Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and the Coalition of African Lesbians (Advisory Opinion) (2017) 2 AfCLR 606

Application 002/2015, *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and the Coalition of African Lesbians*

Advisory Opinion, 28 September 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Court held that it did not have jurisdiction to consider a request for an Advisory Opinion by two NGOs, neither of which was recognised by the African Union.

Jurisdiction (request advisory opinion, African organisation, 50, 51, recognized by the African Union, 56, 57)

Separate opinion: BEN ACHOUR

Jurisdiction (request for advisory opinion, 8, 9)

Separate opinion: MATUSSE

Procedure (decision, 13, 15, 20)

I. The Applicants

1. This Request dated 2 November 2015, and received at the Registry on the same date was submitted jointly by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians (hereinafter referred to as "the Applicants").

2. The Centre for Human Rights, University of Pretoria (hereinafter referred to as "the Centre") presents itself as a Department in the University and a Non-Governmental Organisation (NGO) established in 1986 and engaged in human rights education in Africa, wide dissemination of human rights publications in Africa and the improvement of the rights of women, persons living with HIV, indigenous peoples and other disadvantaged or marginalised groups across the continent. The Centre indicates that it has had Observer Status before the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") since December 1993; that in 2006, it received the UNESCO Prize for Human Rights Education; and in 2012, on the occasion of the celebration of its 25th Anniversary, the Commission conferred on the Centre its "Human Rights NGO Prize".

3. The Coalition of African Lesbians (hereinafter referred to as "the Coalition") presents itself as a network of organisations committed to the equality of Lesbians in Africa. According to the Applicants, the Coalition was

established in 2003 and is registered as a Non-Governmental Organisation in South Africa with its Secretariat in Johannesburg. They also indicate that the goal of the Coalition is to contribute to Africa's transformation into a continent where women in their diversity, including lesbians, enjoy every element of human rights and are recognised as fully-fledged citizens. The Applicants further indicate that the Coalition has Observer Status before the Commission.

II. Circumstances and subject of the request

4. In January 2015, in its Decision on the 37th Activity Report of the Commission, the Executive Council of the African Union (hereinafter referred to as "the Executive Council") requested it (the Commission) to delete from its Activity Report, passages concerning two decisions against the Republic of Rwanda and to give the State the opportunity to present its views in a public hearing on the two cases.

5. In July 2015, in its Decision on the 38th Activity Report of the Commission, the Executive Council requested the Commission to "take into account fundamental African values, identity and good traditions and to withdraw the Observer Status granted to NGOs which may attempt to impose values contrary to African values". In this respect, it requested the Commission to review its Criteria for Granting Observer Status to NGOs and to withdraw the Observer Status granted to the Coalition of African Lesbians.

6. The Executive Council also recommended that the Assembly of the African Union authorise the publication of the Commission's 38th Activity Report only after its update and incorporation therein of the proposals made by Member States.

7. The Executive Council further requested the Commission to "observe the due process of law in making decisions on complaints received, consider reviewing its rules of procedure, in particular, the provisions in relation to provisional measures and urgent appeals, in consistence with the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and to take measures to avoid interference by NGOs and other parties in its activities".[1]

8. The Centre and the Coalition are seeking the opinion of the Court on how the term "considered" as used in Article 59(3) of the Charter should be interpreted. More specifically, they raise the question as to whether, in the afore-cited decision taken in 2015, the Executive Council and the Assembly of the African Union have not exceeded the reasonable limits of their powers to "consider" the Activity Report of the Commission.

1 Doc.EX.CL/921(XXVII), EX.CL/Dec.887(XXVII).

III. Procedure

9. The Request was received at the Court Registry on 2 November 2015.
10. At its 39th Ordinary Session held from 9 to 29 November 2015 the Court considered the Request and decided to transmit it to Member States of the African Union, the Commission and to the African Institute of International Law for possible observations, pursuant to Rule 69 of the Rules of Court, (hereinafter, referred to as "the Rules"). The transmission was effected by letters dated 21 December 2015, 27 and 29 January 2016 indicating a time limit of ninety (90) days for submission of observations, if any.
11. On 2 March 2016, the Commission notified the Court that the Request does not relate to any Application pending before it.
12. On 14 April 2016, the Centre submitted to the Court an application for the intervention of four (4) other NGOs, in the capacity of amici curiae.
13. The Court rejected the Centre's application because it was not the Centre itself that wished to act as amicus curiae, rather, it was the four NGOs. The Court, therefore, requested that each NGO file its individual application specifying its contribution in this regard. None of the four NGOs submitted its application.
14. At its 41st Ordinary Session, held from 16 May to 3 June 2016, the Court decided to extend by sixty (60) days, the time limit for Member States and other entities to submit their observations on the Request, if any.
15. The Republic of Côte d'Ivoire and the Federal Democratic Republic of Ethiopia transmitted their observations to the Court on 6 June and 3 April 2016, respectively.
16. On 20 October 2016, the Registry notified the Parties of the close of the written procedure.

IV. Jurisdiction of the Court

17. In terms 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".
18. In terms of Rule 39 of the Rules, "The Court shall conduct preliminary examination of its jurisdiction…"
19. From the provisions of these Rules, the Court must determine whether it has jurisdiction on the Request before it.
20. In determining whether it has personal jurisdiction in the instant matter, the Court must satisfy itself that the Centre and the Coalition 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. Applicants' arguments

21. The Centre and the Coalition recall that Article 4(1) of the Protocol lists four categories of entities entitled to bring a request for Advisory Opinion before the Court, namely: (1) Member States, (2) the African Union; (3) any of its organs, and (4) any African organisation recognised by the African Union.

22. They maintain that they fall under the fourth category and that the expression "any African organisation recognized by the African Union" should be interpreted within its ordinary meaning and in accordance with the objectives and purposes of the Protocol.

23. According to the Applicants, the term "organisation" defined by the Oxford English Dictionary as "an organized group of persons with a specific objective" is sufficiently wide to cover non-governmental organisations.

24. They assert that, apart from Article 4(1), the term is also used in other articles of the Protocol such as Article 5(1) in which reference is made to "non-governmental organisations"; thus showing that the use of the expression "any African organization" in Article 4(1) is deliberate, intended to place various types of organisation under the generic term "organisation".

25. The Centre and the Coalition further argue that, contrary to Article 5 of the Protocol which concerns the Court's contentious jurisdiction, Article 4 (1) does not make a distinction between Governmental and Non-Governmental Organisations.

26. They therefore conclude that the term "organisation" includes but is not limited to "inter-governmental organisations", and that it also includes African Human Rights NGOs, such as the Centre and the Coalition.

27. As regards the adjective "African", the Centre and the Coalition argue that the Oxford English Dictionary defines it as "that which is related to Africa", that according to this ordinary meaning, this term can also relate to (i) the geographical situation of an organisation which, according to them, is valid for organisations based in Africa, (ii) organisations with a predominantly African management structure even where they are not based in Africa, and lastly, (iii) international human rights NGOs with essentially African composition and mission.

28. They conclude that an organisation is regarded as "African" under Article 4(1) of the Protocol when it fulfils any of the criteria listed in the three aforementioned categories.

29. As regards the requirement of "recognition by the African Union", the Applicants maintain that the recognition of an NGO by an organ or structure of the African Union should amount to recognition by the main body, namely, the African Union.
30. They maintain that it is customary in "modern" international law that an agent is authorised to act on behalf of his/her principal within the context of the mandate received from the latter; that it is therefore logical and practical to consider NGOs with Observer Status before African Union organs, such as the Commission or Civil Society Organisations represented at the Economic, Social and Cultural Council of the African Union (ECOSSOC) as recognised by the African Union under Article 4(1) of the Protocol.
31. They contend that the Centre and the Coalition have had Observer Status before the Commission (since December 1993 for the Centre, and May 2015 for the Coalition) and that, for that reason, the two organisations should be regarded as having met the requirement of recognition by the African Union as set forth under Article 4(1) of the Protocol.

B. Observations of Member States

32. The following are the observations of the Federal Democratic Republic of Ethiopia and the Republic of Côte d'Ivoire.

i. Observations from the Federal Democratic Republic of Ethiopia

33. On the question as to whether the Applicants are African organisations within the meaning of Article 4 of the Protocol, the Federal Democratic Republic of Ethiopia responds that they are not.
34. She states that the African Union adopted a Resolution on the Criteria for Granting Observer Status and a System of Accreditation, and that the term "organisation" in the Protocol should be interpreted in light of the aforesaid system of recognition and accreditation defined by the African Union.
35. According to the Federal Democratic Republic of Ethiopia, the Centre and the Coalition are not organisations within the definition of the term "organisation" adopted by the said African Union Resolution. She indicates that according to that Resolution, an "organisation" is a "regional integration or an international organization, including sub-regional, regional or inter-African organisations which are not recognised as regional economic communities".
36. The Federal Democratic Republic of Ethiopia further submits that the Non-Governmental organisations (NGOs) recognised by the

African Union are accorded Observer Status in accordance with the Criteria for Granting Observer Status before the AU and neither the Centre nor the Coalition has indicated having been recognised by the AU or as having Observer Status in accordance with that procedure. Moreover, even if they have been granted the Observer Status, it would not confer on them the right to seek an Advisory Opinion from the Court because this is not one of the prerogatives recognised for them under the Executive Council decision.

37. She contends that recognition or acquisition of Observer Status before the Organs established by treaty, including the Commission, are not synonymous with recognition by the African Union and that no provision of the Resolution mentioned above envisages this.

38. She avers that the Commission was established by virtue of the Charter to oversee the human rights situations in Africa; that the Commission accords Observer Status to non-governmental organisations on the basis of its own Resolution to facilitate NGOs' participation in human rights promotion on the continent; that this status allows NGOs to participate in sessions of the Commission, submit shadow reports and engage in constructive dialogue on the consideration of the reports of State Parties; that the Centre and the Coalition, as NGOs with Observer Status before the Commission, can enjoy the aforesaid privileges and institute a request without demonstrating that they have an interest in such a request; that such status does not however allow them to request the Court for Advisory Opinion on matters concerning another organisation.

39. The Federal Democratic Republic of Ethiopia also argues that the Commission's Rules of Procedure establish a distinction between "organisations with observer status" and "organisations recognised by the AU", and recalls Rule 32(3)(e) of the said Rules of Procedure which provides that an organisation recognised by the African Union, a national human rights institution with the status of affiliated member or a non-governmental organisation with Observer Status, can propose items for inclusion in the provisional agenda of sessions of the Commission; that in the same vein, Rule 63(1) thereof accords these two types of organisation the right to request the Commission to include in the agenda of an ordinary session a debate on any human rights situation; that in light of the aforesaid provisions, the Rules of Procedure of the Commission treats the two types of organisation differently.

40. The Federal Democratic Republic of Ethiopia concludes that the Observer Status obtained by the Centre and the Coalition before the Commission does not confer on them the capacity to seek an Advisory Opinion from the Court.

ii. Observations from the Republic of Côte d'Ivoire

41. The Republic of Côte d'Ivoire submits that under Article 4(1) of the Protocol, Requests for Advisory Opinion are reserved for Member States of the Union, its organs and African organisations recognised by the latter; that contrary to the assertions of the requesting NGOs, the expression "African organisation recognised by the African Union" used in Article 4 of the Protocol does not cover both African International Organisations and non-governmental organisations having Observer Status before the Commission; that if that were the case, the drafters of the Protocol would not have taken pains to enumerate in Article 5 thereof, these two entities as entitled to file applications against State Parties before the Court.

42. The Republic of Côte d'Ivoire contends that, in law, prohibition from making a distinction where the law does not do so, carries with it the obligation to make such a distinction where the law so does; that consequently, in the absence of specific mention thereof in Article 4 of the Protocol, as was the case in Article 5, NGOs with Observer Status before the Commission must not be considered as entitled to seize the Court with Requests for Advisory Opinion.

43. She further contends that the notion "African organisation" as used in Article 4 of the Protocol concerns African inter-governmental organisations and not NGOs, and that the organisations concerned include, notably, Regional Economic Communities, like the Arab Maghreb Union (AMU), Economic Community of West African States (ECOWAS), West African Economic and Monetary Union (WAEMU), Central Africa Economic and Monetary Community (CEMAC), Indian Ocean Community (IOC) and the East African Community (EAC).

44. The Republic of Côte d'Ivoire also maintains that to offer NGOs with Observer Status before the Commission, the possibility of seizing the Court with a request for Advisory Opinion, would enable them to target States, even those that are yet to make the Declaration prescribed by Article 34(6) of the Protocol, that the initiatives of the Centre and the Coalition clearly falls within this logic; that the real target of their request is, in fact, the African Union which, through the Executive Council, has recommended the withdrawal of the Coalition of African Lesbians' Observer Status before the Commission.

45. The Republic of Côte d'Ivoire therefore requests the Court to rule that it has no jurisdiction to examine the request for Advisory Opinion filed by the Centre and the Coalition.

C. Position of the Court

46. Article 4(1) of the Protocol, which lists the four categories of

entities entitled to apply to the Court for an Advisory Opinion, provides as follows: "[a]t 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…"

47. The fact that the two NGOs which filed the request do not fall within the first three categories is not contested.

48. The first question which arises is whether these NGOs are of the fourth category, that is, whether they are "African organisations" within the meaning of Article 4(1) of the Protocol.

49. 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 organisations and inter-governmental organisations.[1]

50. As regards the appellation "African", the Court 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.[2]

51. The Court notes that the Centre and the Coalition are both registered in South Africa and with their Observer Status before the Commission, they are entitled to carry out their activities beyond the countries where they are registered. It concludes that they are "African Organisations" in terms of Article 4(1) of the Protocol.

52. The second question that follows is whether these organisations are recognised by the African Union.

53. The Court notes that the Centre and the Coalition have relied on their Observer Status before the Commission to contend that they are recognised by the African Union.

54. 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 African Union. It has thus established that only the NGOs recognised by the African Union itself are covered by Article 4(1) of the Protocol.[3]

55. 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/or Cooperation

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

2 *Idem*, para 48.

3 *Idem*, para 53.

between the African Union and those NGOs.[4]

56. In the instant case, the Centre and the Coalition have not claimed and have not provided proof as to their Observer Status before the African Union or that they have signed any Memorandum of Understanding with the Union.

57. From the foregoing, the Court finds that, although the Applicants are African organisations within the meaning of Article 4(1) of the Protocol, they lack the second essential condition required by this provision as a basis for the Court's jurisdiction, namely, to be "recognised by the African Union".

58. For the above reasons

The Court,

Unanimously:

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

Separate Opinion: 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

4 *Idem*, para 64.

3. the legal issues of utmost significance raised by the NGOs[1] 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).

4. 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" (paragraph 54 of the Opinion on the Centre and the Coalition).

5. 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 Protocol[2] and by the restrictive practice of the Union in matters of granting observer status to NGOs.

6. 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.

7. 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 review of this article shows

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 Defense des Droits de l'Homme (RADDHO);
- 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".

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 Commission,[3] 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 African Court 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.

Separate opinion: MATUSSE

1. The Court, unanimously, held that it did not have jurisdiction *ratione personae* to issue the Advisory Opinion requested by the Centre for Human Rights and the Coalition of African Lesbians, yet names the procedure by which it arrived at that conclusion an "Advisory Opinion", a view that I do not endorse. I, hereby, set my separate opinion on record on the following grounds:

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

I. The form of the Court's acts

2. The legal instruments governing the Court, namely, the Protocol[1] and the Rules of the Court are silent regarding the designation of each of the different forms that its acts may take. That notwithstanding, the practice that has become the norm is the use of the following terms: "Order", "Ruling", "Decision" and "Judgment".

3. When adopting the terms hereinabove, the Court has not been consistent in its practice in that it has used the same expression to designate different things at different times, as demonstrated herein below.

II. The practice of the Court

4. In the Requests for Advisory Opinion Nos. 002/2011,[2] 001/2012[3] and 001/2014,[4] the Court used the expression "Order" to designate the act through which it struck out the request due to the fact that the applicants had either given up on them or had lost interest in pursuing the matter.

5. In the Request for Advisory Opinion No. 002/2012,[5] the Court used the expression "Order" to hold that it was not going to entertain the request due to the fact that the same was pending before the African Commission on Human and People's Rights (the Commission).

6. In the Request for Advisory Opinion No. 001/2015,[6] the Court used the expression "Order" to strike out the request for failure, on the part of the author, to specify the legal provision of the Charter or of any other human rights instrument in relation to which the Court's Opinion was sought, as provided for under Rule 68(2) of the Court's Rules.

1 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

2 Request for Advisory Opinion by Advocate Marcel Ceccaldi on behalf of the Great Socialist People's Libyan Jamahiriya, Judgement of 30 March 2012.

3 Request for Advisory Opinion by The Socio-Economic Rights & Accountability Project (SERAP), "Order" of 15 March 2013.

4 Request No 001/2014 - Coalition on the International Criminal Court Ltd/gte(ciccn),Legal Defence & Assistance Project Ltd/gte (LEDAP), Civil Resource Development & Documentation Center (Cirddoc) and Women Advocates Documentation Center Ltd/gte(WARDC), "Order" of 05 June 2015.

5 Request No 002/2012 - The Pan African Lawyers' Union (PALU) and Southern African Litigation Centre (SALC), "Order" of 15 March 2013.

6 Request No 001/2015 - Coalition on International Criminal Court LTD/GTE, "Order" of 29 November 2015.

7. In the Request for Advisory Opinion No. 002/2013,[7] the Court pronounced itself on the merits of the request by means of an "Advisory Opinion".

8. In other words, in instances where the Court did not get to the examination of the merits of the request and decided to strike it out due to either lack of interest on the part of the author or to failure to comply with the requirements laid down in Article 68, the Court has preferred the term "Order".

9. In contentious matters, the Court issued an "Order" to declare that it lacked jurisdiction to examine the matter,[8] to hold that it was to continue examining the matter,[9] to decide that it was going to merge the applications[10] and to strike the application due to lack of interest on the part of the applicant to pursue the matter.[11]

10. Still in respect to contentious matters, the Court used a Judgment to declare that some applications were inadmissible,[12] and to declare that it lacked jurisdiction.[13] The expression "Order" is also used in most of the Orders for Provisional Measures that the Court has issued.[14]

11. The Court has extensively used the expression "Decision" to

7 Request No 002/2013 - The African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights, "Order" of 05 December 2014.

8 App. No. 019/2015 – *Femi Falana v African Commission on Human and Peoples' Rights*, "Order" of 20 November 2015.

9 App. No. 016/2015 – *General Kayumba Nyamwasa And Others v Republic of Rwanda*, "Order" of 03 June 2016.

10 App. Nos. 009&011/2011 – *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, "Order" of 22 September 2011.

11 App. No. 002/2015 – *Collectif Des Anciens Travailleurs du Laboratoire (ALS) v Republic of Mali*, "Order" of 05 September 2016.

12 App. No. 003/2012 – *Peter Joseph Chacha v United Republic of Tanzania*, "Ruling" of 28 March 2014; App. No. 003/2011 – *Urban Mkandawire v Republic of Malawi*, "Judgment" of 21 June 2013.

13 App. No 001/2008: *Michelot Yogogombaye v Republic of Senegal*, "Judgment" of 15 December 2009; App: No. 001/2011 – *Femi Falana v African Union*, "Judgement" of 26 June 2012.

14 Namely: APP. No. 016/2015 – *General Kayumba Nyamwasa And Others v Republic of Rwanda*, "Order" of 24 March 2017. App. No. 004/2013 – *Lohe Issa Konate v Burkina Faso*, "Order" of 04 October 2013; App. No. 002/2013 – *The African Commission on Human and Peoples' Rights v Libya*, "Order" of 15 March 2013.

declare that it lacked jurisdiction in contentious matters.[15]

III. Analysis

12. In the instant case, the Court found that it lacks jurisdiction *ratione personae*, and yet it designated the act by which it arrived at that conclusion an "Advisory Opinion", which looks, at least, contradictory.
13. For me, the Court either has jurisdiction hence moves on to issue the Advisory Opinion, or it lacks jurisdiction, in which case it issues no Advisory Opinion.
14. My fellow judges might have been influenced by the fact that, in its Request, SERAP asks the Court to take a position with regard to its *locus standi* to seize the Court in terms of Article 4(1) of the Protocol. Meanwhile, this is an issue that would, in any case, be examined by the Court, since, according to Article 39(1) of the Rules, applicable by virtue of Article 72 of the Rules, "[The] Court shall *conduct preliminary examination* of its jurisdiction and the admissibility of the application ..." (my emphasis), before it can adjudicate on any case brought before it.
15. In my view, Article 39(1) of the Rules requires the Court to conduct preliminary examination in order to ascertain its jurisdiction and the admissibility of the application, a proceeding that under no circumstance can be termed, *per se*, an "Advisory Opinion", even if, in instances where the Court has jurisdiction, the decision on jurisdiction and admissibility becomes part of the Advisory Opinion issued, as it was the case in the Request for Advisory Opinion No. 002/2013.
16. It is, therefore, my understanding that preliminary examination, as envisaged under Article 39(1) of the Rules, is clearly different from issuing an Advisory Opinion, even though, sometimes, may form part of the issued Advisory Opinion.
17. In other words, when the Court, as a result of the preliminary examination so conducted holds that it has no jurisdiction, by no means

15 App. No. 002/2011 – *Soufiane Ababou v Peoples' Democratic Republic of Algeria,* "Decision" of 16 June 2011; App. No. 005/2011 – *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines*, "Decision" of 16 June 2011; App. No. 006/2011 – *Association des Juristes d'Afrique pour la Bonne Gouvernance v Republic of Cote d' Ivoire*, "Decision" of 16 June 2011; App. No. 007/2011 – *Youssef Ababou v Kingdom of Morocco*, "Decision" of 02 September 2011; App. No. 008/2011 – *Ekollo M. Alexandre v Republic of Cameroon and Federal Republic of Nigeria*, "Decision" of 23 September 2011; App. No. 010/2011 – *Efoua Mbozo'o Samuel v Pan African Parliament*, "Decision" of 30 September 2011; App. No. 012/2011 – *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v Republic of Gabon*, "Decision" of 15 December 2011; App. No. 002/2012 – *Delta International Investments S.A, Mr and Mrs A.G.L De Lange v Republic of South Africa,* «Decision» of 30 March 2013; App. No. 004/2012 – *Emmanuel Joseph Uko and Others v Republic of South Africa*, "Decision" of 30 Marche 2012; App. No. 005/2012 – *Amir Adam Timan v The Republic of Sudan*, "Decision" of 30 March 2012.

it can still term the act by which it arrives to that conclusion an Advisory Opinion.

18. In terms of comparative law, when the Inter-American Court of Human Rights (TIDH) decides not to issue an Advisory Opinion, it adopts a form of "Resolución"[16] in lieu of an "Opinión Consultiva" (*Advisory Opinion*). Even when issuing the "Opinión Consultiva", it makes a clear separation between the section pertaining to its jurisdiction (wherein it ascertains whether or not it has jurisdiction vis-à-vis the request for advisory opinion) from the section pertaining to the Advisory Opinion itself (wherein it gives its opinion on the issue it has been seized with, in the event it finds that it has jurisdiction to issue the Advisory Opinion).[17]

19. The Permanent Court of International Justice (PCIJ), in the Request for Advisory Opinion submitted by the Council of the League of Nations in the case of *Russia v Finland*, implicitly[18] used the expression "Advisory Opinion",[19] when it found that it could issue the Advisory Opinion due to Russia's *ad hoc* refusal to accept its jurisdiction. However, this precedent is an incongruous and isolated dating back a century, and it cannot inform the instant case. In actual fact, this precedent has never informed any of the approaches adopted by the Court in its previous decisions on Requests for Advisory Opinion.

IV. My position

20. I am of the opinion that, for the reasons expounded above, the Court should use the term "Decision" to name the act by which it conducts preliminary examination of its jurisdiction and the admissibility of request for Advisory Opinion, in light of Article 39 of the Rules of the Court. Indeed, the recurring practice of using the term "Decision" when it declares its lack of jurisdiction to adjudicate on contentious matters, is perfectly applicable in matters for advisory opinion. This is because

16 Resolución de la corte interamericana de derechos humanos de 23 de junio de 2016, solicitud de opinión consultiva presentada por el secretario general de la organización de los estados americanos; resolución de la corte interamericana de derechos humanos de 27 de enero de 2009, solicitud de opinión consultiva presentada por la comisión interamericana de derechos humanos.

17 Advisory Opinion Oc-21/14 of August 19, 2014 Requested by The Argentine Republic, The Federative Republic Of Brazil, The Republic Of Paraguay And The Oriental Republic Of Uruguay; Advisory Opinion Oc-20/09 Of September 29, 2009 Requested By The Republic Of Argentina.

18 Why not termed formally as such. Only at the end of the provision is "(...) Present Avis ... (…)" mentioned.

19 Decision of the Third Ordinary Session of 23 July 1923, Dossier F. v V Rôle III. 3, available at http://www.icj-cij.org/pcij/serie_B/B_05/Statut_de_la_Carelie_orientale_Avis_consultatif.pdf , accessed 24.05.2017.

Article 72 of the Rules requires that the Court applies *mutatis mutandis* the procedure for contentious matters to procedure relating advisory opinions.

21. The use of the term "Decision" would avoid giving the wrong impression that the Court issues an Advisory Opinion, even when it has issued none. On the other hand, this Court would benefit by remaining consistent in using appropriate terms for its acts, and this would ensure that it is in line with its well-established jurisprudence wherein it uses the term "Decision" when it determines jurisdiction on contentious matters.