

SUBMISSIONS ON THE INTERIM RULES OF PROCEDURE OF
THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

MARCH 2009

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INTRODUCTION

The Legal Resources Centre (LRC) hereby submits comments and observations on the *Interim Rules of Procedure* as published by the African Commission on Human & Peoples' Rights (hereinafter the Commission). The LRC welcomes this opportunity provided to Non-Governmental Organisations with Observer Status to maximize their participation in the Commission's work of protecting and promoting human and peoples' rights in Africa.

The LRC was granted Observer Status by the African Commission at the 43rd Ordinary Session held in May 2008 in Swaziland.

ORGANISATION OVERVIEW

The LRC, established in 1979, is a South-African based human rights organization with regional offices in Johannesburg, Durban, Grahamstown and Cape Town. The organization uses the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances. The strategies employed to secure the protection and promotion of human rights include impact litigation, law reform, participation in partnerships and development processes, education, and networking within South Africa, the African continent and at the

international level. Focus areas of work include: land, social security, housing and planning, environment, children, women, refugees, civil society, the Constitution and the rule of law, continental outreach and access to justice.

While the Republic of South Africa has one of the most progressive and inclusive Constitutions in the world, with a Bill of Rights proclaimed to be the cornerstone of democracy, the LRC is of the view that the execution and fulfillment of its mandate and consequent contribution to the protection and promotion of human rights must additionally be drawn from the African Union regional mechanisms, human rights instruments and institutions. South Africa is a party to numerous regional human rights instruments and treaties relevant to the work of the organization, including:

1. The African Charter on Human and Peoples Rights as adopted by the Organisation of African Unity in June 1981;
2. The African Charter on the Rights and Welfare of the Child adopted in July 1990;
3. The Convention Governing the Aspects of the Refugee Problems in Africa, adopted in September 1969;
4. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted in 2003.
5. The Protocol to the African Charter on Human and Peoples Rights (African Court on Human and Peoples Rights); and

6. The Solemn Declaration on Gender Equality in Africa adopted at the First African Union Conference of Ministers Responsible for Women and Gender.

The LRC operates from the premise that human rights are indivisible, interdependent and interrelated – that is not possible to enjoy civil and political rights without the full enjoyment and exercise of economic, social and cultural rights. In particular, the LRC acknowledges the feminization of poverty and HIV/AIDS on the African Continent, the gendered effects of conflict on women and children as well as the fact that development cannot be fully achieved on our continent without concerted efforts aimed at mainstreaming gender in all policies and programmes designed for development, conflict resolution and peace building. Most significantly, the LRC recognizes the critical role and mandate of the Commission to protect and promote human and peoples' rights on the Continent as set out in Article 45 of the African Charter on Human & Peoples' Rights.

EXECUTIVE SUMMARY

It is against this backdrop and by paying particular attention to the principles enunciated in the human rights instruments described above that the LRC submits these comments to the Commission on the Interim Rules of Procedure:

1. The LRC urges the Commission to amend Rule 35 to require the Secretariat to provide to observers, by posting on the Commission's website all essential documents at least two weeks prior to the commencement of a session and that these essential documents shall include, but not be limited to: the reports to be presented by the Special Rapporteurs and Working Groups of the Commission.
2. We further submit that Rule 76(1) be amended to require the Secretary of the Commission to provide State reports to NGOs with observer status at least two weeks prior to the session at which a report is to be considered.
3. Additionally, while Rule 73 in its entirety on NGOs is welcomed, the LRC supports the enumeration of the grounds or criteria under which NGOs will be invited to participate in the Commission's private sessions as envisaged in Rule 73(4).

4. The LRC requests that Rule 88 be amended to require the Secretary to provide NGOs with observer status with copies of all communications lodged with the Secretariat. An alternative would be for the Commission to adopt the practice of the European Court of Human Rights and publish all communications on the Commission's website shortly after a communication is lodged.
5. The LRC proposes that the Rule 102 be amended to provide that NGOs with Observer Status will have access to all hearings, unless exceptional circumstances warrant the exclusion of certain organizations or individuals.
6. The LRC submits that the provision of legal aid in terms of Rule 107 should depend on whether assistance is necessary for the author of a communication to receive a fair hearing, rather than whether it is 'essential to the discharge of the Commission's duties'.
7. Regarding Rule 107(2)(b), the LRC requests the inclusion of more detailed criteria or guidelines for determining when an author has 'no sufficient means to meet all or part of the costs involved.' Additionally, it is unclear in the current draft whether subparagraphs (a) and (b) are alternative or whether both must be satisfied.

COMMENTS ON SPECIFIC RULES

i) Ordinary Sessions (Rule 35)

Participation in the bi-annual Ordinary sessions of the Commission remains the most significant means and opportunity of engagement for civil society organisations as provided for in Resolution 33(XXV) 99 of the African Commission on Human and Peoples Rights on the Granting of Observer Status to Non-Governmental Organisations.

While we note the provisions of Rule 35 dealing with transmission and distribution of the provisional agenda, we are however concerned that Rule 35(4) as currently drafted does not require the Secretariat to distribute 'essential documents' to observers in the 'exceptional cases' outlined in Rule 35(3). Having access to all the essential documents, including the Special Procedures Reports, prior to every ordinary session is critical for meaningful participation of Observers.

The LRC therefore requests that the rules be amended to require the Secretariat to provide to observers, by posting on the Commission's website all essential documents at least two weeks prior to the commencement of a session and that these essential documents shall include, but not be limited to the Reports to be presented by the Special Rapporteurs and Working Groups of the Commission.

ii) Consideration of State Reports (Rule 76(1))

Article 62 of the African Charter on Human and Peoples' Rights mandates state parties to the Charter to report every two years to the Commission on the legislative or other measures taken to give effect to the rights and freedoms recognized and guaranteed by the Charter. The LRC welcomes the provisions of Rules 73 of the Interim Rules of Procedure providing for the granting of Observer Status to Non-Governmental Organisations. Rule 76(2) of the Interim Rules of Procedure provides that the Secretary 'shall' inform NGOs with observer status of the session at which a State report will be considered, and 'these institutions may submit any information or shadow report about or regarding the human rights situation in the State party concerned.' The LRC notes with grave concern that the majority of State Parties to the Charter do not comply with Article 62 of the Charter, either by not submitting reports at all, or by extensive delays in submitting their reports. This routine contravention of Article 62 of the Charter creates challenges for the Commission to execute on its mandates to promote and protect human rights on the Continent. In addition, the delay in submitting State Reports creates challenges for NGOs with Observer Status to fully engage with the Commission in terms of Rule 76(2).

In this light, the LRC is concerned that Rule 76(1) currently provides that the Secretary 'may' send copies of State reports to NGOs with observer status prior

to the session at which the report will be considered. Given the importance of State reports, and their proper consideration, the LRC submits that the rules be amended to require the Secretary to provide State reports to NGOs with observer status at least two weeks prior to the session at which the report is to be considered.

Additionally, while Rule 73 in its entirety on Non-Governmental Organisations is welcomed, the LRC supports the enumeration of the grounds or criteria under which NGO's will be invited to participate in the Commission's private sessions as envisaged in Rule 73(4).

iii) Consideration of Communications (Rule 88)

The LRC considers the protective activities of the Commission to be of paramount importance. Article 46 of the African Charter on Human & Peoples' Rights contemplates a role for NGOs in the consideration of communications lodged with the Commission. Article 46 provides that *'the Commission may resort to any appropriate measure of investigation; it may hear from the Secretary-General of the Organization of African Unity or any other person capable of enlightening it.'* Rule 88 of the Interim Rules provides that the Commission 'may accept or solicit interventions by parties other than the complainant and the defending State that it considers will provide it with information relevant to making a decision on the communication.'

The Interim Rules, however, provide no process for informing NGOs when a communication is lodged with the Commission, or for providing copies of such communications to NGOs. Knowledge of the substance of a communication is critical for an NGO to be in a position to provide ‘information relevant to the making of a decision on a communication.’ The LRC therefore requests the rules be amended to require the Secretary to provide NGOs with observer status with copies of all communications lodged with the Secretariat. An alternative would be for the Commission to adopt the practice of the European Court of Human Rights and publish all communications on the Commission’s website shortly after a communication is lodged.

iv) Hearing on communications (Rule 102(8))

Rule 102(8) currently provides that Commission hearings on communications shall be held in camera, and that NGOs will not be admitted unless it is the legal representative of a party or invited by the Commission.

While the LRC appreciates the need for confidentiality and efficiency in hearings, it also emphasizes the important role of NGOs as observers in the hearing of communications. The presence of observers ensures the transparency of proceedings and the accountability of decision-makers. As provided for in other regional human rights instruments , the Rules of Procedure of the Inter-American

Commission on Human Rights provides that 'hearings shall be public' (Article 66). This article goes on to stipulate that private hearings, and the exclusion of certain people, may occur 'when warranted by exceptional circumstances'.

The LRC therefore submits that the Interim Rules on hearing of Communications be amended to provide that NGO's with Observer Status will have access to all hearings, unless exceptional circumstances warrant the exclusion of certain organizations or individuals.

v) Provision of Legal Aid (Rule 107(2))

Article 7(1) of the Charter provides that 'every individual has the right to have his cause heard'. Rule 107 of the Interim Rules also provides that the Commission may facilitate the provision of free legal aid to the author of a complaint.

Rule 107(2) however provides that 'free legal aid shall only be facilitated where the Commission is convinced:

- (a) that it is essential to the discharge of the Commission's duties;
- (b) the author of the communication has no sufficient means to meet all or part of the costs involved.

The LRC submits that individuals seeking to present a communication to the Commission should not be prevented by lack of financial resources. The facilitation of free legal aid is therefore essential. The LRC submits that the provision of legal aid should depend on whether assistance is necessary for the author of a communication to receive a fair hearing, rather than whether it is 'essential to the discharge of the Commission's duties'.

Regarding Rule 107(2)(b), the LRC requests the inclusion of more detailed criteria or guidelines for determining when an author has 'no sufficient means to meet all or part of the costs involved.' Additionally, it is unclear in the current draft whether subparagraphs (a) and (b) are alternative or whether both must be satisfied.

vi) Other Matters

It appears that the reference in Rule 96(3) to Rule 94(2) should in fact be a reference to Rule 96(2).

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SCHEDULE

PROPOSED AMENDMENTS TO INTERIM RULES

Note: in this schedule, text which is:

- **underlined** is a proposed addition to the Interim Rules;
 - **struck-through** is a proposed deletion from the Interim Rules.
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Rule 35 – Transmission and distribution of the provisional agenda

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- (4) In the cases mentioned in Rule 35 (3), the Secretary shall transmit the provisional agenda and essential documents of the session to State parties, the Chairperson of the African Union Commission, affiliate institutions and observers at least two weeks before the opening of an ordinary session of the Commission.
- (5) 'Essential documents' shall include, but not be limited to, the Reports to be presented by the Special Rapporteurs and Working Groups of the Commission.

Rule 76 (1) – Transmission of State reports

- (1) The Secretary ~~may~~ must send copies of state reports of State parties in whole or in part relating to their areas of competence to the following:
- (a) specialized agencies and bodies of the United Nations system;
 - (b) African regional and sub-regional institutions concerned;

- (c) National human rights institutions with affiliated status;
- (d) National and international non-governmental organizations with observer status with the Commission.

...

Rule 88 – Other interventions

- (3) The Commission may decide to solicit or accept interventions by parties other than the complainant and the defending State that it considers will provide it with information relevant to the making of a decision on a communication.
- (4) The Secretary must send copies of communications lodged with the Commission to non-governmental organizations with observer status with the Commission.

Rule 102 – Procedure for hearings on communications

- ~~8) Hearings on communications before the Commission shall be held in camera. Unless the Commission decides otherwise, no person shall be admitted, other than:~~
 - ~~a. the parties to the communication;~~
 - ~~b. their representatives;~~
 - ~~c. any person being heard by the Commission as a witness or as an expert;~~

~~d. the persons referred to in Rule 33 paragraph 2 or any person whom the Commission may decide to invite under Article 46 of the African Charter.~~

- (8) Hearings on communications before the Commission shall be public. When warranted by exceptional circumstances, the Commission, at its own initiative or at the request of an interested party, may hold private hearings and may decide who attends them. The Commission shall notify the parties in this regard in writing prior to the beginning of the hearing.

Rule 107 – Legal aid

- ~~(2) Free legal aid shall be facilitated only where the Commission is convinced:~~
- ~~(a) That it is essential to the proper discharge of the Commission's duties;~~
 - ~~(b) the author of the communication has no sufficient means to meet all or part of the costs involved.~~
- (2) Free legal aid shall be facilitated only where the Commission is convinced:
- (a) that legal aid is necessary for the author of a communication to receive a fair hearing; and
 - (b) the author of the communication has no sufficient means to meet all or part of the costs involved.

Rule 96 – Seizure of the Commission

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- (3) In the event that a communication is missing some of the information listed in 946 (2), the Secretary shall contact the complainant to furnish it.

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