



**CIAC**  
Coalition for the Independence  
of the African Commission

## NGOs & The Independence of the African Commission

June 2021

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### 1. Introduction

It is widely acknowledged that various organisations in the international, regional spheres, as well as non-governmental organisations (NGOs), play a crucial role in holding States accountable. Various schools of thought have divergent reasons for the need for accountability on the part of the State. This contribution latches on the use of accountability as a means of ensuring that the State does not violate rights under the pretext of sovereignty. While this is a commendable perspective, the mode in which organisations attempt to hold the State accountable is instructive.

This is especially critical; where the organisations are engaging an international or a regional human rights body to hold the State accountable. Such a scenario is evident in this context- the African Commission of Human and Peoples' Rights, NGOs and State Parties. Following the Executive Council's adoption of Decision 1015, various voices question the independence of the African Commission yet, others question the effect of the actions or inactions of the NGOs on the independence of the African Commission.

This contribution evaluates whether the actions or inactions of NGOs safeguard or undermine the independence of the African Commission. A couple of sub-claims are used to engage this position. First, a background on the role of CSOs in holding the State accountable is given based on the objective of ensuring that sovereignty is

not used to oppress persons. Secondly, Decision 1015 is contextualised, with particular regard to paragraph 8. Thirdly, the concept of action or inaction is visited in light of the various actions of NGOs since Decisions 1015. A stocktaking is used to evaluate and propose ways of going forward in light of this Decision.

### 2. The Role of Non-governmental Organisations/Civil Society

In international law, the issue of accountability by States is not novel. This practice in international law mitigates instances where the State would otherwise escape with impunity following the violation of fundamental norms.<sup>1</sup> This is an indication that State sovereignty is not used as a ground for the violation of human rights.<sup>2</sup> Various human rights monitoring bodies at the international and regional scene play a critical role in holding States accountable. For instance, the Human Rights Committee of the United Nations monitors the implementation of the International Covenant on Civil and Political Rights. The Committee on Economic, Social and Cultural Rights monitors the implementation of the International Covenant on Economic, Social and Cultural Rights. In Africa, the African Commission on Human and Peoples' Rights monitors the implementation of rights under various instru-

1 L Yarwood *State Accountability under International Law: Holding states accountable for a breach of jus cogens norms* (2010) generally.

2 RKM Smith *Textbook on International Human Rights* 4 ed (2010) 51-93.

ments such as the African Charter on Human and People's Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The African Committee of Experts on the Rights and Welfare of the Child monitors the implementation of the African Charter on the Rights and Welfare of the Child.

Other organisations such as national human rights institutions, non-governmental organisations (NGOs) and/or civil society organisations (CSOs) complement these organisations in carrying out this role. It is acknowledged that civil society is at the forefront of reiterating to the public, the existence of their rights and the duty of States to protect them.<sup>3</sup> The role of NGOs is well documented across various regions in the global field. Under the Inter-American system, NGOs have been a voice for various vulnerable persons such as women, peasants, indigenous peoples, afro-descendants, migrants, children, prisoners, and detainees.<sup>4</sup> Civil society organisations in the European Union (EU) play a critical role in the promotion of fundamental rights as a contribution to the functioning of democracies.<sup>5</sup> Under the European High Rights System, the partnership between the then European Commission and NGOs seeks to serve five major aspirations: 1) to foster participatory democracy, 2) to represent the views of specific groups citizens to the European Institutions, 3) to contribute to policy and 4) project management and finally, to regional integration.<sup>6</sup>

3 PV Gupta 'The role of Civil Society and Human Rights' (2011) 57(2) *The Indian Journal of Political Science* 363.

4 The Crucial Role of Human Rights NGOs in the Inter-American System [https://www.researchgate.net/publication/337164810\\_The\\_Crucial\\_Role\\_of\\_Human\\_Rights\\_NGOs\\_in\\_the\\_Inter-American\\_System](https://www.researchgate.net/publication/337164810_The_Crucial_Role_of_Human_Rights_NGOs_in_the_Inter-American_System) (accessed 11 June 2021).

5 Challenges facing civil society organisations working on human rights in the EU [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-challenges-facing-civil-society-summary\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-challenges-facing-civil-society-summary_en.pdf) (accessed 11 June 2021).

6 Commission of European Communities, 'Commission Discussion Paper 'The Commission and Non-governmental Organisations: Building a stronger partnership'<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0011&from=EN> (accessed 11 June 2021).

### 3. NGOs and the Independence of the African Commission

The African Commission recognises that NGOs play a critical role in the promotion and protection of human rights in Africa<sup>7</sup> and calls on States Parties to encourage the participation of CSOs in decision-making processes to consolidate participatory democracy and sustainable development.<sup>8</sup> As such, NGOs add value to the partnership between human rights monitoring bodies, and States Parties in the promotion and protection of human rights.<sup>9</sup>

NGOs play a critical role in supporting the mandate of the African Commission in the promotion and protection of human rights in Africa.<sup>10</sup> Some of the notable actions include the submission of communications as organisations or on behalf of individuals,<sup>11</sup> and complementary State reports to the African Commission as an indication of the contextual extent to which States are complying with the requirements of the African Charter.<sup>12</sup> As such, the subsequent steps by the African Commission informed by the NGOs become a measure that may be used to establish the effect on the independence of the African Commission.

Undermining the mandate of the African Commission has occurred in instances where CSOs

7 Grand Bay (Mauritius) Declaration and Plan of Action, adopted at the 1st Organisation of African Unity (OAU) Ministerial Conference on Human Rights, meeting from 12 to 16 April, 1999 in Grand Bay, Mauritius

8 Kigali Declaration, adopted at the 1st African Union (AU) Ministerial Conference on Human Rights in Africa, on 8 May 2003 in Kigali, Rwanda

9 Engaging Africa-based Human Rights Mechanisms, A Handbook for NGOs and CSOs <https://www.acdhrs.org/wp-content/uploads/2018/11/Africa-Engaging-Africa-based-HRM-Publications-Reports-Thematic-reports.pdf> (accessed 11 June 2021).

10 Grand Bay Declaration (n 7 above).

11 Some of the Communications filed by Civil Society across Africa include: *Open Society Justice Initiative (On Behalf Of Pius Njawe Noumeni) / Cameroon*, Communication 290 of 2004; *SERAP (On Behalf Of Daniel Nsofor And Osayinwinde Agbomien) V Nigeria*, Communication 427 of 2012; *Emil Touray And Saikou Jammeh (Represented By IHRDA And Sagar Jahateh) V The Republic Of The Gambia* Communication 705 of 2018 and *Egyptian Initiative For Personal Rights And INTERIGHTS*, Communication 323 of 2006.

12 Rule 70(3) of the Rules of Procedure, 2020.

do not offer complementary reports or present low-quality work, do not support States in the submission of State Reports, do not engage in studies, conferences, or support the activities of the Commission. One may safely state that this affects the quality of execution of the independence of the African Commission due to the lack of or inadequate support to its mandate. The African Commission thus executes its mandate less optimally due to minimal or lack of input from NGOs and civil society. This culminates in low-quality recommendations, fewer engagements in the various activities of the African Commission. Recent statistics show that a total of 528 NGOs have observer status.<sup>13</sup>

#### 4. Independence Under the African Charter

The question of safeguarding or undermining the independence of the African Commission lies in appreciating ‘independence’ provided for under the African Charter on Human and Peoples’ Rights. In this regard, the word ‘independent’ appears thrice and none of these instances refer to the African Commission as an institution.<sup>14</sup> The closest regard to the independence of the African Commission states that:

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples’ rights; particular consideration being given to persons having legal experience.
2. The members of the Commission shall serve in their personal capacity.<sup>15</sup>

This indicates that the moral authority possessed by the Commissioner is a conduct precedent to the expectations for the office. In addition, the Rules of Procedure state that

In accordance with Articles 30 and 45 of the African Charter, the African Commis-

<sup>13</sup> The combined 48th and 49th activity report of the African Commission on Human and Peoples Rights (accessed 11 June 2021).

<sup>14</sup> African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5, preamble and Articles 26 and 29.

<sup>15</sup> African Charter (n 14 above) Article 31.

sion is an autonomous treaty organ with the mandate of promoting human and peoples’ rights and ensuring the protection of human and peoples’ rights in Africa.<sup>16</sup>

This shows that the independence of the African Commission is a platform on which the realisation of its mandate is informed.

#### 5. Decision 1015: Coalition of African Lesbians As A Scapegoat

Decision 1015 was adopted by the African Union Executive Council at its 33<sup>rd</sup> session in June 2018 in Mauritania. This decision followed the standoff between the African Commission and the Executive Council following the grant of observer status to an African NGO, Coalition of African Lesbians (CAL).

The Executive Council underscored that the independence of the African Commission was functional and this did not mean independence from the organs that created it.<sup>17</sup> In addition to the withdrawal of observer status from CAL,<sup>18</sup> the Executive Council called on the African Commission to address the ambiguity of its status in the Rules of Procedure, formulate a code of conduct, and pay equal attention to the rights in the African Charter.<sup>19</sup> In response, the African Commission concluded the revision of the revised rules that foresaw the change in the criteria for the *granting and enjoying observer status* to non-governmental organizations working in the field of human and peoples’ rights in Africa.<sup>20</sup> Rule 72(1) of the Rules of procedure made express reference to the revised criteria on the grant and maintenance of observer status. The African Commission would now withdraw observer status of NGOs that no longer fulfilled the

<sup>16</sup> Rules of Procedure of the African Charter on Human and People’s Rights (2020), Rule 3(1) <https://www.achpr.org/legalinstruments/detail?id=72> (accessed 11 June 2021).

<sup>17</sup> Decision 1015, adopted at the 24th Extraordinary Session of the Executive Council held 30 July – 8 August 2018 in Mauritania, para 5.

<sup>18</sup> Decision 1015 (n 17 above), para 8(vii).

<sup>19</sup> Decision 1015 (n 17 above), para 8(i)-(iii).

<sup>20</sup> Resolution on the criteria for granting and enjoying observer status to non-governmental organisations in the field of human and people’s rights, ACHPR/Res.33(XXV)98.

criteria or had defaulted on their obligations.<sup>21</sup> It is argued that this change is seen as a need to ensure that NGOs maintain a given code or mode of conduct to ensure that observer status is maintained.<sup>22</sup> However, there was no dedicated section on the fundamental African values, identity and good traditions.<sup>23</sup>

Paragraph 8(vi) of decision 1015 required the African Commission to develop clear Guidelines with regards to its engagement with external actors, following the relevant AU Rules, Regulations and practices. The African Commission's response culminated in the adoption of Rule 11 in the 2020 Revised Rules of Procedure. The Rules provide that

'Rule 11 Code of Conduct

1. Without prejudice to the independence of the Commission, members of the Commission shall observe the principles and codes of conduct stipulated in these Rules as governing the terms and conditions of their service including the principles relating to recusal and confidentiality, as well as relevant provisions of the African Union Staff Rules and Regulations, the African Union Code of Ethics and Conduct and the African Union Harassment Policy.
2. In case of a conflict, the specific rules as applicable under these Rules shall take precedence.'

This provision was not in the 2010 Rules of Procedure. This was also captured in the Annual report of the African Commission to the AU Assembly.<sup>24</sup> In the report, it was stated that the Draft Revised Rules of Procedure took into

account, the AU Code of Conduct and that the members of the ACHPR and Staff of the Secretariat had been trained on the AU Code of Ethics and certified accordingly.<sup>25</sup>

## 6. Withdrawal of CAL's Observer Status As A Threat to Civic Space

Decision 1015 required the African Commission to 'withdraw the accreditation of the Coalition for African Lesbians (CAL) NGO by 31st December 2018 following previous decisions of AU Policy Organs. In response, the African Commission adopted a decision to withdraw the observer status of the CAL at its 24<sup>th</sup> extraordinary session,<sup>26</sup> and subsequently wrote a letter to CAL concerning the withdrawal.<sup>27</sup> These responses have been treated as a threat to civic engagement at the African Commission. Not only do they undermine the mandate of the African Commission but they also diminish meaningful, inclusive and non-discriminatory civil society participation.

On this basis, the actions taken by CSOs since the adoption of Decision 1015 have been resolute to protect the independence of the African Commission. As such any key aspect to note is the use of strategy to engage the African Commission on various issues. For instance, the use of the NGO Forum to lobby the African Commission to take a specific direction, to use seminars and other fora to inform and disseminate findings on critical issues.<sup>28</sup> This remains evident in the use of side events on the margins of the African Commission session by the civil society to enhance efforts to uphold the mandate of the African Commission.<sup>29</sup>

21 Rules of Procedure (n 16 above), Rule 72(3).

22 Resolution on observer status (n 20 above).

23 The issue of fundamental African values, identity and good traditions is only referred to in the Preamble. Similar sentiments on the lack of details are evident in MG Nyarko & AO Jegede 'Human rights developments in the African Union during 2016' (2017)17 *African Human Rights Law Journal* 299.

24 The 46th activity report of the African Commission on Human And Peoples' Rights, [https://www.achpr.org/public/Document/file/English/46th%20Activity%20Report%20ACHPR\\_%20ENG.PDF](https://www.achpr.org/public/Document/file/English/46th%20Activity%20Report%20ACHPR_%20ENG.PDF) (accessed 11 June 2021).

25 The 46th activity report (n 24 above) para 57.

26 Final Communiqué of the 24th Extraordinary Session of the African Commission on Human and Peoples' Rights [https://www.achpr.org/public/Document/file/English/final\\_communique\\_\\_24eos\\_eng.pdf](https://www.achpr.org/public/Document/file/English/final_communique__24eos_eng.pdf) (accessed 11 June 2021).

27 CIAC, Tracking decision 1015 [https://achprindependence.org/wp-content/uploads/2020/07/Tracking\\_Decision\\_1015.pdf](https://achprindependence.org/wp-content/uploads/2020/07/Tracking_Decision_1015.pdf) (accessed 11 June 2021).

28 The NGO forum is a collective of CSOs that play a critical role in the work of the African Commission through holding meeting before sessions, and adopting positions, informing the Agenda of the African Commission, rallying and supporting the African Commission in the exercise of its mandate. See M Millstein, Regionalising African Civil societies <http://nai.diva-portal.org/smash/get/diva2:790494/FULLTEXT02.pdf> (accessed 11 June 2021).

29 Tracking decision 1015, (n 27 above) para 3.



## 7. We Shall Not Forget

NGOs and civil society organisations play a crucial role in supporting the African Commission to fulfil the mandate of promoting and protecting human and people's rights, especially where they enjoy observer status.<sup>30</sup> The ability of the NGOs to inform the agenda of the African Commission shows a position of influence that may translate into an action or inaction that may affect the independence of the African Commission.<sup>31</sup>

Since the adoption of Decision 1015, NGOs continue to meet and engage to devise modes of protecting the independence of the African Commission. These activities all point to upholding the mandate of the African Commission as an independent organ. Initiatives such as the Coalition for the Independence of the African Commission<sup>32</sup> (CIAC) complements the use of instructive initiatives like strategic litigation by NGOs at national and regional levels.<sup>33</sup>

The African Commission maintains the discretion to decide what it should engage in, it is misinformed to state that its independence is negatively affected by NGOs. It is recognised that the human rights landscape has greatly evolved since 2018. Hence, a more nuanced approach is required informed by a shared understanding that the African Commission, States and NGOs need to work collaboratively to protect the rights of people in Africa.

## 8. What next? Strategies

Other strategies that NGOs can employ include engaging the Executive Council, the Permanent

Representatives Committee and other AU organs in their work to ensure that human rights promotion and protection remains a priority in Africa. For instance, the NGOs may engage the Economic, Social and Cultural Council to engage on the requirements for affiliation of NGOs to the AU under the ECOSSOC Statute. Article 6 defines the eligibility requirements for NGO engagements that require that Member States contribute 50 per cent of the budget of NGOs.<sup>34</sup> Engagements on the practical application of this, the underlying rationale for the same and the need for practical solutions to the threat on the independence of the African Commission should inform the post Decision 1015 agenda.

NGOs should adopt strategies to engage with other AU Organs like the Permanent Representatives Committee (PRC) and the Executive Council. This will present opportunities to effect change using a top-bottom approach. This comes down to having dissemination workshops where the content and context of the activities of NGOs are unpacked for the AU organs. The use of a strategy that works with the African Commission should be used regarding the relationship between the other AU Organs and NGOs.

There should be an emphasis on an understanding of the concept of functional independence as a key outcome of Decision 1015. This is informed by the normative framework of the African Commission. Article 45 broadly provides for the promotional, protectional and interpretative mandate of the African Commission. Specific reference should be on Articles 45(2) and (3) that mandate the African Commission to:

2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.<sup>35</sup>

It is instructive to maintain the sanctity of the protective mandate of the African Commission,

30 Resolution on observer status (n 20 above), The African Charter (n 14 above), Article 45(1)(c). See Rules of Procedure (n 16 above), Rule 72(1) and (2). These rules refers to NGOs with observer status to Resolution 361 on the criteria for granting and maintaining observer status.

31 Rules of Procedure (n 16 above), Rules 33(3)(e) and 68(1).

32 Coalition for the Independence of the African Commission (CIAC) <https://achprindependence.org/> (accessed 11 June 2021).

33 Adrian Jjuuko conducts a study on the use of strategic litigation to bolster the promotion and protection of rights of LGBTI at Uganda's national level. See Unpublished: A Jjuuko 'Beyond court victories: Using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in Common Law Africa' unpublished PhD thesis, University of Pretoria doctoral dissertation 2018 generally.

34 The Statute of the ECCOSSOC [https://au.int/sites/default/files/newsevents/workingdocuments/27445-wd-ecosoc\\_statutes\\_-\\_en.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/27445-wd-ecosoc_statutes_-_en.pdf) (accessed 11 June 2020), Article 6(6).

35 The African Charter (n 14 above) Article 45 (2) and (3).

by ensuring that due process is reiterated and followed.

## **9. Conclusion**

The independence of the African Commission is established by the African Charter on Human and Peoples' rights. The African Charter provides that the African Commission enjoys independence in the exercise of its mandate. Non-governmental organisations play a key role in supporting the African Commission in the exercise of its mandate. Any action or inaction taken by NGOs affects the independence of the African Commission in qualitative exercise of its mandate. As such, NGOs ought to remain ac-

tive in engaging with the African Commission on decisions that it passes. These may include recommendations in Concluding Observations, Communications, or statements made on topical issues. It is prudent that the narrative should go beyond Decision 1015 to engage aspects that would pre-empt similar attacks, not only other the African Commission, but also on the mandate of other regional human rights bodies in future. The first step is to reiterate the African Commission and the NGOs as joint critical partners to the protection of human rights in Africa. This should be followed by deliberating engaging with specific AU Organs such as the Executive Council and the PRC.

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