

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
<b>AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS</b> <b>COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES</b>		

**REQUEST FOR ADVISORY OPINION BY**  
***RENCONTRE AFRICAIN POUR LA DEFENSE DES DROITS DE L'HOMME***

**NO. 002/2014**

**ADVISORY OPINION**



**28 SEPTEMBER 2017**



**The Court composed of:** Sylvain ORÉ - President, Ben KIOKO, Vice-President; Gérard NIYUNGEKO, El Hadji GUISSÉ, Rafâa BEN ACHOUR, Solomy B. BOSSA and Angelo V. MATUSSE – Judges; and Robert ENO, Registrar

REQUEST FOR ADVISORY OPINION SUBMITTED BY LA RENCONTRE AFRICAINE  
POUR LA DÉFENSE DES DROITS DE L'HOMME

After deliberation,

Renders the following Advisory Opinion:

**I. THE APPLICANT**

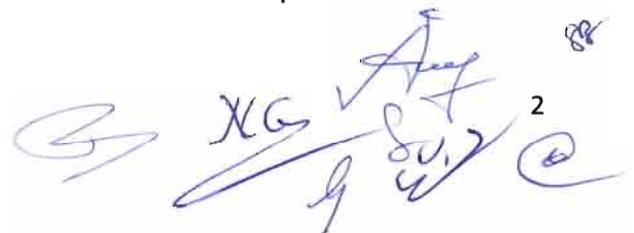
1. This Request, dated 18 June, 2014, was filed at the Registry on 19 June 2014 by *Rencontre Africain pour la Défense des Droits de L'homme* (hereinafter referred to as "the Applicant").
2. The Applicant states that it is a Non-Governmental Human Rights Organisation founded in 1990 in Senegal by Africans of different origins, whose main mission is to "promote, defend and protect human rights in Africa and across the world."

**II. CIRCUMSTANCES AND SUBJECT OF THE REQUEST**

3. The Applicant avers that as part of fulfilling its mission, it is "...seized whenever a legal fact, where the violation of human rights and certain provisions of national, regional and international legal instruments occurs. This is the case with unconstitutional changes of government and human rights violations in a State Party to regional and international instruments, such as violations of freedom of movement, freedom of expression, demonstration, meeting and participation, attacks on the independence of the judiciary, torture, crimes against humanity, violations of international law and international humanitarian law." Through this request for Advisory Opinion, the Applicant is of the view, aims at achieving greater "...efficiency in its actions and ensure better information of the victims..."

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4. The Request for Advisory Opinion is based on three key questions:
  
5. Firstly, the Applicant requests the Court for clarification as to whether, in light of Article 13 of the African Charter on Human and Peoples' Rights (herein-after referred to as "the Charter"); Article 23 of the African Charter on Democracy, Elections and Governance (hereinafter referred to as "the African Charter on Democracy"); Article 4 of the Constitutive Act of the African Union; and Article 25 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR"):
  - a) It is possible to institute legal action before the Commission or the Court against a State following an unconstitutional change of government, especially since no national court has the jurisdiction to examine such an action.
  
  - b) If so, which entity would be entitled to initiate such action; the citizens of the country concerned or any African Non-Governmental human rights Organisation recognized by the African Union and within what time limit?
  
  - c) If, following an unconstitutional change of government, presidential elections are organized, will this new factor obviate any action against the State under accusation for the aforesaid change of government?
  
6. Secondly, the Applicant prays the Court to clarify:
  - a) The meaning of the expression "serious or massive violations of human and peoples' rights", referred to in Article 58 (1) of the Charter;
  
  - b) Whether the foregoing provision involves only the direct responsibility of the State or whether it also applies to the State's indirect responsibility, where the violations in question stem from



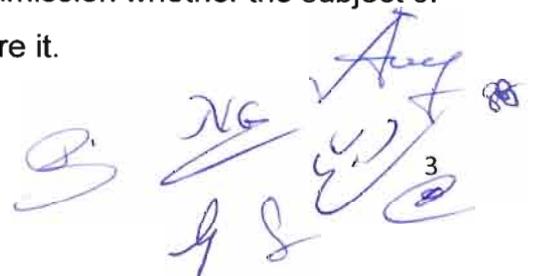
acts committed by pro-government militia or from the inaction of the State; and

- c) What criteria should apply in determining the emergency situation referred to in Article 58(3) of the Charter.

7. Thirdly, the Applicant prays the Court to provide clarification on the question as to whether the fairness and impartiality of the justice system as contemplated by Article 7 of the Charter, Article 14 of the ICCPR and the Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) are compatible with the expression of political support to government by the judiciary or by its senior officers, particularly when such support is expressed collectively (through demonstration) or in the discharge of the judicial function through various forms of zealous actions, such as the establishment of special chambers to try opposition figures, or the refusal to investigate complaints brought by persons suspected of being hostile to the ruling government.

### III. PROCEDURE BEFORE THE COURT

8. The Request for Advisory Opinion dated 18 June, 2014, was received at the Registry on 19 June 2014.
9. By a letter dated 23 September, 2014, the Registry notified the Applicant of the registration of its Request for Advisory Opinion and urging it to comply with Rule 68 of the Rules of Court (hereinafter referred to as "the Rules") and to resubmit the same within 30 days, if it so wishes.
10. On 8 November 2014, the Applicant filed an amended Request.
11. By a letter dated 17 March, 2015, the Registry, pursuant to the provisions of Rule 68 (3) of the Rules, enquired from the Commission whether the subject of the Request relates to any matter pending before it.



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12. On 8 June, 2015, the Registry transmitted the Request and the annexes to the entities listed under Rule 69 of the Rules.
13. By an email of 13 May, 2015, the Commission confirmed that the subject of the Request does not relate to any matter pending before it.
14. At its 38th Ordinary Session held from 31 August to 9 September, 2015, pursuant to Rule 70 of the Rules, the Court decided to extend to 10 October, 2015, the period initially set for submission of written pleadings by the entities listed in Rule 69 of the Rules.
15. By a letter dated 25 September, 2015, the Registry notified the entities in Rule 69 of the Rules that pursuant to Rule 70 of the Rules, the Court had extended to 10 October, 2015 the period initially set for submission of written pleadings.
16. At its 39th Ordinary Session held from 9 to 22 November, 2015, the Court decided, on its own, to extend to 31 January, 2016, the period for submission of written pleadings by the entities referred to in Rule 69 of the Rules.
17. By a letter dated 5 January, 2016, the Registry notified the entities listed in Rule 69 of the Rules that period for submission of written pleadings has been extended to 15 February, 2016.
18. On 30 April, 2016, the Registry received written submissions from the Republic of Kenya.
19. Since the Republic of Kenya filed its written observations out of time (see paragraphs 17 and 18 of the instant Opinion), the Court decided, *suo motu*, to accept the said observations in terms of Rules 70 (1) of its Rules.
20. At its 41st Ordinary Session, held from 16 May to 3 June, 2016, the Court decided to close the procedure for the filing of written submissions.



#### IV. JURISDICTION OF THE COURT

21. In accordance with the provisions of Rule 39, which is applied by virtue of Rule 72 of the Rules, "The Court shall apply, *mutatis mutandis*, the provisions of Part IV of these Rules to the extent that it deems them to be appropriate and acceptable".
22. In accordance with Rule 39 of the Rules, "The Court shall conduct preliminary examination of its jurisdiction..."
23. From the provisions of these Rules, the Court must determine whether it has jurisdiction to give an opinion on the Request before it.
24. In determining whether it has personal jurisdiction in the instant matter, the Court must satisfy itself that the Applicant is amongst the entities entitled to request for advisory opinion under Article 4 (1) of the Protocol to the African Charter on Human and peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as the "Protocol").

##### i. Applicant's Arguments

25. The Applicant contends that, under Article 4 of the Protocol and Rules 26(b) and 68 of its Rules, the Court has jurisdiction *ratione personae* to examine the Request as it is filed by an organisation recognized by the African Union by virtue of its Observer Status before the Commission.

##### ii. Submissions of the Republic of Kenya

26. The Republic of Kenya, recalling the provisions of Articles 5(3) and 34 (6) of the Protocol, holds that seizure of the Court by individuals and Non-Governmental Organisations is contemplated by the texts, and as such, does not contest the Applicant's entitlement to bring a Request for Advisory Opinion before the Court.



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### iii. The Position of the Court

27. Article 4 (1) of the Protocol provides that “At the request of a Member State of the [African Union], the AU], any of its organs, or any African organization recognised by the [AU], the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments...”
28. The fact that the NGO which filed the request does not fall within the first three categories within the meaning of Article 4(1) of the Protocol is not contested.
29. The first question which arises is whether the NGO is of the fourth category, that is, whether it is an “African organisation” within the meaning of Article 4(1) of the Protocol.
30. On this issue, the Court has, in its Advisory Opinion Socio-Economic Rights and Accountability Project (SERAP) established that the term “organisation” used in Article 4 (1) of the Protocol covers both non-governmental organisations and inter-governmental organisations.<sup>1</sup>
31. As regards the appellation “African”, the Court has established that an organisation may be considered as “African” if it is registered in an African country and has branches at the sub-regional, regional or continental levels, and if it carries out activities beyond the country where it is registered.<sup>2</sup>
32. The Court notes that the Applicant is registered in Senegal and with its Observer Status before the Commission, is entitled to carry out its activities beyond the country in which it is registered. The Court concludes that the Applicant is an “African Organisation” in terms of Article 4 (1) of the Protocol.
33. The second question that follows is whether the Applicant is recognised by the African Union.

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<sup>1</sup>Request for Advisory Opinion by *Socio-Economic Rights and Accountability Project (SERAP)*, Request No. 001/2013, **Advisory Opinion** of 26 May 2017, Paragraph 46.

<sup>2</sup>Idem, Paragraph 48.

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34. The Court notes that the Applicant has relied on its Observer Status before the Commission to contend that it is recognised by the African Union.

35. In this respect, the Court has, in the afore-mentioned SERAP Advisory Opinion, indicated that Observer Status before any African Union organ does not amount to recognition by the latter. It has thus established that only the NGOs recognised by the African Union itself are covered by Article 4 (1) of the Protocol.<sup>3</sup>

36. The Court has further established that recognition of NGOs by the African Union is through the granting of Observer Status or the signing of a Memorandum of Understanding and Cooperation between the African Union and those NGOs.<sup>4</sup>

37. In the instant case, the Applicant has not claimed and has not provided proof as to its Observer Status before the African Union or that it has signed any Memorandum of Understanding with the Union.

38. From the foregoing, the Court finds that, although the Applicant is an African organisation within the meaning of Article 4(1) of the Protocol, it lacks the second essential condition required by this provision as a basis for the Court's jurisdiction, namely, to be "recognised by the African Union".

39. For the above reasons,

The Court

Unanimously:

*Finds* that it is not able to give the Advisory Opinion which was requested of it.

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<sup>3</sup> *Idem*, Paragraph 53.

<sup>4</sup> *Idem*, Paragraph 64.

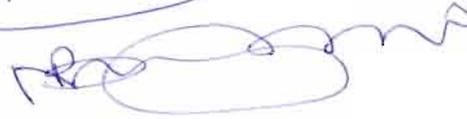
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**Signed,**

Sylvain ORÉ, President



Ben KIOKO, Vice President



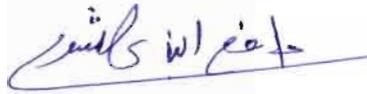
Gérard NIYUNGEKO, Judge



El Hadji GUISSSE, Judge



Rafâa BEN ACHOUR, Judge



Solomy B. BOSSA, Judge



Ângelo V. MATUSSE, Judge, and



Robert ENO, Registrar.



Done at Arusha, this twentieth Day of September 2017 in the year two thousand and seventeen, in English and French, the French text being authoritative.

In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules of Court, the Separate Opinions of Judges Rafâa Ben ACHOUR and Angelo V. MATUSSE are appended to this Opinion.

