

Individual Opinion of Judge Rafâa Ben Achour

1. The four opinions rendered on 28 September 2017, reproduces *in extenso* the grounds adduced in the SERAP Opinion of 26 May 2017. That individual opinion merely affirms the opinion we had expressed in the SERAP Opinion.
2. The Court once again finds itself unable to address the four requests for Advisory Opinion and is constrained to not respond to the legal issues of utmost significance raised by the NGOs¹ in regard to the interpretation of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and the Protocol to the Charter establishing the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), or other relevant human rights instruments in Africa such as the African Charter on Democracy, Elections and Governance or the Protocol to the Charter on the Rights of Women in Africa (the Maputo Protocol).
3. I am by an large in agreement with the reasoning and justifications developed by the Court on the four Opinions in its ruling that "recognition of NGOs by the African Union is subject to the granting of Observer Status or the signing of a Protocol or Cooperation Agreement between the African Union and the NGOs concerned" (para. 54 of the Opinion on the Centre and the Coalition).
4. The Court had no choice and could not have done otherwise. Its hands were "tied" by the explicit terms of Article 4(1) of its Protocol² and by the restrictive practice of the Union in matters of granting observer status to NGOs.
5. In the four Opinions rendered on 28 September 2017 at the request of several NGOs, all having observer status before the African Commission on Human and Peoples' Rights, the Court came up against the concept of "African organisation recognized by the African Union", as used in Article 4(1) of the Protocol.
6. It is noteworthy that Article 4(1) of the Protocol on institutions entitled to seek the Court's Advisory Opinion is paradoxically more restrictive than Article 5(3) of the Protocol on NGOs entitled to refer cases to the Court. Whereas Article 4(1) provides that "At the request [...] of any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instrument", Article 5(3) of the Protocol states that "the Court may entitle relevant non-governmental organizations (NGOs) with observer status

¹ The NGOs concerned are:

- Centre for Human Rights of the University of Pretoria (CHR) & The Coalition of African Lesbians;
- African Association for the Defence of Human Rights (ASADHO);
- Rencontre africaine pour la défense des droits de l'homme (RADHO);
- The Centre of Human Rights, University of Pretoria; Federation of Women Lawyers in Kenya ; Women Advocates Research and Documentation Centre and Zimbabwe Women Lawyers Association.

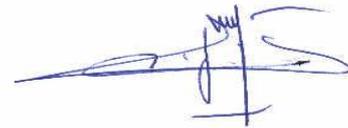
² "At the request of a Member State of the OAU, the OAU, any of its organs or any African organization recognized by the OAU, the Court may provide an Opinion on any legal matter relating to the Charter or any other relevant human rights instrument, provided that the subject matter of the Opinion is not related to a matter being examined by the Commission".

The four Advisory Opinions of 28 September 2017

before the Commission ... to institute cases directly before it, in accordance with Article 34(6) of this Protocol”.

7. Review of this article shows that, in the case of NGOs, referrals in contentious matters are less restrictive than in matters of Advisory Opinion because in seizing the Court on contentious matters, the NGO merely needs to have an observer status with the Commission³, whereas it needs to be *recognised* by the AU to seek the Court’s advisory opinion.
8. The novelty in the four Opinions rendered on 28 September 2017, lies in the formulation of the operative provisions. Instead of stating, as it did in the SERAP Opinion, that the Court “declares that it has no personal jurisdiction to issue the Opinion sought”, the Court, on the four Opinions of 28 September 2017, states “that it cannot issue the Advisory Opinion requested of it”, thus adopting the position of the International Court of Justice (ICJ) Advisory Opinion of 8 July 1996 on the *Legality of the threats of use of nuclear weapons*, which Opinion we had advocated in the case of SERAP.
9. In conclusion, we wish to reiterate our hope that the African Union will amend Article 4 (1) of the Protocol with a view to opening up possibilities for referrals to AfCHPR and relaxing the conditions required of NGOs to bring their request for Advisory Opinion within the ambit of the Court’s jurisdiction; or, the way of amendment being uncertain, to broaden its criteria for granting observer status to include NGOs with similar status before the Banjul Commission.

Judge Rafâa Ben Achour



³ Clearly on condition that the State has subscribed to the jurisdiction clause set forth in Article 34 (6) of the Protocol.