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ADVISORY OPINION
ON THE APPLICATION OF THE PRINCIPLE OF REGIONAL ROTATION IN THE ELECTION
OF THE BUREAU OF THE PAN AFRICAN PARLIAMENT

REQUEST FOR ADVISORY OPINION NO. 001/2021
BY THE PAN AFRICAN PARLIAMENT

A DECISION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Date of Press Release: 16 July 2021

Arusha, 16 July 2021: The African Court on Human and Peoples' Rights (the Court) delivered an Advisory Opinion in the Request No. 001/2021 by the Pan African Parliament.

The Request for Advisory Opinion (hereinafter referred to as "the Request") was filed by the Pan African Parliament (hereinafter referred to as "PAP" or "the Author") represented by Mr Vipya Harawa, Clerk of PAP.

The Request, as it emerges from the Author's submissions, arises from the suspension on 1 June 2021 of the election of the Bureau of the PAP. The incident occurred after the election process was disrupted due to an argument over the application of the principle of regional rotation in the election of the Bureau.

The Author submits that, there is currently a strong dispute within PAP regarding the interpretation of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (hereinafter referred to as "the PAP Protocol")¹ and the Rules of Procedure of PAP (hereinafter referred to as "the PAP Rules")² with respect to the election of the Bureau of the Institution. According to the Author, the said dispute is mainly on whether its abovementioned instruments prescribe for the application of the principle of regional rotation adopted by the African Union (AU), and whether the said principle is binding and enforceable when electing the Bureau

¹ Adopted, 2 March 2001; entered into force, 14 December 2003.

² Adopted, 21 September 2004; amended, 10 October 2011.



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of PAP. The Author submits that these contradicting interpretations of the PAP statutes and practices adopted by the Institution over the years in respect of the matter led to stalemate which requires clarification.

PAP, therefore, requests for an opinion from the Court on the following questions:

- a. Whether the regional rotation principle observed by the AU in general, is stipulated in Rule 12 of the PAP Protocol and Rules 14-16 of the Rules of Procedure when electing the Bureau or not.
- b. And if rotation is not stipulated in the Protocol and Rules of Procedure of PAP, is the principle and practice of rotation binding and enforceable when the PAP elects its Bureau members (President and Vice-President)?
- c. And whether if the elections of the Bureau are conducted in accordance with the Protocol and Rules of Procedure as they stand currently, that is, without following regional rotation, such elections would be valid and compliant with the PAP Protocol and Rules of Procedure or not.
- d. And whether the Court is of the opinion that the Rules of Procedure will have to be amended to make regional rotation binding and enforceable or not.
- e. And if the Court is of the opinion that to be binding and enforceable, the Rules of Procedure must be amended, whether the elections of the new Bureau should be conducted first to facilitate the amendment of the Rules or not.

PAP requests the Court to use its inherent jurisdiction provided in terms of Rule 59(1) and (2) of the Rules of Procedure of the Court (hereinafter referred to as “the Rules of Court”), either based on this request and/or its own accord and treat this matter as urgent, and issue the Advisory Opinion as requested on an urgent basis.

On the request for urgent consideration under Rule 59(1) of the Rules of Court, the Court found that the said request should be considered as one for expedited examination of the matter as the Rule invoked governs provisional measures. The Court therefore examined the request as such and proceeded with an expedited consideration of the Request for Advisory Opinion.

On the capacity of the Clerk of PAP to bring the Request for Advisory Opinion on behalf of PAP, the Court, based on the general principle of representation and its Rules relevant thereto, referred to provisions of the PAP Rules pertaining to the functions of the Clerk. The Court found that the



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Clerk had capacity to bring the Request given that his in charge of the Secretariat of PAP and can act on behalf of the Institution.

On its jurisdiction, the Court held that the issue of both its temporal and territorial jurisdiction does not arise under advisory processes given that such requests do not involve contestation of facts between opposing parties. The Court therefore considered only the personal and material aspects of its jurisdiction.

On its personal jurisdiction, the Court found that it had jurisdiction given that, pursuant to Article 4(1) of its Protocol, the PAP is an organ of the African Union (AU) as expressly listed in Article 17 of the AU Constitutive Act.

Regarding its material jurisdiction, the Court that, pursuant to Article 4(1) of its Protocol and Rule 82(2) of its Rules, it is empowered to provide an Advisory Opinion only when the question raised by the concerned Request is a legal matter; and if the said matter relates to the African Charter on Human and Peoples' Rights (the Charter) or a relevant human rights instrument.

In considering whether the question raised in the present Request is a legal matter, the Court observed that the Author mainly seeks an answer to the question whether the principle of regional rotation in electing the Bureau of PAP is binding, enforceable and failure to apply same renders any election null and void. The Court found that the question is a legal matter within the meaning of Article 4(1) of its Protocol given that the said question pertains to the understanding of prescription made under the PAP Protocol and its Rules of Procedure, as well as the application of decisions of the policy organs of the AU, which are legal instruments whose provisions govern elections of the Bureau of PAP; that the principle of regional rotation in electing Members of AU Organs appears to be grounded in norms and practices of the Union which are legal in nature; and that there are conflicting interpretations of the said norms which require clarification.

On whether the legal matter thus identified relates to the Charter or a relevant human rights instrument, the Court elected to consider first whether the instruments involved are human rights instruments as prescribed by Article 4(1) of its Protocol. In reference to its case law, the Court recalled that a human rights instrument is one whose purpose is either to expressly provide for

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subjective rights to be enjoyed by individuals or groups; or for obligations on State Parties from which the said rights can be derived.³

The Court found that, in the present Request, these instruments are not human rights instruments given that the clauses of the PAP Protocol and its Rules pertaining to the principle of regional rotation do not provide subjective rights for individuals or groups, nor do they prescribe obligations from which such rights may be derived but rather pertain to the administrative operation of PAP as they relate exclusively to the composition of its Bureau and how the elections of the Bureau Members should be conducted.

The Court further found that, the mere reference to human rights in the preamble and Article 11(1) of the PAP Protocol does not suffice to make it a human rights instrument as these clauses do not enunciate individual subjective rights or prescribe corresponding obligations for State Parties to the instrument. The Court took note of the Author's reference to the Charter and the Democracy Charter and found that, their provisions relating to elections and participation thereto are expressly said to apply to *citizens* and in respect of elections conducted at the *national level* within AU Member States and not to how elections of the PAP Bureau should be conducted.

In light of these considerations, the Court found that it did not have material jurisdiction to entertain the Request given that the relevant instruments were not human rights instruments within the meaning of Article 4(1) of its Protocol.

Having found so, the Court opined that the paramount importance of the mandate entrusted to PAP and the fact that the present Request involves a situation that threatens the smooth operation of the Institution as it faces a legal quandary, demanded that PAP be as to what legal means could be effectively utilized to resolve the predicament that it faces.

On this point, the Court opined that, under Article 20 of the PAP Protocol, the Court of Justice of the African Union has jurisdiction to interpret the PAP Protocol; that the Protocol establishing the Court of Justice had entered into force since 2009 even though the said Court has yet to become operational; that, however, it cannot exercise jurisdiction merely because the legally empowered Court has yet to start its operations. The Court further opined that, based on the same provisions

³ *APDH v. Côte d'Ivoire* (merits) (18 November 2016) 1 AfCLR 668, § 57.



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of the Protocol establishing the Court of Justice, pending the operation of the latter Court, the Assembly of Heads of State and Government of the AU is empowered to interpret the PAP Protocol. The Court found that, due to the above, it could not therefore exercise jurisdiction on the question arising in the present Request without overstepping jurisdictional boundaries vis-à-vis both the Court of Justice and the Assembly.

The Court, for these reasons, found that it did not have jurisdiction to give the Advisory Opinion requested.

Further Information

Further information about this case, including the full text of the decision of the African Court, may be found on the website at: <https://www.african-court.org/cpmt/details-case/0082016>

For any other queries, please contact the Registry by email registrar@african-court.org.

The African Court on Human and Peoples' Rights is a continental court established by African Union Member States to ensure the protection of human and peoples' rights in Africa. The Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights and any other relevant human rights instrument ratified by the States concerned. For further information, please consult our website at www.african-court.org.