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COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES
AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS

Request for Advisory Opinion N° 001/2015

Coalition for the International Criminal Court, Legal Defence & Assistance Project (LEDAP), Civil Resource Development & Documentation Center (CIRDDOC) and Women Advocates Documentation Center (WARDC)

Dissenting Opinion of Judge Fatsah Ouguergouz

1. I consider that this request for re-listing in the general list of the Court of the request for advisory opinion N° 001/2014 is "*formally*" admissible as it stood, and that there was thus no reason to dismiss it. I therefore wish to express my dissenting opinion on the Court's response to this request, and on the procedure followed in treating it.

I - Procedure followed in the treatment of this request

2. I would recall that this request was received at the Registry on 1st July 2015 and was registered in the Court's general list under N° 001/2015. This request sought the restoration in the list, of the request for advisory opinion received at the Registry on 28 March 2014, listed under N° 001/2014 and struck off this same general list by an Order of the Court dated 5 June 2015.

3. In this respect, it is my view that the Court should have observed greater procedural orthodoxy in the treatment of the current request (N° 001/2015) as well as of the previous request (N° 001/2014). Two hypotheses could be envisaged in the instant case.

4. Either that this request was not "*in due and proper form*" because it did not meet the conditions set forth in Rule 68 (2) of the Rules of Court, in which case it lies with the Registrar to notify the Authors accordingly and invite them to

comply with the requirements laid down in the Rule. The request should therefore not have been registered in the general list since the aforesaid requirements had not been met, and it is by a letter from the Registrar that the Authors of the request should have been notified.

5. Or that the request was "*in due and proper form*", *i.e.*, that it fulfilled the conditions prescribed by Rule 68 (2), in which case it should have been registered in the Court's general list, been transmitted to all the entities mentioned in Rule 69 of the Rules, and gone through a thorough judicial process pursuant to Rules 70 to 73 of the Rules.

6. In my opinion, there is no middle way. If, as the Court observed in its Order, the request "*did not comply with the requirements under Rule 68 of the Rules of Court*", the said request should have been given a purely administrative treatment and rejected by a simple letter from the Registrar.

7. I therefore recommend that, in future, only requests for advisory opinion that fulfill the conditions of formal validity set forth in the Protocol and in the Rules of Court should be registered on the general list. Only the requests that contain all the information required to determine the jurisdiction of the Court to entertain them, shall be deemed to fulfill the said conditions.

8. Under Article 4 (1) of the Protocol and Rule 68 of the Rules of Court, the advisory jurisdiction of the Court is subject to four conditions: 1) the request for advisory opinion shall emanate from an entity entitled to do so, 2) it shall be on a legal matter, 3) it shall relate to the African Charter or any other international human rights instrument, and 4) its subject matter shall not relate to an application pending before the African Commission.

II - Response to the request

9. The request for advisory opinion registered in the general list under N° 001/2014 was struck off by Order of the Court dated 5 June 2015 on the dual reason that it did not meet the conditions laid down in Rule 68 (2) of the Rules and that the Authors had not shown interest in continuing with the procedure.

10. On 1st July 2015, the four concerned Non-Governmental Organizations requested a re-listing of the request on the general list, providing copy of the correspondence that they had addressed to the Court on 15 November 2014 but which clearly never reached the Registry.

11. In the present Order, the Court justified its refusal to re-list the request with two reasons: to wit, that:

> *"The Authors have not supplied any evidence to show that they responded to the Court's letter of 30 June, 2014, and that the new Request does not comply with the requirements under Rule 68 of the Rules of Court".*

12. With regard to the first reason, I believe that the Court should have offered the Authors of the request the opportunity to adduce evidence that they have indeed responded to the letter of 30 June 2014. The Court should therefore have instructed the Registry to write to the Authors of the request asking them, for example, to produce a receipt for dispatch of their response.

13. It is however, in my opinion, the second reason that is more substantial and more probative in the instant case, to wit, that "*the new Request does not comply with the requirements under Rule 68 of the Rules of Court*". In this regard, a reading of the first sentence of paragraph 17 of the Order shows that reference is being made more specifically to the conditions laid down in paragraph 2 of Rule 68.

14. In the opinion of the Court, the Authors of the request "*have not specified the provisions of the Charter or any other international human rights instrument in respect of which the advisory opinion is being sought*" and "*the issues raised by the Authors are of general public international law and not of human rights*";[1] the Court then specifies that *"the issues raised have to do with the hierarchy of norms in Public International Law*".

15. I do not share the position of my colleagues on these points.

16. With respect to the first point, I would like to underline that both in their new request dated 1 July 2015, and in the request received at the Registry on 28 March 2014, and registered under N° 001/2014, the Authors indicated their reliance in particular on Articles 1, 4, 5, 12, 13 and 86 of the Rome Statute of the International Criminal Court; they also specified the circumstances giving rise to their request.

17. The question was therefore to know whether or not the Rome Statute could be considered "*a human rights instrument*" under Article 4 of the Protocol; the Court should have clearly pronounced itself on this question.

18. Regarding the second point, *i.e.* that "*the issues raised by the Authors are of general public international law and not of human rights*" and *"have to do with the hierarchy of norms in Public International Law*", it is an assertion which the

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[1] These are the very reasons given in the Court's Order of 5 June 2015 to reject the request for advisory opinion No. 001/2014.

Court should have elaborated. For my part, I believe that the fact that the issues raised relate to "*general public international law*" and *"hierarchy of norms in Public International Law"* in particular does not necessarily mean that the said issues are alien to "*human rights*".

19. Indeed, the protection of human rights for which the Court is responsible under the Protocol is based on international law and is by definition irrigated by that law. In more general terms, the whole issue of "*human rights*" is more and more imbibed by international law, in terms of subjects, sources, international responsibility and peaceful settlement of disputes. The question of human rights, like any other matter governed by international law, is therefore likely to raise issues relating to the law of treaties in general and the hierarchy of international norms in particular.

20. Should the Court, for example, refrain from entertaining a request for advisory opinion relating to the African Charter on Human and Peoples' Rights, a reference instrument *par excellence* for the Court, on the grounds that such request raises questions of "*general public international law*" and *"hierarchy of international norms"* in particular ? This question of course calls for a negative response.

21. It is therefore my view that the two main reasons advanced by the Court to dismiss that request (see *supra*, paragraph 14), and the previous request, are insufficient and should have been further elaborated.

22. The four concerned NGOs are as a matter of fact entitled to know for what specific reasons their request failed to meet the requirements set forth in Rule 68 of the Rules.[2] In addition to the right of the Authors of the request to be informed of the reasons for the dismissal of their request, there is also the question of the pedagogical virtues of the Court's pronouncements and the need for the Court to inform potential authors of requests for advisory opinions of what exactly is expected of them.

23. In any event, the two reasons advanced by the Court (see *supra,* paragraph 14), in particular that *"the issues raised by the Authors are of general public international law [hierarchy of international norms] and not of human rights"*,

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[2] See for example the reasons developed by the International Court of Justice and the European Court of Human Rights for declining their jurisdiction to provide the opinion requested: Advisory opinion of ICJ of 8 July 1996 on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* and the decision of the European Court of 2 June 2004 on the *Competence of the Court to give an advisory opinion.*

indeed touch upon the material jurisdiction of the Court. In dismissing the request on this basis, the Court implicitly ruled on its material jurisdiction and this is a question that it should have addressed in the context of the procedure laid down in Rules 69-73 of the Rules. It would have been desirable for the Court to rule on this request by way of an "*advisory opinion*"[3] or at the least by way of a "*decision*"[4], rather than a simple Order signed only by the President of the Court.

24. I would observe, in substance, that when seized of a request for advisory opinion, the Court should ensure that it has both the personal and material jurisdiction to deal with the request. It follows, from a reading of the present Order, that the Court is concerned only with its material jurisdiction and, thus, seems to have taken its personal jurisdiction for granted. As the Court did not in this case pronounce itself on the *locus standi* of the four non-governmental organizations seeking an advisory opinion on the basis of Article 4 (1) of the Protocol, it does not seem to me appropriate to express my opinion on this issue.

Fatsah Ouguergouz
Judge

Robert Eno
Registrar

[3] See for example the afore-mentioned advisory opinion of 8 July 1996 on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, by which the International Court of Justice declares that it does not have jurisdiction to give the opinion requested.

[4] See for example the afore-mentioned decision of 2 June 2004 on the *Competence of the Court to give an advisory opinion*, by which the European Court declares that it does not have jurisdiction to give the opinion requested.