

AFRICAN UNION
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UNION AFRICAINE
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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

**REQUEST FOR ADVISORY OPINION BY THE COALITION FOR THE
INTERNATIONAL CRIMINAL COURT, THE LEGAL DEFENCE & ASSISTANCE
PROJECT (LEDAP), THE CIVIL RESOURCE DEVELOPMENT & DOCUMENTATION
CENTER (CIRDDOC) AND THE WOMEN ADVOCATES DOCUMENTATION CENTER
(WARDC)**

No. 001 of 2015

ORDER

The Court composed of: Augustino S. L. RAMADHANI, President, Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, Duncan TAMBALA, Sylvain ORÉ, El Hadji GUISSÉ, Ben KIOKO, Rafâa BEN ACHOUR, Solomy B. BOSSA and Ângelo V MATUSSE, Judges; and Robert ENO, Registrar.

IN THE MATTER OF

REQUEST FOR ADVISORY OPINION BY THE COALITION FOR THE INTERNATIONAL CRIMINAL COURT, THE LEGAL DEFENCE & ASSISTANCE PROJECT (LEDAP), THE CIVIL RESOURCE DEVELOPMENT & DOCUMENTATION CENTER (CIRDDOC) AND THE WOMEN ADVOCATES DOCUMENTATION CENTER (WARDC)

After deliberations;

Makes the following Order:

I. Nature of the Request

1. The Authors of the Request state that they are Non-governmental organizations (NGOs) based and registered in Nigeria and they undertake the promotion and protection of human rights and the fight against impunity across Africa, especially in West Africa.
2. The Authors submit that they "have justiciable interest in the issues raised in this Request", noting that Nigeria is a State Party to the Rome Statute of the International Criminal Court (ICC) and a member of the African Union (AU), and therefore bound by treaty obligations under the Rome Statute by virtue of Article 86 thereof and the Resolutions of the AU, by virtue of Article 23 of the Constitutive Act of the African Union.
3. The Authors argue that being a coalition of NGOs working to end impunity in Nigeria and across West Africa, "and engaging with these governments on ICC, as well as on AU issues", they are deeply interested in the questions presented to the Court for Advisory

Opinion. The Authors submit that their particular interest in the Request arises from the following:

- i. In engaging with Government officials on ICC and AU issues, as well as broader international justice issues, they need advice on which of the treaty obligations [under the ICC and the AU] are superior when they conflict. According to the Authors, "there is such a conflict because the AU, by various Resolutions, has demanded that its members should not cooperate with the ICC with respect to the arrest and surrender of President Omar Al-Bashir of Sudan who has been indicted for crimes under the Rome Statute of the ICC, while at the same time the Statute creates treaty obligations on its States parties, such as Nigeria, Ghana and other countries in West Africa, to cooperate with the ICC, especially in the arrest and surrender of any person indicted by the ICC against whom a warrant of arrest has been issued, as in the case of President Omar Al-Bashir".
 - ii. The Authors work on projects aimed at tackling impunity in Nigeria and in West Africa, and they rely on the treaty obligations of these countries under the Rome Statute as well as domestic laws, including the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act of Nigeria, and other international and regional instruments.
 - iii. In various summits of Heads of State and Government of the AU, between 2011 and 2013, the Union adopted various resolutions calling on its members not to cooperate with the Office of the Prosecutor of the ICC with respect to the arrest and surrender of President Omar Al-Bashir of Sudan.
4. The Authors submit that since 2009, when President Al-Bashir was indicted by the ICC and international warrants for his arrest were issued and forwarded to the Nigerian Government, the said President Al-Bashir has entered the territory of Nigeria twice, in 2009 and in 2013. On both occasions, the Nigerian Government had obligation under the Rome Statute to arrest and surrender him to the ICC. At the same time, the Nigerian

Government was faced with various resolutions of the African Union referred to in paragraph 3 above, demanding that it refrained from cooperating with the ICC in that respect. They aver that as civil society organizations working to tackle impunity, including demanding the arrest and surrender of persons indicted by the ICC, they demanded that the Nigerian Government arrest and surrender President Al-Bashir on both occasions, noting that in his 2013 visit, one of them sought a court order from the domestic court to compel the Government to fulfill its treaty obligation in this regard, but the case was not heard before President Al-Bashir left the territory of Nigeria.

II. Issues for determination by the Court

5. The Authors request the Court to give its opinion on the following issues:

- i. Whether the treaty obligation of an African State Party to the Rome Statute of the ICC to cooperate with the Court is superior to the obligation of that state to comply with AU resolutions calling for non-cooperation of its members with the ICC.
- ii. If the answer to question (i) above is in the affirmative, whether all African States Parties to the ICC have overriding legal obligation above all other legal or diplomatic obligations arising from resolutions or decisions of the African Union to arrest and surrender President Omar Al-Bashir any time he enters the territory of any of the African States Parties to the ICC.

III. PROCEDURE

6. The Request was received at the Registry of the Court on 28 March 2014.
7. On 8 April 2014, the Registrar wrote to the Executive Secretary of the African Commission on Human and Peoples' Rights (the Commission) seeking confirmation whether the subject matter of the Request was related to a matter being examined by the Commission.

8. By letter dated 17 April 2014, the Executive Secretary of the Commission confirmed that the subject matter of the Request was not related to any matter before the Commission.
9. At its 33rd Ordinary Session held from 28 May to 13 June, 2014, the Court examined the Request and noted that it did not comply with the requirements under Rule 68 of the Rules of Court, and instructed the Registrar to notify the Authors accordingly.
10. By letter dated 30 June 2014, the Registrar notified the Authors of the Court's decision, that is, that the said Request does not meet the requirements under Rule 68 of the Rules of Court, in particular, Rule 68(2).
11. At its 34th Ordinary Session held from 8 to 19 September, 2014, the Court noted that the Authors had not responded to the Registrar's letter of 30 June 2014.
12. At its 36th Ordinary Session held from 9 to 27 March 2015, the Court noted that the Authors had still not responded to the Registrar's letter of 30 June 2014.
13. At its 37th Ordinary Session held from 18 May to 5 June, 2015, the Court, by an Order, struck out the Request on the grounds that it does not satisfy the requirements under Rule 68 of the Rules of Court and for lack of interest on the part of the Authors.
14. By letter of 30 June 2015, the Registrar served the Court Order on the Authors.
15. By email dated 1 July 2015, the Authors transmitted to the Court a document dated 14 November, 2014, by which they claimed they had sent the same to the Registry in response to the Registrar's letter of 30 June, 2014, and requested leave of Court to relist the Request for consideration.

Decision of the Court

16. At its 38th Ordinary Session held from 31 August to 18 September 2015, the Court considered the Authors' request for the matter to be relisted and noted that the Authors did not supply any evidence to show that they had transmitted their response to the Registrar's letter of 30 June, 2014, to justify a relisting.
17. Be that as it may, the Court decided to examine the new request and noted that it still did not comply with the requirements under Rule 68(2) of the Rules of Court, which provides 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'*.
18. The Court notes in this regard that the Authors have not specified the provisions of the Charter or any other international human rights instrument in respect of which the advisory opinion is being sought. The issues raised by the Authors are rather of general public international law and not of human rights. Indeed, the issues raised have to do with the hierarchy of norms in Public International Law.

Now therefore, having determined that:

The Authors have not supplied any evidence to show that they responded to the Registrar's letter of 30 June, 2014, and that the new Request does not comply with the requirements under Rule 68 of the Rules of Court;

The Court, by a majority of nine (9) to one (1), Judge Fatsah OUGUERGOUZ dissenting,

Rejects the Authors' request to relist this Request for Advisory Opinion and Orders that the same BE and is HEREBY struck out.

In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules, the Dissenting Opinion of Judge Fatsah OUGUERGOUZ is appended to this Order.

Done at Arusha, this 29th day of November, in the year Two Thousand and Fifteen, in English and French, the English version being authoritative.

Signed:


Justice Augustino S. L. Ramadhani, President

Robert Eno, Registrar



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COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES
AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS

Request for Advisory Opinion N° 001/2015

Coalition for the International Criminal Court, Legal Defence & Assistance Project (LEDAP), Civil Resource Development & Documentation Center (CIRDDOC) and Women Advocates Documentation Center (WARDC)

Dissenting Opinion of Judge Fatsah Ouguergouz

1. I consider that this request for re-listing in the general list of the Court of the request for advisory opinion N° 001/2014 is “*formally*” admissible as it stood, and that there was thus no reason to dismiss it. I therefore wish to express my dissenting opinion on the Court’s response to this request, and on the procedure followed in treating it.

I - Procedure followed in the treatment of this request

2. I would recall that this request was received at the Registry on 1st July 2015 and was registered in the Court’s general list under N° 001/2015. This request sought the restoration in the list, of the request for advisory opinion received at the Registry on 28 March 2014, listed under N° 001/2014 and struck off this same general list by an Order of the Court dated 5 June 2015.

3. In this respect, it is my view that the Court should have observed greater procedural orthodoxy in the treatment of the current request (N° 001/2015) as well as of the previous request (N° 001/2014). Two hypotheses could be envisaged in the instant case.

4. Either that this request was not “*in due and proper form*” because it did not meet the conditions set forth in Rule 68 (2) of the Rules of Court, in which case it lies with the Registrar to notify the Authors accordingly and invite them to

comply with the requirements laid down in the Rule. The request should therefore not have been registered in the general list since the aforesaid requirements had not been met, and it is by a letter from the Registrar that the Authors of the request should have been notified.

5. Or that the request was "*in due and proper form*", i.e., that it fulfilled the conditions prescribed by Rule 68 (2), in which case it should have been registered in the Court's general list, been transmitted to all the entities mentioned in Rule 69 of the Rules, and gone through a thorough judicial process pursuant to Rules 70 to 73 of the Rules.

6. In my opinion, there is no middle way. If, as the Court observed in its Order, the request "*did not comply with the requirements under Rule 68 of the Rules of Court*", the said request should have been given a purely administrative treatment and rejected by a simple letter from the Registrar.

7. I therefore recommend that, in future, only requests for advisory opinion that fulfill the conditions of formal validity set forth in the Protocol and in the Rules of Court should be registered on the general list. Only the requests that contain all the information required to determine the jurisdiction of the Court to entertain them, shall be deemed to fulfill the said conditions.

8. Under Article 4 (1) of the Protocol and Rule 68 of the Rules of Court, the advisory jurisdiction of the Court is subject to four conditions: 1) the request for advisory opinion shall emanate from an entity entitled to do so, 2) it shall be on a legal matter, 3) it shall relate to the African Charter or any other international human rights instrument, and 4) its subject matter shall not relate to an application pending before the African Commission.

II - Response to the request

9. The request for advisory opinion registered in the general list under N^o 001/2014 was struck off by Order of the Court dated 5 June 2015 on the dual reason that it did not meet the conditions laid down in Rule 68 (2) of the Rules and that the Authors had not shown interest in continuing with the procedure.

10. On 1st July 2015, the four concerned Non-Governmental Organizations requested a re-listing of the request on the general list, providing copy of the correspondence that they had addressed to the Court on 15 November 2014 but which clearly never reached the Registry.

11. In the present Order, the Court justified its refusal to re-list the request with two reasons: to wit, that:

“The Authors have not supplied any evidence to show that they responded to the Court’s letter of 30 June, 2014, and that the new Request does not comply with the requirements under Rule 68 of the Rules of Court”.

12. With regard to the first reason, I believe that the Court should have offered the Authors of the request the opportunity to adduce evidence that they have indeed responded to the letter of 30 June 2014. The Court should therefore have instructed the Registry to write to the Authors of the request asking them, for example, to produce a receipt for dispatch of their response.

13. It is however, in my opinion, the second reason that is more substantial and more probative in the instant case, to wit, that *“the new Request does not comply with the requirements under Rule 68 of the Rules of Court”*. In this regard, a reading of the first sentence of paragraph 17 of the Order shows that reference is being made more specifically to the conditions laid down in paragraph 2 of Rule 68.

14. In the opinion of the Court, the Authors of the request *“have not specified the provisions of the Charter or any other international human rights instrument in respect of which the advisory opinion is being sought”* and *“the issues raised by the Authors are of general public international law and not of human rights”*;¹ the Court then specifies that *“the issues raised have to do with the hierarchy of norms in Public International Law”*.

15. I do not share the position of my colleagues on these points.

16. With respect to the first point, I would like to underline that both in their new request dated 1 July 2015, and in the request received at the Registry on 28 March 2014, and registered under N° 001/2014, the Authors indicated their reliance in particular on Articles 1, 4, 5, 12, 13 and 86 of the Rome Statute of the International Criminal Court; they also specified the circumstances giving rise to their request.

17. The question was therefore to know whether or not the Rome Statute could be considered *“a human rights instrument”* under Article 4 of the Protocol; the Court should have clearly pronounced itself on this question.

18. Regarding the second point, *i.e.* that *“the issues raised by the Authors are of general public international law and not of human rights”* and *“have to do with the hierarchy of norms in Public International Law”*, it is an assertion which the

¹ These are the very reasons given in the Court’s Order of 5 June 2015 to reject the request for advisory opinion No. 001/2014.

Court should have elaborated. For my part, I believe that the fact that the issues raised relate to “*general public international law*” and “*hierarchy of norms in Public International Law*” in particular does not necessarily mean that the said issues are alien to “*human rights*”.

19. Indeed, the protection of human rights for which the Court is responsible under the Protocol is based on international law and is by definition irrigated by that law. In more general terms, the whole issue of “*human rights*” is more and more imbibed by international law, in terms of subjects, sources, international responsibility and peaceful settlement of disputes. The question of human rights, like any other matter governed by international law, is therefore likely to raise issues relating to the law of treaties in general and the hierarchy of international norms in particular.

20. Should the Court, for example, refrain from entertaining a request for advisory opinion relating to the African Charter on Human and Peoples' Rights, a reference instrument *par excellence* for the Court, on the grounds that such request raises questions of “*general public international law*” and “*hierarchy of international norms*” in particular? This question of course calls for a negative response.

21. It is therefore my view that the two main reasons advanced by the Court to dismiss that request (see *supra*, paragraph 14), and the previous request, are insufficient and should have been further elaborated.

22. The four concerned NGOs are as a matter of fact entitled to know for what specific reasons their request failed to meet the requirements set forth in Rule 68 of the Rules.² In addition to the right of the Authors of the request to be informed of the reasons for the dismissal of their request, there is also the question of the pedagogical virtues of the Court's pronouncements and the need for the Court to inform potential authors of requests for advisory opinions of what exactly is expected of them.

23. In any event, the two reasons advanced by the Court (see *supra*, paragraph 14), in particular that “*the issues raised by the Authors are of general public international law [hierarchy of international norms] and not of human rights*”,

² See for example the reasons developed by the International Court of Justice and the European Court of Human Rights for declining their jurisdiction to provide the opinion requested: Advisory opinion of ICJ of 8 July 1996 on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* and the decision of the European Court of 2 June 2004 on the *Competence of the Court to give an advisory opinion*.

indeed touch upon the material jurisdiction of the Court. In dismissing the request on this basis, the Court implicitly ruled on its material jurisdiction and this is a question that it should have addressed in the context of the procedure laid down in Rules 69-73 of the Rules. It would have been desirable for the Court to rule on this request by way of an “*advisory opinion*”³ or at the least by way of a “*decision*”⁴, rather than a simple Order signed only by the President of the Court.

24. I would observe, in substance, that when seized of a request for advisory opinion, the Court should ensure that it has both the personal and material jurisdiction to deal with the request. It follows, from a reading of the present Order, that the Court is concerned only with its material jurisdiction and, thus, seems to have taken its personal jurisdiction for granted. As the Court did not in this case pronounce itself on the *locus standi* of the four non-governmental organizations seeking an advisory opinion on the basis of Article 4 (1) of the Protocol, it does not seem to me appropriate to express my opinion on this issue.

Fatsah Ouguergouz

Fatsah Ouguergouz
Judge



³ See for example the afore-mentioned advisory opinion of 8 July 1996 on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, by which the International Court of Justice declares that it does not have jurisdiction to give the opinion requested.

⁴ See for example the afore-mentioned decision of 2 June 2004 on the *Competence of the Court to give an advisory opinion*, by which the European Court declares that it does not have jurisdiction to give the opinion requested.