



C I A C

Coalition for the Independence
of the African Commission

Implementation of decision 1015 of the African Union (AU) executive council by the African Commission on Human and Peoples' Rights

by Foluso Adegalu

1. An overview of AU Executive Council Decision 1015

During the African Union (AU) Summit held in Nouakchott, Mauritania, from 25 June to 2 July 2018,¹ the AU Executive Council adopted its Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (African Commission).² The decision endorsed the recommendations that emanated from a joint retreat, held in June 2018, by the African Commission and the PRC,³ in accordance with AU Decision 995.⁴ The AU Executive Council Decision 1015, was primarily targeted at the African Commission. However, Decision 1015 also included obligations for states and the other two human rights organs of the AU.⁵

With respect to the African Commission, AU Executive Council Decision 1015 recommends that:⁶

- the work of the African Commission should be aligned with the Constitutive Act, Agenda 2063, African Common Positions, institutional reform of the Union, and decisions of the policy organs taking into consideration the virtues of historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;
- the PRC in collaboration with the AU Commission, should take necessary steps to regularize the status of the African Commission as an Organ of the AU in line with Decision Assembly/AU/Dec.200 (XI) (Para 8);
- the PRC and the African Commission should strengthen communication between them and AU Policy Organs to build greater synergy in the interest of promoting and protecting human rights on the continent;
- the African Commission should address the ambiguity of its status in its Rules of Procedures within the framework of its ongoing revision of these Rules;
- the African Commission consult the Office of Legal Counsel of the Commission and other relevant legal bodies within the framework of formulating a code of conduct and the revision of the Rules of Procedure;
- the African Commission should pay equal attention to all rights as enshrined in the African Charter;
- The African Commission should submit to the policy organs for consideration and adoption the revised criteria for granting and withdrawing observer status for Non-Governmental Organizations (NGOs), which should be in line with the already existing

1 AU press release 'Summary of the key decisions and declarations of the 31st AU Summit' (6 July 2018) <https://au.int/en/summit/31> (accessed 18 January 2021).

2 EX.CL/Dec.1015(XXXIII) (Decision 1015).

3 ACHPR '45th activity report' (2018) para 10; see also ACHPR news 'Joint retreat of the Permanent Representatives' Committee of the African Union and the African Commission on Human and Peoples' Rights' (June 2018) <https://www.achpr.org/news/viewdetail?id=15> (accessed 18 January 2021). AU Executive Council Decision 1015 paragraph 1.

4 AU Executive Council decision EX.CL/Dec.995(XXXII) paragraph 4.

5 The AU human rights organs are: The African Commission, the African Court on Human and Peoples' Rights (African Court), and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).

6 AU Executive Council Decision EX.CL/Dec.1015(XXXIII) Paragraphs 6 & 8.

criteria on the accreditation of NGOs to the AU, taking into account African values and traditions;

- the African Commission should verify all allegations submitted to it and carry out due diligence with concerned State Parties before including such allegations in its activity reports to the Executive Council;
- the African Commission should develop clear Guidelines with regards to its engagement with external actors, in accordance with the relevant AU Rules, Regulations and practices;
- the African Commission should withdraw the accreditation of the Coalition for African Lesbians (CAL) NGO latest by 31st December 2018 in accordance with previous decisions of AU Policy Organs;
- the African Commission should observe confidentiality at all stages of the work of the ACHPR in line with Article 59 of the Charter;
- the African Commission should scrupulously implement provisions related to the conflict of interest in the execution of its functions;
- the African Commission should strengthen collaboration with the Peace and Security Council (PSC) particularly within the context of promoting transitional justice.

The obligations imposed on states by AU Executive Council Decision 1015 are:⁷

- fully provide the ACHPR with both financial and human resources for it to discharge its mandate in accordance with the Constitutive Act and the pertinent decisions of the AU;
- take advantage of the various platforms to strengthen the dialogue, cooperation and collaboration between the ACHPR and AU policy organs;
- conduct an analytical review of the interpretative mandate of ACHPR to in the light of a similar mandate exercised by the African Court and the potential for conflicting jurisprudence;
- operationalize the PRC Sub-Committee on human rights, democracy and governance as

⁷ AU Executive Council Decision EX.CL/Dec.1015(XXXIII) Paragraph 7.

previously approved by the Executive Council to follow up on implementation of the ACHPR's decisions and recommendations;

- invite the ACHPR to conduct Promotion Missions in the respective Member States;
- expedite the process of harmonization of the emoluments of the members of the ACHPR in accordance with other AU Organs and institutions as part of the ongoing institutional reform of the Union;
- regularly submit their periodic reports to the ACHPR and participate more actively in the sessions of the ACHPR.

Finally, Decision 1015 urges the AU human rights organs to ensure regular interactions within the context of African Governance Architecture (AGA) with the AU policy organs with a view to ensuring a coordinated approach towards ensuring the protection of human rights.

2. Purpose and history of Decision 1015

As stated by the Executive Council, Decision 1015 intends to address the need for improved cooperation between the African Commission and other AU organs, particularly the PRC.⁸ Decision 1015 also intends to underscore the fact that the independence enjoyed by the African Commission is a functional independence and not independence from the organs that created the African Commission.⁹ Finally, Decision 1015 expressed the concerns of the AU Executive Council about the tendency of the African Commission to undermine states' national legal system by acting as an appellate body.¹⁰

Historically, the origin of AU Executive Council Decision 1015 can be traced to the AU Summit of June 2015. Article 54 of the African Charter on Human and Peoples' Rights (African Charter) requires the African Commission to submit a report on its activities to each ordinary sessions of the AU Assembly of Heads of State and Go-

⁸ AU Executive Council Decision EX.CL/Dec.1015(XXXIII) Paragraph 4.

⁹ AU Executive Council Decision EX.CL/Dec.1015(XXXIII) Paragraph 5.

¹⁰ As above.

vernment.¹¹ Pursuant to the provisions of article 54 of the African Charter, the African Commission submitted its 38th Activity Report that covered the period of 1 January to 7 May 2015 to the AU Executive Council for consideration.¹² Upon consideration of the African Commission's report, the AU Executive Council adopted its Decision on the Thirty-Eight Activity Report of the African Commission (Decision 887).¹³ The AU Executive Council requested the African Commission to:¹⁴

- take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values;
- review its criteria for granting Observer Status to NGOs
- withdraw the observer status granted to the Organization called Coalition of African Lesbians (CAL)
- observe the due process of law in making decisions on complaints received;
- Consider reviewing its rules of procedure, in particular, provisions in relation to provisional measures and letters of urgent appeals in consistence with the African Charter on Human and Peoples' Rights;
- take the appropriate measures to avoid interference by NGOs and other third parties in its activities

On 2 November 2015, the CAL and the Centre for Human Rights, University of Pretoria requested for an advisory opinion from the African Court on the legality of the request by the Executive Council in Decision 887.¹⁵ On 28 September 2017, the African Court in deciding on issues of personal jurisdiction, ruled that it is not able to give the Advisory Opinion that was

requested of it by the two organisations because the two organisations are not recognised by the African Union as required by article 4(1) of the Court's Protocol.¹⁶ The dismissal of the request for an advisory opinion against Decision 887 gave the Executive Council the impetus to follow-up on the implementation of its request to the African Commission.

In January 2018, the Executive Council during the consideration of the 43rd Activity Report of the African Commission expressed concerns about the non-implementation of the directives of Decision 887 on the withdrawal of the observer status of CAL.¹⁷ The Executive Council requested the African Commission to comply with the decision. The Executive Council took one step further by requesting for a joint retreat between the PRC and the African Commission to resolve the concerns of AU member states and other AU policy organs with a view to finding modalities for improved coordination and cooperation amongst all the concerned AU entities.¹⁸ The joint retreat was also tasked with improving dialogue and resolving outstanding issues and recommend appropriate measures in respect of the full authority of the AU organs. The joint retreat between the PRC and the African Commission was held in Nairobi, Kenya between 4 & 5 June 2018 and the recommendations of the retreat were adopted by the AU Executive Council in Decision 1015.¹⁹ Further to the endorsement of the recommendations of the joint retreat, the Executive Council also issued the directives that were enumerated in section 1.

3. Assessment of the implementation of Decision 1015 by relevant AU Organs

Decision 1015 is a binding decision pursuant to article 23(2) of the AU Constitutive Act and rule 34 of the Executive Council Rules of Procedure. As stated above, the African Commission is the primary duty bearer of the obligations arising

11 The consideration of the activity report of the African Commission has been delegated by the AU Assembly of Heads of states to the AU Executive Council.

12 38th Activity Report of the African Commission on Human and Peoples' Rights, page 2.

13 EX.CL/Dec.887(XXVII).

14 AU EX.CL/Dec.877(XXVII) Paragraphs 7 & 12.

15 Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians Application 002/2015.

16 Application 002/2015 Paragraph 57.

17 AU Executive Council Decision on the African Commission on Human and Peoples' Rights, EX.CL/Dec.995(XXXII) (Decision 995) Paragraph 3.

18 Decision 995 Paragraph 4.

19 Decision 1015 Paragraph 3.

from 1015 of the AU Executive Council. From a thematic perspective, this section discusses the steps taken by the African Commission to implement the recommendations contained in Decision 1015. This section also discusses general developments that have been influenced by Decision 1015 within other AU organs.

a. General working of the African Commission

i. Formulation of a code of conduct

During the 24th extraordinary session of the African Commission held between 30 July and 8 August 2018, the African Commission constituted a Committee comprised of three Commissioners tasked with conducting research on relevant aspects that can be useful in developing a Code of Conduct for its Commissioners.²⁰ This step reflects an implementation of the directive that the African Commission should formulate a code of conduct.²¹ Subsequently, in its 63rd Ordinary Session held from 24 October to 13 November 2018, the African Commission made observations on the: proposals on the operationalisation of the recommendation on Code of Conduct of the African Commission.²² Through its 46th Activity Report, the African Commission indicated that the Draft Revised Rules of Procedure had taken account of the AU Code of Conduct as directed under Decision 1015. Additionally, it indicated that the members of the African Commission and the Staff of the Secretariat have been trained on the AU Code of Ethics and certified accordingly.²³

ii. Review of the interpretative mandate of the African Commission (August 2018)

During its 24th extraordinary session held from 30 July and 8 August 2018, the African Commission constituted a Committee comprised of three Commissioners to conduct research on the in-

terpretative mandate of the Commission.²⁴ This step was highlighted in the 45th Activity Report of the ACHPR.²⁵ Subsequently, in its 63rd Ordinary Session conducted from 24 October to 13 November 2018, the African Commission adopted a resolution which reiterated that ‘its interpretive mandate is inherent in its promotion and protection mandates as set out by the African Charter.’²⁶ In this regard, it expressed deep concerns on Decision 1015 which requests State Parties to conduct an analytical review of the interpretative mandate of the Commission in light of a similar mandate exercised by the African Court.²⁷ It further called on State Parties and AU policy organs to ensure that the on-going reforms process of the AU preserves and enhances the ‘independent, distinct and specialized mandates’ of each organ.²⁸ This resolution was also noted on the 47th activity report of the African Commission.²⁹

iii. Revision of Rules of Procedures

In 2019, the African Commission published the Draft Revised Rules of Procedure on its website for public consultation, therefore allowing stakeholders to make comments and observations prior to the adoption of the revised Rules.³⁰ Notes Verbales and the Draft Rules were also conveyed to AU States Parties for comments and observations.³¹ The African Commission adopted its new Rules of Procedure, 2020 at the Commission’s 27th Extra-Ordinary Session, held from 19 February to 4 March 2020.³² The rules came into force on 2 June, 2020, pursuant to Rule 145 of the rules. In what appears to be influenced by Executive Council Decision 1015,

20 Final communique of the of the 24th extraordinary session of the African Commission on Human and Peoples’ Rights’ Paragraph 8.

21 AU Executive Council Decision 1015 Paragraph 8(iv).

22 Final Communiqué of the 63rd Ordinary Session of the African Commission on Human and Peoples’ Rights’ (2018).

23 African Commission 46th Activity Report’ (2019) paragraph 57.

24 Final communique of the of the 24th extraordinary session of the African Commission on Human and Peoples’ Rights’ Paragraph 8(iii).

25 Paragraphs 61-63.

26 Resolution on the interpretative and protective mandates of the Commission’ (2018) ACHPR/Res. 402 (LXIII) paragraph 2.

27 As above, preamble.

28 As above paragraph 6.

29 African Commission 47th activity report (2019) para 57.

30 African Commission 47th Activity Report’ (2019) para 52.

31 As above, paragraph 53.

32 Rules of Procedure of the African Commission on Human and Peoples’ Rights’ (2020).

Rule 11 of the 2020 Rules of Procedure requires members of the African Commission to observe the principles and codes of conduct stipulated in the Rules. These include relevant provisions of the AU Staff Rules and Regulations, the AU Code of Ethics and Conduct, the AU Harassment Policy, and matters related to recusal and confidentiality.

b. Engagement with NGOs & external actors

i. Withdrawal of the observer status of CAL

During the 24th extraordinary session of the African Commission held between 30 July and 8 August 2018, the African Commission adopted a decision which resulted in the withdrawal of the Observer Status granted to CAL, and the preparation of a letter of notification in this regard.³³ The adoption of this decision by the African Commission gave effect to the directives in AU Executive Council's Decision 1015 that the Commission should withdraw the accreditation of CAL latest by 31st December 2018, in accordance with previous decisions of AU Policy Organs.³⁴

ii. Revised criteria for granting and withdrawing observer status for NGOs

Rule 72 (1) of the 2020 Rules of Procedure amended rule 70(1) of the 2010 Rules of Procedure by making an express reference to the 2016 Resolution on the Criteria for Granting and Maintaining Observer Status to NGOs working on Human and Peoples' Rights in Africa. This clarifies the legal basis upon which the Commission grants observer status to NGOs. However, the African Commission did not apply the AU criteria for granting observer status to Non-governmental Organisations. However, Rule 72(3) of the 2020 Rules of Procedure gives the African Commission the power to take away the observer status of NGOs when it finds that such NGOs no longer fulfil the criteria, or that they have defaulted on their obligations.

³³ Final communique of the of the 24th extraordinary session of the African Commission on Human and Peoples' Rights' Paragraph 8 (i).

³⁴ AU Executive Council Decision 1015, Paragraph 8(iv).

c. Status of the African Commission (Regularisation and clarity in Rules of Procedures)

In giving effect to the requirement of Decision 1015 that the African Commission should regularise its status as an organ of the AU in line with Decision Assembly/AU/Dec.200 (XI) (Para 8) and should address the ambiguity of its status in its Rules of Procedure, the 2020 Rules of Procedure of the African Commission expressly states that the African Commission is an organ of the AU in accordance with AU Assembly/AU/Dec.200 (XI).³⁵ The previous rules, formulated in 2010, simply described the African Commission as an "autonomous treaty body."³⁶ Additionally, whereas Rule 3 of the 2010 Rules only has a single provision on the status of the African Commission, Rule 3 of the 2020 Rules of Procedures contains extensive provisions on the mandate and status of the African Commission. The 2020 Rules of Procedure contains several provisions which includes the competence of the African Commission to interpret the African Charter and respond to a request for advisory opinion,³⁷ interpret its own decisions,³⁸ and ensure the efficient and technical organization and operation of the African Commission's Secretariat.³⁹ Crucially, in acknowledging the status of the African Commission as an organ of the AU, the 2020 Rules of Procedures expressly stated that the African Commission "shall perform any other tasks which the [AU] Assembly may entrust to it pursuant to Article 45(4) of the Charter."⁴⁰ The extensive provisions of Rule 3 of the 2020 Rules of Procedure of the African Commission can be construed as specific and general responses from the African Commission to Decision 1015.

³⁵ Rule 3 (2) of the Rules of Procedure of the African Commission on Human and Peoples' Rights' (2020).

³⁶ Rules of Procedure of the African Commission on Human and Peoples' Rights 2010, Rule 3.

³⁷ Rule 3 (3) of the Rules of Procedure of the African Commission on Human and Peoples' Rights' (2020).

³⁸ Rule 3 (4) of the Rules of Procedure of the African Commission on Human and Peoples' Rights' (2020).

³⁹ Rule 3 (6) of the Rules of Procedure of the African Commission on Human and Peoples' Rights' (2020).

⁴⁰ Rule 3 (7) of the Rules of Procedure of the African Commission on Human and Peoples' Rights' (2020).

**d. Relationship with AU Policy Organs
(strengthening communication between
the African Commission and AU Policy
Organs)**

During the 31st Extra-Ordinary session of the African Commission held from 19 to 25 February 2021, the African Commission considered and made comments on the report of the Chairperson of the Commission on the meetings of the AU Policy Organs.⁴¹ The report arguably reflects one of the efforts of the African Commission in complying with the requirement of Decision 1015 that the African Commission should improve its communication and relationships with the AU Policy Organs.

e. Developments within other AU Organs

Some of the recommendations contained in Decision 1015 have also impacted on the works of other AU organs. One of such organ is the African Court on Human and Peoples' Rights. During the AU Extraordinary Summit held in November 2018, the President of the African Court emphasized that he did not support the proposal of affording the Court with an 'exclusive protective mandate'.⁴² In his intervention, he indicated that there should be complementarity between the African Court and the African Commission.⁴³

The AU Executive Council has also taken further steps pursuant to some of the issues arising from Decision 1015. During its 34th ordinary session held in February 2019, the AU Executive Council requested that the African Commission should include in its annual report a specific section on the implementation of the recommendations of the Joint Retreat of the PRC and the African Commission held in Nairobi, Kenya in June 2018. The Executive Council also requested that the Joint Retreat of the PRC and African

Commission be held annually.⁴⁴ Furthermore, the AU Executive Council, during its 36th ordinary session held in February 2020 reiterated the fundamental importance of proper follow up of the outcomes of the Joint retreat of the PRC and the African Commission Retreat held in 2017 in Kenya which culminated to Decision 1015. The AU Executive Council also called for ensuring of the holding of the Annual Joint Retreat of the two organs as previously decided by relevant Executive Council Decisions.⁴⁵

**4. An assessment of the impact of
Decision 1015 on the operation of the
African Commission**

Before delving into a comprehensive analysis of the implications of Decision 1015, it is important to set out the nature of the relationship between the African Commission and the African Union.

Evidence abound to show that it was never the intention of the then Organisation of African Unity (OAU) to be totally accountable to the African Commission without any form of control over the African Commission. By way of analogy, a comparison of some of the relevant articles establishing the African Commission in the African Charter with the equivalent provisions in the International Covenant on Civil and Political Rights (ICCPR) establishing the Human Rights Committee shows that the then OAU intended to have at least some form of control over the African Commission and the activities of the African Commission.

Article 30 of the African Charter which established the African Commission provides that the African Commission shall be "established within the Organisation of the African Unity." Article 28 of the ICCPR which establishes the Human Rights Committee and is the equivalent of article 30 of the African Charter provides that: "There shall be established a Human Rights Committee (hereafter referred to in the present

41 Final Communiqué of the 31st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights Paragraph 6.

42 AU 'Meeting of the Permanent Representatives' Committee, 11th Extraordinary Session of the Assembly' (5-6 November 2018) Ext/PRC/Draft/Rpt(XI).

43 As above paragraph 72.

44 AU Executive Council Decision on the Forty-Fifth Activity Report of the African Commission on Human and Peoples' Rights Decision EX.CL/Dec.1045(XXXIV) Paragraphs 3 & 4.

45 AU Executive Council Decision on the Activity Report of the African Commission on Human and Peoples' Rights Decision EX.CL/Dec. 1080(XXXVI) (2020) paragraph 11.

Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.” The Human Rights Committee was established without any form of reference to the UN as an organisation. The use of the word “within the organisation of the African Union” in article 30 of the African Charter arguably shows the intent of the OAU to have a semblance of control over the activities of the African Commission.

A further argument about an intent of control becomes obvious with the comparison of the provisions on the election of the members of the African Commission and the Human Rights Committee. Under article 30(4) of the ICCPR, the members of the Human Rights Committee are to be elected by a meeting of the state parties to the ICCPR. On the other hand, article 33 of the African Charter provides that the members of the African Commission shall be elected by the Assembly of Heads of State and Government. Even though in practise, all members of the AU (with the exception of Morocco) which constitute the AU Assembly of Heads of State and Government have ratified the African Charter and will have been qualified to elect members of the African Commission if a similar provision of article 30(4) of the ICCPR were to be applied within the African context. Nevertheless, the wordings of article 33 of the African Charter clearly reinforces the stance that the African Commission was intended to be accountable to the AU Assembly of Heads of States.

Another subtle signal that the AU Assembly intends to have a sense of control over the activities of the African Commission can be gleaned from the provisions of Article 42(5) of the African Charter that permits the Secretary General of the AU to attend the meetings of the Commission. There is no similar provision in article 39 of the ICCPR as it relates to the meeting of the Human Rights Committee. Article 45(4) of the African Charter also shows the desire of the AU General Assembly to have a hold on the Commission. The article requires the Commission to perform any other tasks that may be entrusted to it by the AU Assembly of Heads of State and Government. The UN General Assembly did not

state its desire to keep entrusting different tasks to the Human Rights Committee, beyond the mandates entrusted to the human Rights Committee in the ICCPR.

The most pertinent provision of the African Charter that brings the African Commission under the control of the AU is article 59 of the African Charter. Article 59 of the Charter provides that all measures taken within the provisions of the African Charter by the African Commission shall remain confidential until such a time as decided by the assembly of Heads of State and Government. Furthermore, the report on the activities of the African Commission shall be published by its Chairperson after it has been considered by the Assembly of Heads of State and Government.⁴⁶ This is in sharp contrast with the provision of Article 45 of the ICCPR which simply requires the Human Rights Council to submit a report on its activities to the UN General Assembly through the Economic and Social Council. The minimalist approach as reflected in the indeterminacy of the text of the African charter adopted by the drafters of the African Charter was a deliberate attempt to fix the African human rights regional system within an open-ended system that is flexible enough for the AU to exert some control on its human rights organs.⁴⁷

The AU Assembly through Decision 200,⁴⁸ has insisted on the regularisation of the African Commission as an organ of the AU as opposed to an independent human rights body established by the African Charter. The phrase “..... and RECOMMENDS the appropriate measures to this end in respect of the full authority of the [AU] organs”⁴⁹ used by the Executive Council in requesting the joint meeting between the ACHPR and the PRC is also an indication of the perception of the status of the African Commission within the AU institutional architecture by the AU Executive Council.

46 Article 59(3) of the African Charter.

47 F Viljoen *International human right law in Africa* (2nd edition) 289.

48 Assembly/AU/Dec.200 (XI) Paragraph 8.

49 AU Executive Council Decision 995 Paragraph 4.

It is in the context of the above discussion on the nature of the relationship between the African Commission and the AU policy organs that Decision 1015 should be examined. The Executive Council, through its Decision 1015 declared that the African Commission only had “independence of a functional nature, and not independence from the same organs that created the body.” This statement can be interpreted to mean that the independence enjoyed by the African Commission relates only to the discharge of its functions, hence, it is not institutionally free from the AU policy organs. The institutional support (the secretariat) that is required by the African Commission as a body of independent experts to discharge its mandate is under the control of the AU institutional set-up. The Chairperson of the AU Commission appoints the Secretary of the African Commission and provides the staff and services necessary for the effective discharge of the duties of the African Commission. The AU as an institution bears the costs of the staff and services.⁵⁰ Also, in the sense of institutional control, it is not entirely out of place for the primary organ in an intergovernmental organisation to influence the workings and activities of human rights bodies. The UN General Assembly has adopted at least four resolutions expressing its concerns about the effectiveness of the treaty bodies and fashioning out modalities for strengthening and enhancing the effective functioning of the human rights treaty body system.⁵¹ The UN General Assembly has also in the course of strengthening the treaty body system given guidance on the workings and functioning of the treaty bodies.⁵² The AU General Assembly in exercise of its powers under article 59 of the African Charter has previously paid negligible attention to the activities of the African Commission. The position has however changed with

the delegation of that role to the AU Executive Council. The Executive Council has given more life to article 59 of the African Charter and has become more engaged in scrutinising the activities of the African Commission, thus resulting in the adoption of numerous Decisions that finally culminated into Decision 1015. The adoption of these decisions in itself cannot be interpreted as eroding the abilities of the African Commission as an independent institution. As stated above, the African Commission cannot be said to enjoy complete independence from the AU policy organs as an institution.

Notwithstanding the institutional relationship between the African Commission and the AU policy organs, the African Commission is expected to hold African states accountable for compliance with the provisions of the African Charter and other human rights treaties. It is important that the discharge of this duty is conducted with the utmost functional independence. The members of the African Commission serve in their personal capacity and are required to discharge their duties impartially and faithfully.⁵³ In this regard, the AU policy organs can borrow a leaf from the approach of the UN General Assembly. While taking steps to strengthen the effectiveness of the UN treaty bodies, the UN General Assembly reaffirmed “the importance of the independence and impartiality of members of the human rights treaty bodies, and underlines the importance of all stakeholders of the treaty body system, as well as the Secretariat, respecting fully the independence of treaty body members and the importance of avoiding any act that would interfere with the exercise of their functions.”⁵⁴ Even though the African Commission is an organ that functions within the AU, it is an independent human rights body and should be allowed to exercise its functions without any act of interference from the policy organs. Additionally, the Commission’s mandate is exercised by its Commissioners, who should act without any political influence from the AU member states they come from. Given the important human rights function of the African

50 Article 41 of the African Charter on Human and Peoples’ Rights.

51 See United Nations A/RES/66/254 of 23 February 2012; A/RES/66/295 of 17 September 2012; A/RES/68/2 of 20 September 2013 and A/RES/68/268 of 21 April 2014.

52 For instance, the General Assembly reviewed the allocation of the meeting time of the treaty bodies with respect to consideration of state reports, mandated activities and individual communications; and allocated a maximum of three official working languages for the treaty bodies (A/RES/68/268 para 26 &30).

53 Article 31 & 38 of the African Charter.

54 United Nations A/RES/68/268 paragraph 35.

Commission, it needs a considerable degree of independence from day-to-day political pressures if it is to promote and protect human rights. This type of independence could be described as ‘functional independence’, as the independence is directly linked to the functions of the African Commission.

5. Conclusion and recommendations

Without any doubt, some of the recommendations of Decision 1015 clearly put the African Commission at a cross-road. The African Commission was in a crisis after the adoption of Decision 1015 by the AU Executive Council. However, the African Commission has arguably managed the crisis in its implementation of the recommendations of Decision 1015. The African Commission has managed to strike a balance between performing its job as a human rights organ that is required to hold AU states accountable and also as an organ that has been designed to be accountable to the AU highest organs. As revealed in section 3, the African Commission, duly recognising its status as an institution within the AU has implemented the provisions of Decision 1015 within a reasonable limit of the nature of the relationship between the African Commission and the AU. In asserting its autonomy as an independent human rights organ of the AU, the African Commission has also pushed back on the implementation of some of the provisions of Decision 1015 that may severely undermines the functioning of the African Commission as an independent human rights institution.

For example, the African Commission has rightly pushed back on the review of its interpretive mandate by the members of the AU states. The directive to review the interpretative mandate of the African Commission in light of a similar mandate exercised by the African Court will restrict access to the African Commission and deny victims of human rights violations the right to effective remedies. The African Court was created for purposes of complementing the mandate of the ACHPR to determine complaints.⁵⁵ On the

one hand, the African Charter has been ratified by all AU member states except Morocco, which means that African citizens can directly file complaints before the African Commission. Whereas, several AU member states have not deposited their instruments of ratification of the African Court Protocol,⁵⁶ and more importantly, only 6 states have made a declaration allowing individuals and NGOs to directly file cases before the African Court.⁵⁷ This means that the African Court is not accessible to the majority of African citizens, and therefore, it offers little chance for them to hold their governments accountable. In practical terms, the African Commission’s jurisprudence has also enriched the jurisprudence of the Court.⁵⁸

Another evidence of pushback is evident in the partial implementation of decision 1015 as it relates to the alignment of the African Commission’s criteria for granting observer status with the AU’s criteria. Clearly, a strict compliance with this requirement by the African Commission would place overly restrictive requirements on prospective applicants. The AU’s criteria for granting observer status to NGOs is evidently a herculean task due to the restrictive requirements. The most concerning is the requirement that the basic resources of such an NGO shall be substantially, at least two-thirds, be derived from contributions of its members. Evidently, most African NGOs depend substantially on donor funding, which, quite interestingly, is similar to the way the AU itself is funded. Commendably, the African Commission in complying with the recommendation on the review of the criteria for the granting of NGO status has retained its criteria which is more flexible, requiring NGOs

⁵⁵ Protocol to the African Charter on Human And Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, Article 2.

⁵⁶ List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights <https://au.int/sites/default/files/treaties/36393-sl-protocol-to-the-african-charter-on-human-and-peoplesrights-on-the-estab.pdf> (Accessed January 29 2021).

⁵⁷ Protocol to the African Charter on Human And Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, Article 34(6).

⁵⁸ J Biegion ‘The rise and rise of political backlash’ <https://www.ejiltalk.org/the-rise-and-rise-of-political-backlash-african-union-executive-councils-decision-to-review-the-mandate-and-working-methods-of-the-african-commission/> (accessed 27 January 2021).

applying for observer status to only declare their financial resources.

In order to preserve the institutional existence of the African Commission, it is suggested that members of the Coalition for the Independence of the African Commission⁵⁹ (CIAC) and other human rights stakeholders must engage in a one-on-one conversation with state representatives within the different AU policy organs to highlight that the African Commission in deference to the AU policy organs has complied with the directives in Decision 1015 within the permissible limits of the functional independence of the African Commission. The knowledge of

⁵⁹ About the Coalition for the Independence of the African Commission (CIAC) - <https://achprindependence.org/>

substantive compliance with the directive of the AU Executive Council can then be used as a shield by friendly states to defend the African Commission, in the event that non-friendly states attempt to paint the African Commission as a rogue institution/organ of the AU.

In order to promote the legitimacy of the African Commission and restore the faith of NGOs in the African Commission, it is suggested that the CIAC, as an entity engages with NGOs through various medium (such as conferences, seminars, side events during the African Commission sessions etc) to highlight the nature of the relationship of the African Commission with the AU and how the African Commission has protected its autonomy by pushing back within reasonable limits.

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