by the Commission in dealing with corruption related human rights cases. The Commission's jurisprudence in this regard can be broadly divided into three key distinct phases.

1 Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project, Application 001/2013 Advisory Opinion, 26 May 2017 (2017) 2 AfCLR 572 para 3 (*SERAP Request*).

2 A Jones 'Form over substance: the African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion' (2017) 17 *African Human Rights Law Journal* 321, 321.

3 *SERAP Request* (n 1) para 65.

In the first phase, a promising start was made when the Commission explicitly considered corrupt acts or corrupt contexts as part of facts proven that contributed to a human rights violation. For instance, in the *Free Legal Aid Assistance Group and others v Zaire*,<sup>4</sup> the Commission determined that the failure of a (corrupt) government to provide basic services such as safe drinking water and medicines violates the right to health. Likewise, in the inter-state communication *Democratic Republic of Congo v Burundi, Rwanda and Uganda*,<sup>5</sup> the Commission considered that the systemic looting, price-fixing and money laundering were violations of the right to development.<sup>6</sup>

The second phase is the period during which the Commission has missed the opportunity to explicitly consider that facts of corruption by themselves constituted a violation of an obligation or a right derived from the Charter. Two cases are illustrative. The first is *SERAP v Nigeria*,<sup>7</sup> concerning grand corruption by senior government officials and legislators to inflate budget estimates. In its complaint, SERAP contended that this form of corruption violates several rights under the Charter.<sup>8</sup> The second is *Asociación Pro Derechos Humanos de España v Equatorial Guinea*,<sup>9</sup> alleging that the family of the President of Equatorial Guinea had diverted the natural resources of Equatorial Guineans to their private benefit and established and maintained a corrupt system, and thus, violated several human rights guaranteed by the Charter. The Commission declared both communications inadmissible for not exhausting local remedies without commenting on the merits of the case.

The third and current phase of dismissal (and avoidance) is exemplified by the dismissal on technicalities of cases that sought to link corruption to the violation of the African Charter. A recent example is the case of *David Mendes v Angola*, where the Commission was confronted with the question whether it could make a finding that as a result of the state's failure to investigate the allegations of corruption and embezzlement against the president, local remedies should be deemed unavailable.<sup>10</sup> The Commission, without further explanation, considered that 'the subject matter did not fall within the purview of its mandate' as it did not relate to the violation of a right provided under the Charter and dismissed the matter.<sup>11</sup>

This comment mainly focuses on the request by SERAP to reflect and contemplate future decisions of the Court whether its judgments will be consistent with, and grounded in, the way in which the Commission has developed in this regard or it will go further and consider corruption a violation of rights under the Charter. This

4 Communication 25/89, 47/90, 56/91, 100/93 (1995).

5 Communication 227/99.

6 As above, para 95.

7 Communication 300/2005.

8 As above, para 2.

9 Communication 347/07.

10 Communication 413/12 para 53.

11 Communication 413/12 para 60.

comment is particularly helpful for readers seeking to understand the point at which a human right is actually violated by corruption in the sense of constituting a breach of international law triggering state responsibility.<sup>12</sup>

This comment utilises empirical research methodology to investigate whether previous case law of the Commission influences the Court. Selected judgments and inadmissible decisions submitted not only before the two organs but also to the African Committee of Experts on the Rights and Welfare of the Child (Committee) and sub-regional human rights courts on the link between corruption and human rights will be examined. The comment borrows from methodologies outside the legal sciences by utilising citation network analysis -- a focused, systematic and reproducible investigation of judicial practice to gain more accurate convincing empirical results.<sup>13</sup> Specifically, the comment uses a network of citations in all 80 contentious majority opinions contained in the two volumes of the Court's law reports from 2006 to 2018 to demonstrate how network data can aid the analysis of precedent and its influence in judicial decision-making.

## **2 THE PATH OF CORRUPTION-HUMAN RIGHTS JURISPRUDENCE BEFORE THE COMMISSION**

### **2.1 A promising start**

Before mainstreaming human rights into corruption interventions had become popular, the Commission took on a pioneering role and came close to declaring corruption a violation of human rights. The Commission had an opportunity to adjudicate on two cases explicitly alleging that corrupt acts or corrupt contexts are relevant facts that have contributed to a human rights violation under the Charter. The two cases are briefly discussed below.

#### **2.1.1 *Free Legal Aid Assistance Group and others v Zaire***

Free Legal Assistance Group, the Committee Against Torture, and the *Centre Haitien des Droits et Libertés* against Zaire, constituted four communications joined together.<sup>14</sup> The first communication alleged the severe torture of civilians by members of the Zaire military.<sup>15</sup> The second communication complained of several arbitrary arrests, detentions, torture, extra-judicial executions, unfair trials, severe

12 See A Peters 'Corruption as a violation of international human rights' (2018) 29 *European Journal of International Law* 1251-1287.

13 M Van Der Haegen 'Building a legal citation network: the influence of the court of cassation on the lower judiciary' (2017) 13 *Utrecht Law Review* 65-76.

14 25/89, 47/90, 56/91, 100/93 (joined).

15 Communication 25/89 para 1.

restrictions imposed on the right to association and peaceful assembly, and suppression of the freedom of the press.<sup>16</sup> The third communication concerned the persecution of the members of a religious group – Jehovah’s Witnesses and alleges several types of harassment including arbitrary arrests, unlawful appropriation of church property, and exclusion from access to education.<sup>17</sup> The fourth communication contains not only allegations of physical rights violations such as through torture, executions, arrests, detention, unfair trials, restrictions on freedom of association and freedom of the press.<sup>18</sup> It also alleged that public finances were illegally mismanaged, to the extent that the government failed to provide basic services such as safe drinking water and electricity; shortage of medicines in the country; and that universities and secondary schools had been closed for two years.<sup>19</sup>

The Commission determined that the failure of the corrupt government to provide basic services such as safe drinking water and medicines violates the right to health in article 16 of the Charter.<sup>20</sup> The then government of Mobutu Sese Seko in Zaire was publicly known to be highly corrupt and some commentators believe the word ‘kleptocracy’, meaning a bureaucracy in which corruption is endemic, was coined with Zaire in mind.<sup>21</sup> Mobutu and his cronies are believed to have looted between \$4 to \$7 billion dollars during his 30 years in power, with Mobutu personally controlling 90% of state funds.<sup>22</sup>

### **2.1.2 Democratic Republic of Congo v Burundi, Rwanda and Uganda**

The first inter-state communication that has been filed before the Commission namely Democratic Republic of Congo (DRC) against Burundi, Rwanda and Uganda<sup>23</sup> provided another opportunity for the Commission to expand its own jurisprudence on corruption and human rights.

16 Communication 47/90 filed by the Lawyers’ Committee for Human Rights in New York dated 16 October 1990 para 2.

17 Communication 56/91 submitted by the Jehovah’s Witnesses of Zaire dated 27 March 1991 para 3.

18 Communication 100/93 the Union Interafricaine des Droits de l’Homme and dated 20 March 1993 para 4.

19 As above.

20 As above, para 47.

21 Staff writer, ‘Legacy of Corrupt and Ruthless Dictator who built Versailles in the Jungle’ *The Independent* 5 May 1997.

22 See in general A Steve & C Collins ‘External collusion with kleptocracy: can Zaire recapture its stolen wealth?’ (1993) 57 *Review of African Political Economy* 72-85.

23 Communication 227/99.

In this communication the DRC alleged that between October and December 1998, gold produced by one of its mines, Okimo firm, worth US\$ 100 000 000 was plundered by Rwanda,<sup>24</sup> while Uganda looted coffee in DRC's North Kivu region worth about US\$ 70 000 000.<sup>25</sup> Moreover, Rwanda and Uganda took over control of the fiscal and customs revenue collected by the DRC Directorate General of Taxes.<sup>26</sup> A UN Report of the *Panel of Experts* which identified that all the respondent states, among others actors, profited from the conflict in the DRC was used to corroborate the allegations made by the DRC.<sup>27</sup> The Commission relied on part of the report which provided glaring evidence of the involvement of the respondent states in the illegal exploitation of the natural resources in DRC. It reads:<sup>28</sup>

During this first phase (called mass-scale looting phase by the experts), stockpiles of minerals, coffee, wood, livestock and money that were available in territories conquered by the armies of Burundi, Rwanda and Uganda were taken, and either transferred to those countries or exported to international markets by their forces and nationals. Paragraph 25 of the Report further states: 'The illegal exploitation of resources (of the Democratic Republic of Congo) by Burundi, Rwanda and Uganda took different forms, including confiscation, extraction, forced monopoly and price-fixing. Of these, the first two reached proportions that made the war in the Democratic Republic of the Congo a very lucrative business'.

In its findings, the Commission ruled that 'the illegal exploitation/looting of the natural resources of the complainant state were in contravention of the Charter in particular article 21, which provides as follows:

All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it... (2) States Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity.<sup>29</sup>

More importantly, the Commission decided that the deprivation of the right of the people of the DRC, 'to freely dispose of their wealth and natural resources, has also occasioned another violation – their right to their economic, social and cultural development and of the general duty of States to individually or collectively ensure the exercise of the right to development' which is guaranteed under article 22 of the Charter.<sup>30</sup> The Commission was one step short from declaring corruption a violation of article 22 of the Charter.

## 2.2 A missed opportunity

The turn of the millennium was occupied with the debates on the nexus between corruption and human rights. For instance, in 2003, the

24 As above, para 7.

25 As above.

26 As above.

27 UN Report of the Panel of Experts, submitted to the Security Council of the UN in April 2001 *S/2001/357* para 92.

28 As above, para 93.

29 Communication 227/99 para 94.

30 As above, para 95.

United Nations Sub-Commission on the Promotion and Protection of Human Rights appointed Christy Mbonu from Nigeria as Special Rapporteur to carry out a comprehensive study on *Corruption and Its Impact on the Full Enjoyment of Human Rights*, in particular economic, social and cultural rights.<sup>31</sup> The findings of the study revealed that corruption causes a 'negative impact' on human rights.<sup>32</sup> These findings confirm earlier decisions by the Commission discussed above that corruption can have a debilitating impact on the enjoyment of human rights. Nevertheless, the Commission missed the opportunity to explicitly consider that facts of corruption, by themselves alone, constituted a violation of an obligation or a right derived from the African Charter. Thus, it missed the opportunity to expand the jurisdiction on corruption related human rights violations that it had started in the first phase. Two cases are particularly illustrative.

### 2.2.1 *SERAP v Nigeria*

The former President of Nigeria, Olusegun Obasanjo, in a televised speech of 22 March 2005, reported that members of the Nigerian Senate and the House of Representatives took bribes from senior officials from the Federal Minister of Education in order to increase the budget for education.<sup>33</sup> According to Obasanjo, the Minister of Education in connivance with senior officials paid bribes to some members of the National Assembly so that the budget for the Ministry could be increased.<sup>34</sup> The Directors then allegedly paid about 55 million naira (US \$410,000) in bribes to named legislators.<sup>35</sup>

Using this information, SERAP filed a complaint against the Government of Nigeria before the Commission.<sup>36</sup> SERAP took the admission by the President not as an isolated incident, but as evidence of systemic corruption by senior officials, particularly the paying of bribes by federal ministries to National Assembly members to have their budget estimates inflated.<sup>37</sup> According to SERAP, such systemic corruption has contributed to serious and massive violations of human rights including the right to education, in Nigeria.<sup>38</sup> The Government of Nigeria was derided by SERAP for not serving its intended purpose under the Charter but rather serving the exact opposite purpose:<sup>39</sup>

31 The mandate of the Special Rapporteur on Corruption was established by Sub-Commission resolution 2003/2 of 13 August 2003, and was subsequently endorsed by the Commission decision 2004/106.

32 Resolution 2003/2 para 63.

33 See 'Obasanjo Fires Education Minister For Bribing Senate Leader' *The New Humanitarian*, 23 March 2003, <https://www.thenewhumanitarian.org/report/53569/nigeria-obasanjo-fires-education-minister-bribing-senate-leader> (accessed 23 July 2020).

34 As above.

35 As above.

36 Communication 300/2005

37 As above, para 2

38 As above, para 3

39 As above, para 4.

Nigeria's human rights legal obligations under the Charter to achieve the minimum core contents of the right to education has been honoured more in breach than in observance, resulting in: (a) Failure of government to train the required number of teachers; (b) Gross under-funding of the nation's educational institutions; (c) Lack of motivation of teachers; (d) Non-available class room seats and pupils sitting on bare floor; (e) Non-availability of books and other teaching materials; (f) Poor curricula; (g) Poor and uninviting learning environments; (h) Overcrowding; (i) Persistent strikes by teachers and staff who have not been paid; (j) Inability of supervising agencies to set and/or enforce standards; (k) Absence of infrastructure facilities.

The case is particularly interesting because SERAP made the same allegation as that made in the DRC Communication (discussed above) which was upheld by the Commission that, 'by deliberately failing to investigate all the allegations of corruption the Government of Nigeria has contributed in impeding its ability to utilize Nigeria's natural resources for the benefit of its peoples'.<sup>40</sup> The Commission however made a decision that SERAP neglected to utilise the domestic remedies available to it and had not demonstrated why this could not be done.<sup>41</sup> As a result, the Commission declared the communication inadmissible.<sup>42</sup>

### **2.2.2 *Asociación Pro Derechos Humanos de España v Equatorial Guinea***

A Spanish human rights organisation *Asociación pro Derechos Humanos de España* (APDHE), EG Justice and the Open Society Justice Initiative (OSISA) filed a complaint to the Commission against Equatorial Guinea.<sup>43</sup> The complainant organisations argued that rampant corruption in Equatorial Guinea was a violation of the right of the people of Equatorial Guinea to 'freely dispose of [their] wealth and natural resources' protected under article 21 of the Charter.<sup>44</sup>

The complainant organisations alleged that the Government of Equatorial Guinea violated the Charter in permitting the family of the President of Equatorial Guinea, Teodoro Obiang Nguema Mbasogo, and his inner circle, the majority of them from the his clan (locally known as the 'Nguema-Mongomo group'), for the shameless pillaging of public coffers, embezzlement and siphoning of the funds from Equatoguinean peoples' natural resources.<sup>45</sup> In order to perpetrate these violations, it was alleged that

the Nguema-Mongomo group has established and maintains a far-reaching system of corruption affecting every sphere of life within Equatorial Guinea. The Government of Equatorial Guinea has materially assisted and colluded with this corruption system by, among other things, putting the Equatoguinean judicial system at the disposal of the ruling group, to implement and ratify the massive diversion of the peoples' wealth, thus violating the Government's 'duty to guarantee

40 As above, para 5.

41 As above, para 53.

42 As above, para 69.

43 Communication 347/07 (not to be confused with *APDHE v Obiang Family* case, still active before domestic courts in Spain).

44 As above.

45 As above.



the independence of the Courts,' under Article 26 of the Charter, and the closely related duty to ensure the right of '[every individual [...to] have his cause heard,' under Article 7(1).<sup>46</sup>

The complainant further alleged that the systemic corruption was a clear violation of human rights enshrined in the Charter such as 'spoliation' that is explicitly prohibited by article 21.<sup>47</sup> In addition, the complainants argued that '[t]hese violations entitle the people of Equatorial Guinea to lawful recovery of its property as well as to an adequate compensation.'<sup>48</sup> Moreover, that corruption under President Mbasogo also entails additional grave violations of the 'interest of the people' protected under article 21 of the African Charter.<sup>49</sup> The complainants concluded their petition by listing several rights under the African Charter that were allegedly violated as a result of rampant corruption by President Mbasogo and his inner circle as follows: '[t]he fruits of this corruption system are, in turn, the consequent violations of the right to development, right to health, right to education, and right to lawfully acquired private property, under articles 22, 16, 17(1), and 14'.<sup>50</sup> The Commission declared the application inadmissible because of non-exhaustion of local remedies.<sup>51</sup>

### 2.3 Dismissal and avoidance

So far, this comment has discussed two phases where the Court had entertained cases of corruption and human rights violations. Unlike these two phases, the third and present phase is marked by avoidance and dismissal of cases that sought to link corruption to human rights violations. Although, at this juncture, several commentators have explored the possibilities of incorporating corruption into the human rights framework, there is no consensus on the possibilities of utilising regional human rights courts to address corruption.<sup>52</sup> The Commission has backtracked from its earlier decisions. This can perhaps most clearly be seen in *David Mendes v Angola* (*Mendes case*), discussed below, which seems impossible to reconcile with the two cases discussed in the first phase.

The Centre for Human Rights (CHR), University of Pretoria, as the complainant, submitted a communication on behalf of David Mendes

46 As above.

47 As above.

48 As above.

49 As above.

50 As above.

51 As above.

52 See for example CB Gryting 'Asking Too Much: Why Regional Human Rights Courts Cannot Tackle Corruption' The Global Anticorruption Blog <https://globalanticorruptionblog.com/2016/10/24/asking-too-much-why-regional-human-rights-courts-cannot-tackle-corruption/> (accessed 12 July 2020) For the contrary see K Beach 'Coming Along for the Ride: Regional Human Rights Courts Should Demand Government Measures to Affirmatively Address Corruption' <https://globalanticorruptionblog.com/2016/07/08/coming-along-for-the-ride-regional-human-rights-courts-should-demand-government-measures-to-affirmatively-address-corruption/> (accessed 12 July 2020).

against Angola.<sup>53</sup> The complainant alleged that Mendes' human rights were being violated from the time he announced his candidature for the presidency in the elections and after he initiated proceedings for a private criminal complaint before the Attorney General's Office accusing the then President of Angola, Eduardo dos Santos of corruption.<sup>54</sup>

The complainant further alleged that Mendes could not exhaust local remedies because of the lack of provisions in the domestic laws of Angola allowing them to seek remedies for the violations alleged in respect of the allegations of corruption.<sup>55</sup> The complainant cited articles 133 and 135 of the Constitution of Angola which provide for immunity for the head of state during and after his or her term of office.<sup>56</sup> This implies that no local remedy can be sought on the failure to investigate the allegations of corruption. Moreover, the CHR provided evidence that the Attorney General of Angola had informed Mendes that his Office was not legally competent to proceed with the complaint against the President.<sup>57</sup>

To illustrate the nexus between corruption and human rights, the complainant submitted that the issue of death threats and vandalism of Mende's property is intertwined with that of embezzlement of state funds by the President of the respondent state, since the death threats emanated from the fact that Mendes had lodged a formal complaint with the Attorney General against such embezzlement.<sup>58</sup> The complainant urged the Commission to find that the President of Angola was indeed immune under the Constitution of Angola in respect of the corruption accusations and, therefore, no local remedies were available to Mendes.<sup>59</sup> Further, the complainant submitted that the Commission should dispose of all issues simultaneously, including those on the death threats and vandalism, since these issues could not be divorced from each other.<sup>60</sup>

Regarding exhaustion of local remedies in respect of the failure of the authorities to investigate allegations of corruption against the president of a member state, the Commission made a surprising decision that the subject matter did not fall within the purview of its mandate as it was not related to the violation of a right provided for in the Charter.<sup>61</sup> Therefore, the Commission did not address the issue.

53 Communication 413/12.

54 As above, para 7.

55 As above, para 29.

56 As above, para 35.

57 As above.

58 As above, para 36.

59 As above, para 37

60 As above.

61 As above, para 60.

### 3 THE SERAP REQUEST

The SERAP approached the Court for advisory opinion as to whether extreme, systemic and widespread poverty is a violation of certain provisions of the Charter.<sup>62</sup> The Court seized the SERAP application to set out its jurisprudence on the scope of non-governmental organizations' (NGOs') access to it, although the Court had previously dealt with four separate applications from various NGOs,<sup>63</sup> including an application that was made by SERAP.<sup>64</sup> In the application just cited SERAP challenged the Court 'to give an opinion on whether extreme and widespread poverty in Nigeria violated the prohibition of discrimination and whether poverty could constitute "other status" in the definition of discrimination in the African Charter'.<sup>65</sup> The capacity of NGOs to appear before the Court was not raised in this instance. Instead the Registrar of the Court communicated to SERAP that the request did not meet the requirements of the Rules, in particular Rule 68(2), which reads as follows:

[A]ny request for advisory opinion shall specify the provisions of the Charter or of any other international human rights instrument in respect of which the advisory opinion is being sought, the circumstances giving rise to the request as well as the names and addresses of the representatives of the entities making the request.

Nonetheless, the Court did not dismiss the request. Instead, the Registrar of the Court instructed SERAP to rectify the error. Regrettably SERAP failed to respond to the Registrar leading the matter to be struck off the court roll.<sup>66</sup> Perhaps for some strategic purpose, some applicants may purposefully withhold a claim with the intention of bringing it later – the so-called 'deliberate abandonment' (which is unwise as this could lead to the applicant being barred from filing a similar request in the future). SERAP abandoned its application.<sup>67</sup>

The defect in Request 1/2012 was cured in Request 1/2013. In the latter, SERAP again sought the Court's opinion on the question of whether 'extreme, systemic and widespread poverty is a violation of certain provisions of the Charter, and highlighted, in particular, article 2; the right to freedom from discrimination on grounds including 'any other status'; article 19 the right to equal protection of rights; article 21, the right of states to dispose of natural resources 'in the exclusive interest of the people'; and article 22 on the right of peoples to development, and the duty on states to ensure the same.<sup>68</sup> SERAP sought, by this request, a ruling on whether or not escalating poverty, under-development and *grand corruption* in Nigeria and elsewhere in

62 *SERAP Request* (n 1).

63 Jones (n 2) 321, 322.

64 The *SERAP Request for Advisory Opinion by Socio-economic Rights & Accountability Project* Application 1/2012 Advisory Opinion 15 March 2013 1 AfCLR 721.

65 As above, para 2.

66 As above, para 7.

67 See *Irving M Saunders v United States*, 316 F.2d 346 (DC Cir 1963).

68 *SERAP Request* (n 1) para 8.

Africa amounted to violations of the human rights guaranteed under the Charter.<sup>69</sup>

The request was dismissed on the basis that SERAP had no legal standing to approach the Court. In particular, SERAP was not an 'African organisation recognised by the African Union', as such, it lacked capacity to make a request for an advisory opinion under article 4 of the Court Protocol.<sup>70</sup> Could it be that some judges and states are concerned that opening the door even a crack would lead to the Court adjudicating over matters where it appears to be entertaining law and policy issues that have traditionally been regarded as domestic matters? The Court's decision in the SERAP request has been thoroughly canvassed elsewhere.<sup>71</sup> Suffice it to say that the Courts left the door open for similar organisations with *locus standi* to approach it.

## 4 ANTICIPATING THE PAST: CORRUPTION AND HUMAN RIGHTS

There are two ways of finding out how past experiences of the Commission can influence the future of the Court in regard to corruption and human rights jurisprudence. The first is to look into the issue of complementarity between the Court and the Commission. After all, the Court was established 'to complement the protective mandate of the already existing African Commission'.<sup>72</sup> The second is to go outside the legal field and use a case citation network to analyse the influence of the Commission on the Court. As Van Der Haegen noted, in order to understand the interaction between courts, it is imperative to 'scrutinize citations in court decisions, as they are easily visible remnants of the intellectual interaction of one court with its own previous decisions or those stemming from a different court'.<sup>73</sup>

### 4.1 Complementarity

The African continent has been particularly affected by corruption. For scholars interested in understanding the negative relationship between corruption and human rights, this region can be a treasure trove. As discussed in the previous sections, the Commission has thus far addressed several communications that illuminate the nexus between corruption and human rights abuses. Additionally, other regional human rights mechanisms such as the Committee and Regional

69 Jones (n 2) 321, 321.

70 As above, para 55.

71 See, for instance, Jones (n 2).

72 S T Ebobrah 'Towards a positive application of complementarity in the African human rights system: issues of functions and relations' (2011) 22 *European Journal of International Law* 663,663.

73 M Van Der Haegen 'Building a legal citation network: the influence of the Court of Cassation on the lower judiciary' (2017) 13 *Utrecht Law Review* 65-65.

Economic Communities (RECs) courts have also addressed the connection between corruption and human rights. It is worth looking into the complementary system before the Court and these institutions to see how they influence each other.

#### 4.1.1 The Court and the Commission

Positions diverge when it comes to the interpretation of the African Court Protocol on the relationship between the Court and the Commission. According to Ebobrah, '[t]he hazy usage of complementarity in the African system has attracted more attention in the context of the relationship' between the Court and the Commission.<sup>74</sup> Ebobrah has also characterised the relationship between the Court and Commission as 'peculiar', 'unique', and 'organic'.<sup>75</sup> According to the African Protocol, however, the Court's mandate is interpreted as to 'complement and reinforce' the functions of the Commission,<sup>76</sup> particularly its protective mandate.<sup>77</sup> Thus, the Protocol invokes complementarity as the guiding principle for the relationship between the Court and the Commission. Even so, it provides little to no guidance on the nature and objectives of complementarity as an organising principle.<sup>78</sup>

In this comment it is argued however that the true meaning and implication of complementarity can be found in the practice of the Court. As Juma notes, '[c]omplementarity is normative, it is an aspirational medium for realizing the norms and constitutional goals envisaged under the African human rights system.'<sup>79</sup> He further notes that there are different types of complementarities including 'complementarity in the consideration of communication/ cases'.<sup>80</sup>

#### 4.1.2 The Court and the Committee

The Committee was established in July 2001 to monitor the implementation of the Charter on the Rights and Welfare of the Child.<sup>81</sup> The Committee, like the Commission, is a quasi-judicial body and it draws its mandate from the Charter.<sup>82</sup> Specifically, the Charter empowers the Committee to consider individual communications alleging a violation of any of the rights enshrined in the Charter.<sup>83</sup>

74 Ebobrah (n 72) 665.

75 As above, quoting Österdahl 'The jurisdiction *ratione materiae* of the African Court of Human and Peoples' Rights: a comparative critique' (1998) 7 *Revue africaine des droits de l'homme* 132, 133.

76 Preamble to the African Court Protocol, para 7.

77 Arts 2 and 8 and Preamble, paras 4 and 5 of the African Court Protocol.

78 D Juma 'Complementarity between the African Commission and the African Court' in PALU (ed) *Guide to complementarity within the African human rights system* (PALU 2014) 8.

79 As above.

80 As above, 18.

81 Adopted in 1990 and which came into force in 1999.

82 Article 34-46.

Although the Committee cannot bring cases to the Court, it can request advisory opinions from the Court on legal issues relating to human rights instruments.<sup>84</sup> The Court has referred to the Committee decisions in *The Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v Kenya*,<sup>85</sup> when it decided the *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child*.<sup>86</sup> The Court has also referred to the Committee's decision in the *Centre for Human Rights and Rencontre Africaine pour la Défense des Droits de l'Homme v Senegal*<sup>87</sup> in *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali*.<sup>88</sup>

To date, the Committee has missed the opportunity to address issues of corruption on the human rights of children. This is despite the fact that in the *Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v Cameroon*<sup>89</sup> and in *Dalia Lotfy on behalf Sohaib Emad v Egypt*<sup>90</sup> glaring issues of justice sector corruption were raised but the Committee did not seize the opportunity to make the connections. Reducing corruption is not only necessary for the enjoyment of children's rights in Africa but it is also a human rights obligation. For instance, article 1 of the African Charter on the Rights and Welfare of the Child, member states are obliged to take 'all necessary measures to implement the Charter'. In its General Comment 5 on state party obligations under Article 1, the African Committee reminds states parties that 'they are expected to demonstrate that they have mobilised, allocated and spent budgets to maximise the fulfilment of all children's rights'.<sup>91</sup> The Committee notes that 'resources for the fulfilment of children's rights are frequently diluted or even diverted' and that

83 Article 44.

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

85 Communication 002/2009.

86 (Advisory Opinion) (2014) 1 AfCLR 725.

87 Communication 001/2012.

88 (merits) (2018) 2 AfCLR 380.

89 Communication 002/2015.

90 Communication 001/2016.

91 General Comment 5 on state party obligations under the African Charter on the Rights and Welfare of the Child (article 1) and systems strengthening for child protection. African Committee of Experts on the Rights and Welfare of the Child 6.

corruption ‘dissipates resources that could be available for the fulfilment of children’s rights’.<sup>92</sup>

Recently, the Committee, with the support and partnership of the African Union Advisory Board on Corruption (AU-ABC) and Child Focused Organisations (CFAs) based in Addis Ababa produced a study on *The Impact of Corruption on Children in Africa*.<sup>93</sup> The analytical framework adopted for this report considers various pathways through which corruption may affect children: its conclusion was that ‘corruption significantly reduces the resources available to governments and households to invest in children. Mismanagement and deliberate diversion of public resources is preventing African children from realising their rights’.<sup>94</sup>

#### 4.1.3 The Court and other RECs Courts and Tribunals

Although important, complementarity in regards to the relationship between sub-regional institutions and the traditional continental human rights supervisory bodies, has not been addressed in the Protocol and there is nothing attesting to this in the literature.<sup>95</sup> Other RECs courts have forged relations with the Court, for instance the Court of Justice of the Economic Community of West African States (ECOWAS Court) signed a Memorandum of Understanding and has had exchange visits with the Court to exchange experiences and share judicial knowledge.<sup>96</sup>

Theoretically, decisions of the RECs are not binding on the Court. However, in practice, the Court has on several occasions made references to previous decisions of the RECs courts. For instance, the Court has referred to the East African Court of Justice<sup>97</sup> and the ECOWAS Court.<sup>98</sup> Due to space constraints, this comment focuses on only one of the RECs courts: the ECOWAS Court decision in *SERAP v Nigeria and Universal Basic Education Commission*.<sup>99</sup>

92 General Comment 5 on state party obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection. African Committee of Experts on the Rights and Welfare of the Child 8.

93 African Union Advisory Board on Corruption and the African Committee of Experts on the Rights and Welfare of the Child ‘Stolen Futures: The Impact of Corruption on Children in Africa’ [http://www.aumaticorruption.org/uploads/The\\_Impact\\_of\\_Corruption\\_on\\_Children\\_-\\_Final\\_report.pdf](http://www.aumaticorruption.org/uploads/The_Impact_of_Corruption_on_Children_-_Final_report.pdf) (accessed 1 August 2020).

94 As above, 51.

95 Ebobrah (n 72) 670.

96 African Court, Judges Of Ecowas Court Of Justice To Visit The African Court, Press release 23 February 2018, <https://en.african-court.org/index.php/news/press-releases/item/223-judges-of-ecowas-court-of-justice-to-visit-the-african-court> (accessed 10 July 2020).

97 *Katabazi et al v Secretary General of the East African Community and Another Gombert v Côte d’Ivoire* (jurisdiction and admissibility) (2018) 2 AfCLR 270.

98 *Société AGRILAND v Côte d’Ivoire Gombert v Côte d’Ivoire* (jurisdiction and admissibility) (2018) 2 AfCLR 270.

99 *SERAP v Nigeria*, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, 30 November 2010) (*SERAP Basic Education*).

The Universal Basic Education Commission (UBEC) was investigated for mismanagement of public funds meant for basic education in ten of the federal states of Nigeria. The details were in a report submitted to the President in 2006. Additionally, in 2007 the Corrupt Practices Commission (ICPC) of Nigeria published a damning report revealing that more than 488 million naira of funds was looted from state offices and UBEC was investigating another 3.1 billion naira looted by senior officials. After reading the report, SERAP decided to file an application with the ECOWAS Court. SERAP contends that this is part of systemic corruption rampant in Nigeria. Part of the application reads as follows:

6. The charge against the first defendant is that she has ‘contributed to these problems by failing to seriously address all allegations of corruption at the highest levels of government and the levels of impunity that facilitate corruption in Nigeria.’  
 7. The result is that this has ‘contributed to the denial of the right of the peoples to freely dispose of their natural wealth and resources, which is the backbone to the enjoyment of other economic and social rights such as the right to education..... SERAP contends that the destruction of Nigeria’s natural resources through large scale corruption is the sole cause of the problems denying the majority of the citizens access to quality education.’<sup>100</sup>

The ECOWAS Court stated that corruption in the education sector has a ‘negative impact’ on the human right to quality education, as guaranteed by article 17 of the African Charter but does not by and in itself constitute a violation of that right.<sup>101</sup> However, the ECOWAS Court ruled that in order for corruption to be regarded as a human rights violation in and of itself ‘[t]here must be a clear linkage between the acts of corruption and a denial of the right to education’.<sup>102</sup> The decision has scholars debating its strict interpretation of one of the key challenges in determining whether a human rights violation can occur through corrupt conduct – the issue of causation.<sup>103</sup> Peters is of the view that the ECOWAS Court and other international and regional human rights courts or bodies seized with specific corruption cases have not addressed the question of causation in a systematic way.<sup>104</sup>

## 4.2 Citation analysis

In the section above the comment briefly discussed how the Court relates with the Commission and other courts and tribunals. However, it is still not clear how the Court is influenced by the decisions of these other courts, tribunals and semi-judicial organs. Therefore, to determine the influence of the Commission (as well as other courts and tribunals) on the Court, it is imperative to analyse the citation network of the Court. Building upon previous empirical legal work, this comment turns to artificial intelligence network citation analysis to

100 *SERAP Basic Education*, para 6-7.

101 *SERAP Basic Education*, para 8.

102 *SERAP Basic Education*, para 19.

103 Peters (n 12) see also KE Davis ‘Corruption as a violation of international human rights: a reply to Anne Peters’ (2018) 29 *European Journal of International Law* 1289-1296.

104 Peters (n 12) 1267.



provide insights into the role of precedent in the decisions of the Court.<sup>105</sup> That is to say, this part uses network of case citations as a means to illuminate the influence of cases from the Commission on the work of the Court. Specifically, the comment searches the network of citations in all 80 contentious majority opinions contained in the two volumes of law reports from 2006 to 2018 and selected just one of the most cited cases to simply demonstrate how network data can aid in the analysis of precedent and its influence in judicial decision-making using a free online network citation software known as 'gephi'.<sup>106</sup>

The use of citation networks to estimate the influence of the Commission's decisions on the Court is based on two established assumptions. The first is that a 'judicial citation contained in an opinion is essentially a latent judgment about the case cited.'<sup>107</sup> The second assumption is that international courts develop their jurisprudence in a similar way as domestic courts.<sup>108</sup>

A caveat is necessary. As is well known from the field of common law, the principle of precedent operates in manifold ways. First, the concept of precedent can be used *stricto sensu* when a lower court is obliged to follow the decisions of a higher court in the same jurisdiction in what is referred to as 'vertical' *stare decisis*.<sup>109</sup> Second, in what has been termed 'horizontal' *stare decisis*, the doctrine is that a court, generally an appellate court, 'must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself.'<sup>110</sup> Third, certain authorities are highly persuasive, that is to say, although they are not legally binding, a court's judgments are still entitled to respect and careful consideration. Persuasive authorities include cases decided in a neighbouring jurisdiction, which a court might evaluate 'without being bound to decide the same way.'<sup>111</sup> This is precisely the way in which the Court has been using precedent from the Commission. This is evident in *Thomas v Tanzania*, where it was confirmed that '[t]he Court is persuaded by the reasoning of the African Commission in *Southern African Human Rights NGO Network v Tanzania*, where it stated that the remedies that need to be exhausted are ordinary remedies'.<sup>112</sup>

In terms of data collection, this comment is using material available from the report of advisory opinions, judgments and other decisions of the Court from the two volumes of the Court's law reports covering the period from 2006 to 2018 (note the volumes covers decisions from 2009, the year the Court delivered its first judgment). Although the

105 JH Fowler & S Jeon 'The authority of Supreme Court precedent' (2008) 30 *Social Networks* 17.

106 Gephi is an open-source software for visualising and analysing large networks graphs, available at <https://gephi.org/users/>.

107 Fowler & Jeon (n 105) 17.

108 Y Lupu & E Voeten 'Precedent in international courts: a network analysis of case citations by the European Court of Human Rights' (2012) 42 *British Journal of Political Science* 413.

109 As above.

110 As above

111 As above.

112 *Thomas v Tanzania* para 64 (emphasis added).

volumes include all the judgments, including separate and dissenting opinions, advisory opinions, rulings, decisions, procedural orders and orders for provisional measures adopted by the Court, this comment only analyses the contentious decisions.<sup>113</sup> The key findings are presented in the paragraphs below.

The Court shares a number of features with other regional courts: it pays attention to precedent.<sup>114</sup> The Court has made reference to previous decisions by other international courts and quasi-judicial bodies,<sup>115</sup> as well as its own past decisions. Table 1 shows the number of contentious cases dealt by the Court, the number of cases that cited the African Commission, the number of communications cited and the number of citations that were made.

**Table 1: Reference by African Court to African Commission communications in contentious cases: 2006-2018**

Period	Total no. of cases	No. of cases that made citations	No. of Communications referred to	No. of citations made by Court
2006-2016	50	10	27	43
2017-2018	30	10	11	19
<b>Total</b>	<b>80</b>	<b>20</b>	<b>38</b>	<b>62</b>

The Court cites precedent based on the legal issue in the case, not the country of origin (See Table 2). It is useful to point out that, only ten out of 55 member states of the AU had ever fully committed to the Court by making a declaration under article 34(6) of the Court Protocol which triggers the Court's jurisdictional competency under article 5(3) to allow access for a limited number of NGOs.<sup>116</sup> Following Rwanda's earlier withdrawal, in November 2019 Tanzania withdrew the

113 It is important to note that although the Court lacks jurisdiction in the majority of the cases filed in its early years due to the Respondent States not having filed a Declaration under article 34(6) these decisions would have been dispensed with administratively by the Registry without a judicial decision, however, all such early decisions are included in volume 1 of the law Reports.

114 For more read TR Tyler & G Mitchell 'Legitimacy and the Empowerment of Discretionary legal authority: the United States Supreme Court and Abortion Rights' (1994) 43 *Duke Law Journal* 703-802.

115 African Commission on Human and Peoples' Rights, African Committee of Experts on the Rights and Welfare of the Child, Inter-American Court of Human Rights, Inter-American Commission of Human Rights, European Court of Human Rights, Permanent Court of International Justice, International Justice of Court, East African Court of Justice, ECOWAS Court of Justice, UN Committee Against Torture, UN Committee on the Elimination of Discrimination against Women, UN Human Rights Committee.

116 Tanzania, Benin, Côte d'Ivoire, Mali, Ghana, Burkina Faso, Tunisia, Malawi and Gambia.

declaration. Benin and Côte d'Ivoire have similarly withdrawn their declaration.<sup>117</sup> Nonetheless, Tanzania remains the country with the highest number of the Court judgments against it. This is because Tanzania is the state with the most cases filed against it by individuals and NGOs.<sup>118</sup>

**Table 2: Issues determined by African Court in contentious cases: 2006-2018**

Issues	2006-2016	2017-2018
Admissibility	4	0
Merit	28	18
Reparations	8	6

The extent to which the Court cites the Commission has undergone a series of changes over time: as the Court develops its own precedents it tends to rely more on its own decisions for precedent. The *Sir Dawda Jawara v The Gambia* case<sup>119</sup> is instructive of this particular dimension. The case was the most cited in the first period of the Court: it was cited in five cases, namely *Thomas v Tanzania*,<sup>120</sup> *Mtikila v Tanzania*,<sup>121</sup> *Konaté v Burkina Faso*,<sup>122</sup> *Nganyi v Tanzania*<sup>123</sup> and *Chacha v Tanzania*.<sup>124</sup> In the second phase, the Court relied on the five cases which were cited in subsequent cases on the same basis of the *Sir Dawda Jawara v The Gambia* principles (see Table 3).<sup>125</sup> This is an indication not only of how the 'Court gradually learned to ground its rulings in the facts and opinions of previous decisions',<sup>126</sup> but also that as the Court matures it refers to its own cases. Nonetheless, when the Court is faced with novel questions based on principles not set out in its prior cases, it often refers to the Commission's precedents.

117 O Windridge 'Under attack? Under the radar? Under-appreciated? All of the above? A time of reckoning for the African Court on Human and Peoples' Rights' *Opinio Juris* <http://opiniojuris.org/2020/05/07/under-attack-under-the-radar-under-appreciated-all-of-the-above-a-time-of-reckoning-for-the-african-court-on-human-and-peoples-rights/> (accessed 27 July 2020).

118 International Justice Resource Center 'As African Court Releases New Judgments, Tanzania Withdraws Individual Access' <https://ijrcenter.org/2019/12/05/as-african-court-releases-new-judgments-tanzania-withdraws-individual-access/> (accessed 28 July 2020).

119 Communication 147/95 and 149/96.

120 *Thomas v Tanzania* (merits) (2015) 1 AfCLR 465.

121 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34.

122 *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314.

123 *Wilfred Onyango Nganyi and Others v Tanzania* (merits) (2016) 1 AfCLR 507.

124 *Peter Joseph Chacha v Tanzania* (admissibility) (2014) 1 AfCLR 398.

125 The Court, in its decisions of 2017-2018, for example cited the *Thomas v Tanzania* case 14 times. It cited the *Jawara* case only 5 times.

126 Fowler & Jeon (n 105).

**Table 3: Reference by African Court during 2017-2018 to its own precedents and *Jawara* case**

Case/Communication name	No. of citations by Court	
<i>Thomas v Tanzania</i> <sup>a</sup>	14	
<i>Chacha v Tanzania</i> <sup>b</sup>	12	
<i>Mtikila v Tanzania</i> <sup>c</sup>	9	
<i>Konaté v Burkina Faso</i> <sup>d</sup>	6	
<i>Sir Dawda Jawara v The Gambia</i> <sup>e</sup>	5	
<i>Nganyi v Tanzania</i> <sup>f</sup>	2	

- a. *Thomas v Tanzania* (merits) (2015) 1 AfCLR 465.
- b. *Peter Joseph Chacha v Tanzania* (admissibility) (2014) 1 AfCLR 398.
- c. *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34.
- d. *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314.
- e. Communication 147/95 and 149/96.
- f. *Wilfred Onyango Nganyi and Others v Tanzania* (merits) (2016) 1 AfCLR 507.

Another important finding is that lawyers are more strongly embedded in case law. The cases involving the Pan African Lawyers Union (PALU) which has litigated the majority of the cases before the Courts, are well grounded in precedent from the Commission and other regional human rights courts such as the Inter-American Court of Human Rights and the European Court of Human Rights.

## 5 CONCLUSION AND THE WAY FORWARD

Despite the fact that the Court is ‘not bound by decisions of the Commission and can reach a different decision in the same case’,<sup>127</sup> and that the Court could cite but not follow a case, this comment does illuminate a trend of the citation by the Court of decisions by the Commission during its formative stage. Citation has long been established as a proxy for influence in the legal field.<sup>128</sup> This comment concludes with the proposition that the Commission has significant influence on the Court. Moreover, the comment has also shown that legal practitioners and *amicus curiae* briefs are more inclined toward the use of precedent. Coupled with the fact that it requires the readiness of the litigants to take timely action in order to shape the jurisprudence of Courts. It is now up to litigants and organisations to ‘use precedent

127 A Zimmermann & J Bäumlér ‘Current challenges facing the African Court on Human and Peoples’ Rights’ KAS International Reports, 50 [https://www.kas.de/c/document\\_library/get\\_file?uuid=1933766c-dbe1-d244-ef61-47dcb64ce9bb&groupId=252038](https://www.kas.de/c/document_library/get_file?uuid=1933766c-dbe1-d244-ef61-47dcb64ce9bb&groupId=252038) (accessed 28 July 2020).

128 R Mott ‘Judicial influence’ (1936) 30 *American Political Science Review* 295-315.

to examine what factors influence the evolution of the law, identify which issues are currently most relevant, and predict what issues might become active in the future' in regard to the corruption-human rights jurisprudence',<sup>129</sup> and how decisions, particularly of the early phase of the Commission that were just one step short of finding corruption as a violation of rights guaranteed under the Charter, can be used by the Court as a barometer and stimulus to expand corruption-human rights jurisprudence.