

Separate Opinion of Judge Rafâa Ben Achour

1. I am by and large in agreement with the reasoning and justifications developed by the Court in ruling that the Applicant for Advisory Opinion (SERAP) “even if it operates not only in Nigeria, but also within the West Africa region and the continent as a whole, and thus meets the description of an African organization within the meaning of Article 4 of the Protocol” (§51); but that SERAP does not have observer status before the African Union and having not signed Memorandum of Understanding with the African Union...it is not recognised by the latter, and therefore it is not entitled to bring a request for Advisory Opinion before this Court” (§65).

2. 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 Protocol¹ and by the restrictive practice of the Union in granting observer status to NGOs.

3. It would have been desirable that referrals to the Court in advisory matters should be more open and that the conditions imposed on NGOs should be less rigid. The Court had expressed a similar wish in its Advisory Opinion of 5 December 2014 (*African Committee of Experts on the Rights and Welfare of the Child*). In paragraph 94 of that Opinion, the Court further “notes that the action by the policy organs (insertion of the Committee of Experts among the bodies that could refer cases to the Court in the 2008 Protocol merging the African Court on Human and Peoples’ Rights and the Court of Justice of the AU) confirms the view of the Court that it is highly desirable that the Committee should have access to the Court”. In the same vein, the Court affirms in point 3 (iii) of the operative section of its Opinion that “the Court is of the view that it is highly desirable that the Committee is given direct access to the Court under Article 5 (1) of the Protocol.”

4. However, my agreement with the reasons given by the Court in the SERAP Opinion does not amount to my agreement with the operative section of the Opinion.

5. In my opinion, the Court gave its (negative) Opinion on the first of the two questions posed by SERAP in its request for an opinion, namely, “whether SERAP is an African organization recognized by the AU”.

6. It is true, as the Court quite rightly notes, that this question boils down to examination of the Court's jurisdiction to give an Advisory Opinion. In paragraph 39, the Court affirms that “consideration of Its jurisdiction will lead the Court to respond to the first question raised by SERAP relating to its capacity to seize the Court with a request for Advisory Opinion”.

7. Logically, the operative section of the Opinion should have been worded differently from a rigid 'declaration' of lack of jurisdiction *ratione persone*.

¹ “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 instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission”

8. In my view, the Court should have concluded its Opinion by reaffirming what it had developed in the reasons, namely that:

- i. SERAP is an African organization within the meaning of Article 4 (1) of the Protocol
- ii. SERAP is not recognized by AU
- iii. The Court cannot therefore answer the second question posed by SERAP as to whether extreme, systemic and widespread poverty is a violation of certain provisions of the African Charter, in particular, Article 2 which prohibits discrimination based on "any other status," in the absence of the the Applicant's capacity to seek an advisory Opinion.

9. This position is firmly grounded in the jurisprudence of the Permanent Court of International Justice (PCIJ) and in that of its heiress, the International Court of Justice (ICJ).

10. With regard to PCIJ, the august Court had to reject a request on one occasion. The Opinion concerned is that of 23 July 1923 in the matter of the *Status of Eastern Carelia*². In that Opinion, the Court does not declare that it has no jurisdiction. It explains that its discretionary refusal to give the requested Advisory Opinion was motivated by the following factors:

1. the fact that the question raised in the request for an Advisory Opinion related to a dispute between two States (Finland and Russia);
2. the fact that answering the question was tantamount to settling that dispute;
3. the fact that one of the States Parties (Russia) to the dispute in respect of which an Advisory Opinion was sought, was neither a party to the Statute of the PCIJ nor, at that time, a member of the League of Nations , and had refused to give his consent;
4. the fact that the League of Nations did not have jurisdiction to deal with a dispute involving non-member States which refused its intervention on the grounds of the fundamental principle that no State should be obliged to submit its disputes with other States, either for mediation or arbitration, or for any other method of peaceful settlement, without its consent;
5. the fact that, following Russia's refusal, the Court could not establish the facts on equal terms between the Parties, and was therefore faced with the concrete lack of "material information necessary to enable it to pass judgment on the question of fact" raised in the request for Advisory Opinion.

² PCIJ, Advisory Opinion, *Status of Eastern Carelia*, 23 July 1923, *Serie B No. 5*

11. The ICJ, for its part, has constantly held that "in principle, a request for an Opinion must not be refused"³ and that only compelling reasons could lead the Court to such a refusal of a request for an Advisory Opinion ⁴. The compelling reasons relied on by the Court include the non-judicial⁵ nature of the questions, matters which concern cases essentially within the ambit of national jurisdiction⁶, or indeed questions which should lead to a "final determination of a dispute",⁷ etc.

12. Like PCIJ, the ICJ refused on only one occasion to respond to a request for an Advisory Opinion. That was the Opinion on the request by the World Health Organization (WHO) on the *Legality of the use of nuclear weapons in armed conflict*⁸. In that request, WHO prayed the Court to rule on the following question: "given the effects of nuclear weapons on health and the environment, would their use by a State in the course of a war or other conflict constitute a breach of its obligations under international law, including the WHO Constitution?." Referring to Article 2 of the Constitution of WHO⁹ which lists the 22 functions conferred on the Organization, the Court notes that "none of these points expressly concerns the legality of any activity dangerous to health; and none of the functions of WHO is predicated on the legality of the situations which require it to act" (§20). Later on, the Court adds, in relation to Article 2 of the Constitution of WHO concerning the Organization's means of achieving its aims, that "the provisions of Article 2 may be read as empowering the organization to address the health effects of the use of nuclear weapons or any other hazardous activity and to take preventive measures to protect the health of populations in the event such weapons are used or such activity is carried out (§21). However, the Court notes that "the question posed in the present case, relates not to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons, given their effects on health and the environment. Whatever the said effects, the competence of the WHO to address them is not dependent on the legality of the acts which produce them. Accordingly, *it does not appear to the Court that the provisions of Article 2 of the WHO Constitution, interpreted in accordance with the above criteria, can be understood as conferring jurisdiction on the Organization to address the legality of the use of nuclear weapons and, hence, to put a question to the Court*" (§21)¹⁰. And the Court thus held in conclusion that "Having reached the conclusion that the request for Advisory Opinion submitted by WHO does not concern a question which arises (within the scope of the activities" of that organization in accordance with paragraph 2 of Article 96 of the Charter, the Court finds that an essential condition for founding its jurisdiction in the present case is lacking and that it cannot therefore give the Opinion requested. Consequently, the Court does not have to examine the arguments which

³ ICJ, Advisory Opinion of 3 March 1950, *Competence of the General Assembly of the Admission of a State to the United Nations*, Rec. 1950. P. 71

⁴ ICJ, Advisory Opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapon*, Rec. P. 235 para. 14, Advisory Opinion of 9 July 2004, *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory*, Rec. 2004, p. 156 – 157, para. 44

⁵ ICJ, Advisory Opinion of 20 July 1962, *Certain Expenses of the United Nations*, Rec. 1962, p. 1155

⁶ ICJ, Advisory Opinion of 3 March 1950 already cited, p. 70

⁷ ICJ, Advisory Opinion of 15 December 1989, *Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations*

⁸ ICJ, Advisory Opinion of 8 July 1996 already cited.

⁹ The WHO Constitution was adopted and opened for signature on 22 July 1946; it entered into force on 7 April 1948 and was amended in 1960, 1975, 1977, 1948 and 1994

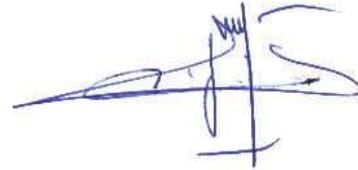
¹⁰ Emphasis not in the text

have been developed before it concerning the exercise of its discretion to give an Opinion"(§ 31).

13. Thus, like this honourable Court, the ICJ held that it had no jurisdiction to give the Opinion. However, in the operative part of the Opinion, the ICJ indicated that "it cannot give¹¹ the advisory Opinion requested of it under the World Health Assembly resolution WHA46.40 of 14 May 1993 ". This is what the AfCHPR should have said with respect to SERAP.

14. In conclusion, one can only express the hope that the African Union would 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 extend its criteria for granting observer status to include NGOs with similar status before the Banjul Commission.

15. Finally, it is noteworthy that despite their rejection of the requests for Opinion in the case of *Eastern Karelia* and in the *Legality of the use of nuclear weapons*, both PCIJ and ICJ did not hesitate to give a title to their two decisions denying an Advisory Opinion. It is in effect the nature of the request which determines the nature of the decision and its characterization, and not the response to the request¹².

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¹¹ Idem

¹² See on the contrary, the Opinion of Judge Matusse on this Opinion