

Chapter 4

Confidentiality or Secrecy? Interpretation of Article 59, and Implications for Advocacy on Pending Communications before the African Commission

Dr. Ruth Nekura & Sibongile Ndashe

Introduction

Despite persisting controversies about the role of law in social transformation, there is little doubt that the impact of litigation is best understood in relation to other processes (such as advocacy and mobilisation) alongside which, gradual shifts become possible.¹ Thus, litigating for social change requires publicity and freedom of information, which are vital elements that facilitate this 'cohabitation between advocacy and litigation' in women's rights interventions.² The aim of this paper is to draw attention to the fallible ways in which a restrictive interpretation of article 59 of the African Charter on Human and Peoples' Rights (the Charter), specifically the words '*all measures*' in 59(1) and '*considered*' in 59(3) convert an otherwise well-intentioned principle of confidentiality into a shroud of secrecy that cripples advocacy efforts relating to pending communications before the African Commission on Human and Peoples' Rights (African Commission).

The first section explores how a restrictive interpretation of confidentiality presents an obstacle to legal mobilization and the challenges it presents to the process of submitting amicus briefs before the African Commission. It also considers how the restrictive interpretation of confidentiality contributes to the invisibility of the work of the African Commission and the dearth of jurisprudence on women's rights, including sexual rights. The second section highlights how

1. Duffy H. *Understanding and maximising the impact of strategic human rights litigation* 2017.

2. Killander, M. "Confidentiality versus Publicity: Interpreting Article 59 of the African Charter on Human and People's Rights." *African Human Rights Law Journal*. LJ 6 (2006) 572-580.

a restrictive interpretation of article 59 continues to be used to undermine the independence of the African Commission, with reference to the African Union (AU) Executive Council Decision 1015 of 2018.³

Background to Article 59

Article 59 of the African Charter on Human and Peoples' Rights (the Charter/ACHPR) provides that⁴

1. All measures taken within the provisions of the present Chapter shall remain confidential until the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

The 'present chapter' referred to in Article 59 is Chapter III (Articles 46-59) which deals with procedures of the African Commission, including individual communications. The application of Article 59 to the entire communication procedure has been criticized because NGOs have a legitimate interest in publicizing the communications they file at the Commission.⁵ In practice, Article 59 has been interpreted to mean that while a communication is pending, the only information to be revealed is to be contained in the Commission's activity reports, and this is limited to the name and number of the communication and the stage at which it is.⁶ By this interpretation, pleadings and submissions by parties are essentially kept secret from the public.

3. Decision by the Executive Council of the African Union on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR). Doc.EX.CL/1015(XXXII).

4. Article 59, the African Charter on Human and Peoples' Rights.

5. Killander M. above note 2 at 572.

6. Murray R. "Confidentiality and the implementation of the decisions of the African Commission on Human and Peoples' Rights." *African Human Rights Law Journal* 19, no. 1 (2019): 1-25.

This austere and formalistic interpretation of Article 59 equates the term '*all measures*' to '*everything done or received*', which adversely affects advocacy efforts by limiting the publicization of information on pending communications. For example, the African Commission has previously asked Civil Society Organisations (CSOs) to pull down their own pleadings from their websites, arguing that the proceedings are entirely confidential.⁷ This interpretation leads to uncertainty and NGOs that litigate before the Commission find it difficult to know whether, and to what extent to publicize a case as part of their advocacy efforts. The situation is further complicated by the fact that some versions of the African Charter, including a version published on the Commission's website for a while, substituted the word 'Chapter' with 'Charter' which may explain the very limiting interpretation of Article 59.

To some, the term 'all measures' logically means all the recommendations and decisions taken by the Commission, whether they are interim or final.⁸ Odinkalu has argued that '*all measures*' ideally should be limited to '*suitable actions*', a term that is clearly distinct from '*everything done or received*' by the African Commission.⁹ Therefore, the essential facts of a communication that is pending before the Commission, contained in pleadings, is hardly a '*measure taken*'. Neither are individual submissions, or the names of parties implicated in a communication.

In the early years of operation, the Commission interpreted Article 59 to mean strict confidentiality and neither publicized any information on the communications before it nor any decisions made.¹⁰ In December 1993, following a request from NGOs, copies of decisions were made available in Activity Reports. From 1994 to 2012 the Commission included decisions it took on communications in its activity reports. Since 2012, decisions on communications appear in reports

7. African Commission Litigators-Discussion Paper on Confidentiality- *African Commission and Confidentiality of Communications and Pleadings*, January 2015.

8. Gumedze, S. "Bringing communications before the African Commission on Human and Peoples' Rights." *African Human Rights Law Journal* 3, no. 1 (2003): 118-148.

9. Odinkalu, A. C. "Proposals for review of the Rules of Procedure of the African Commission of Human and Peoples' Rights." *Human Rights Quarterly* 15 (1993): 533 -548.

10. Killander M. above note 2 at 578. See also Second Annual Activity Report of the African Commission on Human and Peoples' Rights, 14 June 1989, para. 35.

merely as references followed by publication on the Commission's website. Many have considered this change of practice since 1994 as a watershed moment which eased the shroud of secrecy under which the entire communication process was hidden.¹¹ However, none of these developments in interpretation have thus far resolved the question of NGOs' access and publication of information relating to pending communications for purposes of advocacy.

Challenges of a Restrictive Interpretation of Article 59

a) A restrictive interpretation of Article 59 as an obstacle to legal mobilisation

The potential impact of litigation is likely to be realised if litigation is conceptualised as part of a broader strategy for change.¹² As such, there is growing recognition and reflection of the value of engaging social movements, outside of the courts, as part of the litigation strategy.¹³ This understanding of litigation sees the legal process as a tool that is used alongside other tools such as advocacy, media and communications, with an expectation that litigation has a role to play in 'chang[ing] ideas, perceptions and collective social constructs relating to the litigation's subject matter.'¹⁴ This implies that when strategic litigation is embedded in social movements, it has the capacity to 'alter the cultural or ideological landscape with regard to the social problem posed by the case'.¹⁵

Strengthening the relationship between litigation and social movements creates opportunities for movements to use litigation to advance advocacy. Social movements can use litigation to catalyse debates by illuminating on issues that are overlooked or considered taboo.¹⁶ Litigation also has the power to humanize

11. Killander M. above note 2.

12. Duffy H. above note 1.

13. Ibid.

14. Ibid at 54.

15. Ibid.

16. Ibid.

social ills by individualizing a story and providing ‘a graphic illustration of the effects of laws, policies and practices’.¹⁷ However, for strategic litigation to be embedded in social movements, publicity of information regarding pending communications is important because individuals and NGOs need reliable information in order to mobilise. The restrictive interpretation of Article 59 is an obstacle to legal mobilisation because substantive information on individual communications are kept secret from the public.

This secrecy impedes advocacy during litigation, which is especially important because communications before the African Commission can last for many years. In such instances of delay, advocacy can provide the ‘oxygen of publicity’, which is often essential in a prolonged legal process.¹⁸ More importantly, advocacy during the pendency of a communication can create impact on the ground which can lead to social change because it encourages social engagement with the rights issues raised before the African Commission. This way, the impact of litigation is not dependent on the eventual judgement, which may result in legal or policy change. On the contrary, human rights litigation becomes a spark and a contributor to diverse dimensions of long-term change resulting from multiple forms of impact alongside social, political, cultural and institutional processes.

b) Challenges of strict confidentiality to the submission of amicus briefs

The current interpretation of Article 59 creates a difficulty in the submission of amicus briefs because the shroud of secrecy inhibits individual experts or organizations who may wish to appear as amicus to know the specific issues before the Commission. Consequently, amicus submissions are likely to come from those who catch wind of a case which may be of interest, with little chance of obtaining pleadings or other case information that will allow them to draft their briefs with requisite focus to the issues under consideration.¹⁹

17. Ibid at 54 - 55.

18. African Commission Litigators-Discussion Paper on Confidentiality above note 7.

19. Murray R. & Obonye J.s, ‘Amicus before the African Commission: Proposals for addressing the challenges of confidentiality’, January 2018. See also F. Viljoen and A. K. Abebe, ‘Amicus Curiae Participation Before Regional Human Rights Bodies in Africa’, 58(1) *Journal of African Law* (2014) 22–44.

Limitations on confidentiality create an amicus system that lacks transparency and clarity, which exposes it to abuse, bias and legitimacy concerns.²⁰ The current rules on submitting amicus have no restrictions on who can apply, with little clarity on the content of briefs or at what point amicus can intervene during the proceedings. The lack of clear rules encourages contact between parties and amici, outside of the African Commission processes, which may be viewed as a breach of confidentiality outside of the Commission's control.²¹ To bypass these difficulties, Murray consolidates lessons learnt from other bodies who have grappled with balancing the need for confidentiality with amicus interventions. She suggests that:²²

- The African Commission could publish a brief or summary of information on pending communications on its website and activity reports, much like the African Court does.
- The African Commission could actively solicit amicus interventions on the basis of Rule 85 of its Rules of Procedure, through directly approaching experts or issuing a public call for amicus interventions which may be seen as levelling bias.
- The African Commission could actively encourage parties to the case to invite experts they know of to submit amicus interventions.
- The African Commission could invite the parties to share their pleadings with amicus who have been admitted to the proceedings, who could also be bound by confidentiality.
- Relevant information could be shared while sensitive data is redacted.
- The African Commission could issue a resolution to clarify specific requirements on submission of amicus, to formalize the participation of amici making it less ad hoc.

These suggestions are useful ways of beginning to undo the restrictive interpretation of Article 59 and its impact on amicus submissions. However, it is

20. Ibid.

21. Ibid.

22. Murray R. & Obonye J. above note 19.

important to note that most of these difficulties can be resolved without necessarily shifting the restrictive interpretation of Article 59 that creates secrecy. For instance, actively soliciting amicus only to bind them under the same strict confidentiality as parties to a case may enlarge the elitist sphere of access to the African Commission, but it may not service the kind of public access to information that is necessary for legal mobilisation, outside of the legal process. In addition, while the African Commission may be willing to publish substantive case summaries in its activity reports, a restrictive interpretation of Article 59 would lead the Commission to delete any of this information if/when requested to do so by an Executive Council's decision, a practice that is discussed further below.

The African Commission's 2020 Rules of Procedure has brought new developments in the procedure governing the intervention of an amicus curiae.²³ It provides that once the African Commission grants an application seeking to intervene as amicus, it will share the parties' pleadings with the amicus curiae. The rules require the amicus curiae to respect the confidentiality of the parties' pleadings in accordance with Article 59 of the African Charter.²⁴ It further allows the African Commission to publish admitted amicus briefs on its website.²⁵ These developments are useful as they provide the needed guidance on the procedure for amicus curiae interventions. They also provide an opportunity for interpretation of what confidentiality of parties' pleadings means in the context of amicus curiae applications. For example, it may be useful to explore whether or how amicus curiae applications can outline key issues of the matter pending before the African Commission without infringing on the privacy of the parties involved.

However, the rules do not resolve the question of the lack of public information on pending communications which is essential for enabling a wide range of experts and other stakeholders to know the issues pending before the commission in order to make application for amicus curiae in the first place. Although the rules allow the African Commission to invite amicus curiae to make submissions,²⁶

23. Rules Of Procedure Of The African Commission On Human And Peoples' Rights, 2020 Adopted By The African Commission On Human And Peoples' Rights During Its 27th Extra-Ordinary Session Held In Banjul (The Gambia) From 19 February To 04 March 2020.s

24. Ibid Rule 105(5).

25. Ibid Rule 105(6).

26. Ibid Rule 104.

which widens the scope of potential engagement, only the most visible and publicly renowned experts and stakeholders are likely to benefit from these interventions. Therefore, as noted earlier, this may not service the kind of public access to information needed for wide range visibility and inclusive engagement by social movements, activists, lawyers, CSOs and other actors with the protective mandate of the African Commission that is necessary for legal mobilisation.

c) Invisibility of the communications mandate and the dearth of jurisprudence on women's rights and sexual rights

The shroud of secrecy created by a restrictive interpretation of Article 59 creates a general lack of knowledge and information on the communications mandate of the African Commission. This limits the extent to which lawyers, NGOs, human rights defenders, social movements and victims of rights violations engage with this crucial regional human rights protection mechanism. It is especially concerning that over the past 32 years of existence, the African Commission has only issued two decisions on women's human rights.²⁷ Advocacy with regard to pending communications can bring visibility to the role of the African Commission which may allow new constituencies to engage the African Commission's communications mandate.

Article 59 and Challenges to the Independence of the African Commission

Article 59 has also been used to establish the principle of secrecy when the Executive Council invokes Article 59(3) to undermine the independence of the African Commission and prevent the publication of information on certain individual communications. Article 59(3) as currently interpreted and implemented limits access to all communication related information to the

27. Communication 323/06, Egyptian Initiative for Personal Rights & Interights v Egypt, ACHPR. And Communication 341/2007, Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia, ACHPR.

parties until the Assembly has approved publication of its Activity Reports.²⁸ Under Article 54 of the Charter, the African Commission is required to ‘submit to each ordinary session of the Assembly of Heads of State and Government a report of its activities.’ A restrictive interpretation of Article 59 (3) as read with Article 54 gives the Assembly the power to control and censor not only what information the Commission can publish, but to interrogate the substantive content of the Commission’s decisions or findings. Such an interpretation of Article 59(3) implies that the Commission is subordinate to the political organs of the AU.²⁹

This political control is also manifested when the Executive Council invokes Article 59 to make prescriptions on what the Commission should or should not publish. For example, in 2006, the Executive Council adopted the 20th activity report, except for decision 245 on Zimbabwe. Zimbabwe and other member states were given two months to submit their observations on the decision.³⁰ In 2015 the Executive Council requested the African Commission to delete passages from its 37th activity reports.³¹ These passages concerned two decisions against the Republic of Rwanda, and similarly, the State was given an opportunity to present their views in a public hearing. The basis for this right to reply remains unclear given that states already have the opportunity to participate in the communications process leading up to the final decision.³²

28. African Commission on Human and People’s Rights Working Group on Communications, 2017 Reports. See also Analysis on decision 1015 of the executive council of the African Union: a wrongful interpretation of international human rights law to undermine the independence of the African Commission on human and peoples’ rights, Briefing note prepared by AMSHeR, CAL, ISLA, Center for Human Rights (University of Pretoria), Synergía-Initiatives for Human Rights. February 2019, para 31.

29. Odinkalu, A.C. “The Individual Complaints Procedures of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment.” *Transnat’l L. & Contemp. Probs.* 8 (1998): 359.

30. Decision on the Activity Report of the African Commission on Human and Peoples’ Rights (ACHPR) EX.CL/Dec 310 (IX), 2006.

31. Decision on the Activity Report of the African Commission on Human and Peoples’ Rights (ACHPR) Activity Report 37, 2015.

32. Killander M. above note 2.

A recent request for advisory opinion at the African Court on Human and Peoples' Rights (African Court) sought interpretation of Article 59(3) inquiring whether the Executive Council and the Assembly, in these types of decisions, are not exceeding the reasonable limits of the powers to '*consider*'.³³ In September 2017, the African Court issued an evasive decision and bypassed an opportunity to provide guidance on how the term '*considered*' in Article 59(3) should be interpreted.³⁴ The Court relied on a technicality and failed to engage substantively with the meaning of Article 59(3). It found that the applicants lacked capacity to request an advisory opinion, because they are not organizations 'recognized by the African Union' since they do not have Observer Status before the African Union.

The Executive Council's Decision 1015 issued in 2018 demonstrated further subordination of the African Commission by jeopardising its independence and reinforcing secretive confidentiality in its interpretation of Article 59. The decision directed the African Commission to 'observe confidentiality *at all stages* of its work in line with Article 59 of the Charter'.³⁵ This is contrary to the confirmation expressed by the Working Group on Communications that while only parties to a communication are entitled to receive information relating to their communications, once the Activity Report has been authorised for publication by the Assembly, the general public can have access to the final decisions mentioned in that report.³⁶ The Executive Council's blanket directive on confidentiality also misconstrues the Charter which is clear that Article 59 applies to measures (decisions) taken in relation to 'the present Chapter' which are specific sections as explained above.

This directive is dangerous because it could be used to erode the current understanding of Article 59, which lays a basic threshold of public access to information in the activity reports after approval by the Assembly. This erosion will extensively limit access to the workings of the African Commission which is contrary to principles of accountability and transparency.³⁷

33. Advisory Opinion No. 002/2015, African Court on Human and Peoples' Rights, 28 September.

34. Ibid.

35. Decision 1015 above note 3.

36. Working Group on Communications 2017 Reports, above note 28.

37. The Initiative for Strategic Litigation in Africa (ISLA), Implications of the African union executive council's decision on the communications procedure, Briefing Note, October 2018.

Other directives in Decision 1015 largely delegitimize the nature of the African Commission, which has implications for the communications procedure, and affect the interpretation of confidentiality under Article 59.³⁸ This directive threatened the general independence of the African Commission by stating that this independence 'is functional in nature and does not mean independence from the bodies that created it'.³⁹ This directive erroneously overlooks the fact that the African Commission derives its existence and mandate from the Charter.⁴⁰ The decision also directs States to review the interpretive mandate of the African Commission and challenges the Commission's autonomy to lay down its own rules and procedures, mandates which are both clearly defined and secured by the Charter.

Murray has argued that an important principle to respect is that the African Commission has the power to interpret the Charter and therefore, the Commission can learn from best practices adopted by other regional and international systems to develop a purposive interpretation of Article 59.

Conclusion and Suggested Way Forward

The African Commission needs to adopt a functional interpretation of Article 59, one that is read in realization of the fact that one of the functions of the African Commission is to 'disseminate information'.⁴¹ This function is as much achieved through the Commission's promotional visits, as well as through the full publication of reports on its work. After all, 'public bodies hold information not for themselves but as custodians of the public good, and everyone has a right to access this information, subject only to clearly defined rules established by law'.⁴² At the very least, this principle on access to information should form

38. Ibid.

39. Decision 1015 above note 3.

40. ISLA. above note 37.

41. Killander M. above note 2. See also article 3 Constitutive Act of the African Union.

42. Declaration of Principles on Freedom of Expression in Africa, 2002, para 4(1).

the basis for continuing to challenge the shroud of secrecy established by the strict interpretation of Article 59. Some practical steps for NGOs to consider may include: formal engagement with the African Commission to adopt a progressive approach; establishment of a working group to track and analyse practical challenges of restrictive interpretation of Article 59, especially in light of implementation of the new rules of procedure, and to advocate for the publication of information relating to pending communications; working with the ongoing campaign for the independence of the African Commission; and launching a specific campaign on publicity and access to information.

Bibliography

Primary sources

- African Union, *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.
- Advisory Opinion No. 002/2015, African Court on Human and Peoples' Rights, 28 September 2017.
- Communication 323/06, Egyptian Initiative for Personal Rights & Interights v Egypt, ACHPR.
- Communication 341/2007, Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia, ACHPR
- Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002.
- Decision by the Executive Council of the African Union on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR). Doc.EX.CL/1015(XXXII).
- Decision on the Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) EX.CL/Dec 310 (IX), 2006.

Decision on the Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) Activity Report 37, 2015.

Decision on the Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) EX.CL/Dec 310 (IX), 2006.

Organization of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000.

Rules Of Procedure Of The African Commission On Human And Peoples' Rights, 2020 Adopted By The African Commission On Human And Peoples' Rights During Its 27th Extra-Ordinary Session Held In Banjul (The Gambia) From 19 February To 04 March 2020.

Second Annual Activity Report of the African Commission on Human and Peoples' Rights, 14 June 1989, para. 35.

Secondary sources

African Commission Litigators, *Discussion Paper on Confidentiality African Commission and Confidentiality of Communications and Pleadings*, January 2015.

AMShEr, CAL, ISLA, Center for Human Rights (University of Pretoria), *Synergía-Initiatives for Human Rights Analysis on decision 1015 of the executive council of the African Union: a wrongful interpretation of international human rights law to undermine the independence of the African Commission on human and peoples' rights*, Briefing note, February 2019.

Duffy H. *Understanding and maximising the impact of strategic human rights litigation*, 2017.

Gumedze, S. "Bringing communications before the African Commission on Human and Peoples' Rights." *African Human Rights Law Journal* 3, no. 1 (2003): 118-148.

Initiative for Strategic Litigation in Africa (ISLA), *Implications of the African union executive council's decision on the communications procedure*, Briefing Note, October 2018.

- Killander, M. "Confidentiality versus Publicity: Interpreting Article 59 of the African Charter on Human and People's Rights." *African Human Rights Law Journal*. LJ 6 (2006) 572-580.
- Murray Rachael & Obonye J. 'Amicus before the African Commission: Proposals for addressing the challenges of confidentiality', January 2018.
- Murray R. "Confidentiality and the implementation of the decisions of the African Commission on Human and Peoples' Rights." *African Human Rights Law Journal* 19, no. 1 (2019): 1-25.
- Odinkalu, A. C. "Proposals for review of the Rules of Procedure of the African Commission of Human and Peoples' Rights." *Human Rights Quarterly* 15 (1993): 533 -548.
- Odinkalu, A.C. "The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment." *Transnat'l L. & Contemp. Probs.* 8 (1998): 359.
- Viljoen F. and Abebe A. K. 'Amicus Curiae Participation Before Regional Human Rights Bodies in Africa', 58(1) *Journal of African Law* (2014) 22-44.