


AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES		

REQUEST FOR ADVISORY OPINION BY
THE CENTRE FOR HUMAN RIGHTS OF THE UNIVERSITY OF PRETORIA
AND THE COALITION OF AFRICAN LESBIANS

NO. 002/2015



ADVISORY OPINION

28 SEPTEMBER 2017

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The Court composed of: Sylvain ORÉ – President, Ben KIOKO – Vice-President; Gérard NIYUNGEKO, El Hadji GUISSÉ, Rafâa Ben ACHOUR, Solomy B. BOSSA, Angelo V. MATUSSE, Ntyam O. MENGUE, Marie-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Judges; and Robert ENO, Registrar

In the Request for Advisory Opinion introduced by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians,

After deliberation,

renders the following Advisory Opinion:

I. THE APPLICANTS

1. This Request dated 2 November, 2015, and received at the Registry on the same date was submitted jointly by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians (hereinafter referred to as “the Applicants”).
2. The Centre for Human Rights, University of Pretoria (hereinafter referred to as “the Centre”) presents itself as a Department in the University and a Non-Governmental Organisation (NGO) established in 1986 and engaged in human rights education in Africa, wide dissemination of human rights publications in Africa and the improvement of the rights of women, persons living with HIV, indigenous peoples and other disadvantaged or marginalised groups across the continent. The Centre indicates that it has had Observer Status before the African Commission on Human and Peoples’ Rights (hereinafter referred to as “the Commission”) since December 1993; that in 2006, it received the UNESCO Prize for Human Rights Education; and in 2012, on the occasion of the celebration of its 25th Anniversary, the Commission conferred on the Centre its “Human Rights NGO Prize”.

3. The Coalition of African Lesbians (hereinafter referred to as “the Coalition”) presents itself as a network of organisations committed to the equality of Lesbians in Africa. According to the Applicants, the Coalition was established in 2003 and is registered as a Non-Governmental Organisation in South Africa with its Secretariat in Johannesburg. They also indicate that the goal of the Coalition is to contribute to Africa’s transformation into a continent where women in their diversity, including lesbians, enjoy every element of human rights and are recognised as fully-fledged citizens. The Applicants further indicate that the Coalition has Observer Status before the Commission.

II. CIRCUMSTANCES AND SUBJECT OF THE REQUEST

4. In January, 2015, in its Decision on the 37th Activity Report of the Commission, the Executive Council of the African Union (hereinafter referred to as “the Executive Council”) requested it (the Commission) to delete from its Activity Report, passages concerning two decisions against the Republic of Rwanda and to give the State the opportunity to present its views in a public hearing on the two cases.
5. In July, 2015, in its Decision on the 38th Activity Report of the Commission, the Executive Council requested the Commission to “take into account fundamental African values, identity and good traditions and to withdraw the Observer Status granted to NGOs which may attempt to impose values contrary to African values”. In this respect, it requested the Commission to review its Criteria for Granting Observer Status to NGOs and to withdraw the Observer Status granted to the Coalition of African Lesbians.

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6. The Executive Council also recommended that the Assembly of the African Union authorise the publication of the Commission's 38th Activity Report only after its update and incorporation therein of the proposals made by Member States.
7. The Executive Council further requested the Commission to "observe the due process of law in making decisions on complaints received, consider reviewing its rules of procedure, in particular, the provisions in relation to provisional measures and urgent appeals, in consistence with the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and to take measures to avoid interference by NGOs and other parties in its activities"¹.
8. The Centre and the Coalition are seeking the opinion of the Court on how the term "considered" as used in Article 59 (3) of the Charter should be interpreted. More specifically, they raise the question as to whether, in the afore-cited decision taken in 2015, the Executive Council and the Assembly of the African Union have not exceeded the reasonable limits of their powers to "consider" the Activity Report of the Commission.

III. PROCEDURE


9. The Request was received at the Court Registry on 2 November 2015..
10. At its 39th Ordinary Session held from 9 to 29 November 2015 the Court considered the Request and decided to transmit it to Member States of the African Union, the Commission and to the African Institute of International Law for possible observations, pursuant to Rule 69 of the Rules of Court, (hereinafter, referred to as "the Rules"). The transmission was effected by letters dated 21 December, 2015, 27 and 29 January, 2016 indicating a time limit of ninety (90) days for submission of observations, if any.

¹ Doc.EX.CL/921(XXVII), EX.CL/Dec.887(XXVII).

11. On 2 March, 2016, the Commission notified the Court that the Request does not relate to any Application pending before it.
12. On 14 April, 2016, the Centre submitted to the Court an application for the intervention of four (4) other NGOs, in the capacity of *amici curiae*.
13. The Court rejected the Centre's application because it was not the Centre itself that wished to act as *amicus curiae*, rather, it was the four NGOs. The Court, therefore, requested that each NGO file its individual application specifying its contribution in this regard. None of the four NGOs submitted its application.
14. At its 41st Ordinary Session, held from 16 May to 3 June, 2016, the Court decided to extend by sixty (60) days, the time limit for Member States and other entities to submit their observations on the Request, if any.
15. The Republic of Côte d'Ivoire and the Federal Democratic Republic of Ethiopia transmitted their observations to the Court on 6 June and 3 April, 2016, respectively.
16. On 20 October, 2016, the Registry notified the Parties of the close of the written procedure.

IV. JURISDICTION OF THE COURT

17. In terms of Rule 72 of the Rules: "The Court shall apply, *mutatis mutandis*, the provisions of Part IV of these Rules to the extent that it deems them to be appropriate and acceptable".
18. In terms of Rule 39 of the Rules, "The Court shall conduct preliminary examination of its jurisdiction..."
19. From the provisions of these Rules, the Court must determine whether it has jurisdiction on the Request before it.

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20. In determining whether it has personal jurisdiction in the instant matter, the Court must satisfy itself that the Centre and the Coalition are amongst the entities entitled to institute a request for advisory opinion under Article 4 (1) of the Protocol to the African Charter on Human and peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol").

i. Applicants' Arguments

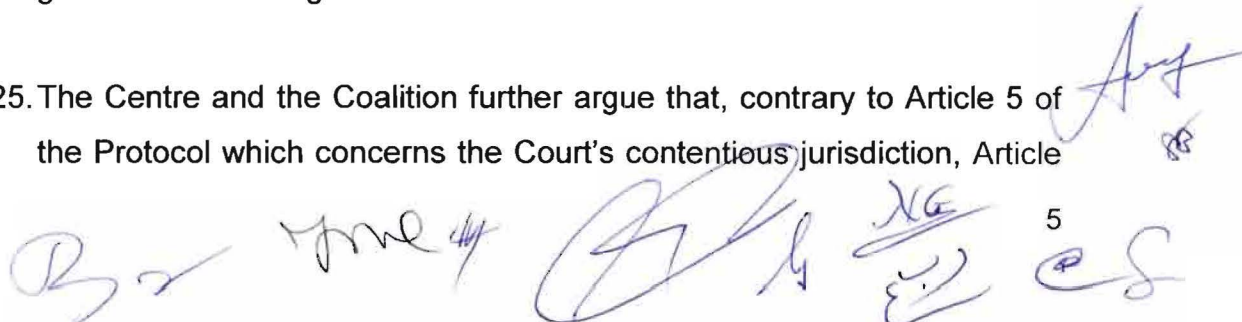
21. The Centre and the Coalition recall that Article 4 (1) of the Protocol lists four categories of entities entitled to bring a request for Advisory Opinion before the Court, namely: (1) Member States, (2) the African Union; (3) any of its organs, and (4) any African organisation recognised by the African Union.

22. They maintain that they fall under the fourth category and that the expression "*any African organisation recognized by the African Union*" should be interpreted within its ordinary meaning and in accordance with the objectives and purposes of the Protocol.

23. According to the Applicants, the term "organisation" defined by the *Oxford English Dictionary* as "an organized group of persons with a specific objective" is sufficiently wide to cover non-governmental organisations.

24. They assert that, apart from Article 4 (1), the term is also used in other articles of the Protocol such as Article 5 (1) in which reference is made to "non-governmental organisations"; thus showing that the use of the expression "any African organization" in Article 4 (1) is deliberate, intended to place various types of organisation under the generic term "organisation".

25. The Centre and the Coalition further argue that, contrary to Article 5 of the Protocol which concerns the Court's contentious jurisdiction, Article



4 (1) does not make a distinction between Governmental and Non-Governmental Organisations.

26. They therefore conclude that the term “organisation” includes but is not limited to “inter-governmental organisations”, and that it also includes African Human Rights NGOs, such as the Centre and the Coalition.

27. As regards the adjective “African”, the Centre and the Coalition argue that the *Oxford English Dictionary* defines it as “that which is related to Africa”, that according to this ordinary meaning, this term can also relate to (i) the geographical situation of an organisation which, according to them, is valid for organisations based in Africa, (ii) organisations with a predominantly African management structure even where they are not based in Africa, and lastly, (iii) international human rights NGOs with essentially African composition and mission.

28. They conclude that an organisation is regarded as “African” under Article 4 (1) of the Protocol when it fulfils any of the criteria listed in the three aforementioned categories.

29. As regards the requirement of “recognition by the African Union”, the Applicants maintain that the recognition of an NGO by an organ or structure of the African Union should amount to recognition by the main body, namely, the African Union.

30. They maintain that it is customary in “modern” international law that an agent is authorised to act on behalf of his/her principal within the context of the mandate received from the latter; that it is therefore logical and practical to consider NGOs with Observer Status before African Union organs, such as the Commission or Civil Society Organisations represented at the Economic, Social and Cultural Council of the African Union (ECOSSOC) as recognised by the African Union under Article 4 (1) of the Protocol.

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31. They contend that the Centre and the Coalition have had Observer Status before the Commission (since December 1993 for the Centre, and May 2015 for the Coalition) and that, for that reason, the two organisations should be regarded as having met the requirement of recognition by the African Union as set forth under Article 4 (1) of the Protocol.

ii. Observations of Member States

32. The following are the observations of the Federal Democratic Republic of Ethiopia and the Republic of Côte d'Ivoire.

(a) Observations from the Federal Democratic Republic of Ethiopia

33. On the question as to whether the Applicants are African organisations within the meaning of Article 4 of the Protocol, the Federal Democratic Republic of Ethiopia responds that they are not.

34. She states that the African Union adopted a Resolution on the Criteria for Granting Observer Status and a System of Accreditation, and that the term "organisation" in the Protocol should be interpreted in light of the aforesaid system of recognition and accreditation defined by the African Union.

35. According to the Federal Democratic Republic of Ethiopia, the Centre and the Coalition are not organisations within the definition of the term "organisation" adopted by the said African Union Resolution. She indicates that according to that Resolution, an "organisation" is a "regional integration or an international organization, including sub-regional, regional or inter-African organisations which are not recognised as regional economic communities".

36. The Federal Democratic Republic of Ethiopia further submits that the Non-Governmental organisations (NGOs) recognised by the African Union are accorded Observer Status in accordance with the Criteria for Granting Observer Status before the AU and neither the Centre nor the Coalition has indicated

having been recognised by the AU or as having Observer Status in accordance with that procedure. Moreover, even if they have been granted the Observer Status, it would not confer on them the right to seek an Advisory Opinion from the Court because this is not one of the prerogatives recognised for them under the Executive Council decision.

37. She contends that recognition or acquisition of Observer Status before the Organs established by treaty, including the Commission, are not synonymous with recognition by the African Union and that no provision of the Resolution mentioned above envisages this.

38. She avers that the Commission was established by virtue of the Charter to oversee the human rights situations in Africa; that the Commission accords Observer Status to non-governmental organisations on the basis of its own Resolution to facilitate NGOs' participation in human rights promotion on the continent; that this status allows NGOs to participate in sessions of the Commission, submit shadow reports and engage in constructive dialogue on the consideration of the reports of State Parties; that the Centre and the Coalition, as NGOs with Observer Status before the Commission, can enjoy the aforesaid privileges and institute a request without demonstrating that they have an interest in such a request; that such status does not however allow them to request the Court for Advisory Opinion on matters concerning another organisation.

39. The Federal Democratic Republic of Ethiopia also argues that the Commission's Rules of Procedure establish a distinction between "organisations with observer status" and "organisations recognised by the AU", and recalls Rule 32 (3) (e) of the said Rules of Procedure which provides that an organisation recognised by the African Union, a national human rights institution with the status of affiliated member or a non-governmental organisation with Observer Status, can propose items for inclusion in the provisional agenda of sessions of the Commission; that in the same vein, Rule 63 (1) thereof accords these two types of organisation the right to request the Commission to include in the agenda of an ordinary session a debate on any human rights situation; that in light of the

aforesaid provisions, the Rules of Procedure of the Commission treats the two types of organisation differently.

40. The Federal Democratic Republic of Ethiopia concludes that the Observer Status obtained by the Centre and the Coalition before the Commission does not confer on them the capacity to seek an Advisory Opinion from the Court.

(b) Observations from the Republic of Côte d'Ivoire

41. The Republic of Côte d'Ivoire submits that under Article 4 (1) of the Protocol, Requests for Advisory Opinion are reserved for Member States of the Union, its organs and African organisations recognised by the latter; that contrary to the assertions of the requesting NGOs, the expression "African organisation recognised by the African Union" used in Article 4 of the Protocol does not cover both African International Organisations and non-governmental organisations having Observer Status before the Commission; that if that were the case, the drafters of the Protocol would not have taken pains to enumerate in Article 5 thereof, these two entities as entitled to file applications against State Parties before the Court.

42. The Republic of Côte d'Ivoire contends that, in law, prohibition from making a distinction where the law does not do so, carries with it the obligation to make such a distinction where the law so does; that consequently, in the absence of specific mention thereof in Article 4 of the Protocol, as was the case in Article 5, NGOs with Observer Status before the Commission must not be considered as entitled to seize the Court with Requests for Advisory Opinion.

43. She further contends that the notion "African organisation" as used in Article 4 of the Protocol concerns African inter-governmental organisations and not NGOs, and that the organisations concerned include, notably, Regional Economic Communities, like the Arab Maghreb Union (AMU), Economic Community of West African States (ECOWAS), West African Economic and Monetary Union (WAEMU), Central Africa Economic and Monetary

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Community (CEMAC), Indian Ocean Community (IOC) and the East African Community (EAC).

44. The Republic of Côte d'Ivoire also maintains that to offer NGOs with Observer Status before the Commission, the possibility of seizing the Court with a request for Advisory Opinion, would enable them to target States, even those that are yet to make the Declaration prescribed by Article 34 (6) of the Protocol, that the initiatives of the Centre and the Coalition clearly falls within this logic; that the real target of their request is, in fact, the African Union which, through the Executive Council, has recommended the withdrawal of the Coalition of African Lesbians' Observer Status before the Commission.

45. The Republic of Côte d'Ivoire therefore requests the Court to rule that it has no jurisdiction to examine the request for Advisory Opinion filed by the Centre and the Coalition.

iii. Position of the Court

46. Article 4 (1) of the Protocol, which lists the four categories of entities entitled to apply to the Court for an Advisory Opinion, provides as follows: "[a]t the request of a Member State of the [African Union], the [AU], any of its organs, or any African organization recognised by the [AU], the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments..."

47. The fact that the two NGOs which filed the request do not fall within the first three categories is not contested.

48. The first question which arises is whether these NGOs are of the fourth category, that is, whether they are "African organisations" within the meaning of Article 4(1) of the Protocol.

49. On this issue, the Court has, in its Advisory Opinion in Socio-Economic Rights and Accountability Project (SERAP), established that the term

“organisation” used in Article 4 (1) of the Protocol covers both non-governmental organisations and inter-governmental organisations.²

50. As regards the appellation “African”, the Court established that an organisation may be considered as “African” if it is registered in an African country and has branches at the sub-regional, regional or continental levels and if it carries out activities beyond the country where it is registered.³

51. The Court notes that the Centre and the Coalition are both registered in South Africa and with their Observer Status before the Commission, they are entitled to carry out their activities beyond the countries where they are registered. It concludes that they are “African Organisations” in terms of Article 4 (1) of the Protocol.

52. The second question that follows is whether these organisations are recognised by the African Union.

53. The Court notes that the Centre and the Coalition have relied on their Observer Status before the Commission to contend that they are recognised by the African Union.

54. In this respect, the Court has, in the afore-mentioned SERAP Advisory Opinion, indicated that Observer Status before any African Union organ does not amount to recognition by the African Union. It has thus established that only the NGOs recognised by the African Union itself are covered by Article 4 (1) of the Protocol.⁴

²Request for Advisory Opinion by *Socio-Economic Rights and Accountability Project* (SERAP), No. 001/2013, Advisory Opinion of 26 May 2017, Paragraph 46

³Idem, Paragraph 48.

⁴Idem, Paragraph 53.

55. The Court has further established that recognition of NGOs by the African Union is through the granting of Observer Status or the signing of a Memorandum of Understanding and/or Cooperation between the African Union and those NGOs⁵.

56. In the instant case, the Centre and the Coalition have not claimed and have not provided proof as to their Observer Status before the African Union or that they have signed any Memorandum of Understanding with the Union.

57. From the foregoing, the Court finds that, although the Applicants are African organisations within the meaning of Article 4(1) of the Protocol, they lack the second essential condition required by this provision as a basis for the Court's jurisdiction, namely, to be "recognised by the African Union".

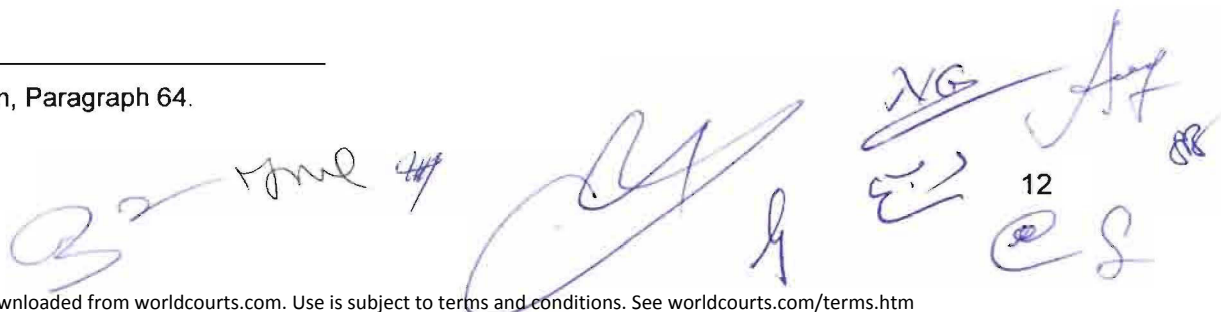
58. For the above reasons

The Court,

Unanimously:

Finds that it is not able to give the Advisory Opinion which was requested of it.

⁵Idem, Paragraph 64.


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Signed:

Sylvain ORE, President



Ben KIOKO, Vice-President



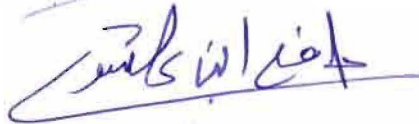
Gérard NIYUNGEKO, Judge



El Hadji GUISSSE, Judge



Rafâa Ben ACHOUR, Judge



Solomy Balungi BOSSA, Judge



Angelo Vasco MATUSSE, Judge



Ntyam O. MENGUE, Judge



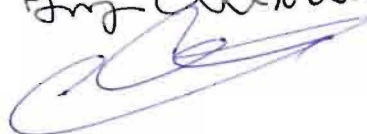
Marie-Thérèse MUKAMALISA, Judge



Tujilane R. CHIZUMILA, Judge



Chafika BENSAOULA, Judge



Robert ENO, Registrar



Done at Arusha, this Twenty Eighth Day of the month of September, in the year Two Thousand and Seventeen, in English and French, the English text being authoritative.

In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules of Court, the Separate Opinions of Judges Rafâa Ben ACHOUR and Angelo V. MATUSSE are appended to this Opinion.



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