African Commission's Rejection of Observer Status Applications by Three Human Rights Organizations Threatens its Ability to Discharge its Mandate to Promote and Protect Human Rights for All

We, the undersigned organisations, express grave disappointment with the decision of the African Commission on Human and Peoples' Rights (African Commission) to reject the observer status applications of Alternative Côte d'Ivoire, Human Rights First Rwanda, and Synergía – Initiatives for Human Rights. In the Final Communiqué of its 73rd ordinary session held in Banjul, The Gambia, from 20 October to 9 November 2022, the African Commission states that it rejected the applications of the three organizations on the ground that 'sexual orientation is not an expressly recognized right or freedom under the African Charter' and is 'contrary to the virtues of African values'.

We believe that this decision of the African Commission encourages discrimination and intolerance. The decision negatively impacts the work to end ongoing human rights violations against persons and communities on the basis of their real or perceived sexual orientation, gender identity and/or expression and sex characteristics. It affirms not only homophobic and transphobic prejudices on the African continent but also exposes human rights defenders working on the protection of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons to violence and discrimination by State and non-State actors.

The African Commission's decision departs from measures to protect LGBTI people, including law reforms, executive and judicial decisions decriminalizing consensual same-sex conduct among adults, taken by many African States such as Angola, Botswana, Cape Verde, Côte d'Ivoire, Gabon, Malawi, Mozambique, Seychelles, and South Africa.

International and regional organizations have the responsibility to ensure the participation of NGOs and civil society, thus ensuring the respect of the rights underpinning participation. Their effective functioning is inexorably linked to civil society participation. The participation of NGOs is inextricably linked with the right to participate in the conduct of public affairs, as well as with the rights to freedom of expression, peaceful assembly and association, which are human rights protected by several treaties, including the African Charter on Human and Peoples' Rights and the International Covenant for Civil and Political Rights (ICCPR). These rights must be available to everyone, without any discrimination, including on grounds of sexual orientation, gender identity and/or expression and sex characteristics.

By rejecting the applications of the three organisations, the African Commission has deviated and acted contrary to its own established jurisprudence and normative standards. The African Commission has expressed the view that 'other status' as used in Article 2 of the African Charter is not limited to the grounds stated in the text but extends to other factors, including 'sexual orientation'. In fact, in the case of *Zimbabwe Human Rights NGO Forum v Zimbabwe* [Communication No. 245/2002], the African Commission noted that the aim of Article 2 is to 'ensure equal treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or *sexual orientation*'.

Similarly, in *Resolution 275 on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender Identity (ACHPR/Res.275(LV)2014*), the African Commission recalled that the African Charter prohibits discrimination against every individual on the basis of distinctions of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. It further recalled that article 3 of the Charter entitles every individual to equal protection of the law.

At the same time, the African Commission unequivocally confirmed that the guarantee under Articles 4 and 5 of the African Charter (integrity of their person and prohibition of torture and other cruel, inhuman and degrading treatment or punishment) must be enjoyed by every individual irrespective of their sexual orientation or gender identity. The Commission recognises that LGBTI persons are rights holders under the Charter and should thus have access to all human rights, including the right to freedom of association, without any discrimination. The Commission has highlighted that the right to freedom of association must be understood in a manner consistent with regional and international human rights law. It is now a well-established principle that discrimination on grounds of sexual orientation is prohibited; the Commission should thus uphold this principle in all its decisions.

In rejecting the observer status applications, the African Commission denies that individuals who protect the rights of LGBTI people can be human rights defenders, contravening *Resolution 376/2017 on the Situation of Human Rights Defenders in Africa*, in which the African Commission itself called for the adoption of specific legislative measures to recognize the 'status of human rights defenders and protect their rights and the rights of their colleagues and family members,

including women human rights defenders and those working on issues such as [...] sexual orientation and gender identity.'

The Commission's reference to 'virtues of African values' is not only a misquotation of the Charter, but it is a departure from the Charter itself. While article 29(7) states that every individual has the duty to 'preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society', it is hard to believe that denying the enjoyment of the rights and freedoms recognised and guaranteed in the Charter to any right-holder without discrimination, including LGBTI people, is a 'positive African cultural value' protected by the Charter.

In its Communiqué, the Commission seems to reject the basic principles of universality and inalienability of human rights enshrined in the Universal Declaration of Human Rights as foundational principles of all current human rights instruments and mechanisms. In this regard, the preamble to the Universal Declaration of Human Rights recognizes the 'inherent dignity and […] the equal and inalienable rights of all members of the human family'. The decision of the African Commission thus contravenes the spirit of article 60 of the Charter, which states that 'the Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, [...] the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights'.

The mission, vision and mandate of the three organisations include but are not limited to the protection of the human rights of LGBTI individuals and human rights defenders. In rejecting their applications, the Commission sends a chilling message to all human rights defenders in the continent that protecting the human rights of LGBTI individuals and human rights defenders would restrict their opportunities to participate in the conduct of public affairs and with the African system. Such an approach is in stark contrast with Resolution 275 that calls on 'State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution' and makes the Resolution itself inoperable since it stigmatises everyone that would work to make it real.

The procedure leading to the decision of the Commission also deviates from its own standard practice to consider observer status applications in public. More importantly, the Commission published the rejection of the observer status applications in its Final Communiqué without notifying the applicants. *Resolution 361 on granting and maintaining observer status to non-governmental organizations working on human and peoples' rights in Africa* expressly requires the African Commission to notify observer status applicants of its decision without delay.

We are concerned that the decision of the African Commission may have been motivated by Decision 1015 of the Executive Council, a political organ of the African Union that previously put pressure on the African Commission to withdraw the observer status it had granted to the Coalition of African Lesbians. Therefore, the decision not only suggests the Commission's predisposition to appease certain repressive member States, but it also signals a dangerous turn towards irredeemably relinquishing its independence in executing the mandate set forth by article 45 of the Charter. It calls into question the integrity, impartiality and human rights competence of the members of the African Commission as required by article 31 of the Charter.

On the basis of the above, the undersigned organizations urge the African Commission to:

- promptly reverse its decision to reject the observer status applications of the three organizations and fulfil its mandate to protect and promote human rights for all persons, as required by article 45 of the Charter;
- ensure to respect, protect and fulfil human rights according to international and regional human rights law and standards, free from any political interference and by upholding its independence in all its decisions;
- reaffirm the spirit of Resolution 275/2014 in all its decisions and acknowledge the dangers of violence and other forms of discrimination against persons based on their real or imputed sexual orientation and gender identity;
- commit to the protection of all human rights defenders without any discrimination;
- refrain from any restrictive interpretation of the Charter that negatively impacts on their mandate to protect and promote human rights for all.

Statement Co-Sponsors

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Article 19
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Equality Now
Human Rights First Rwanda
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