Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and Others (Advisory Opinion) (2017) 2 AfCHR 622

Application 001/2016, *Request for Advisory Opinion by the Centre for Human Rights; Federation of Women Lawyers, Kenya; Women's Legal Centre; Women Advocates Research and Documentation Centre; Zimbabwe Women Lawyers Association*

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

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, 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 NGOs which were not recognised by the African Union.

Jurisdiction (request advisory opinion, African organisation, 41-43, recognized by the African Union, 48, 49)

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 for Advisory Opinion dated 7 January 2016 was filed at the Registry on 8 January 2016 jointly by the Centre for Human Rights of the University of Pretoria, Federation of Women Lawyers Kenya, Women's Legal Centre, Women Advocates Research and Documentation Centre and Zimbabwe Women Lawyers Association (hereinafter referred to as "the Applicants").

2. The Applicants state that they are all registered Non-Governmental Organisations (NGOs) based in South Africa, Nigeria, Kenya and Zimbabwe, respectively, working on women's human rights issues in various capacities, including public interest litigation, provision of legal aid, research and in academia. They also state that they are NGOs with Observer Status with the African Commission on Human and Peoples' Rights (hereinafter referred to as the "Commission"). They have provided copies of the attestation of their Observer Status with the Commission.

3. The Applicants are represented by Ms. Sibongile Ndashe of the Initiative for Strategic Litigation in Africa and Professor Frans Viljoen of the Centre for Human Rights, University of Pretoria, South Africa.

II. Circumstances and subject of the request

4. The Applicants submit that unrecorded and unregistered marriages are common in Africa due to (i) the fact that domestic laws do not stipulate requirements or procedures for the compulsory registration of all forms of marriages and are grossly inadequate; (ii) the cost of registering marriages (iii) onerous requirements for such registrations; (iv) unequal gender relations; (v) lack of awareness; and (vi) lack of legal frameworks regulating the consequences of unrecorded and unregistered marriages.

5. The Applicants state that the issue of non-registration and non-recording of marriages has rendered women vulnerable in that (i) women are unable to provide proof of their marriages, (ii) women are easily divorced, (iii) women are unable to enforce the requirement that a woman's consent must be sought before the man can take a second wife in a polygamous marriage, (iv) women are unable to secure land and property rights and that, (v) it makes it difficult for countries to collect, monitor and analyse vital information about a population.

6. The Applicants are requesting for an Advisory Opinion on the interpretation of Article 6(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter referred to as "the Women's Rights Protocol") and the States' obligations consequent thereto.

7. They indicate that for the purposes of this request and in line with Articles 6(a) and (b) of the Women's Rights Protocol, the term "marriage" shall mean a "marriage entered into with the full and free consent of the parties and the term shall refer only to marriages entered into by women who are at least 18 years of age".

8. The Applicants state that the request is anchored on Articles 2(1)(a) to (e) and 2(2) of the Women's Rights Protocol, which provide for the elimination of discrimination against women by requiring State Parties thereto to prevent all forms of discrimination against women through appropriate legislative, institutional and other measures.

9. The Applicants submit that Article 6(d) of the Women's Rights Protocol imposes an obligation on State Parties to enact national legislative measures to guarantee that every marriage is recorded in writing and registered in accordance with national laws in order to be legally recognised.

10. The Applicants aver that the Court's interpretation of Article 6(d) of the Women's Rights Protocol to include a positive obligation to adopt legislative measures for the registration of marriages, would be in consonance with the obligation set out in Article 21(2) of the African Charter on the Rights and Welfare of the Child which provides that registration of all marriages in an official registry is compulsory.

11. The Applicants contend that the overall purpose of the Women's Rights Protocol and particularly Article 2 thereof require that in addition to "taking legislative measures", State parties are obligated to take measures aimed at promoting awareness of the obligation to register marriages and to allocate financial and other resources aimed at facilitating such registration.

12. The Applicants maintain that the word "shall" in Article 6(d) of the Women's Rights Protocol is peremptory and denotes a duty requiring State Parties to guarantee the registration of marriages in order for them to be legally recognised. The Applicants submit further that there is nothing in this provision suggesting that, in meeting this obligation, States Parties should impose penalties or sanctions for non-compliance with the registration requirements set out in their national laws.

13. The Applicants contend that Article 2 of the Women's Rights Protocol requires State Parties to put in place measures aimed at combatting discrimination, among which are:

a. integrating a gender perspective into their policy and other decisions; and

b. taking positive and corrective actions in those areas where discrimination in law continue to exist.

14. The Applicants submit that in order to give effect to the overall purpose of the Women's Rights Protocol, the commitment towards eliminating discrimination in Article 2 and the rights and protections in marriage established in Articles 6(e) to 6(j) thereof and affirmed in other regional and international human rights treaties, Article 6(d) must be interpreted purposively and in a way that rejects the imposition of unnecessary sanctions for non-compliance by its rights holders and does not perpetuate indirect discrimination against women.

15. The Applicants argue that non-recognition of marriages that are not recorded in writing or registered perpetuates discrimination against women as it results in vulnerability, compromises enjoyment of marital rights enshrined in Article 6(e) to 6(j) of the Women's Rights Protocol and other regional and international instruments. The Applicants submit further that, this discrimination is particular where non-registered marriages are automatically and as a matter of law presumed void, invalid or nullified such that the personal and proprietary consequences and protections in marriage are denied.

16. The Applicants state that Article 6(d) of the Women's Rights Protocol was not intended and should not be interpreted as suggesting that a failure to register will invalidate a marriage, and that while national laws must require registration of marriages, non-compliance with registration requirements should not as a matter of law void, nullify or invalidate the marriage.

17. The Applicants submit that a distinction must be drawn between "validity" and "legal recognition" (as used in the Women's Rights Protocol), and that in their view an action or undertaking which is not legally recognised need not necessarily be presumed or declared invalid. The Applicants argue that an unregistered marriage may simultaneously have the status of being valid but not legally recognised and that drawing a distinction between the concepts of validity and legal recognition for the purposes of elaborating on the precise meaning of Article 6(d) would give greatest effect to the rights and objects enshrined in the Women's Rights Protocol.

18. The Applicants submit that in order to give effect to the overall purpose of the Women's Rights Protocol, the commitment to eliminate discrimination in Article 2 and the rights in marriage established in Article 6(e) to 6(j) thereof and other human rights instruments, the legal consequences of non-registered marriages, which should be stipulated by national laws, should be aimed at preserving the personal and proprietary consequences of marriage that are intended to protect the parties thereto. State Parties to the Women's Rights Protocol are duty bound to also stipulate condonation procedures in their national laws that afford parties to a marriage an opportunity to rectify or correct non-compliance with registration requirements.

19. The Applicants submit that the language in Article 6(d) of the Women's Rights Protocol seems to have been interpreted as meaning that unregistered marriages are invalid and/or should not receive legal recognition and that such an interpretation causes prejudice and injustice to women across Africa, whose marriages are unrecorded and unregistered. They submit further that this interpretation is contrary to the overall purpose of the Women's Rights Protocol and to the objectives of Article 2 thereof.

20. The Applicants state that by maintaining the requirement of recording and registration of marriage as a possible intended precursor to legality, Article 6(d) of the Women's Rights Protocol has the potential to jeopardise the right to equality in marriage and that it is against this backdrop that they make the request to the Court for an Advisory Opinion on the precise meaning of this provision.

21. The Applicants submit that their request is therefore that the Court:

a. Confirm that a failure to enact laws that require and regulate marriage registration constitute a violation of the Women's Rights Protocol by a Member State;

b. Advise on the nature and scope of State obligation that Article 6(d) of the Women's Rights Protocol prescribes in respect of recording and registration of marriages, taking into account the broader duty of State parties to, respect,

protect and promote the rights of women, as enshrined in the Women's Rights Protocol;

c. Confirm that Article 6(d) of the Women's Rights Protocol does not suggest or require that non-registration invalidates a marriage;

d. Advise whether State parties are required to enact national laws that provide for condonation procedures to correct or remedy non- compliance with registration requirements ; and

e. Advise on the legal consequences that flow non-registered marriages, having regard to the overall purpose of the Women's Rights Protocol and the specific protections and commitments set out in Articles 2 and 6(e-j) of the Women's Rights Protocol and other relevant instruments.

II. Procedure before the Court

22. The Request dated 7 January 2016 was received at the Registry of the Court on 8 January 2016 and registered forthwith as Request No.001/2016.

23. By a letter dated 15 February 2016, the Registry requested the Commission to advise whether the Request relates to a matter pending before it. The Commission responded by a letter dated 18 May 2016, indicating that the Request does not relate to any matter pending before it.

24. By a letter dated 15 March 2016, the Registry sought confirmation from the Commission, of the Applicants' Observer Status. By a letter dated 30 March 2016, the Commission confirmed that they have Observer Status before the Commission.

25. By a notice dated 13 June 2016, the Request was notified to African Union Member States, the Commission, the African Union Commission, the Pan African Parliament, the Economic, Social and Cultural Council of the African Union, the African Union Commission on International Law, the Directorate of Women and Gender of the AU Commission and Women's Rights Non-Governmental Organisations. The Court set a ninety (90) day time limit for receipt of observations from the date of receipt. By a notice dated 6 October 2016, the Court extended the time for receipt of such observations by sixty (60) days. This period elapsed on 31 January 2017.

26. One of the entities to whom the request was transmitted pursuant to Rule 69 of the Rules, *L'Association des Femmes Juristes de Cote' d'Ivoire* filed their Observations on the merits of the request on 13 September 2016.

27. By a notice dated 12 July 2017, the Applicants and other entities to whom the Request was transmitted were notified of the close of the procedure for the filing of written submissions.

IV. Jurisdiction of the court

28. 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".
29.
30. In terms of Rule 39(1) of the Rules, "The Court shall conduct preliminary examination of its jurisdiction".
31.
32. From the provisions of these Rules, the Court must determine whether it has jurisdiction on the Request before it.
33. 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

34. The Applicants state that Article 4(1) of the Protocol as read with Article 68(1) of the Rules confer a discretionary competence to the Court to provide an Advisory Opinion at the request of, among others, any African Organisation recognised by the African Union.
35. The Applicants submit that an interpretation of the clause "any African organisation recognised by the African Union encompasses any organisation with Observer Status with the Commission".
36. The Applicants submit that this interpretation is consistent with the principles of statutory interpretation that requires courts to give effect to every word and clause of a statute, to assume that the construction was intentional and to avoid rendering any statutory language superfluous.
37. The Applicants also submit that on a reasonable construction of the overall text of the Protocol, two types of organisations are envisaged: African Intergovernmental Organisations, as mentioned in Article 5(1)(e) thereof, and Non-Governmental organisations, as mentioned in Article 5(3) thereof, which may or may not have been granted Observer Status with the Commission.
38. The Applicants submit that in their view, the phrase "African Organisations recognised by the African Union" must be construed

as an umbrella term referring to both African Intergovernmental Organisations and Non-Governmental Organisations. They submit that this interpretation is consistent with an overall reading of the text and also gives effect to the unique distinction drawn in the text between types of organisations that may seek the assistance of the Court.

39. The Applicants conclude that they qualify as African organisations **r**ecognised by the African Union for the purposes of Article 4(1) of the Protocol and Article 68(1) of the Rules, thus are entitled to request the Advisory Opinion.

B. Position of the Court

40. 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…".

41. The fact that the Applicants do not fall within the first three categories within the meaning of Article 4(1) of the Protocol is not contested.

42. The first question which arises, however, is whether they fall under the fourth category, that is, whether they are "African organisations recognised by the AU" within the meaning of Article 4(1) of the Protocol.

43. On this issue, the Court has in the past in the Advisory Opinion in *Socio-Economic Rights and Accountability Project* (SERAP) established that the term "organization" used in Article 4(1) of the Protocol covers both Non-Governmental Organisations and Inter-Governmental Organisations.[1]

44. As regards the appellation "African", the Court noted in the same Opinion 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]

45. The Court notes that the Applicants are registered in South Africa, Kenya, Nigeria and Zimbabwe, respectively and with their Observer Status before the Commission, they are entitled to carry out their activities beyond the countries where they are registered. In view

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

2 *Idem*, Para 48.

of this, the Court concludes that they are "African Organisations" in terms of Article 4(1) of the Protocol.

46. The second question the Court must address is whether these organisations, apart from being African, are recognised by the African Union.

47. The Court notes that the Applicants have relied on their Observer Status before the Commission to contend that they are recognised by the African Union.

48. In this respect, the Court has in the afore-mentioned Opinion held that Observer Status before any African Union organ does not amount to recognition by the African Union, rather that, only NGOs recognised by the African Union itself are envisaged in Article 4(1) of the Protocol.[3]

49. 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 between the African Union and those NGOs.[4]

50. In the instant case, the Applicants have not claimed to be and have not provided proof that they have Observer Status with the African Union or have sipned any Memorandum of Understanding with the Union.

51. 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".

52. For the above reasons,

The Court,

Unanimously:

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

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3 SERAP Advisory Opinion, para 53.

4 *Idem*, para 64.

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 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).

3. 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).

4. 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.

5. 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.

6. It is noteworthy that Article 4(1) of the Protocol on institutions

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".

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 to institute cases directly before it, in accordance with Article 34(6) of this Protocol".

7. Review of this article shows 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.

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.

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

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 others, 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:

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).

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. 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.

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

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

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.

of the Orders for Provisional Measures that the Court has issued.[14]

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

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.

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.

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 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,

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.

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 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.