

Request for Advisory Opinion by the Pan African Parliament (PAP) (Advisory Opinion) (2021) 5 AfCLR 889

Application 001/2021, Request for Advisory Opinion by the Pan African Parliament (PAP) on The Application of the Principle of Regional Rotation in the Election of the Bureau of the PAP

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

The Clerk of the Pan African Parliament brought this request on behalf of the Parliament to seek the Court's interpretation of the core instruments of the Parliament as it relates to the application of the principle of rotation in the election of the Bureau of the Parliament. The Court held that it does not have the jurisdiction to entertain the request since the instruments sought to be interpreted are not human rights instruments.

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

Procedure (urgency under Rule 59 not applicable to requests for advisory opinion, 17-19; expedited consideration of request for advisory opinion, 19-20; legal capacity of author, 22-24)

Jurisdiction (personal jurisdiction, 31-33; African organisation, 23; material jurisdiction, 34-51)

I. The Author of the Request

1. This Request for Advisory Opinion (hereinafter referred to as “the Request”) was filed by the Pan African Parliament (hereinafter referred to as “PAP” or “the Author”) represented by Mr Vipya Harawa, Clerk of PAP.

II. Subject of the Request

2. This Request, as it emerges from the Author's submissions, arises from the suspension on 1 June 2021 of the election of the Bureau of the PAP. The incident occurred after the election process was disrupted due to an argument over the application of the principle of regional rotation in the election of the Bureau.
3. The Author submits that, there is currently a strong dispute within PAP regarding the interpretation of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (hereinafter referred to as “the

PAP Protocol”¹ and the Rules of Procedure of PAP (hereinafter referred to as “the PAP Rules”)² with respect to the election of the Bureau of the Institution. According to the Author, the said dispute is mainly on whether its abovementioned instruments prescribe for the application of the principle of regional rotation adopted by the African Union (AU), and whether the said principle is binding and enforceable when electing the Bureau of PAP.

4. According to the Author, the Southern Caucus of PAP is of the view that the principle of rotation provided for in Article 12(2) and (4) of the PAP Protocol is binding and enforceable and therefore elections of the Bureau that do not apply rotation among the five regions of the African Union would be invalid. The Author submits that, the dispute also arose from the Southern Caucus’ contention that regional rotation is compulsory in light of not only the PAP statutes but also AU practice and past decisions of the AU Executive Council on the issue. This position, the Author avers, is wrongly based on an Opinion which the Southern Caucus sought from the AU Legal Counsel who erred in interpreting the afore mentioned provisions as prescribing rotation in respect of the elections of the Bureau.
5. The Author submits that these contradicting interpretations of the PAP statutes and practices adopted by the Institution over the years in respect of the matter led to stalemate which requires clarification.
6. PAP, therefore, requests for an opinion from the Court on the following questions:
 - a. Whether the regional rotation principle observed by the AU in general, is stipulated in Rule 12 of the PAP Protocol and Rules 14-16 of the Rules of Procedure when electing the Bureau or not.
 - b. And if rotation is not stipulated in the Protocol and Rules of Procedure of PAP, is the principle and practice of rotation binding and enforceable when the PAP elects its Bureau members (President and Vice-President)?
 - c. And whether if the elections of the Bureau are conducted in accordance with the Protocol and Rules of Procedure as they stand currently, that is, without following regional rotation, such elections would be valid and compliant with the PAP Protocol and Rules of Procedure or not.
 - d. And whether the Court is of the opinion that the Rules of Procedure will have to be amended to make regional rotation binding and enforceable or not.

1 Adopted, 2 March 2001; entered into force, 14 December 2003.

2 Adopted, 21 September 2004; amended, 10 October 2011.

- e. And if the Court is of the opinion that to be binding and enforceable, the Rules of Procedure must be amended, whether the elections of the new Bureau should be conducted first to facilitate the amendment of the Rules or not.
7. PAP requests the Court to use its inherent jurisdiction provided in terms of Rule 59(1) and (2) of the Rules of Procedure of the Court (hereinafter referred to as “the Rules of Court”), either based on this request and/or its own accord and treat this matter as urgent, and issue the Advisory Opinion as requested on an urgent basis.

III. Summary of the Procedure before the Court

8. The Request was filed at the Registry of the Court on 18 June 2021.
9. On 21 June 2021, the Registry informed the Author that the Request had been received and registered.
10. On 23 June 2021, the Registry received a supplementary submission from the PAP relating to the Request.
11. On 23 June 2021, the Court requested the African Commission on Human and Peoples’ Rights (hereinafter referred to as the “Commission”) to confirm that the subject matter of the Request was not related to any matter pending before it.
12. On 24 June 2020, the Court received a communication from the Commission in which it advised that the subject matter of the Request is not related to any matter before it.

IV. Alleged urgency under Rule 59(1) of the rules of Court

13. The Author asks the Court to consider the Request on an urgent basis and cites the provisions of 59(1) of the Rules of Court.
14. According to PAP, the elections of Members of its Bureau should be conducted as soon as possible to prevent the Institution from facing further disruption in its operation than has already been caused due to the afore mentioned suspension of the May-June 2021 sitting. The Author submits that the next possible time to hold the elections is during the August 2021 Committee meetings.
15. The Author further submits that, given that the wide media coverage of the disruption of the sitting has negatively impacted on the image of PAP, it is important that this Court urgently considers the Request and issues an opinion to help the Institution hold the election and restore its democratic image.
16. PAP finally avers that an urgent consideration of the Request will prevent the matter from spilling into a political and diplomatic crisis mainly in light of the forthcoming AU Summit.

17. The Court notes that urgency as alleged by the Author under Rule 59(1) of the Rules of Court is not justified as the Rule governs the granting of provisional measures. The Court recalls that urgency as provided for under the said Rule is applicable to contentious matters and not to advisory procedures as it the case in the present Request.
18. The Court observes, with reference to its practice,³ that requests on grounds of urgency made under Rule 59(1) of the Rules of Court as part of advisory processes are to be considered as requests for an expedited consideration of the concerned matter and examined as such.
19. The Court notes that the present Request by PAP is not a contentious matter. Conversely, it emerges from the Author's submissions that what is sought from this Court is that the issue placed before it be considered urgently in order to allow PAP resume the normal course of its operations as soon as possible. In this respect, the Court notes that the failure to complete the elections of its Bureau during the May-June 2021 sitting has left PAP in an institutional limbo which has inevitably disrupted and continue to disrupt its effective operations, and therefore negatively impacts on the discharge of its mandate. In view of the possible scheduling of fresh elections at the August 2021 sitting of the PAP Committees, this Court considers that the determination of the present Request warrants urgency.
20. In the circumstances, and in light of the above, the Court grants the request for expedited consideration of this Request.

V. Capacity of the Clerk to file the present Request on behalf of PAP

21. The Author submits that its Clerk is the appropriate authority to make this Request when there is a vacancy in the whole Bureau

3 See *Jeremy Baguian v Burkina Faso*, Application No. 014/2019; and *Ulrich Dibgolongo v Burkina Faso*, Application No. 013/2019, Registry Letters dated 24 September 2020 informing the Applicants that their requests for expedited consideration had been granted; and Request No. 001/2020 for Advisory Opinion by the Pan African Lawyers Union on obligations of States in respect of holding elections in time of covid-19, Registry Letter dated 2 November 2020 informing the Author that the request for provisional measures has been declined, and expedited consideration granted.

as is currently the case. According to PAP, its Clerk is tasked by the statutes to assist the Bureau in managing the Institution, including to act as head of the Secretariat; organise the elections of the Bureau; be responsible to Parliament on accounting issues; and manage the day-to-day administrative affairs of Parliament.

22. The Court recalls that as a general principle, when it comes to representation, capacity is vested with any person who, by the legal authorisation of the applicant, has the power to act on behalf of the latter. There lies the principle encapsulated in Rule 40(1) of the Rules of Court, which provides that Applications filed before the Court may be signed by the Applicant or his or her representative. Several other provisions of the Rules of Court expound on how capacity applies before the Court, including Rules 41(1)(a), (b), and (c) of the Rules of Court respectively on the filing of Applications by legal person, and on their behalf; and on the signing of Applications by representatives including those of a legal person. In particular, Rule 41(3)(d) of the Rules of Court provides that the representative of a legal person has to prove capacity to act on behalf of the said person.
23. In the present matter, the Court notes that, pursuant to Rule 12(5), 20 and 21 of the PAP Rules, the Clerk is the Head of the Secretariat of the PAP, and is empowered to assist the Bureau in managing the Institution. In particular, Rule 21(b) of PAP Rules provides that the Clerk shall organise the elections of the President and Vice-President of PAP; while Rule 21(g) prescribes that the Clerk “shall manage the day-to-day administrative affairs of Parliament”.
24. The Court observes that the above cited provisions suggest that the Clerk is empowered by the PAP Rules to perform institutional acts that involve the operation of PAP including when the Bureau is on duty. In light of these considerations, there is nothing to suggest to the Court that the Clerk of PAP is not empowered to file the present Request for Advisory Opinion as the representative and on behalf of the Author.

VI. Jurisdiction

25. 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"), whose provisions are reiterated in Rule 82(1) of the Rules of Court, 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 [the African Charter on Human and Peoples' Rights] 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.

26. The Court observes that Rule 87 of its Rules provides that "[t]he Court shall apply, *mutatis mutandis*, the provisions of Part V of [the Rules] to the extent that it deems appropriate, to advisory procedure/proceedings." In line with the prescription in 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 accordance with the Charter, the Protocol and these Rules."
27. Following from the provisions of Rule 49(1) of the Rules, therefore, in all advisory proceedings, the Court must ascertain its jurisdiction.
28. In the present Request, the Author submits that the Request is made under Rules 82 to 86 of the Rules of Court. It also avers that the Request concerns a legal dispute about the proper interpretation of the PAP statutes as they relate to elections, that is the PAP Protocol and its Rules.
29. In its supplementary submissions, the Author avers that the Request relates to legal and human rights issues affecting the rights of individuals as well as the integrity of PAP. The Author also submits that the legal issue arising in the matter relates to basic governance questions provided for in the Charter such as non-discrimination under Article 2, equality before the law and equal protection of the law under Article 3, and the right to participate in public service under Article 13; and in the principles stated in Articles 2, 3, 11 and 17 of the African Charter on Democracy, Elections and Governance. The Author finally states that the Permanent Committee on Rules, Privileges, and Discipline whose function is to assist PAP in interpreting rules related to elections has been dissolved and the advice it gave on the matter were largely ignored.

30. The Court recalls that in advisory opinions, given that such requests do not involve contestation of facts between opposing parties, the issue of territorial and temporal jurisdiction does not arise.⁴ For this reason, therefore, the Court will only interrogate whether the Request satisfies the requirements for personal and material jurisdiction.

A. Personal jurisdiction

31. 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, to request for an advisory opinion.⁵
32. Considering the entities listed in Article 4(1) of the Protocol, the Court observes that PAP is an organ of the AU as expressly provided for under Article 17 of the AU Constitutive Act.
33. Given the above, the Court concludes that it has personal jurisdiction to deal with the Request.

B. Material jurisdiction

34. With respect to its material jurisdiction, the Court recalls that under Article 4(1) of the Protocol, whose provisions are reiterated in Rule 82(2) of the Rules of Court, it may provide an advisory opinion on “any legal matter relating to the Charter or any other relevant human rights instrument ...”.
35. The Court notes that, from the reading of these provisions, two main conditions govern its advisory jurisdiction in respect of subject matter: i) the request for advisory opinion ought to raise a legal question; and ii) the concerned legal question must pertain to either the Charter or a relevant human rights instrument. Furthermore, a literal interpretation of the above stated provisions suggests that the Court cannot exercise jurisdiction unless both conditions are met. In determining whether it has material jurisdiction to entertain the present Request, the Court must therefore consider both conditions in turn.
36. As to whether the question arising in the present Request is a legal matter, the Court observes that the Author mainly seeks an

4 *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (Advisory Opinion) (5 December 2014) 1 AfCLR 725, § 38.

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

answer to whether the principle of regional rotation in electing the Bureau of PAP is binding, enforceable and failure to apply same renders any election null and void.

37. The Court notes that, as the Author rightly submits, the question thus posed pertains to the understanding of prescriptions made under the PAP Protocol and its Rules of Procedure, as well as the application of decisions of the policy organs of the AU, which are legal instruments whose provisions govern elections of the Bureau of PAP. The Court observes that the principle of regional rotation in electing Members of AU Organs appears to be grounded in norms and practices of the Union.⁶ With a particular reference to PAP, it is worth mentioning Decision EX.CL/Dec.979(XXXI) of 2017 in which the AU Executive Council “calls upon the Pan African Parliament to apply the African Union values, rules and regulations in managing all activities of the organ, including rotation of the Bureau and presidency ...”. It flows from the foregoing, that questions pertaining to whether and how the principle of regional rotation applies in conducting elections within AU Organs qualify as legal issues as they are sourced from AU norms which are legal in nature.
38. Noting further that the dispute which forms the subject of the present Request relates to conflicting interpretations within PAP of its Protocol, Rules of Procedure and abovementioned decisions of the AU Executive Council, this Court finds that the Request pertains to a legal matter.
39. Turning to whether the legal matter arising from the present Request relates to the Charter or a relevant human rights instrument, the Court considers that the requirement of the nature of the instrument contemplated under Article 4(1) of the Protocol is preliminary to the relevance of the same instrument. It must therefore be considered first whether the Request pertains to a human rights instrument and, should the Court answer in the negative, it would be superfluous to examine the criterion of relevance.
40. The Court recalls that, in reference to its case-law, a human rights instrument is identified by its intended purpose. Such purpose, as the Court has held, is determined through either an express provision for subjective rights to be enjoyed by individuals or groups; or obligations on State Parties from which the said rights

6 See for instance, EX.CL/Dec.907(XXVIII) on the modalities on implementation of criteria for equitable geographical and gender representation in the African Union Organs whose paragraph 2(ii) provides that “where applicable, one (1) seat shall be a floating seat and will rotate among the five (5) regions”.

can be derived.⁷ More specifically, the Court has held that legal matters pertaining to human rights as intended under Article 4(1) of the Protocol are those “relating to the enjoyment of human rights guaranteed in the aforementioned instruments”.⁸

41. The Court notes that, in the instant matter, the Author seeks an answer to whether, pursuant to Article 12(2) and (4) of the PAP Protocol and Rules 14 to 16 of its Rules, the principle of regional rotation applies while electing the Bureau of PAP. The Court observes that these provisions pertain to the administrative operation of PAP as they relate exclusively to the composition of its Bureau and how the elections of the Bureau Members should be conducted. The same provisions do not provide subjective rights for individuals or groups, nor do they prescribe obligations from which such rights may be derived. As such, the PAP Protocol and its Rules cannot be said to be human rights instruments within the meaning of Article 4(1) of the Court Protocol.
42. The Court is cognisant of the fact that provisions of the PAP Protocol other than those invoked by the Author include references to human rights. For instance, the preamble to the PAP Protocol refers to the commitment of AU Member States to “human rights in accordance with the Charter”; while Article 11(1) of the same instrument entrusts PAP with the advisory and consultative powers to “examine, discuss and make recommendations in relation to, inter alia, matters pertaining to respect of human rights, ...”.
43. The question which may arise is whether their references to human rights suffice for the PAP Protocol, and ancillary its Rules of Procedure to qualify as “human rights instruments” within the meaning of Article 4(1) of the Court Protocol. The answer is again, as earlier found, that the above cited provisions of the PAP Protocol which include mentions of human rights do not enunciate individual subjective rights or prescribe corresponding obligations for State Parties to the instrument. Notably, as an instrument, the PAP Protocol is only meant to establish PAP as an organ of the African Union and its human rights references merely aim to qualify the nature of the functions and specify the mandate of the Institution and not to confer human rights or impose obligations on State Parties to the PAP Protocol. A different understanding would suggest that the AU law-makers intended to adopt the

7 *APDH v Côte d'Ivoire* (merits) (18 November 2016) 1 AfCLR 668, § 57.

8 *Request for Advisory Opinion by the Pan African Lawyers Union on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa*, Request No. 001/2018 (Advisory Opinion, 4 December 2020), § 27.

PAP Protocol as a human rights instrument as would qualify, for instance, the Protocol to the Charter on the Rights of Women in Africa. Such understanding cannot be established for lack of legislative intent.

44. The Court takes notes that, in attempting to establish the human rights nature of the instruments invoked in the present Request, the Author makes reference to the provisions of Article 2, 3, and 13 of the Charter on the rights to non-discrimination, equality before the law, and participation in public affairs; and those of Articles 2, 3, 11 and 17 of the Charter on Democracy relating to the conduct of elections. In this regard, the Court reiterates its earlier finding on the human rights nature of the PAP Protocol and its Rules. Furthermore, the Court notes that the provisions of both Charters relating to elections and participation thereto are expressly said to apply to *citizens* and in respect of elections conducted at the *national level* within AU Member States.
45. The Court observes that, in the present Request, the question posed by the Author is specifically whether the PAP Protocol and its Rules of Procedure prescribe the principle of regional rotation in electing Members of the Bureau of the Institution; and if the non-observance of the principle would render any election void. As such, references made by the Author to the Charter and the Charter on Democracy are not relevant as none of the two instruments includes provisions governing how elections of the Bureau of PAP should be conducted and whether regional rotation would apply.
46. In light of the above, while the question arising in the present Request is indisputably a legal matter within the meaning of Article 4(1) of the Protocol, the Court's material jurisdiction is not established with respect to whether the PAP Protocol and its Rules of Procedure are human rights instruments.
47. Having said that, the Court cannot overlook both the paramount importance of the mandate entrusted to PAP and the fact that the present Request involves a situation that threatens the smooth operation of the Institution as it faces a legal quandary, which must be solved. Against this backdrop and in light of the fact that the present Opinion is being given within its advisory jurisdiction, the Court considers that the matter at hand warrants that PAP still be enlightened as to what legal means could be effectively utilized to resolve the predicament that it faces.
48. On this point, the Court notes that Article 20 of the PAP Protocol provides that

The Court of Justice shall be seized with all matters of interpretation emanating from this Protocol. Pending its establishment, such matters

shall be submitted to the Assembly which shall decide by a two-thirds majority.⁹

49. The Court further notes that, as stated in the afore mentioned provisions, the Court of Justice of the African Union was subsequently established and vested with jurisdiction, under Article 19(1)(b) of its Protocol, to examine “all disputes and applications which relate to the interpretation, application or validity of Union treaties ...”.¹⁰ In a comparative approach, rules on jurisdiction in other regions and globally reveal a trend to specialisation that entrusts Courts of Justice with competence to examine general affairs and interpretation of treaties of general nature, including community law, as opposed to human rights treaties. Illustrations include the European Court of Justice and the European Court of Human Rights for Europe; the International Court of Justice and Human Rights Treaty Bodies for the United Nations at the global level; and the Court of Justice of the AU and the African Court on Human and Peoples’ Rights in Africa.
50. The Court observes that, in any event, the PAP Protocol does not make provision for any exception to the jurisdiction of the Court of Justice other than the AU Assembly of Heads of State and Government. While it is not ignored that the Court of Justice of the AU has not begun its operations despite the entry into force of its Protocol since 2009, this Court cannot arrogate itself jurisdiction that it was not granted in its own Protocol for the mere reason that the legally competent judicial body is not yet operational. Without a doubt, Article 20 of the PAP Protocol ousts the jurisdiction of this Court when it comes to interpretation of the said Protocol.
51. Besides, the AU law-makers have unequivocally provided for jurisdiction to be vested in the Assembly pending the operation of the Court of Justice. This Court cannot therefore exercise jurisdiction on the question arising in the present Request without overstepping jurisdictional boundaries vis-à-vis both the Court of Justice and the Assembly.

9 The 2014 Protocol extending the mandate of the PAP also includes a similar provision vesting jurisdiction with the African Court of Justice and Human Rights (ACJHR) of the AU “on all questions of interpretation of this Protocol”.

10 See Protocol of the Court of Justice of the African Union; adopted, 1 July 2003; entered into force, 11 February 2009.

VII. Operative part

52. For the above reasons:

The Court,

Unanimously,

- i. *Finds* that it does not have jurisdiction to give the Advisory Opinion requested.