

AFRICAN UNION

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UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF:

REQUEST FOR ADVISORY OPINION BY 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

REQUEST NO. 002/2013



ADVISORY OPINION



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The Court composed of: Augustino S. L. RAMADHANI, President, Elsie N. THOMPSON, Vice-President; Gérard NIYUNGEKO; Duncan TAMBALA; Sylvain ORÉ; El Hadji GUISSSE, Ben KIOKO; Rafâa BEN ACHOUR; Judges: and Robert ENO, Registrar,

Having deliberated,

Gives the following Advisory Opinion:

I. NATURE OF THE REQUEST

1. The African Committee of Experts on the Rights & Welfare of the Child (hereinafter the “Committee”) seized the African Court on Human and Peoples’ Rights (hereinafter referred to as the “Court”) with a Request for Advisory Opinion under Article 4 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”) and Rule 68 of the Rules of Court (hereinafter referred to as the “Rules”).

2. The Committee submits that it is established under Article 32 of the African Charter on the Rights and Welfare of the Child (hereinafter referred to as the “Children’s Charter”), within the African Union, to *inter alia*, promote and protect the rights enshrined in the Children’s Charter, formulate and lay down rules and principles aimed at protecting the rights and welfare of children in Africa and, interpret provisions of the Children’s Charter.¹ The Committee further submits that

¹ DSA/ACE/64/1697.13, at paragraph 1.

it has been bestowed with quasi-judicial powers to receive communications and investigate any matter prescribed by the Children's Charter.² The Committee adds that the mandate of the Court will complement that of the Committee and thus, ensure effective protection of the rights and welfare of the child in Africa.³

3. On the substance of the request, the Committee submits that on the proper interpretation of Article 4 (1) of the Court Protocol and Rule 68 (1) of the Rules, the Court has jurisdiction to provide an advisory opinion upon the request of the African Union or any of its organs representing it in specific matters, such as the Committee.⁴

4. The Committee has also sought right of access before the Court in contentious matters pursuant to Article 5 (1) (e) of the Court Protocol and Rule 33 (1) (e) of the Rules and mainly based its request on the contention that the mandate of the Court will complement that of the Committee and thus, ensure effective protection of the rights and welfare of the child in Africa.⁵

5. With regard to the Applicable law, the Committee relies on certain provisions of the Protocol, namely, the fifth preambular paragraph as well as Article 3, which provides for the contentious jurisdiction of the Court. In addition, the Committee cites Article 5 (1) (e) of the Protocol as well as Rule 33 (1) (e) of the Rules, which provides for access to the Court by African Intergovernmental Organisations. With regard to advisory jurisdiction of the Court, the Committee cites Article 4 of the Protocol, which provides for the advisory jurisdiction of the

² *Ibid.*

³ *Ibid.*, at paragraph 2.

⁴ *Ibid.*, at paragraph 3.

⁵ *Ibid.*, at paragraph 2.



Court; and; Rule 68 (1), which sets out the entities that are entitled to bring a request for an advisory opinion before the Court.

6. To buttress its request, the Committee refers to Article 4 (1) of the Children's Charter, which provides for the best interests of the child to be the primary consideration in all actions undertaken; Article 32, which establishes the Committee; and Article 42, which outlines the mandate of the Committee. The Committee also relies on Article 31 (1) of the Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention"), which provides for the general rule of interpretation of treaties.

7. The Committee also cites three authorities in support of its request, namely:

- i. The International Court of Justice (hereinafter referred to as the "ICJ") in Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations; ICJ Reports (1950) 8.
- ii The Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (On behalf of children of Nubian descent in Kenya)/the Government of Kenya decided upon by the Committee;⁶
- iii. ZH Tanzania v Secretary of State for the Home Department, 2011 UK SC 4.

II. ISSUES FOR DETERMINATION

⁶ Communication No. Com/002/2009 (2011).

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8. Based on the above, the Committee submits to the Court the following issues for determination:

- a. Whether the Committee has standing to request an advisory opinion under Article 4 (1) of the Protocol;
- b. Whether the Committee, as an 'African Intergovernmental Organization', is included within the meaning of Article 5 (1) (e) of the Protocol;
- c. Whether Article 5 (1) (e) should be interpreted in line with the mandates of the African Court and the Committee; and
- d. Whether the standing of the Committee before the Court under Article 5 (1) (e) of the Protocol is in line with the object and purpose of this Protocol.

II. PROCEDURE

9. The request dated 11 November 2013, was received at the Registry of the Court on 25 November 2013. The Registry acknowledged receipt by letter dated 26 November 2013.

10. During its 31st Ordinary Session, held between 25 November and 6 December 2013, the Court decided to transmit the request by the Committee to Member States of the African Union, the African Commission on Human and Peoples' Rights (hereinafter the "African Commission"), and other interested entities, pursuant to Rule 69 of the Rules and that, in accordance with Rule 70, they should be given a deadline of 90 days within which to submit their observations, if any.

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11. In the instant Request, the court identified the interested entities as the following:

- Economic, Social and Cultural Council (ECOSSOC);
- African Union Commission on International Law (AUCIL);
- African Union Commission (AUC);
- African Commission on Human and Peoples' Rights (ACHPR);
- African Institute of International Law (AIIL);
- African Committee of Experts on the Rights of the Child;
- Gender & Women Development Directorate;
- Pan African Parliament;
- Citizens and Diaspora Organizations Directorate (CIDO).

12. By letter dated 2 January 2014, the Registry transmitted the same to all African Union Member States, requesting interested parties to submit their written submissions within 90 days of receipt of the letter.

13. By email dated 30 January 2014, the Office of the Legal Counsel (OLC) advised that the request had not been attached to the Registry's letter dated 2 February 2014.

14. By email of the same date, Registry forwarded the request and thereafter the OLC acknowledged receipt.

15. By letter dated 19 February 2014, the Republic of Kenya submitted its observations on the questions raised in the request.

16. During its 32nd Session, held from 10 to 28 March 2014, the Court decided to extend the time within which Member States could make observations on the subject of the request to 30 April 2014. Similarly, the Court decided to invite the specified African Union organs and institutions to make observations on the Request by the same time limit.





17. By letter dated 18 March 2014, the Registry requested the African Commission (the African Commission) to confirm whether or not the subject of the Request related to a matter pending before the African Commission, and by letter dated 19 March 2014, the African Commission confirmed that the subject matter of the Request was not related to any matter before it.

18. By letters and Notes verbal dated 26 March 2014, the Registry communicated the decision of the Court to the Members States and entities concerned.

19. By letter dated 7 April 2014, the African Commission sought an extension of time to 31 May 2014 to make its observations on the Request. By letter dated 15 April 2014, the Registry advised the African Commission that its request for extension of time had been granted.

20. By email dated 30 April 2014, Burkina-Faso requested more time to submit its opinion.

21. By its letter dated 16 May, the Registry informed Burkina-Faso that the Court had granted its request for extension of time and that it has to file the observations by 31 May 2014.

22. During the 33rd Session held from 26 May to 23 June 2014, the Court decided to grant a new deadline to all Member States and concerned entities until 30 June 2014, for them to submit their comments and observations on the Request. On 2 June 2014, the Registry notified all member States accordingly.

23. The Republic of Senegal submitted its observations on the Request by letter dated 5 May 2014.

24. By letter dated 29 May 2014, the African Commission submitted its observations on the Request, which was received at the Registry on 2 June 2014. The Registry acknowledged receipt on 3 June.


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25. On 2 June 2014, the Registry received the submission of the Republic of Gabon dated 06 May 2014 and the Registry acknowledged receipt on 4th June.

III. OBSERVATIONS RECEIVED FROM STATES AND OTHER ENTITIES

26. Following the request for comments and observations, the Court received responses from the Republic of Kenya,⁷ the Republic of Senegal,⁸ the Republic of Gabon⁹ and the African Commission on Human and Peoples' Rights.¹⁰ The AU Commission did not submit any observations.

27. The Republic of Kenya proffered its affirmative opinion¹¹ on all the questions raised by the Committee in its Request as set out in paragraph 8 above..

28. In this regard, the Republic of Kenya submits that: -

- 'in accordance with Article 4(1) of the Protocol, the Committee has standing to request for an opinion and the Court has jurisdiction to provide the opinion on a legal matter related to the Charter.
- The African Committee is an Intergovernmental Organization within the meaning of Article 5(1)(e) of the Protocol and is therefore entitled to submit cases to the Court.
- The Committee should be given access to the Court for cases concerning serious violations of children's rights in line with the object and purpose of the Court Protocol which is to strengthen the African Human Rights system'.

⁷ MFA.AU16/38.

⁸ No 02927/MJ/DDH/MMS.

⁹ No 001703/MAEFIR/SG/DGA/JI/DATI/DTM.

¹⁰ Ref:AfCHPR/Reg./ADV./002/2013/018.

¹¹ MFA.AU 16/38, at paragraph 1.

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29. The Republic of Senegal expressed the view that 'in accordance with Article 32 of the Children's Charter, the Committee is an organization recognized by the African Union and its request for Advisory Opinion is allowed under Article 4(1).¹² ...that the Committee's request is in accordance with Rule 68 (1) of the Rules as it relates to an issue that is purely legal". For the Republic of Senegal, 'The African Committee of Experts on the Rights and Welfare of the Child is indeed founded in seizing the African Court on any matter within the Court's jurisdiction; The African Committee of Experts on the Rights and Welfare of the Child is an inter-governmental organization; The Court should comply with the powers of interpretation conferred on it under Article 3 of the Protocol setting up the African Court on Human and Peoples' Rights; Referrals to the African Court on Human and Peoples by the African Committee on Experts on the Rights and Welfare of the Child are indeed consistent with the aims and objectives of the Protocol.'

30. For the Republic of Gabon, *'After considering all the provisions referred to, in support of the request made by the Committee, the general principles governing contentious, jurisdictional and quasi jurisdictional procedure in the field of human rights, notably, the relevant African instruments in this area, the jurisdiction of the Court and that the Committee, the Ministry is of the view that the Committee is on the one hand, entitled to request for an advisory opinion from AfCHPR, such as the one currently under consideration'; and that, 'the Committee is, on the other hand, entitled to seek redress for any alleged cases of violation of the rights of the Child.'*

31. The African Commission submitted a comprehensive response to all the issues raised in the request for an Advisory Opinion. It expressed the view that the Committee could be considered as an African Organization within the meaning of Article 4(1) of the Protocol but not as an organ. Furthermore, the African Commission asserted that 'the Committee should not be considered as an intergovernmental organization within the meaning of Article 5(1) of the protocol'. Nevertheless, the African Commission left all these issues to the appreciation of the Court.

32. As far as it is concerned, the African Commission concluded by asserting that the Committee was entitled to request for an Advisory Opinion as an "African

¹² No 02927/MJ/DDH/MMS, at page 2.

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Organization”, but not as an organ of the Union, within the meaning of Article 4(1) of the Protocol.¹³ With regard to Article 5(1) of the Protocol,¹⁴ the African Commission also asserted that the Committee should not be considered as “an intergovernmental organization”. Nevertheless, the African Commission left all these issues to the appreciation of the Court.

IV. THE JURISDICTION OF THE COURT

33. Although the Court will focus on jurisdiction in this section, it cannot lose sight of the fact that there are also other matters relating to contents of the request that must be considered.

34. Pursuant to the provisions of Article 4 (1) of the Protocol, 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.

35. Rule 68 (1) of the Rules provides that “Requests for Advisory opinion pursuant to Article 4 of the Protocol may be filed with the Court by a Member State, by the African Union, by any organ of the African Union or by an African organization recognised by the African Union. The request shall be on legal matters and shall state with precision the specific questions on which the opinion of the Court is being sought”. In addition, sub-paragraph 2 requires that “any request for advisory opinion shall specify the provisions of the Charter or of any other international human rights instrument in respect of which the advisory opinion is being sought, the circumstances giving rise to the request as well as the names and addresses of the representatives of the entities making the request”.

¹³ Ref: AfCHPR/Reg./ADV./002/2013/018, at page 3, paragraph 3.1, page 13, at paragraph 3.30.

¹⁴ *Ibid*, at pages 4 to 9, paragraphs 3.5, 3.8 to 3.18; page 11, paragraph 3.23; pages 14 to 18, paragraphs 3.34, 3.35 and 3.37 to 3.42.



36. In the instant Request, the authors have requested for an interpretation of the Protocol in order to determine whether the Committee is entitled to request for an advisory opinion and to submit cases to the Court under Articles 4 and 5 of the Protocol.

37. In view of the nature of the Request, and given the fact that one of the issues to be determined is precisely related to the personal jurisdiction of the Court, namely, whether the Committee is one of the entities envisaged under Article 4(2) of the Protocol and Rule 68 (2) of the Rules, the Court does not have to consider it at this stage since it will be considered along with the substance.

38. With regard to material jurisdiction, the Court is required to consider whether the request is on legal matters relating to human rights and is satisfied that indeed that is the case.

39. The Court is of the view that given the nature of the Request there is no need to consider *jurisdiction ratione temporis* and *jurisdiction ratione loci*, because these two issues do not arise in a request for advisory opinion.

40. By virtue of Article 4 (1) of the Protocol, the Court "may provide" an opinion and, therefore, has discretion on whether or not to provide an Advisory Opinion on the request submitted to it. Having considered this matter, the Court finds no compelling reason not to provide an opinion.

41. Pursuant to the provisions of Article 4 (2) of the Protocol and Rule 68 (2) of the Rules, and as indicated above, the Court is required to determine, in terms of

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the contents of the Request the following additional conditions, which can deciphered from these two provisions, namely, whether:

- i. The Request states with precision the specific questions on which the opinion of the Court is being sought;
- ii. The Request specifies the provisions of the Charter or of any other international human rights instrument in respect of which the advisory opinion is being sought;
- iii. The Request specifies the circumstances giving rise to the Request;
- iv. The request specifies the names and addresses of the representatives of the entities making the request.

42. Having considered the request in the light of the above conditions, the Court is of the view that all the conditions above have been satisfied.

V. ADMISSIBILITY

43. Before considering a request for Advisory Opinion, the Court is required to apply Rule 68 (3) of the Rules relating to admissibility, which provides as follows: "the subject matter of the request for advisory opinion shall not relate to an application pending before the African Commission". The Court is of the view that given the nature of this request, there cannot be another similar matter pending before the African Commission. In any case, by letter of 19 March 2014, the Commission itself confirmed that the matter was not pending before it.

44. The Court will now proceed to consider the substance of the Request.

VI. SUBSTANCE OF THE REQUEST

- a) 'Whether the Committee has a standing to request an advisory opinion under Article 4 (1) of the Protocol'

45. On the first issue relating to a request for an advisory opinion, the Committee submits that it is one of the bodies entitled to request for an advisory opinion under Article 4 (1) of the Protocol, and that it has *locus standi* before the Court as an organ established, recognised and operating within the framework of the AU.

46. The Committee further submits that the interpretation of a treaty in its ordinary meaning is an important element of international law. With regard to this, it cites the ICJ Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations in which the ICJ held that


‘[T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context that is the end of the matter.’¹⁵

47. The Committee goes on to refer to Article 32 of the Children's Charter, which provides that ‘An African Committee on the Rights and Welfare of the Child’ shall be established within the Organization of African Unity to promote and protect the rights of children.’

48. The Committee asserts that in its ordinary and natural meaning and within the context of the said Charter, the provisions of the article clearly show that the Committee is an organ of the AU, established within the framework of the Union and that, this position, is cemented by the 2002 Resolution of the AU Assembly, which directed that the Children's Committee ‘shall henceforth operate within the framework of the African Union’.¹⁶

¹⁵ ICJ Reports (1950) 8.

¹⁶ AU Doc ASS/AU/Dec.1 (i) xi.



49. The Committee therefore submits that as an organ of the AU, it has the *locus standi* to bring a request for an advisory opinion before the Court as provided under Article 4(1) of the Court Protocol, acting within the framework of the AU.

Observations submitted by States and other entities

50. As already indicated above, the Member States that responded to the Request, namely, Kenya, Senegal and Gabon, all of them supported the request by the Committee in all its aspects.

51. On its part, the Commission argued that the Committee was entitled to request for an Advisory Opinion as an "African Organization", but not as an organ of the Union, within the meaning of Article 4(1) of the Protocol.

Consideration of the issue by the Court

52. Article 4 (1) of the Protocol establishing the Court reads as follows:

'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 instruments, provided that the subject matter of the opinion is not related to a matter being examined by the African Commission'.

53. In the view of the Court, the provisions of Article 4 (1) of the Protocol implies the need for the Court to determine whether the Committee is an organ of the Union or an African organization recognised by the AU.

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54. The Court notes that in 2002, by decision AU/Ass/Dec.1 (i) (xi), adopted at its First Ordinary Session, the Assembly of the Union decided that 'the Committee would henceforth operate within the framework of the Union.' This decision should be taken into consideration when examining the specific mandate of the Committee and its nature, the actual practice of the Committee's operations, its status and relationship with the policy organs of the AU. The Court further observes that the Children's Charter, which has created the Committee, has been adopted under the aegis of the Pan African organization, the then OAU. It should be noted that all the States that submitted observations on the Request, expressed the view that the Committee is an organ of the Union.

55. The Court is mindful that the Committee is a specialised body of the AU in the area of child rights and has all the attributes of an organ of the Union in terms of reporting, its quasi-judicial nature, its budgeting processes, as well as the manner in which it reports to the policy organs. In this regard, the Court notes that the Committee is always treated in the same manner as other AU Organs and is listed in the Agendas of the Executive Council and the Assembly of the Union, which are formally adopted by those organs, among "organs of the Union" for purposes of submission and consideration of proposed budgets and annual reports. Decisions of the Policy organs on the annual reports of the Committee also appear next to those of the other organs, which are listed under Article 5 of the Constitutive Act.

56. Taking all these factors into account, the Court is satisfied that even though there has not been any formal decision of the Union to the effect that the Committee shall be an organ of the Union, the policy organs of the AU have treated the Committee as an organ of the Union. It would appear that the Assembly



of the Union has interpreted and implemented its 2002 decision as assimilating the Committee as an organ of the Union.

57. The Court is therefore satisfied that the Committee is an organ of the Union; and in view of this finding, it logically follows, that the Committee has *locus standi* to request for an advisory opinion from the Court pursuant to Article 4 (1) of the Protocol in its capacity as an organ of the Union.

b) 'Whether the Committee, as an 'African Intergovernmental Organization', is included within the meaning of Article 5 (1) (e) of the Protocol'

58. The Court will now consider the second aspect of the request, relating to access by the Committee to the Court under Article 5 (1) (e) of the Court Protocol to submit cases in contentious matters.

59. The Court is of the view that this second aspect of the request by the Committee rests entirely on whether the Committee is an African intergovernmental organization within the meaning of sub paragraph (e) of Article 5 (1) of the Protocol, which provides as follows:

'The following entities are entitled to submit cases to the Court:

- a. The Commission;
- b. The State Party which has lodged a complaint to the Commission;
- c. The State Party against which the complaint has been lodged at the Commission;
- d. The State Party whose citizen is a victim of human rights violation;

e. African Intergovernmental Organizations.'

60. According to the Committee, in determining the meaning of 'African inter-governmental organisation', recourse should be made to Article 31 (1) of the Vienna Convention, which stipulates that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

61. The Committee also asserts that in determining the ordinary meaning of a treaty provision, the Court may resort to the use of dictionaries, as the African Commission has done in the past.¹⁷ The Committee also relies on the definition of 'African' in the Oxford dictionary as 'relating to Africa or connected to Africa',¹⁸ and underlines that the Committee forms part of the monitoring body of the African human rights system within the African Union and thus qualifies as 'African'. In its view, this is further supported by the 'African' nature of the Committee in that 41 African States have ratified the Children's Charter, which is its founding instrument.¹⁹ The Committee submits that these elements and others are sufficient to qualify it as "African".

62. With regard to the concept of 'intergovernmental organization', the Committee submits that it has the attributes of such an organization as defined by Pevehouse²⁰, namely:

¹⁷ See Interights et al. (On behalf of Mariette Sorijaleen Bosch) / Botswana 240/01 (2003); Michael Majuru / Zimbabwe 308/05 (2008); Ilesanmi / Nigeria 268/03 (2005); Anuak Justice Council/ Ethiopia 299/05 (2006); and Zimbabwe Lawyers for Human Rights & Associated Newspaper of Zimbabwe/Zimbabwe 284/03(2009) amongst other where the African Commission used the Black's Law Dictionary, the Oxford Advanced Dictionary and the Longman Synonym Dictionary as interpretative tools.

¹⁸ Concise Oxford Dictionary, 10th edition, 1999.

¹⁹ <http://www.achrp.org/instruments/childi> (accessed 29 March 2013).

²⁰ "Pevehouse et al intergovernmental organisations 1815-2000: (2003) 2.

'(1) is a formal entity, (2) has [three or more] 'sovereign' states as members, and (3) possesses a permanent secretariat or other indication of institutionalisation such as headquarters and/or permanent staff'.

63. According to the Committee, the first component of this definition requires that intergovernmental organisations must be formed by an internationally recognised treaty,²¹ which the Committee fits, because it is established by an internationally recognized treaty: the Children's Charter, ratified by 41 African Union Member States.

64. The Committee submits that it manifestly meets the second requirement, as it has more than two member states in that it is composed of eleven members from eleven different countries and has a permanent secretariat based in Ethiopia.

65. From the forgoing argument, the Committee submits that it qualifies as an African intergovernmental organization, entitled to submit cases to the Court.²²

66. In its observations on the Request, the Republic of Kenya argued, as indicated above, that the Committee should be given access to the Court for cases concerning serious violations of children's rights in line with the object and purpose of the Court Protocol which is to strengthen the African human rights system.' For its part, Senegal submitted that the Committee is an intergovernmental organization. On the other hand, Gabon asserted that the *'the Committee is.... entitled to seek redress for any alleged cases of violation of the rights of the Child'*.

²¹ As above.

²² Scholarly support for this position includes F Viljoen *International Human Rights Law in Africa* (2012) 434.

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67. According to the Commission, the plain and ordinary meaning of the term "intergovernmental organization " is an entity created by treaty, involving two or more 'international governmental organisation', or 'as between or among governments'. It added that the term "intergovernmental" is thus definitive of entities whose membership is exclusively or primarily for States and that such organizations would also ordinarily have State representatives directing the affairs of the organization.

68. The Court notes that Article 5 (1) of the Protocol sets out a list of the entities that have right of access to the Court for purposes of submitting "cases", to the Court. Notably, not all entities entitled to request the Court for an opinion are also entitled to bring cases to the Court. Thus, for example, whereas the AU organs are entitled to request for an advisory opinion under Article 4 (1), they are not entitled to submit cases under Article 5 of the Court Protocol; only the African Commission is specifically mentioned among the entities that can bring cases under Article 5 of the Protocol.

69. The Court notes further that the Committee is not listed under Article 5 (1) of the Protocol, even though the Children's Charter had already been adopted when the Protocol was being adopted in 1998²³. Although the Charter came into force in 1999, a year after adoption of the Court Protocol, the Committee is taken to have been established by its founding instrument of 1990,²⁴ and therefore could have been included along with the African commission among the entities with direct access to the Court under Article 5 (1).

70. Having not been listed under Article 5 (1) of the Court Protocol, the only avenue open for the Committee to submit cases to the Court is if it is determined

²³ The Children's Charter was adopted on 11 July 1990, while the Protocol was adopted on 9 June 1998.

²⁴ Protocol, Art. 5 (1) (a)

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by the Court to be an intergovernmental organization within the meaning of subparagraph 5 (1) (e). Thus, this question turns on the meaning of "African Intergovernmental Organisation" as used in Article 5 (1) (e) of the Protocol. As noted above, the Committee is an "organ of the Union" and therefore is 'African'. The only word that remains to be interpreted is whether it is an "intergovernmental organization."

71. The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations adopted at Vienna on 21 March 1986, does not define the term 'intergovernmental nor does it set out the attributes or characteristics of an intergovernmental organization.' Nevertheless, it defines the term 'international organization' as meaning an 'intergovernmental organization.'²⁵

72. According to the Encyclopedia of Public International Law, an Intergovernmental Organization is defined as an "association of States established by and based upon a treaty, which pursues common aims and which has its own special organs to fulfil particular functions within the organization."²⁶

73. Pursuant to the provisions of Articles 32 and 33 of the Children's Charter, the Committee is composed of eleven expert members, nominated and elected by States as individuals, and who after their election serve in their personal capacity. Thus, the members of the Committee cannot be described as representatives of states, which seems to the Court to be an important element in determining whether an entity is an "intergovernmental" body or not. Indisputably, States have

²⁵ Article 2 (1) (i)

²⁶ This definition implies that the IGO establishes other organs or institutions to ensure the realization of its objectives. For example, the AU has established several institutions/organs, including the Committee to ensure the objectives of the Union are realized.

no representatives directing the affairs of the Committee. In any event, even if it was so composed, that would still not make it be considered as an inter-governmental organisation.

74. The Committee would have to be expressly added to the list of entities entitled to bring cases under Article 5 of the Protocol, or be determined to be an intergovernmental organisation in order to bring cases to the Court under that Article in its current form. Thus, even though the Children's Charter under which it is established has States as "parties", the Committee as a body or organisation is not "intergovernmental" in the sense that it is not composed of government representatives. In addition, the Court is of the view that an organ cannot at the same time be an international organisation as the former would ordinarily be part of an organization whilst the latter legally stands on its own. Accordingly, the Committee cannot bring cases to the Court alleging violations of human or children's rights under Article 5 (1) (e) of the Protocol in the capacity of an "intergovernmental" organisation.²⁷

75. In the Court's view, however, it is in the interests of protection of rights on the continent that the Committee's mandate should be reinforced just as the African Commission's protective mandate is enhanced under the complementary relationship with the Court. Indeed, there does not appear to be a conceivable reason why the Committee was not included among the organs that can bring cases before the Court under Article 5 (1) of the Protocol, in order to give it the same reinforcement that the African Commission has under the complementary relationship with the Court. It should be noted that this apparent omission was subsequently addressed and included in Article 30(c) of the Protocol on the Statute

²⁸ M Hansungule, "African courts and the African Commission on Human and Peoples' Rights", 251. available at <http://www.kas.de/upload/auslandshomepagesinantibia/Human Rights in Africa/8 Hansungule.pdf> (Accessed on 28 March 2013).

of the African Court of Justice and Human Rights adopted in 2008 by the Assembly of the Union at Sharm el Sheikh, which grants the Committee direct access to the Court.

76. The Court notes that the mandate of the Committee and the African Commission under their respective constituent treaties are broadly similar, except that the former specialises in children's rights and welfare. Nevertheless, the Court finds that its hands are tied by the protocol and therefore cannot grant the Committee standing to access the Court that has not been accorded to it under the constituent instrument and the Protocol.

77. Considering that the third and fourth limb of the request of the Committee are interrelated in that they rest on the contention that the best tool for construction of a legal instrument is purposive interpretation, the Court will deal with the two limbs together, namely:

- c) 'Whether Article 5 (1) (e) should be interpreted in line with the mandates of the African Court and the Committee;
- d) Whether the standing of the Committee before the Court under Article 5 (1) (e) of the Protocol is in line with the object and purpose of the Court Protocol'.

78. Pursuant to Article 3 of the Court Protocol, the jurisdiction of the Court extends to 'all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned'.







79. According to the Committee, the Children's Charter as an instrument adopted within the African human rights system falls under the provision of 'any other relevant human rights instrument ratified by the States concerned,' and therefore falls within the jurisdiction of the Court. It argues that by extension, as the Committee is the primary monitoring body of the Children's Charter under which the Court has jurisdiction, it would defeat the purpose of the Protocol to exclude it from having a standing before the Court. Further, the Committee urges that in order to exercise its mandate effectively, it should be given access to the Court for cases concerning serious violations of children's rights.

80. The Committee also draws the Court's attention to Article 42 of the Children's Charter, which empowers it to promote and protect the rights enshrined in the Children's Charter, thus establishing the protective mandate of the Committee and enabling it to assume a quasi-judicial role by, *inter alia*, considering individual communications. It expresses the view that the Court's mandate is to reinforce the protective mandate of the African Commission and by extension the African human rights framework as a whole, which includes the Committee.

81. Making reference to the rationale for the creation of the Court as stipulated in the Preamble of the Court Protocol, as to 'enhance the efficiency of the African Commission', the Committee recalls that it has been facing the same major challenges that the African Commission's protective mandate has encountered over the years²⁸, namely, non-compliance because of non-binding findings, absence of effective remedies, institutional weaknesses and lack of human and financial

²⁸ M Hansungule, "African courts and the African Commission on Human and Peoples' Rights", 251, available at <http://www.kas.de/upload/auslandshomepagesinantibia/Human Rights in Africa/8 Hansungule.pdf> (Accessed on 28 March 2013).

resources.²⁹ It thus argues that the Court can play a complementary and reinforcing role with regard to adjudication, both in relation to the African Commission and the Committee³⁰ and as a 'remedy to the shortcomings of these bodies.'³¹

82. In light of these considerations, the Committee concludes that an overarching goal of the Protocol establishing the Court is to create an institutional framework for complementarity between the Court, the African Commission and the Committee,³² and that, in line with the respective mandates, the Committee should have standing before the African Court, as a quasi-judicial body making non-binding recommendations.

83. According to the Commission's view, 'Article 5 of the Protocol aims to do nothing more than prescribe who may approach the Court. In particular, Article 5(1)(e) of the Court's Protocol aims to grant "African intergovernmental organisations" access to the Court. There may be many entities which if allowed to approach the Court it would enhance or further the broader objects and purpose of protection of human and peoples' rights. However the broader objects and purpose of protecting human and peoples' rights does not define who is granted access to the Court. Rather which entities are eventually granted access to the Court is prescribed under the relevant law. In this regard Article 5 of the Court's Protocol prescribes who may access the Court. The Committee is neither listed under Article 5(1)(a)-(d), nor in the Commission's view an "African intergovernmental organisation" as under Article 5(1)(e) thereof'.

²⁹ F Viljoen (n 14 above), 416 African Union, 'Information note of the first meeting of African Court of Human and Peoples' Rights', available at www.africanunion.org/background_document_on_the_african_court (accessed on 4 April 2013).

³⁰ S T Eborah, 'Towards a positive application of complementarity in the African Human Rights System: issues of functions and relations' (2011) 22 *The European Journal of International Law* 672; D M Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal on Children's Rights* 170.

³¹ Eboerah (n 15 above) 672.

³² D Juma 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned gamekeeper', http://papers.ssrn.com/so13/papers.cfm?abstract_id=1391482 (accessed 6 March 2013).

84. In support of the second limb (d) of the request, the Committee argues that with respect to the interpretation of treaties, the ICJ in the *Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations*,³³ held the view that treaties should be interpreted 'in accordance with their object and purpose.' According to the Committee, this position is further strengthened by Article 31 of the Vienna Convention, which provides specifically that treaties are to be interpreted in the light of their objects and purpose, adding that one of the overriding objectives of the Protocol, as reflected in its Preamble, is the promotion and protection of human rights in Africa.³⁴

85. The Committee goes on to refer to Article 4(1) of the Children's Charter which underlines that 'in all actions undertaken concerning the child, the best interests of the child shall be the primary consideration,' as well as the United Nations Committee on the Rights of the Child in the General Comment No 5 (2003)³⁵ to the following effect:

'Courts of law [...] every legislative, administrative and judicial body or Institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions.'

86. The Committee also suggests that the Court also consider the Committee's own decision in *The Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (On behalf of children of Nubian descent in Kenya) /the Government of Kenya*,³⁶ in which it held that the best interests of the child,

³³ ICJ Reports (1950) 8.

³⁴ Paras 3 and 7 of the Protocol to the African Court.

³⁵ General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, Para. 6).

³⁶ Supra No 8 above..

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should in some instances, trump technical requirements that could hinder accessibility to courts of justice for children. This is because 'it is not in the best interests of [children] to leave them in a legal limbo'.³⁷ The Committee also refers to the Supreme Court of England, which held in the case of *ZH Tanzania v Secretary of State for the Home Department*,³⁸ that 'where the best interests of the child clearly favour a certain course, that course should be followed.'

87. The Committee invites the Court to be persuaded by the reasoning above and to arrive at the most favourable ruling to the best interests of the child and to include the Committee as one of the bodies having standing before the Court, thus promoting and protecting the rights and welfare of the child. The Committee believes that this interpretation supports the objective of the Court Protocol to supplement existing quasi-judicial human rights protective mechanisms such as the Committee.³⁹

88. The Committee submits that the object and purpose of human rights treaties and the requirement of effectiveness suggest that treaties should be broadly construed in order to arrive at an alternative that is most favourable to the protection of the rights enshrined in the treaty.⁴⁰ Further, a teleological interpretation of Article 5 of the Protocol should therefore be construed to give the widest possible access to the Court. This interpretation fulfils the primary *raison d'être* of international human rights law, in general, and the African Human Rights Court specifically, which is to protect and promote human rights.⁴¹ It adds that a holistic interpretation in line with the object and purpose of the Court Protocol is

³⁷ See paragraph 29 of the above communication.

³⁸ 2011 UK SC 4.

³⁹ F Viljoen (n 13 above) 407.

⁴⁰ M Killander 'Interpreting regional Human Rights Treaties' <file:///C:/Users/OWNER/Desktop/clinicals/getArtigo13.php.htm> (accessed 9 March 2013)

⁴¹ D Juma 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned gamekeeper' http://papers.ssrn.com/so13/papers.cfm?abstract_id=1391482 (Accessed 9 March 2013)

also supportive of efforts to internationalise human rights and develop the regional human rights system as a complementary layer.⁴²

89. According to the Committee, Article 5 (1) (e) of the Court Protocol should therefore be interpreted holistically to include it as having standing before the Court. It submits that the intention to grant it standing before the Court is demonstrated by Article 30 (c) of the Protocol on the Statute of the African Court of Justice and Human Rights adopted on 1 July 2008, which grants the Committee direct access to the Court. There is, therefore, the need to interpret the provisions of this Protocol in the spirit of this evolving context.

90. The Committee submits that a purposive reading of Article 5 (1) (e) of the Court Protocol in line with Article 4 (1) of the Children's Charter leads to the conclusion that the Committee qualifies to submit cases to the African Court. This approach, the Committee adds, would mirror the object and purpose of the Court Protocol, which is to strengthen the African human rights system.⁴³

91. Making its observations on this limb of the Request, the Commission observes, first, that the framing of this question by the Committee 'presupposes that the Committee is "an African Intergovernmental Organisation".' It goes on to argue that 'whereas the Committee is an African organisation, the Commission opines that it is not an "intergovernmental" one'. The Commission goes on to assert that 'even though the Committee it is an African treaty organisation, it is not an "intergovernmental" organisation.'⁴⁴ It is as suggested above simply an

⁴² Juma (n 26 above).

⁴³ Viljoen (n 13 above) 407.

⁴⁴ For Example, the ASEAN Intergovernmental Commission on Human Rights (AICHR) provided for under Art. 14 of the Charter of the Association of South-East Asian Nations (ASEAN Charter). AICHR is, as the name indicates an "intergovernmental" organisation. Its composition (membership) as prescribed under Article 5.1 of the Terms of Reference of the ASEAN Intergovernmental Commission for Human Rights is "member states of ASEAN".

autonomous specialised treaty body similar to the Commission which had to be expressly mentioned because it is equally not an "intergovernmental" organisation.'

92. The Court accepts that the purposive theory or presumption is one of the tools, if not the most important, of interpreting or construing a legal instrument in order to determine whether a statute applies to a particular circumstance, and if yes, what are the consequences. The Court is also aware that there has been a global movement towards the use of the purposive approach over the other approaches which suggested that one start with the literal meaning, then go on to the golden approach (still according to the plain meaning, but with a slight modification to avoid the absurdity), and if a sensible result is still not reached, then it would use the purposive approach - interpret according to what interpretation would best achieve the purpose of the act.⁴⁵

93. The Court would like to recall, at the outset, that while the Committee has not been mentioned among institutions that can bring cases to the Court under Article 5 (1) of the Protocol, it has been specifically authorised to do so in the subsequent 2008 Protocol on the merger of the current Court with the Court of Justice of the African Union to create the African Court of Justice and Human Rights.

94. The Court notes that this action by the policy organs confirms firstly, the view of the Court that it is highly desirable that the Committee should have access

⁴⁵ Aharon Barak, *Purposive Interpretation in Law*, Princeton University Press, 2005. See also John F. Manning, "Competing Presumptions About Statutory Coherence", 74 *Fordham Law Review*, 2009 (2006). Available at: <http://ir.lawnet.fordham.edu/flr/vol74/iss4/15>

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to the Court, and; secondly, that the initial omission of the Committee in the Court Protocol may very well have be attributable to unintended consequences.

95. The Court is persuaded that the arguments that the best interests of the child should be paramount are well founded. It is also persuaded, as the Committee held, in the Nubian Children case referred to earlier, that the best interest of the child, should in some instances, trump technical requirements that could hinder accessibility to courts of justice for children.

96. In the view of the Court, these are well-founded arguments but pertaining largely to specific and substantive matters before the Court relating to the rights of the child. Indeed, this has been the approach of the Court all along in ensuring that all its decisions are based on the overriding objective of promoting access in order to ensure protection of human rights.

97. The Court is conscious that the Children's Charter falls under the provision 'any other relevant human rights instrument ratified by the states concerned'. It also notes that the Committee is the primary monitoring body of the Children's Charter under which the Court has jurisdiction, and that the Committee having access to the Court would facilitate more effective exercise of its mandate concerning serious violations of children's rights.

98. Nevertheless, the Court is not convinced that the use of the purposive approach can override the clear and unambiguous intention of the legislature, which can be discerned from the plain and ordinary meaning of the text in question. In the instant Request, the Court notes that the meaning of the text is clear and unambiguous on who can access the Court under Article 5 of the Protocol. Indeed, it is a well-known principle of law that where a treaty sets out an



exhaustive list, this cannot be interpreted to include an entity that is not listed, even if it has the same attributes.

99. In the instant Request, however, the Court cannot substitute itself and assume the functions of the legislature, where the latter's intention is clear and unequivocal.

100. For these reasons, the Court

Unanimously,

- 1). Finds that it has jurisdiction to give the advisory opinion requested;
- (2). Decides that the Request for an advisory opinion is admissible;
- (3). Replies in the following manner to the questions put by the Committee:
 - i. That the Committee is an organ of the Union and has standing to request for an advisory opinion under Article 4 (1) of the Court Protocol;
 - ii. That the Committee is not an 'African Intergovernmental Organization', within the meaning of Article 5(1) (e) of the Court Protocol;
 - iii. The Court is of the view that it is highly desirable that the Committee is given direct access to the Court under Article 5 (1) of the Protocol.
- :
4. There shall be no order as to costs.

Done, at Addis Ababa this Fifth Day of December 2014, in the English and French languages, the English text being authoritative.



Signed:

Augustino S. L. Ramadhani, President

Elsie N. Thompson, Vice President

Gerard Niyungeko, Judge

Duncan Tambala, Judge

Sylvain ORE, Judge

El Hadji GUISSSE, Judge

Ben KIOKO, Judge; and

Rafaa Ben Achour, Judge.

Robert ENO, Registrar



Augustino S. L. Ramadhani

Elsie N. Thompson

Gerard Niyungeko

Duncan Tambala

Sylvain ORE

El Hadji GUISSSE

Ben KIOKO

Rafaa Ben Achour

Robert ENO

AFRICAN UNION

الاتحاد الأفريقي



UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF

REQUEST FOR ADVISORY OPINION BY 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

REQUEST NO. 002/2013

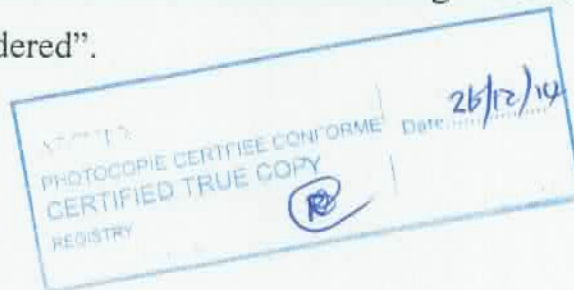
CORRIGENDUM TO ADVISORY OPINION

CONSIDERING the Advisory Opinion rendered by the Court on 5 December, 2014;

Considering the need to make modifications to make the Opinion clearer;

The Advisory Opinion is hereby modified as follows:

- i. Paragraph 33 becomes paragraph 40 and now reads: "Although the Court has focused on jurisdiction in this section, it cannot lose sight of the fact that there are also other matters relating to contents of the request that must be considered".

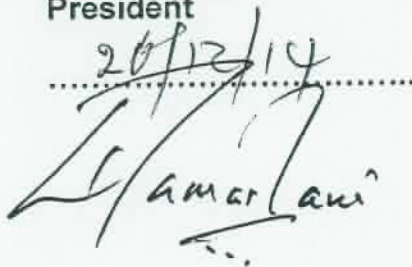


- ii. Paragraph 39 becomes paragraph 38 and now reads: "The Court is of the view that given the nature of the Request, which does not involve determination of facts, there is no need to consider *jurisdiction ratione temporis and jurisdiction ratione loci*.

Done in English and French, the English text being authoritative.

Dated at Addis Ababa, Ethiopia, this 5th day of December, 2014

Justice Augustino S. L. Ramadhani
President

26/12/14

Augustino



Robert Eno
Registrar

26/12/2014
