

IN THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

ADVISORY OPINION 001 OF 2014:

IN THE MATTER OF A REQUEST FOR AN ADVISORY OPINION MADE BY

1. COALITION ON THE INTERNATIONAL CRIMINAL COURT LTD/GTE(CICCN),
2. LEGAL DEFENCE & ASSISTANCE PROJECT LTD/GTE (LEDAP)
3. CIVIL RESOURCE DEVELOPMENT & DOCUMENTATION
CENTER(CIRDDOC)
4. WOMEN ADVOCATES DOCUMENTATION CENTER LTD/GTE(WARDC)

(Made under Article 4 of the Protocol to the African Charter on Human and Peoples' Rights and Rule 68 of the Rules of the African Court on Human and Peoples' Rights)

Parties

The Applicants are:

- A. Coalition on the international criminal court ltd/gte(ciccn) ;
- B. Legal defence& assistance project ltd/gte (ledap) ;
- C. Civil resource development & documentation center(cirddoc) ; and
- D. Women advocates documentation center ltd/gte(wardc)

Represented by:

- Chino Edmund Obiagwu, Esq.
- Obiageli Theodora NwankwoEsq
- Dr. Abiola Akinyode-Afolabi
- Coalition on the International Criminal Court

A. STATEMENT OF INTEREST

1. The four Applicants are registered non-governmental organizations based in Nigeria and undertake work for the promotion and protection of human rights and the fight against impunity across Africa, especially in West Africa. They allegedly have observer status with the African Commission on Human and Peoples Rights and as such are supposedly qualified as “African organizations” recognized by the African Union in Terms of Rule 68 of the Rules of the court.
2. The applicants supposedly have a justiciable interest in the issues raised in this request for advisory opinion.
3. Nigeria is both a State party to the Rome Statute of the ICC and a member of African Union (AU) and therefore bound by both treaty obligations under the Rome Statute by virtue of Article 86 thereof, and the Resolutions of the AU by virtue of Article 23 of the Constitutive Act of the African Union, among others. To this extent, the applicants herein, being a coalition and NGOs working to end impunity in Nigeria and across West Africa, including in the Republic of Ghana, and engaging with these governments on ICC as well as on AU issues, are deeply interested in the questions presented to this Court for Advisory Opinion. The particular interest of the applicants arise from the following:
 - a. In engaging with the Government officials on ICC and AU issues as well as broader international justice issues, the Applicants need advice on which of the treaty obligations is superior when they conflict. There is currently such conflict because the AU by various Resolutions have demanded that its members should not cooperate with the ICC with respect to the arrest and surrender of President Omar Al-Bashir of Sudan who has been indicted for crimes under the Rome Statute of the ICC.
 - b. The applicants are said to be working on projects aimed at tackling impunity in Nigeria and in West Africa, and they rely on the treaty obligations of these countries under the Rome Statute as well as domestic laws, including the African Charter of Human and

Peoples' Rights (Ratification and Enforcement) Act of Nigeria, and other international and regional instruments.

4. To that extent, and following their respective mandates, the applicants consider that they have a legitimate and justiciable interest in the questions formulated in this request for advisory opinion of this Court. Furthermore, the applicants are each allegedly "an African organisation" within the meaning of the Protocol to the African Charter on Human and Peoples Rights and Rule 68 of the Rules of the Court.

B. CIRCUMSTANCES GIVING RISE TO THE REQUEST

5. The International Criminal Court (ICC), governed by the Rome Statute, is the first permanent, treaty based, international criminal court established to help end impunity of the perpetrators of the most serious crimes of concern to the international community, namely genocide, crimes against humanity and war crimes.
6. Nigeria ratified the Rome Statute of the ICC on the 21st of September 2001 and have played active roles in setting up and continued functioning of the court. Many of its citizens are staff of the court including a sitting judge, and Nigerian government has participated in all meetings of the Assembly of State Parties as well as the first review meeting of the Rome Statute held in Kampala Uganda.
7. Nigeria is a prominent member of the African Union and has always complied with the Resolutions of the Union.
8. In its various summits of Heads of State and Government of the AU between 2011 and 2013, the African Union adopted various resolutions calling on its members not to cooperate with the Office of the Trial Prosecutor of the International Criminal Court with respect to the arrest and surrender of President Omar Al Bashir of Sudan. The Applicants herein shall rely on the various resolutions of the African Union in these regards.
9. Since 2009 when President Al Bashir was indicted by the ICC and international warrants for his arrest issued and forwarded to the Nigerian government, the said President Al Bashir has allegedly entered the territory of Nigeria twice, in 2009 and in 2013. On both occasions, the Nigerian government had obligation under the Rome Statute to arrest and surrender him to the ICC. At the same time, Nigerian government

was faced with various resolutions of the African Union referred to in paragraph 11 above demanding that it refrained from cooperating with the ICC in that respect. The applicants, as civil society organizations working to tackle impunity, including demanding the arrest and surrender of persons indicted by the ICC, vigorously demanded from Nigeria government to arrest and surrender President Al Bashir on both occasions. In his 2013 visit, the CICC is said to have sought a court order from the domestic court to compel the government to fulfill its treaty obligation in this regard but the case was said not to have been heard before President Al-Bashir left the territory of Nigeria.

10. It is of immense interest to the applicants that the ***issue of the superiority of an African State party's obligation to the Rome Statute and to the Resolution of the African Union*** be settled so that they will be guided in engaging the Nigerian Government and other Governments in West Africa, including the Government of the Republic of Ghana, on demanding that they comply with their treaty obligations under the Rome Statute.

C. APPLICABLE LAW

11. The Applicants intend to rely on the following instruments:

- a. The Rome Statute of the International Criminal Court:**

- i. Article 1 which provides for the establishment of the ICC;*
- ii. Article 4 which provides for the legal Status and powers of the ICC;*
- iii. Article 5 which provides for the crimes within the jurisdiction of the ICC;*
- iv. Article 12 which provides for preconditions to the exercise of the jurisdiction of the ICC;*
- v. Article 13 which provides for the exercise of the jurisdiction of the ICC; and*
- vi. Article 86 which provides for the general obligation of the state parties to cooperate with the ICC.*

b. The Vienna Convention on the Law of Treaties, 1969

- i. Article 18 which require state parties to a treaty to refrain from acts that would defeat the object and purpose of a treaty; and*
- ii. Article 26 which provides for pactasuntservanda;*

c. The Constitutive Act of the African Union

- i. Article 23 which impose sanctions on member states of the AU that fails to comply with the decisions and policies of the Union.*

D. ISSUES FOR DETERMINATION

12.Based on the above, the Applicants submit to the Court the following issue for determination;

- a.** Whether the Treaty obligation of an African state party to the Rome Statute of the ICC to cooperate with the court is superior to the obligation of that state to comply with the AU resolution calling for non-cooperation of its members with the ICC?
- b.** If the answer to question (a) above is in the affirmative, whether all Africa State parties to the ICC have overriding legal obligation above all other legal or diplomatic obligations arising from resolutions or decisions of the African Union to arrest and surrender President Omah Al Bashir any time he enters into the territory of any of the African State parties to ICC?