

Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples' Rights

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1 Introduction

Publicity and freedom of information play an important role in the effective promotion and protection of human rights. This is for a number of reasons. Individuals, non-governmental organisations (NGOs) and inter-governmental organisations need reliable information to put pressure on governments. Publicity is also important as it increases the visibility of an organisation. The African Commission on Human and Peoples' Rights (African Commission) is a good example of an institution where a lack of visibility has been to the detriment of the important work that the Commission is undertaking under difficult circumstances.

As has often been pointed out, the African Commission has during its almost 20 years of existence faced serious constraints with regard to human and financial resources. Over the last few years, the Commission has also come under increased pressure from the political bodies of the African Union (AU). This is ironical, since the AU Constitutive Act makes the promotion and protection of human rights 'in accordance with the African Charter' one of the objectives of the new continental body.¹

One of the functions of the African Commission is to 'disseminate information'.² The Commission achieves this through promotional visits, participation in seminars and conferences and publishing reports on its work. It is the last of these activities that is the focus of this article. Most information that concerns the work of the African Commission is in the archives of the Commission in Banjul, and therefore not easily

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¹ Art 3 Constitutive Act of the African Union.

² Art 45(1)(a) African Charter.

accessible. This article considers the different reasons why many reports and other documents of the Commission are not publicly available.

2 Article 59 and the role of the OAU/AU Assembly and Executive Council

2.1 Background to article 59

Article 54 of the African Charter on Human and Peoples' Rights (African Charter) provides that the 'Commission shall submit to each ordinary session of the Assembly of Heads of State and Government a report on its activities'.³ This is in line with the requirements of other international human rights instruments adopted by the United Nations (UN), the Organization of American States and the Council of Europe.

In sharp contrast to other international human rights treaties, a restrictive reading of article 59 of the African Charter gives the Assembly the power to decide what the Commission can publish:⁴

- 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 leaves much open for interpretation. 'The present chapter'⁵ is chapter III with the heading 'Procedure of the Commission'. The first

³ Art 54 African Charter. This is the last article under the heading 'Communication from states' (arts 47-54). It is thus possible that it should be interpreted to apply only to the activities undertaken by the African Commission with regard to inter-state complaints. However, this is not how the article has been interpreted by the Commission.

⁴ Sub-paras 1 and 2 were included *verbatim* in the draft African Charter prepared by the Dakar Meeting of Experts in December 1979. The draft prepared ahead of this meeting by Kéba M'baye did not contain any similar provision. The M'baye draft required the African Commission to submit an annual report to the Assembly, and also made provisions for confidentiality with regards to individual complaints. The Monrovia proposal on an African Commission on Human Rights, adopted in September 1979 by a meeting convened by the United Nations, did not make any reference to confidentiality. It provided that the Commission should 'make reports with appropriate recommendations' to the OAU concerning alleged violations'. The Commission should also submit an annual activity report to the Assembly. See drafts of the African Charter reprinted in C Heyns (ed) *Human rights law in Africa 1999* (2002). See also BG Ramcharan 'The *travaux préparatoires* of the African Commission on Human Rights' (1992) 13 *Human Rights Law Journal* 307.

⁵ Many reprints of the African Charter wrongly refer to 'Charter' rather than 'Chapter'. As pointed out by Benedek, this could lead to 'serious misunderstandings'; W Benedek 'The 9th session of the African Commission on Human and Peoples' Rights (1993) 12 *Human Rights Law Journal* 217.

article in this chapter is article 46, which states that the Commission 'may resort to any appropriate method of investigation'. The rest of the chapter deals with 'communications from states' (articles 47-54) and 'other communications' (articles 55-59). State reports are regulated in article 62 and thus clearly falls outside the ambit of article 59. When it comes to mission reports the situation is less clear, as will be discussed further below.

The Assembly adopted the First Activity Report of the Commission in 1988. Concerns that article 59 would be applied restrictively by the OAU Assembly were not realised for many years. The Assembly resolutions on the Activity Reports of the Commission were most of the time drafted by the Commission itself.⁶ The reports were 'adopted without debate, usually late in the evening, after other, more high-profile, business was done'.⁷

The lack of debate over the findings of the Commission by the AU political organs was criticised by some observers.⁸ It was a report on a fact-finding mission to Zimbabwe that finally made the AU political bodies take more than cursory note of the Activity Reports of the Commission.

2.2 Article 59 and mission reports

The Seventeenth Annual Activity Report was presented before the AU Executive Council in June 2004. This followed a decision by the Assembly in July 2003 to mandate the Executive Council to consider the Activity Report at future summits and report to the Assembly.⁹ In its decision, the Executive Council took note of the Seventeenth Annual Activity Report and recommended the Assembly to:

- 3 URGE all Member States to cooperate with the ACHPR, and the various mechanisms it has put in place, and implement its decisions in compliance with the provisions of the African Charter on Human and Peoples' Rights;
- 4 NOTE that some [ACHPR] reports on the State Parties are presented in the form of observations; and INVITE ACHPR to ensure that in future its mission reports are submitted together with the comments of the State Parties concerned and to indicate the steps taken in this regard during the presentation of its annual activity report;
- 5 SUSPEND the publication of the 17th Annual Activity Report in accor-

⁶ R Murray *Human rights in Africa* (2004) 60.

⁷ n 6 above, 58 citing Ben Kioko, AU legal counsel.

⁸ n 6 above, 57-62. Murray notes one instance of interference from the Assembly: the suspension of the review of NGO observer status in 1996; n 6 above, 66.

⁹ Decision on the Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Assembly/AU/Dec 11 (II). At its meeting in June 2006, the Executive Council did not make any recommendation to the Assembly, but adopted the Twentieth Activity Report of the Commission itself. The Executive Council thus does not follow the provision of the African Charter itself, as article 59 explicitly provides that decisions shall be taken by the Assembly.

dance with paragraph 4 above pending the possible observations by the Member States concerned;

The decision of the Executive Council was subsequently endorsed by the Assembly.¹⁰ Sub-paragraph 3 represents the first time that a political organ of the AU urged the member states to comply with the decisions of the Commission,¹¹ but the decision also had negative consequences, as discussed further below. At its next summit in January 2005, the Assembly adopted the Seventeenth Annual Activity Report,¹² after having ensured that the response of Zimbabwe to the Commission mission report had been included.

The reason for the suspension of the publication of the Seventeenth Annual Activity Report was that the Commission in the draft report had included an executive summary of the report of a fact-finding mission undertaken by members of the Commission to Zimbabwe in 2002, without including any comments on the report from the government of Zimbabwe.¹³

The basis for missions of the Commission can be said to fall under the provisions of the mandate of the Commission (article 45, outside chapter III) or as a procedure of the Commission (article 46, first article in chapter III). The Commission has sometimes drawn a distinction between promotional missions and fact-finding missions.¹⁴ However, the Commission has not always drawn a clear distinction between the two types of missions.¹⁵ The Rules of Procedure of the Commission, adopted in 1995, do not solve the problem, as they do not regulate the missions of the Commission.

The first fact-finding mission of the Commission was an election observation mission to Mali in 1992 at the request of the govern-

¹⁰ Decision on the Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Assembly/AU/Dec 49 (III).

¹¹ This appeal was not repeated in the second decision on the Seventeenth Annual Activity Report or in the decisions on the Eighteenth, Nineteenth and Twentieth Activity Reports. However, the Assembly in its 'Banjul Declaration on the 25th Anniversary of the African Charter on Human and Peoples' Rights' urged member states to 'take the necessary steps to fulfil their obligations under the African Charter and other human rights instruments to which they are parties, in particular, the implementation of decisions and recommendations of human rights treaty bodies'. See Assembly/AU/Decl 3(VII), July 2006.

¹² Decision on Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights (ACHPR), Assembly/AU/Dec 56 (IV).

¹³ That the Zimbabwean government had been given the opportunity to respond to the report after it was adopted by the Commission is clear from the response by Zimbabwe in the Seventeenth Annual Activity Report as finally adopted by the Assembly. See para 5.4.

¹⁴ On fact-finding missions, see T Mutangi 'Fact-finding missions or omissions? A critical analysis of the African Commission on Human and Peoples' Rights' (2006) 12 *East African Journal of Peace and Human Rights* 1.

¹⁵ There is no reference to missions in the Commission's Rules of Procedure. See below on the practice of the Commission with regard to missions.

ment.¹⁶ The Commission sent a mission to Togo to discuss alleged human rights violations in January 1995.¹⁷ The same year, the Commission decided to send missions to Mauritania, Nigeria, Senegal, Sudan and Zaire, but all of these did not take place.¹⁸ The clear connection between these suggested missions and the consideration of communications submitted to the Commission can be seen from the case law of the Commission,¹⁹ and from mission reports.²⁰

However, in the decisions on the cases against Mauritania and Sudan, decided in 2000 and 1999 respectively, the Commission emphasised that the missions, both fielded in 1996, should be seen as promotional.²¹ This should be seen in the light of the Commission moving away from seeing missions as connected to the communications procedure. A 'reflection on the establishment of an early intervention mechanism in case of massive human rights violations' was discussed at the 24th session of the Commission in October 1998. It included a provision that '[t]he Commission should exercise its competence under article 45(i) to report on and make public its views on an emergency given that article 59 on confidentiality relates to chapter 3 of the Charter'.²²

¹⁶ Fifth Annual Activity Report para 26, Final communiqué of the 12th ordinary session of the African Commission on Human and Peoples' Rights, Banjul 12-21 October 1992, para 16.

¹⁷ Press release 23 January 1995, reprinted in R Murray & M Evans *Documents of the African Commission on Human and Peoples' Rights* (2001) 417; Eighth Annual Activity Report para 13.

¹⁸ Eighth Annual Activity Report para 24.

¹⁹ *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 86-87; *Constitutional Rights Project (in respect of Akamu & Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995) para 14; *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995) para 16; *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) paras 26 & 46; *Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 6; *Degli & Others v Togo* (2000) AHRLR 317 (ACHPR 1995) para 4. See also the request for a mission to Chad: *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 10. On the Senegal and Mauritania missions, see F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human rights* (2003) 634-638. See also the Final communiqués of the 16th and 17th ordinary sessions of the African Commission, where the Commission with regard to communications mentions the number of cases 'in which the Commission decided to send missions', reprinted in Evans & Murray (n 16 above) 414 423.

²⁰ *Rapport de mission de la Commission Africaine des Droits de l'Homme et des Peuples au Soudan* 1-7 Decembre 1996, undated, paras 165-181.

²¹ *Malawi African Association & Others v Mauritania; Amnesty International & Others v Sudan* para 46. See also Ouguergouz (n 19 above) 638.

²² Reprinted in Murray & Evans (n 17 above) 757. The discussion paper had been prepared by Commissioner Umozurike. See R Murray 'Report on the 1998 sessions of the African Commission on Human and Peoples' Rights — 23rd and 24th ordinary sessions: 20-29 April and 22-31 October 1998' (2000) 21 *Human Rights Law Journal* 374.

Mission reports were published on Mauritania and Senegal as annexes to the Tenth Annual Activity Report, without any comments by the respective states annexed to the reports. A mission report on Zimbabwe submitted by the Special Rapporteur on Prisons and Conditions of Detention was published in the same Activity Report. A report on the mission to Sudan was published separately without any mention in the Activity Reports that the mission report would be published. Though the mission took place in December 1996, the responses from the government of Sudan attached to the undated report are dated April 1999. In a decision contained in the Twelfth Annual Activity Report, the Commission decided to publish 'the mission reports on Mauritania together with the observations of the government'.²³ The Commission decided to send the mission report on Nigeria to the government for its comments.²⁴

In the past, reports of the Special Rapporteur on Prisons and Conditions of Detention in Africa have been published by Penal Reform International and are available on its website.²⁵ Most of these have been published without the explicit approval at a Commission session. At the 28th session in 2000, the Special Rapporteur, Professor Dankwa²⁶

informed the Commission that his mission report to Benin had been published. He indicated that he had recommended that Government urgently address the problem of the health of the prisoners and was pleased to learn that the Government had allocated funds to address this problem. He informed the Commission that the report on his second visit to Mali was translated into Arabic and that the report on Central African Republic will soon be published. He also informed the Commission that he had received comments and observations on his reports from the relevant authorities in The Gambia and Mozambique.

Starting with the Sixteenth Annual Activity Report adopted in 2003, the Commission has adopted the reports of promotional and fact-finding missions and the reports of missions of Special Rapporteurs and working groups.²⁷ At its 36th session in November 2004, the Commission²⁸

²³ Para 32.

²⁴ Para 33.

²⁵ http://www.penalreform.org/english/frset_pub_en.htm (accessed 22 July 2006).

²⁶ Fourteenth Annual Activity Report, para 21.

²⁷ The Commission has adopted reports of fact-finding missions to Zimbabwe, Côte d'Ivoire ('High Level Mission') (Seventeenth Annual Activity Report), Sudan (Eighteenth Annual Activity Report), Sahrawi Arab Republic (Nineteenth Activity Report) and Togo (Twentieth Activity Report). The Commission has further adopted promotional mission reports on Burkina Faso, Côte d'Ivoire, South Africa, Senegal, Zambia (Sixteenth Annual Activity Report); Côte d'Ivoire, Seychelles, Djibouti, Niger, Libya (Seventeenth Annual Activity Report) DRC, Sierra Leone, Sudan, Nigeria, Congo (Eighteenth Annual Activity Report); Central African Republic, Mauritania, São Tomé and Príncipe, Guinea Bissau, Seychelles and Botswana (Nineteenth Activity Report).

²⁸ Fourteenth Annual Activity Report, para 21.

decided to adopt its mission reports before sending them for comments to the States Parties to which missions were made. The African Commission decided to give States Parties a three (3) month deadline to submit their comments. This deadline could be extended for three (3) extra months, if need be.²⁹

This followed the decision by the AU Executive Council/Assembly on the Zimbabwe fact-finding mission report. Though it does not state so expressly, it seems to be implied in the Commission's decision that the reports should either be published or submitted for adoption to the Executive Council/Assembly after comments have been received or the deadline for comments has expired. However, since the Zimbabwe debacle, no mission report has been included in the Activity Reports of the Commission or published in any other way by the Commission.

2.3 Article 59 and individual communications

Communications are the category of measures that clearly fall within the ambit of article 59. In its early years, the Commission interpreted article 59 to mean strict confidentiality with regard to communications, somewhat akin to the 1503 procedure before the UN Commission on Human Rights. In its Second Activity Report, the Commission stated that it had settled ten cases, but that the decisions 'for the time being, remain confidential in conformity with Article 59 of the African Charter . . .'³⁰

The Sixth Annual Activity Report adopted by the Assembly in 1993 included a confidential Annex XI on communications, which was not included in the published Activity Report. However, after a request from NGOs participating at the 5th NGO workshop, that preceded the 14th session of the Commission in December 1993, copies of the annex were made available to these NGOs.³¹ Starting with the Seventh Annual Activity Report, adopted by the Assembly in 1994, the Commission has included the decisions it has taken with regard to communications.

That the Assembly's decision on the Zimbabwe mission report also had relevance to individual communications became clear when the Executive Council adopted the Twentieth Activity Report in June 2006 with the exception of a decision on a communication against Zimbabwe. In the decision the Executive Council

- 1 ADOPTS and, in conformity with Article 59 of the African Charter on Human and Peoples' Rights (African Charter), AUTHORIZES the publica-

²⁹ Eighteenth Annual Activity Report, para 56.

³⁰ Second Annual Activity Report of the African Commission on Human and Peoples' Rights, adopted on 14 June 1989, para 35. Reprinted in Murray & Evans (n 17 above) 177.

³¹ W Benedek '14th session of the African Commission on Human and Peoples' Rights' (1994) 12 *Netherlands Quarterly of Human Rights* 86.

- tion of the 20th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) and the Annexes with the exception of decision 245 on Zimbabwe;
- 2 INVITES Zimbabwe to communicate to the ACHPR, within two (2) months following the adoption of this decision, its observations on the said decision, and ACHPR to submit a report thereon at the next Ordinary Session of the Executive Council;
 - 3 ALSO INVITES Member States to communicate within two (2) months following the reception of ACHPR notification, their observations on the decisions that ACHPR is to submit to the Executive Council and /or the Assembly; . . .³²

It is unclear what the need of this right to response is as states are encouraged to participate in the process leading up to a decision and their position on admissibility and merits are recorded in the decision taken by the Commission.³³

2.4 Article 59 and resolutions

The Assembly took the following decision on the 19th Activity Report of the Commission:³⁴

The Assembly:

- 1 ADOPTS and authorizes, in accordance with Article 59 of the African Charter on Human and Peoples' Rights (the Charter), the publication of the 19th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) and its annexes, except for those containing the Resolutions on Eritrea, Ethiopia, the Sudan, Uganda and Zimbabwe;
- 2 REQUESTS the concerned Member States to make available to the African Commission within three (3) months of the adoption of the present Decision, their views on the said Resolutions and the ACHPR to submit a Report thereon to the next Ordinary Session of the Executive Council;
- 3 CALLS UPON the ACHPR to ensure that in future, it enlists the responses of all States parties to its Resolutions and Decisions before submitting them to the Executive Council and/or Assembly for consideration;
- 4 REQUESTS States parties, within three (3) months of the notification by the ACHPR, to communicate their responses to Resolutions and Decisions to be submitted to the Executive Council and/or the Assembly . . .

This resolution seems to contradict a statement by the Commission in 1995, when the government of Nigeria complained that the adoption of a resolution on Nigeria was a breach of the confidentiality rule in article 59.³⁵

³² Decision on the Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) EX.CL/Dec 310 (IX).

³³ It should be noted that in many cases, the African Commission has not received any response from the state concerned and has thus proceeded to decide the matter on the basis of the allegations of the complainant. See eg *Zegveld & Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003) para 46.

³⁴ Decision on the Nineteenth Activity Report of the African Commission on Human and Peoples' Rights, Assembly/AU/Dec 101(VI).

³⁵ Account of internal legislation of Nigeria and the dispositions of the Charter of African Human and Peoples' Rights, 2nd extraordinary session, Kampala, 18-19 December 1995, DOC II/ES/ACHPR/4, reprinted in Murray & Evans (n 17 above) 472.

The resolution on Nigeria . . . is not a 'measure taken' within the meaning of this article. The 'present chapter' refers to Chapter III of the Charter, dealing with communications. The resolution on Nigeria does not refer to communications in any way. There is no bar on resolutions of the Commission being disseminated however the Commission sees fit.

As a result of the Assembly decision on the Nineteenth Activity Report, the Twentieth Activity Report included the resolutions on Ethiopia, Sudan, Uganda and Zimbabwe together with the at times lengthy responses from these states.³⁶ The resolution on Eritrea was not included. The fact that the Commission did not include any new resolutions is instructive of its deference to the AU political bodies.

Resolutions and statements by the Commission are adopted as response to violations. They clearly do not fall within the ambit of article 59. It is unclear if the decision of the Assembly is also applicable to statements issued by the Special Rapporteurs and working groups of the Commission. These Special Rapporteurs sometimes make joint statements together with other international mechanisms.³⁷ This practice could be jeopardised if the Commission were to adopt a wide interpretation of the Assembly decision.

3 Freedom of information and the reclaiming of the independence of the African Commission

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.³⁸

The quote above is taken from the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission in 2002. The question raised by this article is why should this principle only apply to states and not the body that has adopted the resolution?

It is clear that some states want to curtail the powers of the Commission. It is time for the Commission to stand up against this attack and reclaim its independence. The Commission has not been restrictive in its interpretation of the substantive provisions of the Charter as exemplified by the recognition of implied rights in the *SERAC* decision.³⁹ This follows from articles 60 and 61 of the Charter, which states that the Charter shall be interpreted in the light of international standards. There

³⁶ In particular one could take note of the long response from Ethiopia, a state that has never submitted a state report under art 62 of the African Charter.

³⁷ See eg UN and African Commission experts on the situation of human rights defenders concerned over removal of head of Nigerian rights body, United Nations press release, 28 June 2006.

³⁸ Declaration of Principles on Freedom of Expression in Africa, para 4(1).

³⁹ *Social and Economic Rights Action Centre (SERAC) & Another* (2001) AHRLR 60 (ACHPR 2001).

is no reason why the Commission and its Secretariat should make a narrow interpretation of the procedural provisions of the Charter. More and more African countries are adopting freedom of information laws. It is thus only fair that the principle of freedom of information should also apply to the African regional body, the AU, and its various institutions. The African Court on Human and Peoples' Rights (African Court) is now functional and the African Commission could request an advisory opinion on the meaning of article 59 and draft its Rules of Procedure accordingly. Political interference with the work of the Commission, as seen recently, would then become more difficult and the political bodies could focus on measures to ensure compliance with the decisions of the African Commission and the African Court.

The Commission and its Secretariat should also ensure that public documents are distributed timely and effectively. The recent initiative by the Commission to make state reports for the upcoming session available on its website is a step in the right direction. Other reports, such as those emanating from promotional and fact-finding missions, can be used to pressure governments to implement policy changes, but this cannot happen if they are not accessible.

Obviously, the personnel situation at the Commission leaves a lot to be desired. The AU does not want staff to be financed by donors and, on the other hand, does not want to give sufficient budgetary allocations for the Commission to do its work, despite repeated calls from the AU Assembly to the AU Commission to allocate more resources.

Much could be done with regard to publishing without any major expense. The Commission should more actively use its website to spread information. In addition, it should more actively spread information through the network of NGOs and national human rights institutions with observer status. These organisations could also help to publicise the work of the Commission if the Secretariat would supply them with the reports, etc that have been adopted.

The African Commission held ten years ago in the Mauritius Plan of Action (1996-2001) that '[t]he lack of informative documentation on the work of the African Commission is a problem which needs to be solved urgently'.⁴⁰ As is clear from this overview, the situation has not improved much.

⁴⁰ The Mauritius Plan of Action 1996-2001 reprinted in Evans & Murray (n 17 above) para 7.