


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

**REQUEST FOR ADVISORY OPINION BY THE SOCIO-ECONOMIC RIGHTS AND
ACCOUNTABILITY PROJECT (SERAP)**

No. 001/2013

ADVISORY OPINION

26 May 2017



NG of Aug 2017

The Court composed of: Sylvain ORÉ - President, Ben KIOKO - Vice President; Gérard NIYUNGEKO, El Hadji GUISSÉ, Rafâa BEN ACHOUR, Solomy B. BOSSA and Angelo V. MATUSSE, - Judges; and Robert ENO, Registrar.

REQUEST FOR ADVISORY OPINION BY THE SOCIO-ECONOMIC RIGHTS AND ACCOUNTABILITY PROJECT (SERAP)

Having deliberated,

Gives the following Advisory Opinion:

I. Author of the Request

1. The Request is submitted by the Socio-Economic Rights and Accountability Project (hereinafter referred to as "*SERAP*"), a non-profit Non-Governmental Organization (NGO), registered in 2004 and based in the Federal Republic of Nigeria. The primary objective of SERAP is the promotion of transparency and accountability in the public and private sectors, through human rights.

II. Subject matter of the Request

2. SERAP submits that its Request is based on Articles 2, 19, 21 and 22 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the African Charter"), and 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"). It submits further that by virtue of the said Article 4 of the Protocol, the Court has jurisdiction to provide the advisory opinion requested.



3. It emerges from SERAP's request that the Court is required to give an Advisory opinion on the following :

"i. Whether SERAP is an African organization recognized by the AU; and

ii. Whether extreme, systemic and widespread poverty is a violation of certain provisions of the African Charter, in particular, Article 2 which prohibits discrimination based on "any other status."

4. SERAP argues that by virtue of the fact that it is legally registered in Nigeria, it is an African organization. It also maintains that it is an organization recognized by an organ of the African Union (AU), namely, the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission"), having been granted Observer Status by this organ. It argues further that:

"on the basis of its observer status with the African Commission, and the fact that the African Commission is an organ of the African Union, it has the competence to request an opinion relating to any question within the scope of the African Charter on Human and Peoples' Rights and the African Union Constitutive Act".

5. SERAP also submits that "the non-specific and non-restrictive nature of the word 'organization' used in Article 4 of the Protocol suggests that a non-governmental organization like SERAP was contemplated by the drafters of the Protocol". It notes further that:

"if the drafters wanted to limit the use of the words 'African Organization' only to 'African Inter-governmental Organizations', they would have specifically mentioned this in Article 4".

6. According to SERAP, the use of the term 'African organization' in Article 4 of the Protocol and repeated in the Rules of Procedure of the Court represents a conscious choice to leave the use for the Court to decide. SERAP submits that:

"unlike Article 4, Article 5 [of the Protocol] makes specific reference to 'African Inter-governmental organizations' which further goes to show that the drafters' intention in Article 4 was to have a generic category of 'organization' that is broad and all-encompassing to include organizations like SERAP. In fact, the phrase 'African organization' is used throughout the Rules of Court, and there is nothing in the Rules to suggest that the words have any restrictive meaning".

7. On the merits, SERAP relies on a number of UN instruments and reports to establish a relationship between poverty and human rights.

8. SERAP refers to a World Bank report, published in 2013¹ which indicates that the actual number of people living in poverty across Africa has risen in recent times, despite the increasing discovery of wealth and natural resources in many African States. According to SERAP, while the report notes a marginal decline in the overall number of people living in extreme poverty, it also provides proof that Africa still has the highest poverty rate in the world, with 47.5 percent of the population living on US\$ 1.25 a day, which accounts for 30 percent of the world's poor.

9. SERAP argues that in the final report of the ex-United Nations Human Rights Commission, titled *Human Rights and Extreme Poverty*, Leandro Despouy² stated that poverty spreads and creates a vicious circle of poverty, noting that, the report speaks of extreme poverty as a state of severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information, and that it "depended not only on income but also on access to social services".

¹ See World Bank, 2013. 'Africa Development Indicators 2012/13'. (Washington, D.C: World Bank). Quoted by SERAP in its submission received at the Registry on 29 January, 2016.

² Chairman of the United Nations Human Rights Commission, March 2001 – March 2002.



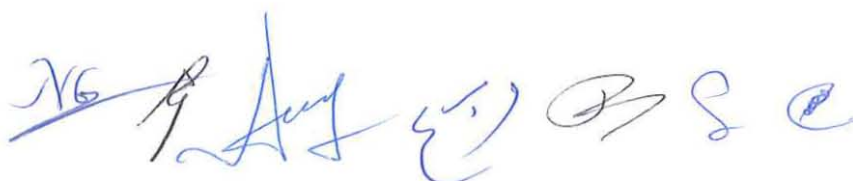
10. SERAP asserts further that these various initiatives were reflected in the recent work of the UN Human Rights Council, in view of the impact of poverty on human rights, and notes that in July 2012, the Special Rapporteur on Human Rights and Extreme Poverty, Magdalena Sepulveda Carmona, submitted her final report on the Guiding Principles on Extreme Poverty and Human Rights to the Human Rights Council, which Principles, according to SERAP, significantly underscores that poverty is not just an economic or developmental matter but also a crucial human rights issue, and that poverty is not an inevitable problem but something "created, enabled and perpetuated by acts and omissions of States and other economic actors".

11. On the definition of the term poverty, SERAP refers to the meaning espoused by the UN Committee on Economic, Social and Cultural Rights, which defines poverty as

"a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living".³

12. SERAP therefore submits that there is a strong relationship between poverty, under-development and lack of respect for human rights guaranteed under the African Charter, noting that this proposition is buttressed by the consensus reached at the World Conference on Human Rights in Vienna in 1993, that extreme poverty and social exclusion should be regarded as violations of human dignity and human rights.

³ See SERAP'S submissions of 12 January, 2016, citing General Comment No. 8 of the UN Committee on Economic, Social and Cultural Rights 'substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, Statement adopted by the Committee on 4 May, 2001. UN Doc E/C. 12/2001/10.



III. Procedure

13. The Request was received at the Registry of the Court on 14 March 2013.
14. By a letter dated 10 June 2013, the Registrar enquired from the African Commission whether the subject matter of the Request relates to a matter pending before the African Commission.
15. By a letter dated 25 June 2013, the African Commission confirmed that the subject matter of the Request does not relate to any matter pending before it.
16. By separate letters, all dated 3 July 2013, the Registry transmitted copies of the Request to the African Commission as well as to Member States of the AU, through the Chairperson of the African Union Commission (AUC); and at its 30th Ordinary Session held from 16 to 27 September 2013, the Court decided to invite the Member States to submit written observations on the Request within 90 days.
17. On 12 August 2013, the Registry received from the Centre for Human Rights, University of Pretoria (hereinafter referred to as "the Centre"), a request for leave to submit an *amicus curiae* brief on the Request. *The Court granted leave to the Centre to act as amicus curiae.*
18. On 24 September 2014, the Registry notified Member States and interested parties of the expiry of the time limit prescribed for them to submit their observations, and **by letter of the same date**, the Registry requested the African Union Commission to transmit to it an official list of organizations that have observer status with the AU.
19. On 13 January, 2015, the AUC informed the Court that its records indicate that SERAP is not accredited to the African Union nor has it signed any Memorandum of Understanding with the AUC/Union.

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20. At its 38th Ordinary Session held from 31 August to 18 September 2015, the Court requested SERAP to make submissions on the merits of the Request.

21. On 29 January 2016, the Court received SERAP's submission on the merits of the Request, and by a letter dated 16 February 2016, the submission was transmitted to Member States of the African Union which were requested to make observations thereon, if they so wished, within ninety (90) days of receipt of the notification.

22. Between 5 May and 29 June 2016, the Court received written submissions on the Request from the Republic of Zambia, the Federal Republic of Nigeria, the Republic of Uganda, the Republic of Cape Verde, Burkina Faso and the Republic of Burundi.

IV. Jurisdiction of the Court

i. The position of SERAP

23. Paragraphs 2 to 5 above reflect the submissions of SERAP on the jurisdiction of the Court.

ii. Observations from Member States⁴

24. Six (6) Member States of the African Union submitted written observations, some touching on the jurisdiction of the Court. The States are:

- i. Republic of Uganda⁵;
- ii. Republic of Zambia⁶;
- iii. Federal Republic of Nigeria⁷;

⁴ No observations were received from AU Organs.

⁵ On 25 June 2014.

⁶ On 18 February 2014.



- iv. Republic of Cape Verde⁸;
- v. Burkina Faso⁹; and
- vi. Republic of Burundi¹⁰.

i. Observations of the Republic of Uganda

25. In its observations as to whether SERAP is an African Organization within the meaning of Article 4 of the Protocol, the Republic of Uganda notes that “the ... author of the Request [that is, SERAP], does not qualify as an intergovernmental organization”, and prays the Court to “disallow the Request”.

26. On the question as to whether the African Court has jurisdiction to issue advisory opinion on the Request, Uganda argues that:

“the Court in the instant case is not vested with jurisdiction to hear this matter. This submission is buttressed by the provision in Rule 26 of the Rules of Court. We invite the Court to find that the matter before it needs interpretation of both law and fact. Whereas, the Articles are self-explanatory, the Applicant, with due respect, did not show how it has been aggrieved or how the Charter has been violated. For these reasons, the Court is implored to find that there is no need for an Advisory Opinion and thus disallow the request”.

ii. Observations of the Republic of Zambia

27. In its observations, the Republic of Zambia submits that in considering the Request by SERAP, the Court must first determine whether or not SERAP is entitled to bring a request before it in light of the provisions

⁷ On 28 March 2014.

⁸ On 29 July 2014.

⁹ On 22 September 2014.

¹⁰ On 1 June 2016.



of Article 4(1) of the Protocol and Rule 68(1) of the Rules. Zambia concludes that:

“SERAP falls within the category of institutions permitted to request advisory opinion of the African Court on Human and Peoples’ Rights, as per Article 4(1) of the Protocol and Rule 68(1) of the Rules of Court, as it appears on the list of civil society organizations which have been granted observer status by the [African Union Commission]¹¹ under the auspices of the AU. This fact implies recognition by the AU. Consequently, SERAP has, for purposes of requesting for advisory opinions of the Court, the requisite legal standing”.

iii. Observations of the Federal Republic of Nigeria

28. The Federal Republic of Nigeria submits that SERAP is not an African Organization, adding that “there is a clear distinction between the AU and an organ of the AU. Recognition by an organ of the AU is not the same as recognition by the AU”.

29. On SERAP’s contention that its Request for Advisory Opinion is not subject to the provisions of Article 34(6) of the Protocol, Nigeria argues that “Article 34(6) has effectively barred the Court from entertaining the request from SERAP, being an NGO registered in Nigeria”.

iv. Observations of the Republic of Cape Verde

30. In its observations, the Republic of Cape Verde argues that the Request may, *a priori*, raise the issue as to SERAP’s legitimacy to make such a Request before the Court, **and** submits that:

¹¹ One may assume that the Republic of Zambia must have been referring here to the African Commission on Human and Peoples’ Rights.



"...the *exposé* appended to the Request does effectively indicate that SERAP is a Nigerian NGO whose aim is to promote transparency and accountability in the public and private sectors through human rights. It would appear, then, SERAP is an African organization, and thus precludes the provisions of Article 4, which stipulates that it must be an intergovernmental organization."

31. With respect to the issue as to whether SERAP is recognized by the AU, Cape Verde observes that:

"SERAP enjoys observer status before the African Commission on Human and Peoples' Rights. ... It would appear reasonable to us to conclude that SERAP is recognized by the AU by virtue of having been granted observer status before an organ established by the Union."

v. Observations of Burkina Faso and Burundi

32. Burkina Faso and Burundi did not address the question of the jurisdiction of the Court.

V. Observations of the *amicus curiae*: the Centre for Human Rights, University of Pretoria

33. The Centre, acting as *amicus curiae*, and relying on Rule 45(1) of the Rules of Court, argues that

"the ordinary meaning of the phrase 'any African organization recognized by the OAU', read within the textual context of the Court Protocol as a whole, and in accordance with the object and purpose of the Court's Protocol, supports an interpretation of this phrase that would include NGOs.

34. The Centre argues that the *preparatory documents (travaux préparatoires)* of the Protocol "suggest that the use of the phrase *any African Organization* was understood in its ordinary meaning by all participants during the drafting of the



Protocol”,¹² and that the use of the word “any” in the phrase “any African Organization” in Article 4 (1) of the Protocol also indicates an intention to create wider access to the Court.

35. According to the Centre, the Court has jurisdiction to provide advisory opinions on the request of NGOs, such as SERAP, within the meaning of Article 4, and

“this is because SERAP meets all the 3 requirements of the third category of entities that may request for advisory opinion from the Court, that is, ‘any African organization recognized by the OAU’. First, by virtue of its geographical location in Africa, its predominantly African management and membership, as well as its thematic focus on African issues, it qualifies as ‘African’. Second, that it qualifies as an ‘organization’ within the ordinary meaning and context of Article 4 (1) of the Protocol. Third, SERAP ‘is recognized by the AU’, having enjoyed observer status with the African Commission since 2008”.

36. The Centre concludes that SERAP is therefore “an African organization recognized by the African Union”, and may consequently request for an advisory opinion from the Court pursuant to Article 4(1) of the Protocol.

VI. Position of the Court

37. In accordance with the provisions of Rule 39, read together with Rule 72 of the Rules, the Court will now decide whether it has jurisdiction to render an advisory opinion on the Request before it. These Rules provide as follows:

¹² International Commission of Jurists’ additional Protocol, Article 28, to the African Charter on Human and Peoples’ Rights, 5th workshop on NGO participation in the African Commission on Human and Peoples’ Rights (28-30 November 1993) Addis Ababa, Ethiopia



Rule 39(1): The Court shall conduct preliminary examination of its jurisdiction...

Rule 72: The Court shall apply, mutatis mutandis, the provisions of Part IV of these Rules to the extent that it deems them to be appropriate and acceptable.

Personal Jurisdiction

38. To determine whether the Court has personal jurisdiction, the Court has to satisfy itself that SERAP is one of the entities contemplated under Article 4 of the Protocol, to request for Advisory Opinion.
39. Consideration of its jurisdiction will lead the Court to respond to the first issue raised by SERAP, relating to its capacity to seize the Court with a request for Advisory Opinion.
40. Article 4(1) of the Protocol provides that "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...".
41. It is not in dispute that SERAP does not fall under the first three categories mentioned in paragraph 39 above.¹³ The Court will consequently dwell only on the fourth category, that is, whether SERAP is "an African organization recognized by the AU".

¹³ The first three categories of entities entitled to request the Court for advisory opinion are: a Member State of the AU, the AU itself and AU organs.



42. Consideration of the above expression requires clarification of the phrases used under Article 4(1) of the Protocol for the purpose of this opinion, namely: "African organization", and "recognized by the AU".

i. The notion of an African organisation

43. The Court notes that neither the Constitutive Act of the African Union nor the Charter nor the Protocol define the term "African Organisation."

44. On the other hand, in the document titled the *Criteria for granting observer status and for a system of accreditation within the AU*¹⁴, the African Union defines an organisation as "a regional integration or international organisation, including sub-regional, regional or inter-African organisation that are not recognised as Regional Economic Communities". It defines an NGO as "an organisation at the sub-regional, regional or inter-African levels, as well as those in the Diaspora as may be defined by the Executive Council". This definition is restated in the Protocol on the Statute of the African Court of Justice and Human Rights which defines African Non-Governmental Organization as "Non-Governmental Organizations at the sub-regional, regional or inter-African levels as well as those in the Diaspora as may be defined by the Executive Council".¹⁵

45. The Court is observes from the foregoing paragraph that there is still no definition of 'African Organization', but notes however that the term organization is defined.

46. The Court is of the view that the use of the term 'Organization' used in the abovementioned instruments and the expression 'African

¹⁴ EX.CL/195 (VII) Annex V, adopted by the 7th Ordinary Session of the Executive Council and endorsed by the 5th Ordinary Session of the Assembly held in Sirte, Libya, on 1-2 and 4-5 July 2005, respectively.

¹⁵ Protocol on the Statute of the African Court of Justice and Human Rights, Preamble paragraph 6.



organization' in Article 4 of the Protocol covers both Inter-governmental and Non-governmental organizations.

47. The Court considers that had the drafters of the Protocol intended to limit the phrase 'African Organization', as used in Article 4 of the Protocol, only to African Inter-governmental Organizations, they would have specifically done so, as they did in Article 5 thereof relating to contentious matters. The Court is of the view that this was not an omission, but a deliberate formulation, aimed at giving wide access to the Court by 'African organizations'; which interpretation is in keeping with the letter and spirit of Article 4, as well as the object and purpose of the African Charter.
48. In the light of the above, the Court is of the opinion that an organization can be considered 'African', with regards to NGOs, which are relevant in the present Request, if they are registered in an African State, has structures at the sub-regional, regional or continental level, or undertakes its activities beyond the territory where it is registered, as well as any organization in the Diaspora recognized as such by the African Union.
49. Applying the above definition of an African Organization to the instant matter, the Court notes that SERAP is an organization headquartered in an African country, and operating within that country, as well as at the sub-regional and continental levels. Article 2(a) of its Statute indicates that the objectives of SERAP are "to promote, protect and ensure respect for economic, social and cultural rights in Nigeria in accordance with the Nigerian Constitution, the African Charter on Human and Peoples' Rights, the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights and other similar instruments". Article 3 of the same Statute describes the organization's working methods, which include, *inter alia*, "collaborate with the local and international organizations and agencies involved in the promotion and protection of human rights and the rule of law, and in

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particular, encourage a closely-knit and effective network of African human rights advocates and organizations”.

50. In the exercise of its mandate, SERAP has brought cases, petitions and requests for advisory opinion before the ECOWAS Community Court of Justice, the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights, against a number of African countries, including, Nigeria, The Gambia and Libya.

51. It follows from the foregoing that SERAP operates not only in Nigeria, but also within the West Africa region and the continent as a whole, and thus meets the description of an African organization within the meaning of Article 4 of the Protocol.

ii. The meaning of the expression “recognized by the African Union”

52. It has been argued by the Applicant and certain States as well as the *amicus curiae* that every NGO with observer status before any organ of the African Union, particularly the Commission, is automatically an organization recognized by the African Union within the meaning of Article 4 (1) of the Protocol.

53. In the view of the Court, only African NGOs recognized by the African Union as an international organization with its own legal personality are covered by this Article, and may bring a request for Advisory Opinion before the Court. As a matter of fact, not only does Article 4 (1) of the Protocol make a clear distinction between “the African Union” on the one hand, and “any organ of the African Union” on the other, but in fact, the African Union has developed a system of recognition of NGOs distinct from that of the Commission.

54. Pursuant to Article 4(1) of the Protocol, in determining the entities empowered to make a request for Advisory Opinion, the Protocol clearly establishes a distinction between the African Union and any organ of the African Union and targets the two

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separately. However, in describing the African organizations empowered to bring requests for Advisory Opinion before the Court, the same Protocol in the same provision makes reference only to organizations recognized by the African Union and says nothing about those recognized by any organ of the African Union. Had the authors of the Protocol wanted to also target African organizations recognized by any organ of the African Union, they would certainly not have hesitated to make this clear. In particular, had they wanted to target recognition by the Commission through the granting of observer status, they would have explicitly made mention of this as they did in Article 5 in which reference to observer status before the Commission is indicated *expressis verbis*, with respect to seizure of the Court in contentious matters.

55. Given the fact that the Member States of the African Union did not do so, one is obliged to conclude that they deliberately did not wish to include African organizations recognized by any organ of the African Union other than those mandated to engage directly with the continental organization.¹⁶
56. In the instant case, the term “recognized by the African Union” cannot be understood as meaning “recognized by the African Commission on Human and Peoples Rights”.
57. It is established that in the system of the continental organization, the granting of observer status to an NGO constitutes one of the forms of recognition of the latter.
58. With respect to the Commission, its Rules of Procedure of August 2010 provides in its Article 68 that observer status may be granted to an NGO operating in the field of human rights in Africa, enjoying the rights and discharging the duties as stipulated in a separate resolution. In effect, Resolution No. 33 on the Review of the Criteria for Granting and Enjoying Observer Status to Human Rights NGOs before

¹⁶ This interpretation of the term “recognized by the African Union” as *per* Article 4 (1) of the Protocol is founded on Article 31 (1) of the Vienna Convention of 1969 on the Law of Treaties which states 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”.

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the Commission adopted at its 25th Ordinary Session held from 26 April to 5 May 1999, spells out in its Annex, the criteria for granting such status, the procedure to be followed before the Commission and the rights and duties of the NGOs granted the status. It naturally specifies that it is the Commission which, as the case may be, grants, suspends or withdraws observer status from NGOs.

59. Furthermore, in Rules 32 (3) (e) and 63(1), of its Rules of Procedure, the Commission itself makes a distinction between NGOs with observer status before it on the one hand, and the organizations recognized by the African Union, on the other, as regards the possibility for them to propose or add items for inclusion on the agenda of Ordinary Sessions of the Commission.
60. As regards the African Union *per se*, it has, separately, as an international organization also itself determined not only the criteria for granting observer status to NGOs but also the procedure to be followed and the competent organ in this regard. By its decision EX.CL 195 (VII), Annex V of 1 to 2 July 2005, the Executive Council of the African Union adopted the "Criteria for Granting Observer Status and for a System of Accreditation within the African Union", and this document was endorsed by the 5th Ordinary Session of the Assembly of Heads of State and Government of the African Union in July 2005.
61. On the granting of observer status to NGOs, the document spells out the applicable principles, the procedure for introducing the request as well as the rights and duties emanating from the status for the beneficiaries. It follows from the above, that a request for observer status must be submitted to the African Union Commission which then submits it to the Executive Council through the Permanent Representatives' Committee. It follows also that it is the Executive Council that is vested with power to grant, suspend or withdraw observer status from an NGO. The document underscores the fact that "the granting, suspension and withdrawal of observer status of an NGO, are the prerogative of the African Union and shall not be the subject of adjudication in any Court of Law or tribunal" (Section V 6).

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62. Given the fact that recognition is valid only if it emanates from the competent authority according to the internal rules of the international organization concerned, recognition by the Africa Union is valid only where the said recognition emanates from the competent organ, namely in this case, the Executive Council of the African Union.
63. It follows from the aforesaid distinction between the two systems that NGOs with observer status before the Commission do not automatically have observer status before the African Union and *vice versa*. The two statuses are therefore not interchangeable and there is no system of equivalence between the two.
64. Consequently, it is clear that the authors of the Protocol intended that requests for Advisory Opinion from NGOs be limited to those with observer status before or a Memorandum of Understanding with the African Union.
65. Accordingly, since SERAP does not have observer status before or a Memorandum of Understanding with the African Union, as referred to in paragraph 61 above, it is not recognised by the latter, and therefore it is not entitled to bring a request for advisory opinion before this Court.

For these reasons, the Court, unanimously:

Declares that it does not have personal jurisdiction to give an opinion on the present Request.



Signed:

Sylvain ORÉ, President

Ben KIOKO, Vice- President

Gérard NIYUNGEKO, Judge

EI Hadji GUISSÉ, Judge

Rafâa BEN ACHOUR, Judge

Solomy B. BOSSA, Judge

Ángelo V. MATUSSE, Judge; and

Robert ENO, Registrar.

Done at Arusha, this 26th Day of May, in the Year Two Thousand and Seventeen, in English and French, the English text being authoritative.



In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules of Court, the individual opinions of Judges Rafâa BEN ACHOUR and Ángelo V. MATUSSE are appended to this Opinion.