

Art 59(1)  
Campaign:  
**Confidentiality:  
a general rule  
or an exception**



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## **Art 59(1) Campaign: Confidentiality: a general rule or an exception**

### **1. Introduction**

**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. Article 59(1) African Charter on Human and Peoples' Rights**

There is an Igbo lullaby usually sang by the community during the naming ceremony of new born Igbo babies. The lyrics of this lullaby is about the baby's cry. This lullaby calls out to as many as will hear the baby's cry to run

towards and attend to the baby. And this lullaby ends with the rhetorical question: 'does a child belong to any one person?' What this question implies is infinite, but in the least it clarifies that the African child is born into and bears affinity to a community that joyfully receives and nourishes this affinity. A conflict for the child is a conflict for the community. This rhetoric echoes across a multiplicity of African cultures establishing that communal participation is how we take care of each other as Africans. But then it all begins with the pitch, openness and wide-reach baby's cry, the baby has to cry in the ear shot of the community. And anyone/thing that hinders the community from hearing the baby's cry is both unjust to the baby and unjust to community. Borrowing this metaphor, the proverbial baby is the aggrieved applicant/human rights subject bring a communication of human rights violation by an African state against the African Commission on Human and Peoples' Rights. And the proverbial hinderance is the restrictive interpretation of Article 59(1) of the African Charter by the African Commission.

Globally, the odds are generally stacked up, conspiring against persons and groups that have to contest their entitlement to the protection, respect and fulfilment of their human rights by state parties. Occasionally, national mechanisms falter in the realisation of justice for these persons and groups. And after having exhausted these local remedies, these persons and groups resort, with high hopes, to the sanctum that international human rights law and international human rights bodies are a symbol of. At the level of the African continent, the African Charter on Human and Peoples' Rights (African Charter) embodies this symbol for law. The African Commission on Human and Peoples' Rights (African Commission) is

mandated to see to the adequate interpretation and implementation of the African Charter, and core to its duty are monitoring the state obligation to respect, protect and fulfil the human rights of its citizens. Borrowing from our earlier metaphor, communications submit to and proceeding at the African Commission constitute a great response to the proverbial baby's cry. However, stakeholder involvement is also a parallel and commensurate response to the proverbial baby's cry. 'Does the child belong to any one person?'

The African Commission is bound by both the rule of law and, to a very large extent, its decolonial and democratic trajectory as an organ of the African Union, an overarching body intimately aware of the urgency of fairness, equality and reparation for the victim. The issue here is that within these noble dynamics, the African Commission, through its interpretation of Art 59(1) of the African Charter, inclines towards a blanket application of the principle of confidentiality on all that it deems its measures in the course of its handling a human rights communication, only to be lifted after the 'Assembly of Heads of State and Government shall otherwise decide'. This blanket application also implicates the pleadings of the applicants and this has very problematic impacts on the regional trajectory of human rights on the African continent. These problematic impacts are what Article 59 (1) campaign seeks to centre to and address.

These problematic impacts of the African Commission's blanket application of the confidentiality principle as regards its interpretation of Art 59 (1) exist on normative, technical and sociocultural/philosophical levels.

## **2. Normative impact of the African Commission's blanket application of the confidentiality principle as regards its interpretation of Art 59 (1)**

As opposed to general application of the blanket coverage of confidentiality, confidentiality of human rights proceedings has its place in law. As pointed out in the panel discussion on Art 59(1) during the 81st Ordinary Session of the African Commission. Its relevance arises in the event that public trial and public access to trial information will compromise public safety or the safety of the persons that are implicated by the case. This argument may also be made for extremely sensitive human rights cases which may involve children or similarly sensitive subjects. However, these are exceptions. And these exceptions exist to qualify the general rule of fair and public trials that legal/human rights proceeding in democratic processing shop generally imply.

The rights to fair and public trial is enshrined in Article 10 of the Universal Declaration of Human Rights.<sup>1</sup> The right to fair trial is a customary norm of international human rights law and a corner stone of the application of rule of law across democratic states. The right to fair and public trial is particularly with the African regional human rights frameworks is

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1 UDHR art 10.

an integral part of the democratization and rule of law potential that the African human rights system embodies.<sup>2</sup> If the African Charter is to be respected for this cohesive legal and jurisprudential potential across the African continent, then its incidental procedure ought to be reflective of the rule of law that the African Charter embodies. This rule of law implies that there is impartiality of judges, right to access to information, the right to fair and public trial, as well as the right to equality.

The legal right to equality, especially within legal and quasi-legal proceedings implicates the legal principle of equality of arms. Although the legal principle of equality of arms is not enshrined in the African Charter, Articles 60 and 61 of the African Charter, allows for the referencing of legal principles of international law in the engagement with provisions of the African Charter. In this case, we jointly discuss the right to equality and the legal principle of equality of arms. Equality of arms as a legal principle, come from the sphere of fair trial within international criminal proceeding, and this principle requires that 'the defense never be placed at a substantial disadvantage' in relation to the prosecution in terms of its ability to present its case. This principle of equality of arms implicates an obligation on the court/judicial/quasi-judicial body to provide all practicable facility within its capacity when requested by a party for the purpose of presenting a case.<sup>3</sup> The equality of

arms principle draws on both procedural and substantive quality. As such the rules of court and technical set up of the proceedings as well as expansive regard for normative rights ought to relay fair dynamics to all parties concerned in the case.<sup>4</sup>

Reading this international criminal law proceeding into international human rights proceeding raises the cogent question of what are the actual substantive and procedural needs of the human rights parties within the framework and dynamics of contesting their state violation of their human rights within the African human rights system. Also discussing fair trial and equality of arms within human rights also implicates the contention of 'whether something said or done either before or during a trial undermines fairness to the point which resulted in the miscarriage of justice'.<sup>5</sup> As regards the application of the principle of equality arms in human rights, the General Comment 32 of the United Nations Human Rights Committee 4 provides that the 'equality of arms means that the same procedural rights are to be provided to all the parties unless distinction are based on law and can be objective and reasonable grounds not entailing actual disadvantage or other unfairness to the defendant'.<sup>6</sup> Closely linked to this, Art 6(3) of the European Convention on Human Rights (ECHR); Art 14 (3) (b) of the ICCPR; and Art 8(2) (1) of the American Convention on Human Rights (ACHR) which

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2 I Bansal and S Kushwah 'Concept of fair trial - a human right' (2022) 5 Indian Journal Law Legal Research 2.

3 M Ellis 'The right to fair trial under international law' (2018) Proceedings of the Annual Meeting (American Society of International Law) 8

4 International Covenant on Civil and Political Rights art 14 (1); S Akthar and AB Nordin 'Equality of Arms: a fundamental principle of fair trial guarantee developed by international and regional human rights instruments' (2014) 3.

5 S Akthar and AB Nordin 'Equality of Arms: a fundamental principle of fair trial guarantee developed by international and regional human rights instruments' (2014) 2.

6 United Nations Human Rights Committee General Comment 32, para 13.

provide that parties should have sufficient time and resources to prepare a defense.<sup>7</sup>

An expansive reading of the principle of equality of arms in centres securing access to resources, or in the least not compromising the potential of accessing resources, that may be essential to the realisation of the rights to fair and public trial. Parallel to these standards of fair hearing, public trial and equality of arms, the African Charter provides for the reference to or invitation of third parties as a bolstering measure towards its protective mandate. Art 46 of the African Charter provides that 'the Commission may resort to the any appropriate method of investigation, it may hear from the Secretary General of the Organisation of African Unity, or any other person capable of enlightening it.'<sup>8</sup>

The blanket application of confidentiality, as the African Commission perceives is the implication of Art 59(1) of the African Charter, is substantively inconsistent with the potential and practicability of external assistance and external resources that the African Commission and the parties to it ought to have access to. This blanket confidentiality, which is read to apply to the measures, also applies to the pleadings of the parties. These pleadings contain the most articulate and elaborate stories of the case which should ideally be the first point of contact to any external resource person. Excessively cloaking the pleadings substantively hinders the potential and quality of access to these resource persons and vice versa. And ultimately this hinderance constitutes a substantive

contravening of the quality of proceedings and as such the principle of equality of arms and the rights to fair and public trial.

### **3. Procedural impacts of the African Commission's blanket application of the confidentiality principle as regards its interpretation of Art 59 (1)**

What occurs at the level of substantive rights and set up of the African Commission invariably impacts the technical playout of its procedure. As it exists at the moment, on a procedural level, opportunities for these third parties exist through the Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020 (African Commission Rules). The African Commission Rules provide for third parties along two categorical planes. The first category of third parties, usually referred to as *amicus curiae* are entities that have no interest in the outcome of the communication but may be able to provide the African Commission with legal or factual guidance.<sup>9</sup> The second category of third parties are third parties that have direct interests in the outcome of the communication before the African Commission.<sup>10</sup> The African Commissions Rules provide that both *amicus curiae* and third parties with direct interests can apply to be joined and given audience in the cause of the proceedings and subsequently only after this will they be issued with the proceedings pleadings.<sup>11</sup>

7 ICCPR art 14(3) (b); ECHR art (3)(b); ACHR art 8(2) (1).

8 African Charter art 46.

9 African Commission Rules, Rule 2.

10 African Commission Rules, Rule 106.

11 African Commission Rules, Rules 105(3)(a); Rule 106.

Although the release of the pleadings remain the prerogative of the African Commission, it goes without saying that application to be either an amicus or third party with direct interest cannot be made in ignorance. Applying to come on board a communication as either an amicus or a third party with direct interests ought to be made from an informed perspective or at least with access to some substantial and credible scope of information. If the equality or arms principle are to be fairly applied, then the importance of the amicus to the African Commission and the direct interests of third parties ought to be effectively considered. The inaccessibility of the pleadings to the potential amicus and third party with interests is a gross disarming of these parties because it strips them of access to the resources that would assist them in making effective applications to be part of the African Commission. The blanket confidentiality that the African Commission interprets Art 59 (1) of the African Charter to imply potential constitutes a procedural hinderance to amicus and third party application and participation in the African Commission proceedings where necessary.

It is important to note here that given that the parties before the African Commission must exhausted all local remedies before submitting communication, the matter being contended must have passed through several courts generating a substantial trail of court records as well other public documentation. The summative articulation of these local court records and public documentation at regional level ought to instantly grant the broad scope of the African civil society access to these documents. Rebinding the pleadings as confidential as is arguably implied by the

Art 59 (1) constitutes an illogicality with the parallel open access nature that the comprising documents embody at the level of national public records. Also illogical is that the African Commission requires that the parties before the it must be bound by such confidentiality even it means compromising their access to external support. The broad confidentiality that is ascribed to Art 59(1) of the African Charter, locks not just the applicants and state parties in, but is also complicit in functionally locking the third parties with direct interest and amicus out of the African Commission proceedings and ultimately stifles the ability the potential of the African Commission in the realisation of its protective mandate. This casts a cloak on the human rights plight of the applicants on a platform that ironically ought to offer applicants a transparent, resourceful and fair engagement with the African human rights system.

#### **4. Sociocultural/philosophical impact of the African Commission's blanket application of the confidentiality principle as regards its interpretation of Art 59 (1)**

An Africa where human rights applicants do not get transparent, resourceful and fair engagement with human rights systems is an Africa that is complicit in the oppression of its vulnerable persons. In 2025, the African Union looks to orient its operations around the broad theme of 'Justice for Africans and people of African descent through reparations'. This theme, on the issue of Art 59(1) calls for its joint reading with Aspiration 3 of the AU Agenda 2063 which aims at an Africa of good governance,

democracy, respect for human rights, justice and the rule of law. If the African human rights system is to be part of the reparation trajectory of the AU, then it is crucial that it recognises the scope of reparative justice as being cognisant of procedural and substantive hinderances to fair and public trial rights and the principle of equality of arms.

Reparation is lauded as signaling the final stage of decolonisation.<sup>12</sup> Although emerging from a criminal justice framework, the human rights merits of a reparative incline are infinite. Reparation and reparative approaches are system-focused and quite critical of governance machineries and legacies that are either passive or complicit in perpetuating unnecessary hardship on citizens, communities and the broader society.<sup>13</sup> While being system-focused, reparative frameworks have at their core, the restoration of the victim's dignity in the most constructive way possible. Suggested complementary components of these restoration include: 'reestablishment of the victim's equality of value, power, esteem; relieving the victim's stigmatisation and separation from society; repairing the nation's ability to provide and maintain equality under law and the provision of justice; and asserting the commitment of the international community to community to combat impunity and providing and maintaining equal value under the law and provisions of justice.'<sup>14</sup>

The blanket confidentiality that Art 59(1) of the African Charter is interpreted to proffer is inconsistent with the reparative approach that the African Union is incline towards. This blanket confidentiality hinders the reestablishment

of human dignity that human rights subjects seek because it hampers the ability of human rights subjects to secure the needed resources and expertise. These resources and expertise are integral to securing justice through the transparency of the African Commission and through third parties. As explained in the panel discussion on Art 59(1) campaign at the 81st Ordinary Session of the African Commission, the involvement of third parties are integral to the protection and fulfilment of the human rights of citizens on the African continent. These third parties may include civil society and National Human Rights institutions. It was also explained on this panel that this blanket confidentiality on African Commission measure and proceedings lead to implementation delays on the outcome of these proceedings. These implementation delays are invariably occasioned by the non-involvement of vital implementation-oriented stakeholders owing to the strictness and exclusion that the current restrictive interpretation of Article 59(1) of the African Charter translates to. The exclusion also broadly translates to a lack of public engagement and mobilization.

## 5. Conclusion

The blanket confidentiality that is core to the African Commission's restrictive interpretation of the Article 59(1) of the African Commission constitutes a contravention of substantive, procedural and sociocultural pillars of the human rights of African citizens to fair and public trial. This interpretation is also inconsistent with African Union 2025 thematic trajectory of 'Justice for Africans and people

12 B Agozino 'Reparative justice: the final stage of decolonisation' (2021) 23(5) *Punishment & Society* 613.

13 As above 626.

14 Y Danieli 'Massive trauma and the healing role of reparative justice' (2009) 22(5) *Journal of Traumatic Stress* 353

of African descent through reparations'. The engagement with the fair and public trials rights of African citizens at the African Commission ought to be a demonstration of the best possible manifestations of rule of law, transparency and fairness. This demonstration ought to embody a respect of the principle of equality of arms. The African human rights system unequivocally recognises the value of third party interventions in the course of human rights proceedings for the benefit of parties already present, other parties that have direct interest in the proceeding as well as for the benefit of the African Commission. A trial dynamic, such as the blanket confidentiality interpretation, that potentially hinders necessary third party access cripples not just the rights of the parties but also the potential access of the African Commission to epistemic resources. As such the Article 59(1) campaign urges that a progressive interpretation of Art 59(1) be embraced by the African Commission to ensure that confidentiality measures outlined in Art 59(1) do not hinder transparency (and public participation in parallel advocacy initiatives). The Article 59(1) campaign encourages the African Commission to align its practice with globally accepted best practices in terms of access to information and the right to a fair and public trial. The Article 59(1) campaign also aims encourage an enabling environment for human rights litigation across Africa, one that encourages public participation and advocacy.