

AFRICAN UNION الاتحاد الأفريقي		UNION AFRICAINE 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 L'ASSOCIATION AFRICAINE**  
**DE DÉFENSE DES DROITS DE L'HOMME**

NO. 002/2016

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, Angelo V. MATUSSE, Ntyam S. O. MENGUE, Marie-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA - Judges; and Robert ENO, Registrar,

**IN THE REQUEST FOR ADVISORY OPINION SUBMITTED BY L'ASSOCIATION AFRICAINE DE DÉFENSE DES DROITS DE L'HOMME**

***After deliberation,***

**renders the following Advisory Opinion:**

**I. THE APPLICANT**

1. The Request for Advisory Opinion dated 10 May, 2016, received at the Registry on 8 July, 2016, was submitted by l'Association Africaine de Défense des Droits de l'Homme (ASADHO) (hereinafter referred to as "the Applicant"), a non-profit Non-Governmental Organisation (NGO) registered as per Ministerial Edict No. 370/CAB/MIN/JSDH/2010 of 7 August, 2010, and based in the Democratic Republic of Congo. The Applicant's main objective is the defense and promotion of human rights.

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

2. The Applicant states that, in discharging its mission, it participated under the platform of African Non-Governmental Organisations operating in the natural resources sector known as the International Alliance on Natural Resources in Africa (IANRA) in case studies on the impact of extractive industries on members of local communities in Angola, Democratic Republic of Congo, Kenya, South Africa and Zimbabwe.



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3. The Applicant avers that the said case studies highlighted several negative impacts of the mining activities which are tantamount to breaches of the fundamental rights of members of the communities affected by mineral extraction, which rights are guaranteed by the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter").
4. The Applicant adds that it is in this context that a model mining law for Africa was drafted, titled "Model Law on Mining on Community Land in Africa", which African NGOs intend to present to Member States of the African Union for the purposes of harmonising their mining laws and enhancing the protection of the fundamental rights of the communities affected by extractive industries.
5. The prayer of the Applicant is for the Court to rule that the Draft Model Law on Mining on Community Land in Africa (Draft Model Mining Law for Africa) is consistent with the provisions of the Charter.

### III. PROCEDURE BEFORE THE COURT

6. The Request dated 10 May, 2016, was received at the Registry of the Court on 8 July, 2016.
7. By a letter dated 12 August, 2016, the Registrar requested the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") to indicate whether the Applicant has Observer Status before the Commission and whether the subject matter of the Request concerned any matter pending before it.
8. By an email dated 16 September, 2016, the Commission advised that the Applicant does not have Observer Status before the Commission but did not respond to the issue whether the subject matter of the Request concerned a matter pending before it.

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9. By a letter dated 8 December, 2016, during the 43rd Ordinary Session of the Court held from 31 October to 18 November 2016, the Registry, on the Court's instructions, requested the Applicant to produce a number of documents for purposes of clarification of their request.
10. By an email dated 7 March, 2017, the Applicant submitted a series of documents attesting to its participation in the study process leading to the development of the Draft Model Mining Law for Africa.

### **JURISDICTION OF THE COURT**

11. In accordance with 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".
12. In terms of Rule 39 (1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction..."
13. From the provisions of the Rules, the Court must determine whether it has jurisdiction to examine the Request before it.
14. In determining whether it has personal jurisdiction in the instant matter, the Court must satisfy itself that the Applicants are amongst the entities entitled to institute a 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").

#### **a. Applicant's Arguments**

15. The Applicant bases its request on Article 4 of the Protocol.

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16. The Applicant submits that it is registered in the Democratic Republic of Congo and has legal personality in terms of Ministerial Edict No. 370/CAB/MIN/JDH/2010 of 7 August 2010. The Applicant states that, being based in the Democratic Republic of the Congo and having Observer Status before the Commission confers on it the status of an African organization

17. On the merits, the Applicant makes reference to a number of international legal instruments in its document on implementation of the Draft Model Mining Law for Africa.<sup>1</sup> These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.

18. The Applicant also draws from the Draft Model Mining Law for Africa<sup>2</sup> prepared by the International Alliance on Natural Resources in Africa (IARNA). The Applicants state that the aforesaid draft model law is not just about the Democratic Republic of Congo; it also concerns African communities in other countries such as Angola, Kenya, South Africa and Zimbabwe, which countries also participated in the studies leading to the development of the draft model law, whose consistency with the Charter, the Court is being requested to advise on.

19. In the Draft Model Mining Law for Africa implementation document, the Applicant highlights the impact associated with Ruashi Mining's<sup>3</sup> activities in the synopsis of the information gathered during the raids carried out and affirmed that: "Ruashi Mining PLC did not provide employment for

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<sup>1</sup> Document developed exclusively for the Applicant with financial support from the European Union.

<sup>2</sup> This refers to the draft law which the Court is requested to determine consistency thereof with the Charter.

<sup>3</sup> Ruashi Mining is a mining company based in the Democratic Republic of Congo on which the investigation was conducted. Vide page 18 of the Draft Model Law for Mining in Africa implementation document.

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the population (inhabitants) of the Ruashi Commune, culminating among other things, in urban banditry, increased poverty of the population of the Commune, insecurity, upsurge in robberies, prostitution and children dropping out by abandoning school consequent upon the very high cost of studies for the greatest number of the population".

20. The Applicant also submits that relocation of the population was effected "without the company Ruashi Mining consulting, the specialised services of the municipal administration, so as to be compliant with the requisite procedures".

21. It further submits that the investigation into the Ruashi Mining Company highlighted the existence of negative impacts of the mining activities, which is tantamount to breaches of the fundamental rights guaranteed by the Charter, such as the right to life, health, safety, a healthy environment, physical integrity, the right to justice, the right to work and that, consequently, there is a nexus between the negative impacts of mining activity and the human rights protected by the Charter.

22. The Applicant contends that its Observer Status before the Commission confers on it the status of an African organisation entitled to seek an Advisory Opinion on any matter within the field of application of the Charter.

## ii. Position of the Court

23. In terms of Article 4 (1) of the Protocol, "At the request of a Member State of the African Union (AU), any of its organs, or any African organization recognized by the AU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments ...".

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24. The fact that the Applicant does not belong to the first three categories within the meaning of Article 4 (1) of the Protocol is not in contention.

25. The first question which arises is whether the Applicant falls under the fourth category, that is, whether it is an "African organization" within the meaning of Article 4 (1) of the Protocol.

26. On this issue, the Court has in its Advisory Opinion in Socio-Economic Rights and Accountability Project (SERAP), established that the term "organisation" used in Article 4(1) of the Protocol covers both non-governmental and intergovernmental organisations.<sup>4</sup>

27. 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>5</sup>

28. The Court notes that the Applicant is registered in the Democratic Republic of Congo where it undertakes its activities at the sub-regional and continental levels. Articles 28, 30, 31, 39 of the Statutes which establish ASADHO define the organisation's objectives as: Article 28 "voluntarily assist and represent victims of violations, prisoners of conscience and conscientious objectors ...", Article 30 "work through the press to promote and disseminate human rights and denounce violations thereof" and Article 31 "representative offices are branches of the Association based outside the country ..."

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<sup>4</sup> Request for Advisory Opinion by *Socio-Economic Rights and Accountability Project (SERAP)*, No. 001/2013, Advisory Opinion of 26 May 2017, Paragraph 46.

<sup>5</sup> *Idem*, Paragraph 48.

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29 From the foregoing, it is apparent that the Applicant operates not only in the Democratic Republic of Congo, but also in the Central Africa region and in a significant part of the African continent. Proof thereof is that the studies leading to the adoption of the draft mining law are the inputs of several African States, which in any case are also members of the AU. Proof thereof is that the studies leading to the adoption of the draft mining law are the inputs of several African States, which in any case are also members of the AU.

29. The Court therefore concludes that the Applicant is an African organisation within the meaning of Article 4 of the Protocol.

30. The second question which follows is whether the Applicant is recognised by the African Union.

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

32. 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 Union. It has thus established that only African NGOs recognised by the African Union itself are covered by Article 4(1) of the Protocol.<sup>6</sup>

33. 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 the NGOs concerned.<sup>7</sup>

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

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<sup>6</sup> Idem, Paragraph 53 .

<sup>7</sup> Idem, Paragraph 65.

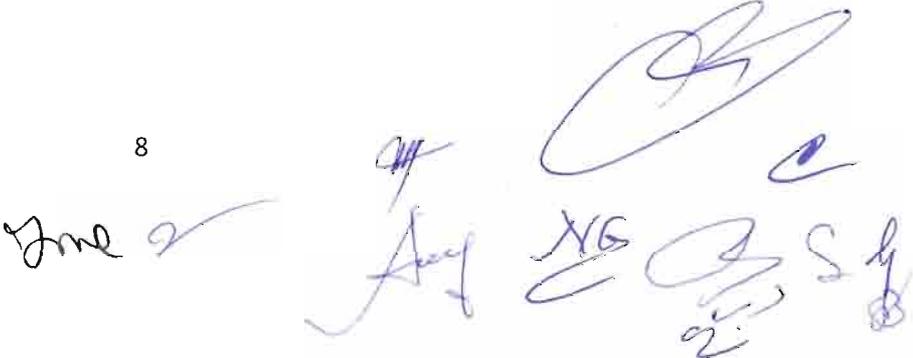
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35. From the foregoing, the Court finds that although the Applicant is an African organization within the meaning of Article 4 (1) of the Protocol, it lacks the second essential condition required under this provision as a basis for the Court's jurisdiction,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

36. 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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**Signed:**

Sylvain ORÉ, President



Ben KIOKO, Vice-President



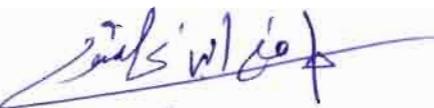
Gérard NIYUNGEKO, Judge



El Hadji GUISSÉ, Judge



Rafâa BEN ACHOUR, Judge



Solomy B. BOSSA, Judge



Angelo V. MATUSSE, Judge



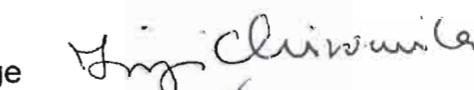
Ntyam O. MENGUE, Judge



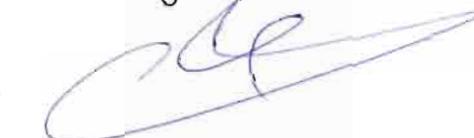
Marie-Thérèse MUKAMULISA, Judge



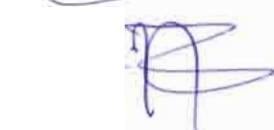
Tujilane R. CHIZUMILA, Judge



Chafika BENSAOULA, Judge



Robert ENO, Registrar



Done at Arusha this Twenty-Eighth Day of the month of September, in the year Two Thousand and Seventeen in French and English, the French text being authoritative.

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