

IN THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, AT ARUSHA

REQUEST FOR ADVISORY OPINION NO. _____ OF 2020

**IN THE MATTER OF A REQUEST BY THE PAN AFRICAN LAWYERS UNION
(PALU) FOR AN ADVISORY OPINION ON THE GUARANTEES FOR THE
EFFECTIVE PROTECTION OF THE RIGHT TO PARTICIPATE IN GOVERNMENT IN
AFRICA, IN THE CONTEXT OF THE COVID-19 PANDEMIC AND CRISIS**

**(Made 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; Rules 68, 70, 71 and 72 of the Rules of the African Court on Human and
Peoples' Rights)**

EXECUTIVE SUMMARY

I. JURISDICTION AND ADMISSIBILITY

1. This is a Request for an Advisory Opinion by the Pan African Lawyers Union (PALU), an African organisation that is recognised by the African Union (AU) through a Memorandum of Understanding entered into in 2006 (***Annexure 1 hereto***).
2. Pursuant to Article 4(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol) and Rule 68 of the Rules of the African Court on Human and Peoples' Rights (Rules of Court), PALU specifically seeks an Advisory Opinion on the guarantees for the effective protection of the right to participate in government in Africa, in the context of the COVID-19 pandemic and crisis.
3. This request invokes the advisory jurisdiction of this Honourable Court to interpret the provisions of the:
 - a. Constitutive Act of the African Union, Articles 3(f)(g)(h)(n) and 4(m)(o)(p);
 - b. African Charter on Human and Peoples' Rights, Articles 1, 2, 4, 5, 6, 9, 13(1) and 16;
 - c. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Articles 9, 19(a) and (b);
 - d. African Charter on Democracy, Elections and Governance, Articles 2(1) (2) (3) (4) (10) and (13); Articles 3(1) (4) (7) (10) and (11); Articles 4, 5, 6, 7, 12, 13, 15, 17, 24, 25; Articles 32(7)(8); Articles 38(1) and 39);
 - e. ECOWAS Protocol on Democracy and Good Governance, Articles 1(b) (c), (d) (h) (k), Articles 2 (1)(2) and 6.
4. The subject matter of this Request is not related to a matter being examined by the African Commission on Human and Peoples' Rights (African Commission.)

II. CIRCUMSTANCES GIVING RISE TO THE REQUEST

5. The political, economic and social crisis wrought upon Africa, and the rest of the world, by the COVID-19 pandemic, poses a challenge to democratic governance, the rule of law and the promotion and protection of human and peoples' rights. There are 22 AU Member States that are scheduled to hold presidential and/or legislative and/or local elections in 2020. At least 11 of these elections are for the position of President or Prime Minister.
6. The scheduling of national elections is a matter of sovereignty within the domestic jurisdiction of every state party. The conduct of elections, nevertheless, is a matter of continental treaty law affecting the exercise of the human right to effective participation in government as well as standards of good governance now accepted in treaty law by African states. In response to the COVID-19 pandemic, AU Member States have mostly taken measures that have had the practical effect of limiting some rights in order to guarantee the right to life. These measures have affected the enjoyment of basic rights such as the rights to freedom of movement, assembly, association and information, and also the right of citizens to effectively participate in the governance of their respective countries, especially (although not limited to) through regular, free and fair elections.
7. While Member States unquestionably enjoy considerable latitude in managing this unprecedented public health emergency, it remains the case that, in the absence of formal derogation, they remain bound by their obligations to safeguard the right to effectively participate in government as enshrined in the Constitutive Act of the African Union, the African Charter on Human and Peoples' Rights (African Charter), the African Charter on Democracy, Election and Governance (ACDEG) and other legal instruments under the AU or regional economic communities (RECs) recognised by the AU, such as the ECOWAS Protocol on Democracy and Good Governance.

III. APPLICABLE LAW

8. The key applicable laws are: -
 - a. Constitutive Act of the African Union (AU)
 - b. African Charter on Human and Peoples' Rights (African Charter)
 - c. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
 - d. African Charter on Democracy, Elections and Governance (ACDEG)
 - e. ECOWAS Protocol on Democracy and Good Governance

IV. ISSUES FOR DETERMINATION

9. PALU respectfully places before this Honourable Court the following issues for determination: -
 - a. Whether this Honourable Court cannot be seised with the question of this advisory opinion in terms of "Safeguarding the Right to Participate in Government under Articles 1 and 13(1) of the African and Peoples' Rights in Elections in Africa Affected by the COVID-19 Crisis."
 - b. Whether this Honourable Court cannot interpret and lay down in terms of treaty law applicable to States parties, standards for conducting elections during or affected by the COVID-19 crisis.
10. If either or both of the above questions are resolved in the affirmative, this Honorable Court is invited to further dispose of the following questions:
 - a. What, if any, are the applicable obligations of states parties for ensuring effective protection of the citizen's right to participate in the government in the context of an election held during the pendency of a declaration of a public health disaster or emergency, such as the COVID 19 crisis, in light of the express provisions of Articles 1 and 13 of the African Charter, and Articles 2(1) (2) (3) (4) (10) and (13); Articles 3(1) (4) (7) (10) and (11); Articles 4, 5, 6, 7, 12, 13, 15, 17, 24, 25; Articles 32(7)(8); Articles 38(1) and 39) of the ACDEG?

- b. What, if any, are the legal standards founded in treaty law applicable to the states parties that choose to conduct elections *vis-à-vis* member states that choose not to conduct elections during the pendency of the COVID-19 disaster or emergency measures?
- c. What, if any, are the legal standards applicable to States precluded by reason of a public health emergency, such as the one caused by the COVID-19 pandemic, from organising elections as the basis of the democratic mandate of government?

I. STATEMENT OF INTEREST

1. PALU was founded in 2002, only 2 months after the birth of the AU, by African Bar leaders and eminent lawyers, to reflect the aspirations and concerns of the African people and to promote and defend their shared interests. It brings together the continent's 5 regional lawyers' associations, over 55 national lawyers' associations and over 1,000 lawyers from Africa and the Diaspora.
2. PALU's vision is to see a united, just and prosperous Africa, built on the rule of law and good governance. Its mission is to advance the law and the legal profession, rule of law, good governance, human and peoples' rights and socio- economic development of the African continent.
3. PALU has a formal Memorandum of Understanding (MoU) on Co-operation and Collaboration with the AU since 2006 (**Annexure 1**) and is routinely involved in the activities of the Office of the Legal Counsel of the AU (OLC-AU); Department of Political Affairs of the African Union Commission (DPA-AUC); African Court; African Commission; African Union Commission on International Law (AUCIL); African Union Advisory Board on Corruption (AUABC) and the Pan African Parliament (PAP), amongst others. PALU also regularly engages the African Regional Economic Communities (RECs), including the East African Community (EAC), Economic Community of West African States (ECOWAS), Common Market for Eastern and Southern Africa (COMESA), Inter-Governmental Authority on Development (IGAD), Southern African Development Community (SADC) and the International Conference of the Great Lakes Region (ICGLR), especially on their interface with the AU.
4. PALU has Observer Status before the African Commission on Human and Peoples' Rights.
5. PALU is the first organisation to be granted *Amicus Curiae* status at the African Court on Human and Peoples' Rights, and the first organisation to be appointed as

a Legal Aid Provider at the said Court, in turn becoming the foremost litigant at the Court.

6. As part of PALU's involvement with the AU, some of the notable projects or initiatives that PALU has undertaken or continues to take include: -
 - a. Was a member of the inaugural Economic, Social and Cultural Council of the African Union (ECOSOCC-AU), and provided the Presiding Officer of the ECOSOCC-AU from 8 September 2008 to 10 November 2014;
 - b. As a Consultant for the African Union Commission (AUC) prepared the Report on Implications, and also the draft Protocol and Statute, for the proposed expansion of the African Court and extension of its jurisdiction to include 14 international crimes. PALU accompanied the AU and Member States through all the stages of validation and negotiation of the draft Protocol and Statute, through to its ultimate adoption by the Assembly of Heads of State and Government of the AU (the AU Summit) in June 2016. To date, 15 Member States have signed and 1 Member State has ratified the said Protocol and Statute;
 - c. As a Consultant for the African Court, prepared a Report with Recommendations for a legal aid funding framework, institutional structure and fund-raising strategy, accompanied by a draft Statute setting up a Trust Fund for Legal Aid for the 3 key AU Human and Peoples' Rights treaty bodies (African Court, African Commission and the African Committee of Experts on the Rights and Welfare of the Child [ACERWC]). This was adopted by the AU Summit in January 2016, and is in operation;
 - d. Is 1 of the only 4 non-state actors who are members of the Consortium to stem Illicit Financial Flows (IFFs) from Africa, led by H.E., President Thabo Mbeki, who was appointed by the AU Summit to coordinate and galvanize support for the implementation of the recommendations of the AU Summit on curtailing IFFs from Africa.

7. PALU makes the present Request for an Advisory Opinion as part of its mandate to promote and protect democracy, the rule of law, good governance, human and peoples' rights, especially responding to the substantial concerns raised by African citizens on some of the methods adopted by member states in responding to the COVID-19 crisis.

II. STATEMENT REGARDING JURISDICTION AND STANDING

8. PALU submits this Request for an Advisory Opinion under Article 4 of the Court Protocol and Rule 68 of the Rules of Court.
9. Article 4 of the Court Protocol grants this Honorable Court advisory jurisdiction “on any legal matter relating to the Charter or any other relevant human rights instrument, provided that the subject matter of the opinion is not related to a matter being examined by the Commission”.
10. PALU respectfully submits that this Request for an Advisory Opinion is a legal matter, relating to the guarantees for the effective protection of the right to participate in government in the context of COVID-19 pandemic and crisis.
11. This request for the exercise of the advisory jurisdiction of this Honorable Court is also sought in terms of the Constitutive Act of the AU, the *Maputo* Protocol and ACDEG, both of which are human rights instruments within the meaning of Article 4 of the Protocol.
12. Pursuant to Rule 68(3) of the Rules of the Court, PALU further submits that the present Request for an Advisory Opinion does not relate to any matter pending before the African Commission.
13. Rule 68(1) provides that a Request for an Advisory Opinion may be filed by an African Organisation recognised by the AU. This Honourable Court has defined “organisation” to include a non-governmental organisation, and “African organisation” to refer to an organisation that is registered in an African State, has structures at the sub-regional, regional or continental levels, or undertakes its

activities beyond the territory where it is registered.¹ PALU therefore respectfully submits that it meets all the above criteria to be classified as an African organisation.

14. Furthermore, this Honourable Court has established that recognition of non-governmental organisations by the AU is through the signing of MoU between the AU and those organisations.² PALU respectfully submits that by virtue of having signed an MoU with the AU (**Annexure 1**), and having illustrated above tangible examples of its engagement with various AU Organs and Institutions, it is accordingly formally recognised by the AU, thus meeting the criteria set forth by this Honourable Court.
15. PALU respectfully submits that as an African organization recognised by the AU, pursuant to the Rules of the Court, and as defined by this Honorable Court, it has demonstrated the requisite *locus standi* to file the present request for an Advisory Opinion.

III. CIRCUMSTANCES GIVING RISE TO THIS REQUEST FOR AN ADVISORY OPINION

16. The COVID-19 crisis presents unprecedented challenges for democratic governance and rule of law in Africa. Even more fundamentally, it is also a challenge to legitimate government founded on the democratic will of the people. It is a defining moment for the exercise of the right to participate in government and to vote on the continent. At least 22 AU Member States are currently scheduled to hold presidential and/or legislative and/ or local government elections in 2020. At least 11 of these are for the position of President or Prime Minister.

¹ Request for Advisory Opinion by Socio-Economic Rights and Accountability Project (SERAP), Request No. 1/2013, Advisory Opinion of 26 May 2017, at paras 46 and 48.

² Request for Advisory Opinion by Centre for Human Rights, University of Pretoria, and Others, Request No. 1/2016, Advisory Opinion of 28 September 2017, at para 47.

17. Across the continent, elections invariably frame stability. Their acceptability, or lack thereof, could be a useful predictor for instability or fragmentation. With the COVID-19 crisis, all African countries going through elections over the next year confront contemporaneous crises of public health, fiscal crunch, political stability and governmental legitimacy. In countries with limited institutional buffers, the consequences could be unpredictable for citizens, countries, regions and Africa's partners.
18. The scheduling of national elections is a matter of sovereignty within the domestic jurisdiction of every state party. The conduct of elections, nevertheless, is a matter of continental treaty law affecting the exercise of the human right to effective participation in government as well as standards of good governance now accepted in treaty law by African states.
19. In response to the COVID-19 pandemic, AU Member States have mostly taken measures to protect the right to life by limiting such rights as freedoms of movement, assembly, association and information, and also the right of citizens to effectively participate in the governance of their respective states, especially (although not limited to) through regular, free and fair elections. Fuller information on the kinds and scope of measures initiated by various countries is illustrated in ***Annexure 2*** hereto.
20. These measures have affected the enjoyment of basic rights such as the rights to freedom of movement, assembly, association and information, and also the right of citizens to effectively participate in the governance of their respective countries, especially (although not limited to) through regular, free and fair elections. They also have the practical effect of constraining democratic competition, could preclude election observation, and potentially interfere with both campaigning and the exercise of franchise. By this request, this Honorable Court is invited to offer guidance to states parties on the proportionality between COVID-19 emergency or disaster measures on the one hand and the effective exercise of the human right to

participate in government on the other in the context of democratic elections in Africa.

21. While States parties unquestionably enjoy considerable latitude in managing this unprecedented public health emergency, it remains the case that, in the absence of formal derogations, states parties remain bound by their obligations to safeguard the right to effectively participate in government as enshrined in the Constitutive Act of the African Union, the African Charter and its Protocols, ACDEG and other legal instruments under the AU or regional economic communities (RECs) recognised by the AU.
22. An illustration of the type of challenges that are manifesting themselves is in respect of the Republic of Burundi, which, on 8 May 2020, only 12 days before its scheduled Presidential and General Elections, notified the East African Community that any Election Observers planning to enter the country to observe the elections would be subjected to a 14-day mandatory quarantine, meaning that the said Observers would only complete their quarantine 2 days **after** the actual voting day. See **Annexure 3** hereto.
23. The decision as to **when** to hold an election is within the domestic jurisdiction of every country. **How** elections are organized, however, has become an accepted object of international law making, and, in Africa it is regulated by treaty law, including the African Charter and ACDEG.
24. While different Member States have adopted or are considering their own decisions on whether, when or how to hold scheduled elections, or are even unable to hold elections, there are growing calls for harmonized approaches that safeguard the right to participate in government, as enshrined in the African Charter and ACDEG, amongst other legal instruments.

IV. APPLICABLE LAW

25. The African Union was created to promote the unity and solidarity of African States and to coordinate and intensify efforts to achieve a better life for the people of Africa. Additionally, it aims to promote democratic principles and institutions, popular participation and good governance. With the current dilemma facing Member States with regard to the COVID-19 pandemic and crisis, PALU respectfully submits that there is a high risk of curtailment or violation of multiple human and peoples' rights.
26. PALU will rely on the following legal provisions: -
- a. The Constitutive Act, Articles 3(f)(g)(h) and Article 4(m)(p);
 - b. The African Charter on Human and Peoples' Rights: Articles 1, 2, 4, 5, 6, 9, 13(1) and 16;
 - c. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Articles 9, 19(a) and (b);
 - d. The African Charter on Democracy, Elections and Governance Articles 2(1) (2) (3) (4) (10) and (13); Articles 3(1) (4) (7) (10) and (11); Articles 4, 5, 6, 7, 12, 13, 15, 17, 24, 25; Articles 32(7)(8); Articles 38(1) and 39);
 - e. The ECOWAS Protocol on Democracy and Good Governance, Article 1(b) (c), (d) (h) (k), Articles 2 (1)(2) and 6.
27. PALU invites this Honourable Court to take cognisance that the AU Assembly, Executive Council and Peace and Security Council apply the provisions of ACDEG and of the Shared Values of the AU when deliberating or making decisions in respect of **any** AU Member State. In that regard, the provisions of ACDEG are applicable to all AU Member States.³

³ See, for instance, the Communique of 384th Meeting of AU-PSC, held on 5th July 2013, at **paragraph 5**, which states that: -

“Recalls the relevant AU instruments on unconstitutional changes of Government, notably the Lomé Declaration of July 2000 and the African Charter on Democracy, Elections and Governance of January 2007, which provide for the automatic implementation of specific

28. PALU further invites this Honourable Court to avail itself the following, as possible interpretative tools: -

- a. Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lome Declaration), 2000
- b. OAU/AU Declaration on the Principles Governing Democratic Elections in Africa, 2002
- c. Guidelines for African Union Electoral Observation and Monitoring Mechanisms, 2002
- d. Ezulwini Framework for the Enhancement of the Implementation of African Union Sanctions in Situations of Unconstitutional Changes of Government in Africa

V. ISSUES FOR DETERMINATION

29. PALU respectfully places before this Honourable Court the following issues for determination: -

- a. Whether this Honourable Court cannot be seized with the question of this advisory opinion in terms of “Safeguarding the Right to Participate in Government under Articles 1 and 13(1) of the African Charter on Human and Peoples’ Rights in Elections in Africa Affected by the COVID-19 Crisis.”
- b. Whether this Honourable Court cannot interpret and lay down in terms of treaty law applicable to States parties, standards for conducting elections during or affected by the COVID-19 crisis.

measures whenever an unconstitutional change of Government occurs, and **reiterates** AU’s condemnation and rejection of any illegal seizure of power;”

African Union Document **PSC/PR/COMM.(CCCLXXXIV)**

See also the Communiqué of 363rd Meeting of AU-PSC, on Central African Republic (CAR), held on 25 March 2013.

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

- a. What, if any, are the applicable obligations of states parties for ensuring effective protection of the citizen’s right to participate in the government in the context of an election held during the pendency of a declaration of a public health disaster or emergency, such as the COVID 19 crisis, in light of the express provisions of Articles 1 and 13 of the African Charter, and Articles 2(1) (2) (3) (4) (10) and (13); Articles 3(1) (4) (7) (10) and (11); Articles 4, 5, 6, 7, 12, 13, 15, 17, 24, 25; Articles 32(7)(8); Articles 38(1) and 39) of the ACDEG?
- b. What, if any, are the legal standards founded in treaty law applicable to the states parties that choose to conduct elections *vis-à-vis* member states that choose not to conduct elections during the pendency of the COVID-19 disaster or emergency measures?
- c. What, if any, are the legal standards applicable to States precluded by reason of a public health emergency, such as the one caused by the COVID-19 pandemic, from organising elections as the basis of the democratic mandate of government?

VI. NAMES AND ADDRESSES OF REPRESENTATIVES OF THE ENTITY MAKING THE REQUEST

31. This Request for an Advisory Opinion is submitted by the Pan African Lawyers Union (PALU). For the purposes of this application, all further correspondence may be directed to:

Mr. Donald DEYA, Advocate
Chief Executive Officer, Pan African Lawyers Union (PALU)

[Redacted]
[Redacted]
[Redacted]
[Redacted]

Mr. Ibrahima KANE, Advocate

c/o Pan African Lawyers Union (PALU)

[REDACTED]

Prof. Chidi ODINKALU, Advocate

c/o Pan African Lawyers Union (PALU)

[REDACTED]

[REDACTED]

Signed and dated at Arusha, in the United Republic of Tanzania

This 2nd day of May 2020

Donald Deya, Advocate

Chief Executive Officer, Pan African Lawyers Union (PALU)

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INDEX OF ANNEXURES

Serial Number	Document
1.	Memorandum of Understanding establishing the Framework for Co-operation and Collaboration between the African Union and the Pan African Lawyers Union, 8 May 2006
2.	Matrix of the AU Member States that have scheduled elections between 1 April 2020 and 31 March 2021
3.	Letter dated 8 th May 2020, from Hon. Isabelle NDAHAYO, Minister in the Office of the President of the Republic of Burundi responsible for East African Community (EAC) Affairs, to H.E. Amb. Libérat Mfumukeko, Secretary General of the EAC, with the title 'Deployment of the Election Observation Mission for the General Elections in Burundi'