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# Article 59(1) campaign

#HumanRights #Article59 #TheAfricaWeWant #TheTransparencyWeDeserve  
#AccessToInformation #ACHPR

## Concept Note

### Introduction

The Litigants Group - a group of civil society and/or legal community members who have been working with the African Commission on Human and Peoples' Rights (ACHPR/ Commission) for over a decade with the objective of reinforcing the ACHPR's protective mandate- has developed this concept note with aim of providing information around the Article 59(1) Campaign. The initiative originated from discussions held during the Litigants Group meeting at the side lines of the ACHPR session in May 2023. The campaign addresses the ACHPR's current interpretation of Article 59, a provision in the African Charter on Human and People's Rights (African Charter), which has inadvertently led to an intricate and obscure dimension in the communications procedure of the ACHPR.

Article 59 stipulates that actions undertaken by the Commission under the communications procedure are to be kept confidential until authorized for disclosure by the AU Heads of State and Government. Regrettably, the Commission's interpretation extends this confidentiality to include all related records and legal submissions by involved parties. This expansive interpretation prompts the need for a more progressive understanding of Article 59(1) due to its far-reaching implications for human rights and the participatory role of Civil Society Organizations (CSOs) in ongoing legal proceedings.



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A fundamental objective of the Litigants Group is to advocate for the strengthening of the ACHPR protective mandate in order to ensure greatest possible human rights protection in Africa. To achieve this objective, the Litigants Group engages in different activities and initiatives which includes organising Campaigns and leading collective efforts aimed at placing pressure on the ACHPR to ensure that Human rights are effectively protected in Africa.

This concept note serves to elucidate the intricacies of Article 59(1), its current interpretation by the ACHPR, and the resulting impacts on human rights protection. Furthermore, it outlines strategies identified for CSOs engagement within the Article59(1) Campaign, given its substantive implications for the communications procedure before the ACHPR.

### **Objectives of the Article 59(1) Campaign:**

- Ensuring progressive interpretation of the provisions of the African Charter.
- Aligning the practices of the ACHPR with best practices, regionally and internationally on access to information and the right to a fair and public trial.
- Creating an enabling environment for human rights litigation on the continent.

### **Background**

Article 59 of the African Charter on Human and People’s Rights provides that:

1. All measures taken within the provisions of the present Chapter shall remain confidential until such a time as 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.

Article 59, in its phrasing, allows room for diverse interpretations. The term “present chapter” within the first paragraph pertains to chapter 3 of the African Charter, which delves into the procedures of the Commission. This chapter, spanning from Article 46 to Article 59, encompasses the process of individual communications stipulated in Article 55 of the African Charter. As such, the confidentiality prescribed by Article 59 extends to the communications procedure before the ACHPR.



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The ACHPR restrictive interpretation of article 59 is problematic, especially regarding its interpretation of “all measures” in Article 59(1) to include all actions and communications conducted and received by the Commission. This constriction extends beyond recommendations and decisions, including all facets of communications, including pleadings, individual submissions, and party identities. This current interpretation of article 59(1) results in profound implications for the protection of human rights on the continent, by restricting access to information, thereby impacting the right to a fair and public hearing, curtailing advocacy efforts related to pending communications, as pertinent information remains veiled until the approval for publication by the Assembly of Heads of State.

## **The Human Rights implications of the ACHPR’s current interpretation of article 59(1)**

The current interpretation of article 59(1) limits the fundamental right to access information, a restriction inconsistent with international human rights standards. These standards stipulate that individuals are entitled to seek, receive and impart information and ideas of all kinds, through varied mediums including oral, written, or artistic expressions. Access to information must be ‘easy, prompt, effective and practical’. Information should be provided without necessitating an explicit rationale or vested interest on the part of the requester. This right is inextricably linked with the “right to truth,” it is considered a first step in the promotion of justice and reparation. In *Toktakunov v Kyrgyzstan*, The UN Human Rights Committee provided guidance on the right to information under article 19 of the ICCPR, reaffirming that exceptions to the right are limited to only those permitted under Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) which pertain to the respecting of individual reputations, national security, public order, health, or morals.

At the regional levels, the Inter-American Commission on Human Rights (Inter- American Commission) has adopted the Inter-American Declaration of Principles on Freedom of Expression, which affirms the right to information and recognises it as a fundamental right of each individual. The Inter-American Court on Human Rights (Inter-American Court) has held that the right to freedom of expression included a right to access information held by public bodies in several occasions. Moreover, the Organisation of American States (OAS) adopted the Inter-American Model Law on Access to Public Information. Similarly, the Council of Europe recognizes the right to access information and adopted the Convention on Access to Official Documents, which obligates member states to guarantee individual’s access to governmental documents upon request.



Coming closer to home, the ACHPR adopted the declaration of principles on freedom of expression and access to information in Africa in 2019. This document is based on article 9 of the African Charter which guarantees individuals the right to receive information as well as the right to express and disseminate information. The Declaration advocates for access to data retained by public as well as pertinent private bodies. It provides for maximum and proactive disclosure of information, circumscribed only by narrowly tailored exceptions that are in accordance with international human rights standards.

The Principles of Publicity and freedom of information are instrumental in the effective promotion and protection of human rights, the ACHPR's current interpretation of article 59(1) violates the right to access to information as provided under international standards and article 9 of the African Charter. This interpretation imposes an unjustified restrictions on the public's right to access information. Such limitations impede the capacity of the wider public, NGO's and CSO's to actively engage with human rights issues pending before the ACHPR. Thereby, limiting their ability to place pressure on governments actions. This is further exacerbated by the fact the ACHPR does not have a list providing information on pending communications before the Commission.

Furthermore, The current interpretation hampers the participation of interested experts or NGOs in ongoing communications and the submission of amicus briefs due to the opacity surrounding communication information. Rule 104 of the ACHPR Rules of Procedure 2020 provides that third parties are allowed to intervene in a pending communications either by invitation or upon request, serving as amicus curiae, to aid the Commission in determining a factual or legal issues. Although Rule 104 permits the invitation of amicus curiae contributions, sub-section 3 requires the authors of the request to indicate the relevant communication(s) and the contribution the proposed amicus- an imperative rendered unfeasible due to the unavailability of such information to the public. Thus, the Rule fails to rectify the absence of information crucial for experts and stakeholders to formulate informed briefs aligned with pertinent matters.

According to Rule 100 of the African Commission on Human and Peoples' Rights' (ACHPR) Rules of Procedure, provisional measures- adopted to prevent irreparable harm to the victim or victims of the alleged violation within pending communications- also fall under the ambit of confidentiality. Consequently, it becomes virtually unfeasible to ascertain either the number of such provisional measures enacted or the level of compliance exhibited by the implicated state. This contrasts markedly with



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practices before the African Court, where orders for provisional measures are issued transparently.

The ACHPR's interpretation of article 59(1) which mandates blanket confidentiality for all proceedings and outcomes, unduly compromises the individual's right to a fair and public trial. This right is enshrined in various international and regional human rights frameworks, including Article 14 of the International Covenant on Civil and Political Rights, Article 8 of the American Convention on Human Rights, and Article 6 of the European Convention on Human Rights. As a general guiding principle, these treaties uniformly assert that everyone is entitled to a fair and public hearing, the public and media may be excluded from the proceeding in the interest of justice, morals, public order, national security or the interest of juveniles.

While Article 7 of the African Charter acknowledges the right to be heard, it remains silent on the issue of publicity of judicial proceedings. Nonetheless, the ACHPR has adopted the principles and guidelines for the right to a fair trial and legal assistance in Africa. According to Principle A(3) within this framework, no limitations should be placed on the categories of individuals permitted to attend hearings. The media is entitled to be present at and report on judicial proceedings and adequate facilities should be put in place to accommodate the attendance of interested members of the public. Exceptions to this general inclusivity may be only take place for the interest of justice, the protection of children, witnesses and victims of sexual violence and for reasons of public order and national security.

The practise of regional bodies follows the same general rule that, in principle, trials and proceedings must be public with few exceptions. For instance, article 15 of The Rules of Procedure of the Inter-American Court of Human Rights provides that hearings shall be public unless it is deemed necessary to resort to private proceedings. Additionally, the same article mandates the public dissemination of various judicial documents, including judgments, orders opinions, documents from the case file and other documents deemed suitable for publication. At the African level, Rule 21 of the Rules of Procedures of the African Court on Human's and People's Rights provides for the publication of the Court's judgement, opinions, pleadings, statements and minutes of public sittings and other relevant documents on its website.



Contrastingly, the ACHPR diverges sharply from these accepted standards. According to Rule 90 of the Rules of procedure of the ACHPR, the Commission's deliberations on communications shall occur in private, and all facets of these discussions are to remain confidential. Furthermore, Rule 102 stipulates that hearings before the Commission shall be held in private and only parties to the communication, their legal representatives, witnesses, experts and third parties are allowed to attend the hearing, provided they abide with article 59(1) of the African Charter. This approach represents a significant deviation from broadly accepted standards on the openness of judicial proceedings.

Moreover, the repercussions of the ACHPR's stringent reading of Article 59(1) include hindrances to legal mobilization and the capacity of individuals and NGOs to engage in strategic litigation for societal change as substantive information on communications are kept a secret from the public. The strict confidentiality also impedes advocacy during protracted litigation, particularly because communications before the ACHPR can take years to conclude. In such instances, advocacy fuelled by reliable data is pivotal in driving social change through ongoing engagement with rights and issues broached before the ACHPR, potentially catalysing legal or policy reform independently of ACHPR decisions.

In light of these implications, it becomes imperative for CSOs to actively participate in the Campaign, advocating for a more progressive interpretation of Article 59(1) given its profound impact on human rights and the meaningful involvement of CSOs in ongoing litigation. This endeavour entails a range of strategies and activities, encompassing knowledge dissemination, CSO mobilization, stakeholder engagement, and public outreach.

### **Contact information:**

For those interested in becoming part of the Article 59(1) Campaign or seeking additional information, please contact **Ms Mai Aman** via **mai@the-isa.org**. We look forward to your participation.



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