# Request for Advisory Opinion by the Pan African Lawyers Union (PALU) (Advisory Opinion) (2021) 5 AfCLR 863

Application 001/2020, *Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Right to Participate in the Government of One's Country in the Context of an Election Held During a Public Health Emergency or a Pandemic such as the Covid 19 Crises*

Advisory Opinion, 16 July 2021. Done in English and French, the English text being authoritative.

This request for advisory opinion was brought by the Pan African Lawyers Union to seek the Court's views on the right to participate in the government of one's country in the context of an election held during a public health emergency or a pandemic such as the Covid 19. The Court held that the decision whether to conduct elections during health or other emergencies is a prerogative of states, which must be exercised on the basis of prior consultation with relevant stakeholders.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

**Jurisdiction** (personal jurisdiction, 22-26; African organisation, 23; material jurisdiction, 28-30; nature of advisory jurisdiction, 45-47)

**Admissibility** (identity of author, 36; pendency before the African Commission, 37; circumstances of request, 38)

**Right to participate** (scope of right, 42; obligation under AU Constitutive Act, 44; decision to conduct elections during pandemic, 50-51, 54-55; postponement of elections, 52-53; state obligation to ensure effective participation, 65-70; role of the Court, 71-72; conditions for limitation of right, 73-79, 84; core content of right, 80-81; state obligation in the event of decision to postpone elections, 96-97, 98-103)

## I. The Author of the Request

**1.** This Request for Advisory Opinion (hereinafter referred to as "the Request") was submitted by the Pan African Lawyers Union (hereinafter referred to as "the Author").

**2.** The Author states that it is an African organisation based in Arusha, United Republic of Tanzania. It further states that it is recognised by the African Union (hereinafter referred to as "the AU"). In support of this assertion, the Author has provided the Court with a copy of the Memorandum of Understanding (hereinafter referred to as "MoU") between itself and the AU, dated 8 May 2006.

## II. Circumstances and subject matter of the Request

**3.** The Author submits that the "Covid-19[1] crisis presents unprecedented challenges for democratic governance and rule of law in Africa" and that, "in response to the Covid-19 pandemic, AU Member States have mostly taken measures to protect the right to life by limiting such rights as freedoms of movement, assembly, association and information, and also the right of citizens to effectively participate in the governance of their respective states, especially (although not limited to) through regular, free and fair elections."

**4.** The Author affirms that those measures taken "also have the practical effect of constraining democratic competition, could preclude election observation, and potentially interfere with both campaigning and the exercise of franchise."

**5.** The Author avers that "across the continent, elections invariably frame stability. Their acceptability, or lack thereof, could be a useful predictor for instability or fragmentation. With the Covid-19 crisis, all African countries going through elections over [2021] confront contemporaneous crises of public health, fiscal crunch, political stability and governmental legitimacy. In countries with limited institutional buffers, the consequences could be unpredictable for citizens, countries, regions and Africa's partners."

**6.** The Author submits that "at least 22 AU Member States are currently scheduled to hold presidential and/or legislative and/ or local government elections in 2020. At least 11 of these are for the position of President or Prime Minister."

**7.** They aver that "while State Parties unquestionably enjoy considerable latitude in managing this unprecedented public health emergency, it remains the case that, in the absence of formal derogations, State Parties remain bound by their obligations to safeguard the right to effectively participate in government as enshrined in the Constitutive Act of the African Union, the African Charter and its Protocols, ACDEG and other legal instruments under the AU or regional economic communities (RECs) recognised by the AU."

**8.** In these circumstances and for these reasons, the Author requests for an Advisory Opinion from the Court on the following questions:

a. Whether this Honourable Court cannot be seized with the question of this advisory opinion in terms of "Safeguarding the Right to

1 For the World Health Organization, Covid-19 is the disease caused by a new coronavirus called SARS-CoV-2. See https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (accessed on 11.6.2021).

Participate in Government under Articles 1 and 13(1) of the African Charter on Human and Peoples' Rights in Elections in Africa Affected by the Covid-19 Crisis."

b. Whether this Honourable Court cannot interpret and lay down in terms of treaty law applicable to State Parties, standards for conducting elections during or affected by the Covid-19 crisis.

If either or both of the above questions are resolved in the affirmative, this Honourable Court is invited to further dispose of the following questions:

a. What, if any, are the applicable obligations of State Parties for ensuring effective protection of the citizen's right to participate in the government in the context of an election held during the pendency of a declaration of a public health disaster or emergency, such as the Covid-19 crisis, in light of the express provisions of Articles 1 and 13 of the African Charter, and Articles 2(1) (2) (3) (4) (10) and (13); Articles 3(1) (4) (7) (10) and (11); Articles 4, 5, 6, 7, 12, 13, 15, 17, 24, 25; Articles 32(7)(8); Articles 38(1) and 39 of the ACDEG?

b. What, if any, are the legal standards founded in treaty law applicable to the State Parties that choose to conduct elections *vis-à-vis* Member States that choose not to conduct elections during the pendency of the Covid-19 disaster or emergency measures?

c. What, if any, are the legal standards applicable to States precluded by reason of a public health emergency, such as the one caused by the Covid-19 pandemic, from organising elections as the basis of the democratic mandate of government?

## III. Summary of the Procedure before the Court

**9.** The Request was received at the Registry of the Court on 3 June 2020, together with the Application requesting the Court to "abridge the time and process for procuring the Advisory Opinion". This request was rejected by the Court on 2 November 2020.

**10.** On 9 June 2020, the Registry requested the African Commission on Human and Peoples' Rights (hereinafter referred as "the Commission"), pursuant to Article 4 of the Protocol, to confirm that the subject matter of the Request was not related to any matter pending before it. On 14 June 2021, the Commission informed the Registry that no case relating to the subject matter of this advisory opinion is pending before it.

**11.** On 11 August 2020, the Registry notified the following entities of the filing of the Request: AU Member States; the Commission; the AU Commission; the African Committee of Experts on the Rights and Welfare of the Child; the Pan African Parliament; the Economic, Social and Cultural Council of the AU; the AU Commission on International Law; the Directorate of Women,

Gender and Development of the AU; the African Institute of International Law; and the Centre for Human Rights, University of Pretoria. The Court set a ninety (90) day limit for receiving observations on the Request.

**12.** On 28 January 2021, the AU Member States and entities indicated above were given an extension of forty-five (45) days to submit their observations on the Request. In the same letter, four new entities were added to the list: Electoral Law and Governance Institute for Africa, COVID-DEM, Journal of African Law and International IDEA.

**13.** On 26 April 2021, the SOAS Centre for Human Rights Law, on behalf of the Journal of African Law, deposited an *amicus curiae* brief after it had been granted, *suo motu*, an extension of time of seven (7) days. Apart from this *amicus curiae* brief, the Court did not receive any submission from the entities notified of the Request.

**14.** By a notice dated 22 June 2021, the Author and all entities cited in paragraphs 11 and 12 above, were notified of the closure of pleadings.

## IV. Jurisdiction

**15.** Article 4(1) of the Protocol to the African Charter on Human and People' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), whose provisions are reiterated in Rule 82(1) of the Rules of Court (hereinafter referred to as "the Rules"),[2] provides as follows:

> At the request of a Member State of the OAU, the OAU, any of its organs, or any African organisation recognised by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

**16.** The Court observes that Rule 87 of the Rules provides that "[t]he Court shall apply, *mutatis mutandis*, the provisions of Part IV of [the Rules] to the extent that it deems appropriate, to advisory procedure/proceedings." [3] In line with the provisions of Rule 87 of the Rules, the Court further notes that Rule 49(1) of the Rules stipulates that "the Court shall ascertain its jurisdiction … in

2 Formerly Rule 68, Rules of Court 2010.

3 Formerly Rule 72, Rules of Court 2010.

accordance with the Charter, the Protocol and these Rules." [4]

**17.** From the foregoing follows that in all advisory proceedings the Court must ascertain its jurisdiction.

**18.** The Court reiterates that in a request for an advisory opinion, given that such requests do not involve contestation of facts between opposing parties, the issue of territorial and temporal jurisdiction does not arise.[5] For this reason, the Court will only consider whether the Request satisfies the requirements for (A) personal and (B) material jurisdiction.

## A. Personal jurisdiction

**19.** The Author submits that it "brings together the continent's 5 regional lawyers' associations, over 55 national lawyers' associations and over 1,000 lawyers from Africa and the Diaspora. Citing the Court case law,[6] it submits that "by virtue of having signed an MoU with the AU … it is accordingly formally recognised by the AU, thus meeting the criteria set forth by this Honourable Court."

**20.** To illustrate its involvement all over Africa, it affirms that it "is routinely involved in the activities of the Office of the Legal Counsel of the AU (OLC-AU); Department of Political Affairs of the African Union Commission (DPA-AUC); African Court; African Commission; African Union Commission on International Law (AUCIL); African Union Advisory Board on Corruption (AUABC) and the Pan African Parliament (PAP), amongst others".

**21.** The Author affirms that it "also regularly engages the African Regional Economic Communities (RECs), including the East African Community (EAC), Economic Community of West African States (ECOWAS), Common Market for Eastern and Southern Africa (COMESA), Inter-Governmental Authority on Development (IGAD), Southern African Development Community (SADC) and the International Conference of the Great Lakes Region (ICGLR),

4 Formerly Rule 39(1), Rules of Court 2010.

5 Request for Advisory Opinion by *The African Committee of Experts on the Rights and Welfare of the Child* (5 December 2014) 1 AfCLR 725, § 38. See also *The Pan African Lawyers Union (PALU),* ACtHPR, Request for Advisory Opinion No. 001/2018, Advisory Opinion of 4 December 2020, § 19.

6 Request for Advisory Opinion by *The Centre for Human Rights, University of Pretoria, and Others* (Advisory Opinion) (28 September 2017) 2 AfCLR 622, para 49.

especially on their interface with the AU."

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**22.** To determine whether it has personal jurisdiction, the Court must satisfy itself that the Request has been filed by one of the entities contemplated under Article 4(1) of the Protocol.[7] In the instant case, the question that arises is whether the Author is an "African organization recognised by the AU" in the meaning of this provision of the Protocol.

**23.** The Court recalls that it has held 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."[8]

**24.** In the instant Request, the Court notes that the Author is registered in a Member State of the AU, to wit, the United Republic of Tanzania and that it has structures at the national and regional levels as an umbrella organization of national and regional lawyers' associations. The Court also notes that PALU undertakes its activities beyond the territory where it is registered.

**25.** The Court recalls that, and as confirmed by the AU Commission's Legal Counsel, on 8 May 2006, the Author and the AU signed an MoU to co-operate in undertaking activities concerning the rule of law, promoting peace and integration, and protecting human rights across the continent. The signing of an MoU is an accepted way by which the AU recognises non-governmental organisations.[9] The Court finds, therefore, that the Author is an organization recognised by the AU within the meaning of Article 4(1) of the Protocol.

7 Request for Advisory Opinion by *The Socio-Economic Rights and Accountability Project* (Advisory Opinion) (26 May 2017) 2 AfCLR 572, § 38.

8 *Request for Advisory Opinion by L'Association Africaine de Defense des Droits de l'Homme* (Advisory Opinion) (28 September 2017) 2 AfCLR 637, § 27.

9 *The Centre for Human Rights, University of Pretoria, and Others* (Advisory Opinion), § 49. See also *Socio-Economic Rights and Accountability Project* (Advisory Opinion), §§ 56 à 65.

**26.** Consequently, the Court finds that it has personal jurisdiction to deal with this Request.

## B. Material jurisdiction

**27.** The Author submits that "this Request for an Advisory Opinion is a legal matter, relating to the guarantees for the effective protection of the right to participate in government in the context of Covid-19 pandemic and crisis." It submits further that the Request is also sought in terms of the Constitutive Act of the AU, the Maputo Protocol and ACDEG, all of which are human rights instruments within the meaning of Article 4 of the Protocol.

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**28.** The Court recalls that Article 4(1) of the Protocol, whose provisions are restated in Rule 82(2) of the Rules,[10] stipulates that the Court can give an advisory opinion on "any legal matter relating to the Charter or any other relevant human rights instrument …."

**29.** The Court observes that in the instant Request, it is requested to give its opinion about the application of Articles 1 and 13 of the African Charter, and Articles 2(1)(2)(3)(4) (10) and (13); Articles 3(1)(4)(7)(10) and (11); Articles 4, 5, 6,7, 12, 13, 15, 17, 24, 25; Articles 32(7)(8); Articles 38(1) and 39 of the ACDEG in relation to citizens' right to effective participation in the government of their states, especially (although not limited to), through regular, free and fair elections, in the context of the Covid-19 pandemic. In these circumstances, the Court holds that it has material jurisdiction in respect of the Request.

**30.** Accordingly, the Court declares that it has jurisdiction to issue an opinion in the instant Request. Hence, the Court considers that it has answered the question raised in paragraph 8(a) concerning the first set of questions of this Opinion, in relation to the issue of whether it can be seized with the question on "Safeguarding the Right to Participate in Government under Articles 1 and 13(1) of the African Charter on Human and Peoples' Rights in Elections in

10 Formerly Rule 68(2), Rules of Court 2010.

Africa affected by the Covid-19 Crisis".

**31.** The Court also considers it has answered the question raised in paragraph 8(b) of the first set of questions of this Opinion on whether it can "interpret and lay down in terms of treaty law applicable to State Parties, standards for conducting elections during or affected by the Covid-19 crisis."

## V. Admissibility

**32.** The Court observes that Article 4(1) of the Protocol, whose provisions are restated in Rule 82(3) of the Rules,[11] provides that it may provide an advisory opinion "provided that the subject matter of the opinion is not related to a matter being examined by the Commission."

**33.** Rule 82(2) of the Rules, provides that "[a]ny request for advisory opinion … shall specify … the context or background giving rise to the request as well as the names and addresses of the representatives of the entities making the request."

**34.** It follows from the above that for determination of the admissibility of a Request for Advisory Opinion, the Court must determine if the Author of the Request is properly identified, the Request is not related to a matter pending before the Commission, and the circumstances of the Request have been specified.

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**35.** According to the Author, the Request is admissible since (i) it is properly identified, (ii) the Request does not relate to any application pending before the Commission, and (iii) the circumstances of the Request have been specified.

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11 Formerly Rule 68(3), Rules of Court 2010.

**36.** The Court notes that the Author is well identified and that its representatives are explicitly indicated.

**37.** The Court further notes that on 14 June 2021, in response to its request dated 9 June 2020, the Commission informed the Registry that no case related to the subject matter of this advisory opinion is pending before it.

**38.** The Court also confirms that the Author has provided the context within which the Request arises, which is the political, economic and social crisis wrought upon Africa, and the rest of the World, by the Covid-19 pandemic and which poses serious challenges to democratic governance, the rule of law and the promotion and protection of human and peoples' rights, more generally, and the organisation of elections, more specifically.

**39.** From the foregoing, the Court thus finds that the Request is admissible.

## VI. On the questions presented to the Court

**40.** The Court notes that in paragraph 8 of this Opinion, the Author poses a number of questions. The first set of questions, which relates to the Court's jurisdiction, have already been answered in the affirmative (see paragraphs 30 and 31 above).

**41.** With regard to the second set of questions (see paragraph 8 above), the Court condenses them as follows:[12]

a. On the decision to conduct or not to conduct elections in the context of a public health emergency or a pandemic, such as the Covid-19

b. On the obligations of State Parties to ensure effective protection of citizens' right to participate in the government of their countries in the context of an election held during a public health emergency or a pandemic, such as the Covid-19 crisis

c. On the obligations of State Parties that decide to postpone elections because of a public health emergency or a pandemic, such as the Covid-19 crisis

**42.** The Court notes that the citizens' right to participate freely in the government of their countries is very broad. It does not cover only direct and indirect participation in the government of their countries through elections. However, in the instant Request, the Author limits its question to the participation of citizens in the government of their respective countries within an electoral framework. Thus, the Court's response will be limited to the material scope as set out by the Author.

12 *The Pan African Lawyers Union (PALU)* (Advisory Opinion), § 33.

**43.** In relation to the instruments invoked by the Author, the Court notes that the Charter[13] and the ACDEG[14] have been ratified by fifty-four (54) and thirty-four (34) of the fifty-five (55) Member States of the AU, respectively.

**44.** The Court observes that some Member States of the AU have not ratified the instruments that the Author has invited it to interpret in responding to its questions. Nevertheless, the Court notes that, under Article 3(h) of the Constitutive Act, all Members States of the AU have undertaken to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments." By making this commitment, they assumed the obligation to uphold human rights in all circumstances.

**45.** In exercising its advisory jurisdiction, the Court does not resolve factual disputes between opposing parties. Its main duty is to provide its opinion by answering questions raised by the Author of the Request, as envisaged by Article 4(1) of the Protocol.[15] Any use of examples simply serves to highlight the practical dimensions of the opinion and does not amount to a decision on any factual situation described in those illustrations.[16]

**46.** The Court further recalls that it can be requested to provide an advisory opinion by any Member State of the AU and is not limited to those States that have ratified the Protocol or any other AU human rights instruments. Therefore, the Court reaffirms that its advisory opinions are designed to provide guidance to all Member States of the AU in fulfilling their international human rights commitments.[17]

**47.** The Court makes it clear that this Opinion does not seek to examine the lawfulness of any specific elections that were held or postponed during the Covid-19 Pandemic, much less to assess

13 https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed on 25 May 2021).

14 https://au.int/sites/default/files/treaties/36384-sl-AFRICAN%20CHARTER%20ON%20DEMOCRACY%2C%20ELECTIONS%20AND%20GOVERNANCE.PDF (accessed on 25 May 2021)

15 *The Pan African Lawyers Union (PALU)* (Advisory Opinion), § 36. See also, Inter-American Court of Human Rights, *Advisory Opinion OC-18/03 of September 17, 2003 Requested by the United Mexican States, Juridical condition and rights of undocumented migrants* §§ 63-65.

16 *Ibidem.*

17 *The Pan African Lawyers Union (PALU)* (Advisory Opinion), § 37. See also, Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of September 17, 2003 Requested by the United Mexican States, Juridical condition and rights of undocumented migrants, § 64.

the extent to which they were free, fair and transparent.

## A. On the decision to conduct or not to conduct elections in the context of a public health emergency or a pandemic, such as the Covid-19

**48.** The Author avers that while the scheduling of national elections is a matter of sovereignty of State Parties, the conduct of elections is a matter of continental treaty law relating to the citizen's rights to effectively participate in the government of their countries as well as to standards of good governance enshrined in treaty law by African states.

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**49.** It emerges from the *Amicus Curiae* brief that States can decide to conduct elections in the context of a public health emergency or a pandemic, what matters though are the measure need to be taken to guarantee that elections are conducted in accordance with the applicable international treaty laws.

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**50.** The Court recalls that AU Member States have adopted democracy as their political system[18] and are committed to respecting the principles of the rule of law and to promoting and protecting human and peoples' rights under the provisions of Article 3 (g) and (h) of the AU Constitutive Act.[19]

**51.** The Court considers that one of the fundamental principles of democracy is the regular conduct of transparent, free and fair

18 ACHPR, Communication 318/06 – *Open Society Justice Initiative v Republic of Côte d'Ivoire* (27 May 2016), §164.

19 Article 3: "The objectives of the Union shall be to: g) promote democratic principles and institutions, popular participation and good governance; h) promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments."

elections[20] aimed at creating the conditions for the possibility of democratic alternation[21] and, at the same time, affording the electorate the opportunity to regularly evaluate and politically sanction the performance of those elected officials, through universal suffrage.[22] It follows, then, that State Parties can decide to conduct elections within the timeframe provided for by law, notwithstanding the situation of the Covid-19 pandemic, if they deem it possible.

**52.** Concerning the postponement, the Court notes that, Article 13(1) of the Charter, as supplemented by Articles 2 and 3 of the ACDEG, by referring to domestic law, the determination of conditions for the exercise by citizens of the right to participate freely in the governance of their countries, gives the competent bodies of each State the power to decide to postpone elections in accordance with its domestic law.

**53.** The Court notes that in the absence of specific provisions on the postponement of elections, the provisions concerning the scheduling and holding of elections, including during a situation of emergency are applicable to their postponement. Indeed, those who can schedule elections also must be able to call them off or postpone them if the conditions for holding the elections are not met because of the emergency situation, as is the case with the Covid-19 pandemic. If necessary, appropriate legislation can be adopted for this purpose.

**54.** The Court is of the view that even though the decision to conduct or not to conduct elections, remains with the competent organs of the State concerned, because of the situation of a public health emergency or a pandemic, a consultation of health authorities and political actors, including representatives of civil society, is

20 ACDEG, Article 2: "The objectives of this Charter are to: 3. Promote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments;" Article 3: "State Parties shall implement this Charter in accordance with the following principles: 4. Holding of regular, transparent, free and fair elections."

21 ACDEG, Article 23: "State Parties agree that the use of, inter alia, the following illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions by the Union: 4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections. 5. Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections."

22 ACDEG, Article 2: "The objectives of this Charter are to: "4.Holding of regular, transparent, free and fair elections."

necessary to ensure the inclusiveness of the process.[23]

**55.** The consultation should concern not only the decision to hold elections but also the measures necessary to ensure that they are conducted in a transparent, free and fair manner. In this regard, the Court recalls that the provisions of the ECOWAS Protocol on Democracy and Elections, which requires that the consent of the majority of political actors needs to be obtained when substantial changes are made to the electoral laws within six (6) months before the elections,[24] are an important source of inspiration for states that decide to conduct elections during a situation of public health emergency.

## B. On the obligations of State Parties to ensure effective protection of citizens' right to participate in the government of their countries in the context of an election held during a public health emergency or a pandemic, such as the Covid-19 crisis

**56.** The Author submits that with the Covid-19 crisis, all African countries going through elections in 2021 "confront contemporaneous crises of public health, fiscal crunch, political stability and governmental legitimacy. In countries with limited institutional buffers, the consequences could be unpredictable for citizens, countries, regions and Africa's partners."

**57.** The Author submits that "[i]n response to the Covid-19 pandemic, AU Member States have mostly taken measures to protect the right to life by limiting such rights as freedoms of movement,

23 ACDEG: Article 3: State Parties shall implement this Charter in accordance with the following principles: 7. "Effective participation of citizens in democratic and development processes and in governance of public affairs." Article 8: State Parties shall eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as any other form of intolerance. 2. State Parties shall adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalized and vulnerable social groups. 3. State Parties shall respect ethnic, cultural and religious diversity, which contributes to strengthening democracy and citizen participation." Article 13: "State Parties shall take measures to ensure and maintain political and social dialogue, as well as public trust and transparency between political leaders and the people, in order to consolidate democracy and peace." Article 28: "State Parties shall ensure and promote strong partnerships and dialogue between government, civil society and private sector."

24 Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Article 2(1): No substantial modification shall be made to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of Political actors.

assembly, association and information, and also the right of citizens to effectively participate in the governance of their respective states, especially (although not limited to) through regular, free and fair elections."

**58.** The Author affirms that "[t]hese measures have affected the enjoyment of basic rights such as the rights to freedom of movement, assembly, association and information, and also the right of citizens to effectively participate in the governance of their respective countries, especially (although not limited to) through regular, free and fair elections. They also have the practical effect of constraining democratic competition, which could preclude election observation, and potentially interfere with both campaigning and the exercise of franchise."

**59.** The Author submits that in the absence of formal derogations, State Parties remain bound by their obligations to safeguard the citizens' right to effectively participate in government of their countries. In this vein, it maintains that harmonized approaches that safeguard the right to participate in government, as enshrined in the African Charter and ACDEG, amongst other legal instruments, should be envisaged.

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**60.** According to the *Amicus Curiae*, "[i]f elections are to be held, the authorities must decide how they should be conducted in response to the threat posed by Covid-19." It avers that "[t]hey have to take into consideration public health imperatives, the legal framework governing elections in the country concerned, political, operational and financial factors, and States' regional and international human rights obligations."

**61.** Citing the report of the International IDEA, it affirms that "at least 78 countries and territories across the globe have decided to postpone national and subnational elections due to Covid-19; … 52 countries and territories have held elections that were initially postponed due to concerns related to Covid-19; in Africa, countries where elections have been held include: Algeria, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Côte d'Ivoire, Egypt, Ghana, Guinea, Guinea Bissau, Kenya, Liberia, Malawi, Mali, Niger, Nigeria, Seychelles, Tanzania, Togo and

Uganda at the national level."

**62.** Citing several sources, the *Amicus Curiae* affirms that "[i]n several countries where elections were held, observers raised a series of concerns regarding the electoral process. These included restrictions pertaining to campaigning, the adverse impact on voter registration, the inability of members of vulnerable groups to effectively participate in the process, impediments faced by impartial election observers and the risk of heightened insecurity."

**63.** The *Amicus Curiae* is of the view that State Parties when deciding whether to hold or postpone scheduled elections, should consider the opportunity for deliberation (free and fair election requires that voters have the opportunity to deliberate over the issues at stake in the election and time to formulate preferences in response to individual and collective concerns); equality of contestation; inclusivity in, and equality of, participation in elections (including by vulnerable or marginalised groups in society); robust electoral management system and institutionalisation (institutional clarity to ensure trust in the system and to prevent any undemocratic power grabs).

**64.** The *Amicus Curiae* submits that "measures imposed to combat Covid-19 risk undermining electoral principles such as accurate voter registration or effective (safe) campaigning. To counter these risks, restrictions to the rights to freedom of expression, information, privacy, assembly and association must be kept to the absolute minimum necessary. Campaigning methods that involve physical proximity such as door-to-door visits may be limited. Ensuring the freedom of voters to form an opinion must in such circumstances be made through alternative campaigning methods, including by taking into consideration how changes made impact the overall playing field."

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**65.** The Court notes that the electoral period provides a framework for the general mobilisation of political parties, candidates and their supporters, and public institutions involved in the electoral process, notably, those responsible for issuing documents and validating candidatures. National and international observers, and civil society organisations participating in the civic and voter

education campaigns, are also involved in the electoral process.

**66.** The Court is of the view that conducting elections in a situation of emergency, as is the case with the Covid-19 Pandemic, a disease that is easily transmissible, including through contact between humans and between humans and contaminated objects, requires that appropriate measures be taken to prevent its transmission, without undermining the integrity of the electoral process.

**67.** The Court observes that, as noted by the Author and the *Amicus Curiae*, after the WHO declared the Pandemic, a number of countries that organised elections took restrictive measures that negatively impacted the right of citizens to participate in the government of their countries through elections and the exercise of other rights during the election period. These measures include restrictions on rights during the election period, including the right of movement of candidates and voters, to register, to obtain documents necessary for submission of candidatures, to participate in meetings related to elections, to access information related to the electoral process, as well as election observation by domestic and international observers.

**68.** Also following the declaration of a pandemic, different national and international institutions, including the WHO itself, the AU's relevant bodies, Regional Economic Communities (RECs), and certain civil society organisations issued instructions or guidelines on measures to be taken to mitigate the spread of the disease, including in an electoral context.

**69.** The Court particularly notes the Communiqué of the AU Peace and Security Council, which recommends to States that decide to organise elections during this period

> to create the necessary conducive conditions to ensure safety and security of the population against Covid-19, in line with safeguard protocols issued by World Health Organization (WHO) and the CDC Africa, as well as to preserve the gains made and to maintain the current momentum in the fight against the pandemic and other public health emergencies.[25]

**70.** The Court also notes the Commission's Press Statement on human rights-based effective response to the novel Covid-19 virus in Africa,[26] in which it called the attention of Member States to the fact that measures to combat Covid-19 must respect

25 Communiqué PSC/PR/COMM.(CMLXXVI) § 3, adopted at its 976th meeting held on 29 January 2021, on AU Guidelines on Elections in Africa in the Context of the Novel Coronavirus (Covid-19) Pandemic and Other Public Health Emergencies.

26 https://www.achpr.org/pressrelease/detail?id=522 (accessed on 2 June 2021).

human rights, including the principles of legality, legitimate aim, non-discrimination and proportionality, under Article 27 (2) of the Charter. It should also be recalled that the Commission had already adopted a number of Resolutions on elections in Africa.[27]

**71.** For its part, the Court advocates that, as a judicial body, it is not its role to develop policy guidelines for States on how to conduct elections in a situation of emergency. The Court is of the view that this role falls essentially on the entities that promote human rights at the continental and domestic levels, which indeed have been doing so since the outbreak of the pandemic, as noted above.

**72.** The Court notes that in a pandemic context, where States take measures that are restrictive of human and peoples' rights or postpone elections, it is incumbent on the Court to share with those concerned, through this Opinion, the legal standards applicable to restrictions or suspension of rights under the Charter and other human rights instruments that the Court interprets and applies.

**73.** The Court recalls that one of the specific features of the Charter is that it does not explicit have provisions for derogation of rights even in emergency situations. This means that, under the Charter, States that choose to conduct elections during a state of emergency, as is the case with Covid-19, are obliged to respect human rights. Where they take measures that restrict human rights, they must observe the provisions of Article 27(2) of the Charter, which sets out that "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

**74.** The Court further notes that measures restrictive of rights must also comply with Article 2 of the Charter, which provides that

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

**75.** The Court also considers applicable to the regime of restrictions Article 4(1) and (2) of the International Covenant on Civil and

27 ACHPR/Res.23(XIX)96 – Resolution on Electoral Process and Participatory Governance; ACHPR/Res.138(XXXXIV)08 Resolution on Elections in Africa; ACHPR/Res.164 (XLVII)10 Resolution on the 2010 Elections in Africa; ACHPR/Res.232 (EXT.OS/XIII) 2013 Resolution on Elections in Africa; ACHPR/RES 239 (EXT.OS/XIV) 2013 Resolution on the 2013 Elections in Africa; ACHPR/Res.272 (LV) 2014 Resolution on the 2014 Elections in Africa; ACHPR/Res.293 (EXT.OS/XVII) 2015 Resolution on 2015 Elections in Africa; ACHPR/Res.307 (EXT.OS/XVIII) 2015 Resolution on the Development of Guidelines on Access to Information and Elections in Africa; ACHPR/Res. 331 (EXT.OS/XIX) 2016 Resolution on Elections in Africa.

Political Rights (ICCPR), which provides that

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.[28]

**76.** In view of the above, the Court restates its position that measures restricting rights must be in the form of a general law; must be proportionate;[29] must not undermine the essential content of rights;[30] must not derogate the rights provided for in Articles 6, 7, 8(1) and (2), 11, 15, 16, and 18 of the ICCPR;[31] and must not constitute a form of discrimination against persons.

**77.** With regard to the aim pursued, the Court considers that the restrictions imposed to protect the health and life of persons in the context of elections conducted during a public health emergency or a pandemic must pursue a legitimate aim, which is the satisfaction of the collective interest, as required by Article 27(2) of the Charter.

**78.** As regards proportionality, the Court emphasizes that the restrictions must be appropriate to the intended purpose, including their territorial extent and duration in time; they must be necessary in a democratic society,[32] in the sense that there are no alternative measures less burdensome for the rights of individuals and peoples; and they are not abusive (proportionality *stricto sensu*), in the sense that they are surrounded by safeguards so as to avoid their abusive application.

28 These provisions relate, respectively, to the right to life; the prohibition of torture, cruel, inhuman or degrading treatment or punishment; the prohibition of all forms of slavery, the slave-trade and servitude; the ban of prison for breach of contract; the principle of non-retroactivity of criminal law; the right of everyone to legal personality; the right to freedom of thought, conscience and religion or to adopt a belief of his choice.

29 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits), § 107.1.

30 *Ibidem*.

31 ACHPR, Communication 275/03, *Article 19 v Eritrea* (30 May 2007), § 98.

32 ACHPR, *Kenneth Good v Republic of Botswana*, Communication No. 313/05, Decision of 26 March 2010, § 187.

**79.** The Court further considers that measures restricting rights may not negate the essential content of the restricted rights. That is, the practical effect of the restrictions may not imply the annulment of the essential features of the restricted rights.[33]

**80.** In the instant Request, the Court is of the view that there are some aspects which form the essential content of the right of citizens to freely participate in the government of their countries through elections.[34] These aspects comprise the effective participation in the electoral process, including campaigning, fair and equitable access to the State controlled media; the monitoring of the electoral process by candidates, political parties and the competent voter registration public institutions; the secret ballot; participation in the process of vote counting and publication of the election results by political parties, candidates and any other relevant actors for the transparency of the elections; the possibility of contesting the results before the competent administrative and judicial bodies, if appropriate.

**81.** These aspects of citizens' right to participate in the government of their countries cannot be suppressed, even in an emergency situation such as the Covid-19 Pandemic, without undermining the integrity of the electoral process.

**82.** The Court is of the opinion that particular attention should be given to the right of movement of persons during the election period,

33 ACHPR, *Media Rights Agenda and Others v Nigeria, African Commission on Human and Peoples' Rights*, n.º 105/93, 128/94, 130/94 and 152/96, of 31 October 1998, in which the Commission held that: 67. In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.68. The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27.2, that is that the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality and common interest." 69. The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained. 70. Even more important, a limitation may never have as a consequence that the right itself becomes illusory. "

34 ACHPR, Communication 320/06 - *Pierre Mamboundou v Gabon* (25 July 2013), § 48-49. See also Article 17 of the ACDEG: State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa. To this end, State Parties shall: 1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections. 2. Establish and strengthen national mechanisms that redress election related disputes in a timely manner. 3. Ensure fair and equitable access by contesting parties and candidates to state controlled media during elections. 4. Ensure that there is a binding code of conduct governing legally recognized political stakeholders, government and other political actors prior, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them in through exclusively legal channels."

so restrictions on movement, besides not being absolute, other measures should be considered to mitigate restrictions such as creating conditions for meetings to be held virtually, which requires improving the coverage of the telecommunications network, lifting restrictions on the use of online communication platforms, namely social media.

**83.** On polling day and at electoral events involving crowds of people, appropriate protective measures such as social distancing, the wearing of masks, the sanitation of polling booths and ballot papers, and the protection of polling agents are required, among other such measures that States may deem appropriate.[35]

**84.** Finally, measures restricting rights must not be discriminatory. That is, a State should seek to ensure that, within the overall framework, the measures taken do not, in practice, create an advantage for one party, notably, the incumbent governing parties or candidates, to the detriment of other candidates or parties.

**85.** From the above, the Court is of the opinion that States should regularly conduct elections within the electoral calendar. In a situation of an emergency, such as the Covid-19 Pandemic, it is incumbent upon the States which are sovereign to determine when to conduct elections and to take appropriate measures to protect the health and life of people without undermining the integrity of the elections.

## C. On the obligations of State Parties that decide to postpone elections because of a public health emergency or a pandemic, such as the Covid-19 crisis

**86.** The Author considers that several elections in AU member states are scheduled to be held during the Covid-19 pandemic. In 2020 alone, elections were scheduled in twenty-two (22) AU member states. Therefore, the Author finds it pertinent for the Court to respond to the "growing calls for harmonized approaches that safeguard the right to participate in government, as enshrined in the African Charter and ACDEG, amongst other legal instruments",

35 https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (accessed on 24.6.2021); https://africacdc.org/africa-mask-week-23-30-november-2020/ (accessed on 24.6.2021).

in case of postponement of elections.

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**87.** The *Amicus Curiae* submits that "[i]n case of a postponement of elections, it needs to be determined who has the authority to decide on a new date, in what process and based on what criteria. They have to take into consideration public health imperatives, the legal framework governing elections in the country concerned, political, operational and financial factors, and States' regional and international human rights obligations."

**88.** The *Amicus Curiae* submits that "[a]vailable data indicates that States have taken decisions primarily based on specific local or national contexts. National elections were postponed in Chad, Ethiopia, Gabon, Gambia, Kenya, Liberia, Nigeria, Somalia, with subnational elections postponed in Botswana, Libya, South Africa, Tunisia and Zimbabwe. Postponements varied considerably, from a one-month delay to allow for adjustments made in Liberia to a delay of around ten months in Chad and Ethiopia. The decision to postpone elections has been made by executive bodies, parliaments, and electoral bodies."

**89.** The *Amicus Curiae* submits that "[e]lection experts have raised concerns about the lack of consultation with relevant actors and transparency in taking such decisions. Judicial challenges have been brought in several countries in relation to elections during the Covid-19 period. Legislative approval for public health measures and election schedules has been deemed crucial in countries such as Malawi (*Kathumba and Others v President of Malawi*), the United States of America (U.S.) *(Wisconsin Legislature v Palm*; *Republican National Committee v Democratic National Committee*) and *Singapore (Daniel De Costa Augustin v Attorney General*)."

**90.** Referring to European Convention on Human Rights, it considers that[36] postponement is a restriction to the periodicity of elections under article 3 of the Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms that has

36 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 009, adopted on 20 March 1952, entered into force on 18 May 1954.

to be foreseen by law, be necessary and proportionate.

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**91.** The Court recalls that it is asked whether it is possible to postpone elections because of a situation of emergency, as is the case with the Covid-19 Pandemic. First of all, the Court reaffirms the principle that elections must be held regularly on the scheduled timeframe, as stated above (paragraph 51 above). The postponement, therefore, constitutes an exception to this principle.

**92.** The Court notes that, unlike the holding of elections in a public health emergency or a pandemic, in which rights are restricted in order to protect the health and lives of the people, the postponement of elections entails the suspension of the right of citizens to participate regularly in the governance of their countries through elections, as provided for in Article 13(1) of the Charter and Articles 2(3) and 3(4) both of the ACDEG.

**93.** The Court considers that the question may arise whether the Charter and other instruments which it applies are susceptible to suspension in whole or in part in emergency situations. The Court takes the view, however, that the question of partial suspension of the Charter would arise only if the aspect of the right in question is directly governed by the Charter. To that end, it is necessary to examine the relevant provisions of the Charter as supplemented by the ACDEG.

**94.** The Court notes that Article 13(1) of the Charter provides that "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."

**95.** The Court notes that Article 2(3) of the ACDEG, an instrument that complements the Charter.[37] provides that "The objectives of the present Charter are to: Promote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments." In turn, Article 3(4) of the same instrument provides that "[t]he State Parties shall implement this Charter in accordance with the following principles: Holding of regular, transparent, free and fair

37 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (18 November 2016) 1 AfCLR 668, § 63.

elections."

**96.** The Court is of the view that the above provisions refer back to domestic law the definition of the conditions for the exercise by the citizens of their right to participate in the government of their countries through elections, including in particular their postponement. As these aspects are not directly regulated by the Charter and the ACDEG, the Court considers that it is for the domestic law to define the conditions for postponing elections, namely (i) specific the criteria for postponement and (ii) the regime applicable in the event the term of office of the elected officials expires without elections having been held.

**97.** The Court recalls that it has held that "whilst the said clause envisages the enactment of rules and regulations for the enjoyment of the rights enshrined therein, such rules and regulations may not be allowed to nullify the very rights and liberties they are to regulate."[38] Thus, domestic regulations must comply with international standards in determining the conditions of exercise of the right in question.

## i. Specific criteria for the postponement of elections

**98.** The Court notes that the reference to domestic law to outline the criteria for postponing elections in declared emergencies is subject to certain conditions. The Court is of the view that the regime of restrictions provided for in Article 27(2) of the Charter is applicable *mutatis mutandis* to the suspension of rights. That is, the postponement must be made in application of a general law, must aim at the legitimate purpose, be proportionate to the intended purpose and must not undermine the essential content of rights, as demonstrated above.

**99.** In addition, the Court recalls that as stated above (see paragraph 92), the postponement of elections entails the suspension of the right of citizens to participate regularly in the governance of their countries through elections. In this regard, Article 4(1) of ICCPR provides that:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required

38 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits), § 109; ACHPR, Amnesty International v Zambia, African Commission on Human and Peoples' Rights, Comm. No. 212/98 (5 May 1999), § 50.

by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

**100.** Accordingly, a State concerned who invokes the situation of emergency to postponed elections, must declare it through a general law.[39]

**101.** The Court considers that, in the instant Request, the postponement is legitimate if it aims at protecting the health and life of the people, as well as allowing the creation of conditions for the holding of transparent, free and fair elections.

**102.** The Court notes that, from the point of view of proportionality, the postponement of elections must be a last resort, without which it will not be possible to protect the health and lives of the people and ensure the integrity of the electoral process.[40] In that sense, the period of postponement must be strictly necessary to create the conditions that are required for the elections to take place under the best possible conditions, in accordance with acceptable international standards in the context of an emergency.

**103.** Lastly, the Court considers that the deferral period cannot be used to undermine the obligation of regular legitimization of the elected officials and become a form of unduly prolonging their term of office.

### ii. Applicable standards in the event the term of office of the elected officials expires without elections having been held

**104.** The Court notes that elections can be postponed and still be held before the end of the term of office of the elected officials. In that case, it is only the electoral timetable that has changed, without this implying the expiration of the term of office and the consequent lapse of the organs. In cases where elections are held after the end of the term of office of the organs or the electoral process is completed afterwards, there is a situation of expiration of the organs. The question then arises as to how the problem of the apparent vacancy of power is to be solved.

39 General Comment No. 29 State of Emergency (Article 4 of the ICCPR), § 2, adopted by the UN Committee of Human Rights on 24 July 2001 during its 1950the session.

40 *Ibidem*, § 4.

**105.** The Court recalls that it has already stated above that the details for the exercise of the right of citizens to participate in the government of their countries are governed by domestic law. It is therefore for the latter to define the legal regime applicable when the term of office of elected officials expires. In other words, it is up to the law to define whether interim replacement mechanisms are triggered; whether the elected officials remain in office with full powers; or whether they remain in office but in a caretaker management arrangement, that is, with limited powers.

**106.** The Court recalls that situations of emergency are neither a new phenomenon for States, nor a new phenomenon for the law. Only the causes underlying their declaration vary. Accordingly, in principle, States must have their own legislation on the consequences of the expiry of the term of office of elected officials without elections being held due to the declaration of a state of emergency.

**107.** The Court holds that if such legislation exists, it must be applied, otherwise new legislation should be enacted by the competent bodies. However, the Court is of the view that (see paragraph 54 above), considering that this is a specific context in which the rights of other political and social players at stake, consultation with these actors is required before the legislation in question is enacted by the competent bodies.

## VII. Operative part

**108.** For the above reasons:

**The Court**,

*Unanimously,*

*On jurisdiction*

i. *Finds* that it has jurisdiction to give the Advisory Opinion requested.

*On admissibility*

ii. *Declares* that the Request for Advisory Opinion is admissible.

*On the merits*

*On the decision to conduct or not conduct elections in the context of a public health emergency or a pandemic*

iii. *Finds* that states may decide to conduct or not to conduct elections in the context of a public health emergency or a pandemic. Such a decision requires prior consultation with health authorities and political actors, including representatives of civil society.

*On the obligations of State Parties to ensure effective protection of citizens' right to participate in the government of their countries in the context of an election held during a public health emergency or a pandemic, such as the Covid-19 crisis*

iv. *Finds* that measures restricting rights, applied by States in elections conducted during a public health emergency or a pandemic, must, in accordance with Article 27(2) of the Charter, be in the form of general law; pursue a legitimate purpose; be proportionate; must not undermine the essential content of rights; must not derogate the rights provided for in Articles 6, 7, 8(1) and (2), in Articles 11, 15, 16 and 18, in accordance with Article 4(2) of the ICCPR; and must not be discriminatory.

*On the obligations of State Parties that decide to postpone elections because of a public health emergency or a pandemic, such as the Covid-19 crisis*

v. *Finds* that the postponement of an election because of a public health emergency or a pandemic must comply with Article 27(2) of the Charter mutatis mutandis and Article 4(1) of the ICCPR.

*On the standards applicable in the event the term of office expires*

vi. *Finds* that it is for domestic law to outline the applicable legal standards when the term of office of elected officials expires, including to an interim replacement, to an extension of term of office with full powers, or to a caretaker arrangement. Where appropriate legislation does not exist at the time of a public health emergency or a pandemic, a law may be enacted by the competent bodies, based on prior consultation with political actors, including representatives of civil society.