


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

1. THE CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA
2. FEDERATION OF WOMEN LAWYERS, KENYA
3. WOMEN'S LEGAL CENTRE
4. WOMEN ADVOCATES RESEARCH AND DOCUMENTATION CENTRE
5. ZIMBABWE WOMEN LAWYERS ASSOCIATION

NO. 001/2016

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

REQUEST FOR ADVISORY OPINION BY THE CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA, FEDERATION OF WOMEN LAWYERS, KENYA, WOMEN'S LEGAL CENTRE, WOMEN ADVOCATES RESEARCH AND DOCUMENTATION CENTRE AND ZIMBABWE WOMEN LAWYERS ASSOCIATION

After deliberation,

Gives the following Advisory Opinion:

## **I. THE APPLICANTS**

1. This Request for Advisory Opinion dated 7 January 2016 was filed at the Registry on 8 January 2016 jointly by the Centre for Human Rights of the University of Pretoria, Federation of Women Lawyers Kenya, Women's Legal Centre, Women Advocates Research and Documentation Centre and Zimbabwe Women Lawyers Association (hereinafter referred to as "the Applicants").
2. The Applicants state that they are all registered Non-Governmental Organisations (NGOs) based in South Africa, Nigeria, Kenya and Zimbabwe, respectively, working on women's human rights issues in various capacities, including public interest litigation, provision of legal aid, research and in academia. They also state that they are NGOs with Observer Status with the African Commission on Human and Peoples' Rights (hereinafter referred to as the "Commission"). They have

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provided copies of the attestation of their Observer Status with the Commission.

3. The Applicants are represented by Ms. Sibongile Ndashe of the Initiative for Strategic Litigation in Africa and Professor Frans Viljoen of the Centre for Human Rights, University of Pretoria, South Africa.

## II. CIRCUMSTANCES AND SUBJECT OF THE REQUEST

4. The Applicants submit that unrecorded and unregistered marriages are common in Africa due to (i) the fact that domestic laws do not stipulate requirements or procedures for the compulsory registration of all forms of marriages and are grossly inadequate; (ii) the cost of registering marriages (iii) onerous requirements for such registrations; (iv) unequal gender relations; (v) lack of awareness; and (vi) lack of legal frameworks regulating the consequences of unrecorded and unregistered marriages.
5. The Applicants state that the issue of non-registration and non-recording of marriages has rendered women vulnerable in that (i) women are unable to provide proof of their marriages, (ii) women are easily divorced, (iii) women are unable to enforce the requirement that a woman's consent must be sought before the man can take a second wife in a polygamous marriage, (iv) women are unable to secure land and property rights and that, (v) it makes it difficult for countries to collect, monitor and analyse vital information about a population.
6. The Applicants are requesting for an Advisory Opinion on the interpretation of Article 6(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter referred to as "the Women's Rights Protocol") and the States' obligations consequent thereto.
7. They indicate that for the purposes of this request and in line with Articles 6(a) and (b) of the Women's Rights Protocol, the term "marriage"

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shall mean a "marriage entered into with the full and free consent of the parties and the term shall refer only to marriages entered into by women who are at least 18 years of age".

8. The Applicants state that the request is anchored on Articles 2(1) (a) to (e) and 2(2) of the Women's Rights Protocol, which provide for the elimination of discrimination against women by requiring State Parties thereto to prevent all forms of discrimination against women through appropriate legislative, institutional and other measures.
9. The Applicants submit that Article 6(d) of the Women's Rights Protocol imposes an obligation on State Parties to enact national legislative measures to guarantee that every marriage is recorded in writing and registered in accordance with national laws in order to be legally recognised.
10. The Applicants aver that the Court's interpretation of Article 6(d) of the Women's Rights Protocol to include a positive obligation to adopt legislative measures for the registration of marriages, would be in consonance with the obligation set out in Article 21(2) of the African Charter on the Rights and Welfare of the Child which provides that registration of all marriages in an official registry is compulsory.
11. The Applicants contend that the overall purpose of the Women's Rights Protocol and particularly Article 2 thereof require that in addition to "taking legislative measures", State parties are obligated to take measures aimed at promoting awareness of the obligation to register marriages and to allocate financial and other resources aimed at facilitating such registration.
12. The Applicants maintain that the word "shall" in Article 6(d) of the Women's Rights Protocol is peremptory and denotes a duty requiring State Parties to guarantee the registration of marriages in order for them

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to be legally recognised. The Applicants submit further that there is nothing in this provision suggesting that, in meeting this obligation, States Parties should impose penalties or sanctions for non-compliance with the registration requirements set out in their national laws.

13. The Applicants contend that Article 2 of the Women's Rights Protocol requires State Parties to put in place measures aimed at combatting discrimination, among which are:

a) integrating a gender perspective into their policy and other decisions;  
and

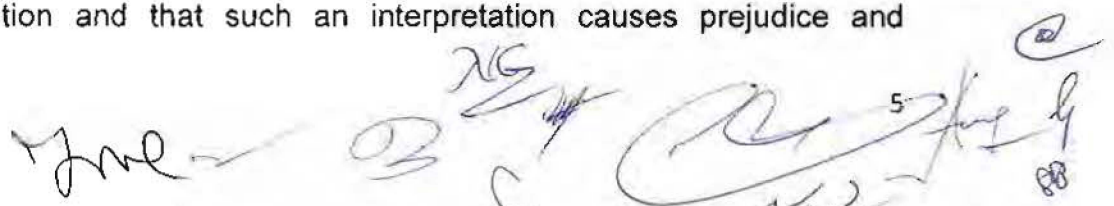
b) taking positive and corrective actions in those areas where discrimination in law continue to exist.

14. The Applicants submit that in order to give effect to the overall purpose of the Women's Rights Protocol, the commitment towards eliminating discrimination in Article 2 and the rights and protections in marriage established in Articles 6(e) to 6(j) thereof and affirmed in other regional and international human rights treaties, Article 6(d) must be interpreted purposively and in a way that rejects the imposition of unnecessary sanctions for non-compliance by its rights holders and does not perpetuate indirect discrimination against women.

15. The Applicants argue that non-recognition of marriages that are not recorded in writing or registered perpetuates discrimination against women as it results in vulnerability, compromises enjoyment of marital rights enshrined in Article 6(e) to 6(j) of the Women's Rights Protocol and other regional and international instruments. The Applicants submit further that, this discrimination is particular where non-registered marriages are automatically and as a matter of law presumed void, invalid or nullified such that the personal and proprietary consequences and protections in marriage are denied.

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16. The Applicants state that Article 6(d) of the Women's Rights Protocol was not intended and should not be interpreted as suggesting that a failure to register will invalidate a marriage, and that while national laws must require registration of marriages, non-compliance with registration requirements should not as a matter of law void, nullify or invalidate the marriage.
17. The Applicants submit that a distinction must be drawn between "validity" and "legal recognition" (as used in the Women's Rights Protocol), and that in their view an action or undertaking which is not legally recognised need not necessarily be presumed or declared invalid. The Applicants argue that an unregistered marriage may simultaneously have the status of being valid but not legally recognised and that drawing a distinction between the concepts of validity and legal recognition for the purposes of elaborating on the precise meaning of Article 6(d) would give greatest effect to the rights and objects enshrined in the Women's Rights Protocol.
18. The Applicants submit that in order to give effect to the overall purpose of the Women's Rights Protocol, the commitment to eliminate discrimination in Article 2 and the rights in marriage established in Article 6(e) to 6(j) thereof and other human rights instruments, the legal consequences of non-registered marriages, which should be stipulated by national laws, should be aimed at preserving the personal and proprietary consequences of marriage that are intended to protect the parties thereto. State Parties to the Women's Rights Protocol are duty bound to also stipulate condonation procedures in their national laws that afford parties to a marriage an opportunity to rectify or correct non-compliance with registration requirements.
19. The Applicants submit that the language in Article 6(d) of the Women's Rights Protocol seems to have been interpreted as meaning that unregistered marriages are invalid and/or should not receive legal recognition and that such an interpretation causes prejudice and





injustice to women across Africa, whose marriages are unrecorded and unregistered. They submit further that this interpretation is contrary to the overall purpose of the Women's Rights Protocol and to the objectives of Article 2 thereof.

20. The Applicants state that by maintaining the requirement of recording and registration of marriage as a possible intended precursor to legality, Article 6(d) of the Women's Rights Protocol has the potential to jeopardise the right to equality in marriage and that it is against this backdrop that they make the request to the Court for an Advisory Opinion on the precise meaning of this provision.

21. The Applicants submit that their request is therefore that the Court :

- a) Confirm that a failure to enact laws that require and regulate marriage registration constitute a violation of the Women's Rights Protocol by a Member State;
- b) Advise on the nature and scope of State obligation that Article 6(d) of the Women's Rights Protocol prescribes in respect of recording and registration of marriages, taking into account the broader duty of State parties to, respect, protect and promote the rights of women, as enshrined in the Women's Rights Protocol;
- c) Confirm that Article 6(d) of the Women's Rights Protocol does not suggest or require that non-registration invalidates a marriage;
- d) Advise whether State parties are required to enact national laws that provide for condonation procedures to correct or remedy non-compliance with registration requirements ; and
- e) Advise on the legal consequences that flow non-registered marriages, having regard to the overall purpose of the Women's Rights Protocol

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and the specific protections and commitments set out in Articles 2 and 6(e-j) of the Women's Rights Protocol and other relevant instruments.

### III. PROCEDURE BEFORE THE COURT

22. The Request dated 7 January 2016 was received at the Registry of the Court on 8 January 2016 and registered forthwith as Request No.001/2016.

23. By a letter dated 15 February 2016, the Registry requested the Commission to advise whether the Request relates to a matter pending before it. The Commission responded by a letter dated 18 May 2016, indicating that the Request does not relate to any matter pending before it.

24. By a letter dated 15 March 2016, the Registry sought confirmation from the Commission, of the Applicants' Observer Status. By a letter dated 30 March 2016, the Commission confirmed that they have Observer Status before the Commission.

25. By a notice dated 13 June 2016, the Request was notified to African Union Member States, the Commission, the African Union Commission, the Pan African Parliament, the Economic, Social and Cultural Council of the African Union, the African Union Commission on International Law, the Directorate of Women and Gender of the AU Commission and Women's Rights Non-Governmental Organisations. The Court set a ninety (90) day time limit for receipt of observations from the date of receipt. By a notice dated 6 October 2016, the Court extended the time for receipt of such observations by sixty (60) days. This period elapsed on 31 January 2017.

26. One of the entities to whom the request was transmitted pursuant to Rule 69 of the Rules, *L'Association des Femmes Juristes de Cote' d'Ivoire*

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filed their Observations on the merits of the request on 13 September 2016.

27. By a notice dated 12 July 2017, the Applicants and other entities to whom the Request was transmitted were notified of the close of the procedure for the filing of written submissions.

#### IV. JURISDICTION OF THE COURT

28. In accordance with 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".

29. In terms of Rule 39(1) of the Rules, "The Court shall conduct preliminary examination of its jurisdiction".

30. From the provisions of these Rules, the Court must determine whether it has jurisdiction on the Request before it.

31. In determining whether it has personal jurisdiction in the instant matter, the Court must satisfy itself that the Applicants 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. Applicant's Arguments

32. The Applicants state that Article 4(1) of the Protocol as read with Article 68(1) of the Rules confer a discretionary competence to the Court to provide an Advisory Opinion at the request of, among others, any African Organisation recognised by the African Union.



33. The Applicants submit that an interpretation of the clause "any African organisation recognised by the African Union encompasses any organisation with Observer Status with the Commission".
34. The Applicants submit that this interpretation is consistent with the principles of statutory interpretation that requires courts to give effect to every word and clause of a statute, to assume that the construction was intentional and to avoid rendering any statutory language superfluous.
35. The Applicants also submit that on a reasonable construction of the overall text of the Protocol, two types of organisations are envisaged: African Intergovernmental Organisations, as mentioned in Article 5(1) (e) thereof, and Non-Governmental organisations, as mentioned in Article 5(3) thereof, which may or may not have been granted Observer Status with the Commission.
36. The Applicants submit that in their view, the phrase "African Organisations recognised by the African Union" must be construed as an umbrella term referring to both African Intergovernmental Organisations and Non-Governmental Organisations. They submit that this interpretation is consistent with an overall reading of the text and also gives effect to the unique distinction drawn in the text between types of organisations that may seek the assistance of the Court.
37. The Applicants conclude that they qualify as African organisations recognised by the African Union for the purposes of Article 4(1) of the Protocol and Article 68(1) of the Rules, thus are entitled to request the Advisory Opinion.

## ii. Position of the Court

38. Article 4 (1) of the Protocol provides that "At the request of a Member State of the [African Union], the [AU], any of its organs, or any African organization

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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...".

39. The fact that the Applicants do not fall within the first three categories within the meaning of Article 4(1) of the Protocol is not contested.

40. The first question which arises, however, is whether they fall under the fourth category, that is, whether they are "African organisations recognised by the AU" within the meaning of Article 4(1) of the Protocol.

41. On this issue, the Court has in the past in the Advisory Opinion in *Socio-Economic Rights and Accountability Project* (SERAP) established that the term "organization" used in Article 4 (1) of the Protocol covers both Non-Governmental Organisations and Inter-Governmental Organisations.<sup>1</sup>

42. As regards the appellation "African", the Court noted in the same Opinion 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.<sup>2</sup>

43. The Court notes that the Applicants are registered in South Africa, Kenya, Nigeria and Zimbabwe, respectively and with their Observer Status before the Commission, they are entitled to carry out their activities beyond the countries where they are registered. In view of this, the Court concludes that they are "African Organisations" in terms of Article 4 (1) of the Protocol.

44. The second question the Court must address is whether these organisations, apart from being African, are recognised by the African Union.

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<sup>1</sup>Request for Advisory Opinion by *Socio-Economic Rights and Accountability Project* (SERAP), Request NO. 001/2013, Advisory Opinion of 26 May 2017, Paragraph 46.

<sup>2</sup>Idem, Paragraph 48.

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45. The Court notes that the Applicants have relied on their Observer Status before the Commission to contend that they are recognised by the African Union.

46. In this respect, the Court has in the afore-mentioned Opinion held that Observer Status before any African Union organ does not amount to recognition by the African Union, rather that, only NGOs recognised by the African Union itself are envisaged in Article 4 (1) of the Protocol.<sup>3</sup>

47. 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 between the African Union and those NGOs.<sup>4</sup>

48. In the instant case, the Applicants have not claimed to be and have not provided proof that they have Observer Status with the African Union **or** have signed any Memorandum of Understanding with the Union.

49. 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".

50. For the above reasons,

The Court,

Unanimously:

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<sup>3</sup>SERAP Advisory Opinion, Paragraph 53.

<sup>4</sup>Idem, Paragraph 64.



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

**Signed:**

Sylvain ORÉ, President



Ben KIOKO, Vice-President



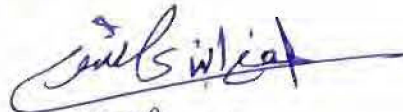
Gérard NIYUNGEKO, Judge



El Hadji GUISSÉ, Judge



Rafâa Ben ACHOUR, Judge



Solomy B. BOSSA, Judge



Angelo V. MATUSSE, Judge



Ntyam O. MENGUE, Judge



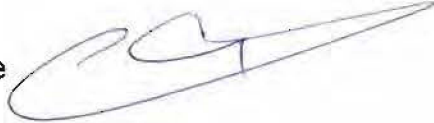
Marie-Thérèse MUKAMULISA, Judge



Tujilane R. CHIZUMILA, Judge



Chafika BENSAOULA, Judge



Robert ENO, Registrar



Done at Arusha, this Twenty Eighth Day 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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