

Shrinking Civil Society Space in the Horn of Africa

The Legal Context



PAX
www.paxforpeace.nl

Colophon

August 2017

ISBN: 978-94-92487-17-9 NUR 828

PAX serial number: PAX/2017/09

Writer: Dr. Mehari Taddele Maru

Initial draft: Mrs. Bashair Ahmed and Mr. Nabil Adib Abdalla

Front cover: Demonstration erupted outside the university of Zaleingi in west Darfur as a peace negotiation team, met with civil society leaders inside the university. At least one protester was killed and several wounded during clashes with the security forces. By UN - West Darfur, Zaleingi, Sudan - 01 December 2010.

About PAX

PAX means peace. Together with people in conflict areas and concerned citizens worldwide, PAX works to build just and peaceful societies across the globe. PAX brings together people who have the courage to stand for peace. Everyone who believes in peace can contribute. We believe that all these steps, whether small or large, inevitably lead to the greater sum of peace. See also www.paxforpeace.nl

About the Al Khatim Adlan Center for Enlightenment and Human Development (KACE)

KACE is a non-governmental and non-profit organization. It undertakes research and campaign on issues pertaining to peace, human rights and democratic transformation. KACE's vision is to see a peaceful democratic and truly multi-cultural Sudan, where all people are equal in dignity, rights and opportunities. KACE's mission is to spread enlightenment. It aims to develop democratic modes of behavior, to encourage freedom of thought and freedom of scientific research, and to reinforce peaceful and civilized debate amongst different groups and sectors of the society. KACE focuses on awareness-raising in the different communities in order to change perceptions about own and others' identity and human worth. It focuses on the root causes of the civil war and human rights violations. It also undertakes research and campaign on cultural and educational reform.



About the Horn of Africa Civil Society Forum (HoACS Forum)

The Horn of Africa Civil Society Forum (HoACS Forum) is a regional network of civil society organizations that is working together to monitor and expand civic space in the countries in which the Forum operates. The forum is formed of representatives from ten countries: Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Somalia, Somaliland, South Sudan, Sudan and Uganda.

The HoACS Forum was founded in March 2016 in response to the diminishing civic space for civil society organizations (CSOs) in the greater HoA region and the repressive legislative environment that characterizes almost all the countries represented in the forum. This particularly impacts those CSOs that are actively working to promote good governance, respect for human rights and democracy in their respective countries.

The HoACS Forum is governed by a steering committee made up of representatives of CSOs from each of the countries and hosted by KACE. A lean secretariat of three-persons is elected by the steering committee to oversee the activities of the Forum.

The objectives of the forum are to:

- Undertake advocacy and lobbying activities at national, regional and international levels;
- Produce the “Horn of Africa Watch,” a periodic bulletin that provides information on civic space in the region;
- Engage in solidarity campaigns with civil society in the region;

FORUM MEMBERS

- | | |
|---|---|
| 1. Awareness (Waey) a cultural and social association | 1. Ethiopian Human Rights Council (EHRCO) |
| 2. Community Empowerment for Progress Organization (CEPO) (South Sudan) | 2. Human Rights Network Uganda (HURINET) |
| 3. Crisis Action | 3. International Centre for Not-for-Profit Law (INCL) |
| 4. CSO Reference Group (Kenya) | 4. Kalangala Human Rights Defenders Network (Uganda) |
| 5. Development Network of Indigenous Voluntary Associations (DENIVA) (Uganda) | 5. Ligue Djiboutienne des Droits Humains (LDDH) |
| 6. East and Horn of African Human Rights Defenders Project (EHAHRDP) | 6. Nagaad Network |
| 7. Eritrean Diaspora in East Africa (EDEA) | 7. National Coalition for Human Rights Defenders in Kenya |
| 8. Eritrean Movement for Democracy and Human Rights (EMDHR) | 8. National Sudanese Women's Alliance (NSWA) (Sudan) |
| | 9. Never Again Rwanda |
| | 10. Peace and Human Security Resources (Uganda) |
| | 11. South Sudan Law Society |
| | 12. Seeds of Peace (Kenya) |
| | 13. Somali Family Service (SFS) |
| | 14. Sudanese Development Initiative (SUDIA) |
| | 15. Witness Somalia |

All rights reserved to Al-Khatim Adlan Centre for Enlightenment and Human Development (KACE). No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means (electronic, mechanical, photocopying, recording, or otherwise) without the prior written permission of the publishers.

Contents

Abbreviations and acronyms	6
Acknowledgements	8
Vital statistics on the Horn of Africa	10
The Horn of Africa	11
Executive summary	12
1. Background	16
1.The development of CSOs	16
2. Regional Engagement with CSOs	18
3. Governance Indicators	19
4.Elections as Governance Indicators: from Participatory to Competitive Elections	20
5.Decentralization, Devolution and Federalism	22
6.Increasing Demand for Local CSOs	24
2. Methodology and notes	26
2.1.CSOs and NGOs	26
2.2.Purpose	27
2.3.Approach and Methodology	27
2.4.Guiding Questions	27
2.5.Limitations and Lessons	26
3. Normative frameworks: international, continental and national constitutions	30
3.1.International and Continental Instruments	30
3.2.Constitutional Frameworks	32
4. Legislation governing CSOs	38
4.1.Overarching Issues in National Law	38
4.2.National Legislation and Practice	41
5. Key findings, policy implications and recommendations	72
5.1.Recommendations	76

Abbreviations and acronyms

ACDEG	African Charter on Democracy, Elections and Governance
ACHPR	African Charter on Human and Peoples' Rights
AU	Africa Union
CBOs	Community Based Organizations
CSOs	Civil Society Organizations
CSP	Charities and Societies Proclamation (Ethiopia)
EAC	East African Community
EACSO	East African Civil Society Forum
ECA	Economic Commission for Africa
ECOSOCC	AU Economic, Social and Cultural Council
ECSA	Ethiopian Charities and Societies Agency
EU	European Union
GDP	Gross domestic product
HAC	Humanitarian Aid Commission (HAC)
HoACS	Horn of Africa Civil Society Forum
ICCPR	The International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
IGAD	Intergovernmental Authority for Development
INCL	International Center for Not-for-Profit Law
KACE	Al Khatim Adlan Center for Enlightenment and Human Development
LDDH	Ligues Djiboutiennes des Droits de l'Homme (Djibouti)
NGOs	Non-Governmental Organizations
PBOs	Public Benefit Organizations
PBORA	Public Benefit Organization Regulatory Authority
PFDJ	People's Front for Democracy and Justice (Eritrea)
RDC	Resident District Commissioners (Uganda)
RGB	Rwanda Governance Board
REC	Regional Economic Community
RRC	Relief and Rehabilitation Commission (South Sudan)
UN	United Nations
UNDP	United Nations Development Fund
UNHCR	United Nations High Commissioner for Refugees
UDHR	Universal Declaration of Human Rights
VHWA	Voluntary and Humanitarian Work Act (Sudan)

Acknowledgements

This report was drafted by Mehari Taddele Maru, a consultant for the Al Khatim Adlan Centre for Enlightenment and Human Development (KACE) and the Horn of Africa Civil Society Forum (HoACS). The report builds on initial drafts compiled by Bashair Ahmed and Nabil Adib Abdalla. It was edited by Sonja Uwimana and Olivia Bueno. The report was reviewed by KACE and validated by the HoACS Forum and its Executive Committee. Therefore, the contents and opinions expressed in this report reflect the views of these institutions.

KACE is grateful to authors, editor and individual forum members who contributed their expertise. Without their efforts, this report would not have come to fruition. We are equally grateful to everyone who provided information. We are also grateful to Pax for supporting this report, and this project more broadly and also for their support in the design and layout of this report.

This report gives an overview of the legal frameworks pertaining to the regulation of civil society organizations (CSOs) in the greater Horn of Africa,¹ ongoing political and economic transformation, as well as the increasing tension and dynamism between governments and CSOs. It focuses deliberately on the shortcomings affecting the growth and contributions of the NGO sector to the general population. It further presents an array of opportunities and threats, as well as successes and challenges, that the NGO sector is now facing.

1 For the purposes of this report, the "greater Horn of Africa" includes Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Somalia, Somaliland, South Sudan, Sudan and Uganda.

With the ultimate aim of assisting in the development of effective civil society engagement, which in turn promotes the enjoyment of human rights and development across Africa, the report discusses the existing national normative, institutional, collaborative and financial frameworks regulating governance. More importantly, it identifies existing shortcomings in these frameworks and offers recommendations to address them. The report is expected to influence, shape and change the relevant legal frameworks by engaging, lobbying and advising governments, regional and continental governance institutions, as well as development partners.

The findings and recommendations in the report primarily target institutions with appropriate mandates in regulating CSO action at the national level, and regionally via the Intergovernmental Authority for Development (IGAD), and the African Union (AU). Moreover, CSOs, international organizations and development partners may draw lessons from these findings and recommendations in their engagement with regional and national stakeholders.

Albaqir al Affif Mukhtar (PhD)
Director

Al Khatim Adlan Center for Enlightenment and Human Development (KACE)
June 2017

Vital Statistics on the Horn of Africa

Table 1:

Vital Statistics in the Horn of Africa

Country	(millions) in 2012	Life Expectancy at birth (in total) yr in 2012	Infant Mortality Rate (per 1000)	Population living below \$1.25 a day (2009-2011)	Adult literacy rate (Female)	Per capita income US dollars for 2012
Djibouti	0.9	61.3	56.3	18.8	n.a.	1030
Eritrea	6.1	62.3	43.2	n.a.	59	450
Ethiopia	91.7	63.0	50.3	30.7	39	410
Kenya	43.2	61.1	52.4	43.4	66.9	850
Somalia	10.2	54.7	80.6	n.a.	n.a.	150
South Sudan	10.8	54.7	79.1	n.a.	16	650
Sudan	37.2	61.9	55.4	19.8	63.2	1450
Uganda	36.3	58.7	57.8	38.0	64.6	440
IGAD Region	236.4	59.7	59.4	n.a.	n.a.	679
Africa	1070.1	58.1	71.4	40.0	64.9	1604

Source: Mehari Taddele Maru, IGAD State of the Region Report, 2015.

The Horn of Africa



Executive Summary

This report reviews the legal framework regulating civil society organizations (CSOs) in ten countries of the greater Horn of Africa (HoA) (for the purposes of this report, the greater HoA is made up of Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Somalia, Somaliland,² Sudan, South Sudan, and Uganda) evaluating them against existing international norms and national constitutional protections.

In doing so, it employs a legal text analysis, investigating what relevant international laws and domestic laws state from a critical perspective, while also considering political and economic factors. Section one provides critical background on overarching political and economic dynamics in the region and the impact that these are likely to have on CSOs as well as discussing the development of CSOs in the region. Section two sets out the intent of the report and addresses key methodological issues. Section three discusses the legal protections of freedom of association and assembly, both at the level of international law and constitutional protections. Section four discusses national laws and assesses the extent to which these are, or are not, compliant with freedom of association protections. Section five draws together key findings and offers recommendations for expanding space for civil society in the region.

2 KACE and the HoACS Forum take no position on the contested status of Somaliland, but in the paper, we wanted to describe the de facto situation for civil society who are de facto regulated by the law described.

Key findings:

All countries covered by the study, except Eritrea, have constitutional provisions for the protection of freedom of association, assembly and expression. All countries covered by this study, including Eritrea, have ratified the African Charter on Human and Peoples' Rights (ACHPR) and the International Covenant on Civil and Political Rights (ICCPR). However legal personality of CSOs emanates from domestic laws and not from international law and the latter often do not provide for the former.

All national constitutions provide that these protections can be restricted in narrow circumstances, including protecting the freedom of others, public security, public order, public safety, and public health. These provisions at the constitutional level are generally compliant with international standards. It is generally agreed internationally that these restrictions may apply to restricting CSOs from partisan political campaigning, fundraising and support of political parties, and these are in fact prohibited in most national laws in the region. However, these narrow exceptions can be referred to in inappropriate circumstances. In general terms, national interest and the protection of public values are among the most likely excuses employed by the executive body in order to curtail basic human freedoms.

In the past decade or so, the relationship between CSOs and governments has been characterized by what one may call “mutually assured distrust”. CSOs are seen by many governments as encroaching upon state functions and CSOs receiving external funding are perceived to be agents of external powers hell-bent on undermining the national sovereignty. As far as many CSOs are concerned, too many governments are only interested in attaining and maintaining power unconstitutionally without any form of accountability or oversight.

As a result, progressive constitutional provisions are being undermined by the introduction of new restrictive legislation. Many countries in the region have, over the past decade, promulgated and implemented legislation that undermines the constitutional and international protections of freedom of association. This has created a framework of laws regulating the formation, registration, operations, funding and accountability of CSOs that are highly restrictive. Laborious and uncertain registration processes, restrictions on funding sources and operations and onerous reporting requirement have created formidable barriers to the enjoyment of freedom of association.

International and constitutional protections are also being threatened by the regressive practices of CSO regulatory bodies. These bodies have, too often, been given extensive discretionary powers to supervise, regulate and interfere with the internal administration of CSOs. Where self-regulation measures are in place for CSOs these are subject to the government's regulatory body, thus rendering them as extensions of the government rather than as ethical self-supervisory bodies. Regulatory bodies lack independence from the government. Exercising sweeping powers, these bodies interfere in almost all aspects of CSO life, undermining the independence of CSOs and their rights to freedom of association. Too often, legislation has limited the possibility of judicial review of these decisions, undermining key due process safeguards.

Governments in the region are also imposing informal barriers on CSOs. Informal barriers include a total mistrust of CSOs, promotion of a discourse that paints CSOs as agents of external forces and corrupt entities.

Space for CSOs to operate is shrinking fast in the greater HoA. This is, however, part of a global trend. More than 50% of the UN member states have imposed some form of restrictions on external funding (purpose, spending, source, and transfer) for CSOs while the states themselves receive significant donor funding and foreign aid. These restrictions have been passed by democratic as well as autocratic governments.³

The first wave of CSO restrictions occurred from 2005 - 2010, when new legislation was introduced requiring CSOs to register. In 2005, with NGO Proclamation No. 145/2005, **Eritrea became the first country to set the trend of shrinking the operating space of CSOs in the HoA.** Adopting a more regressive stance than other HoA countries, Eritrea forbids CSOs from operating and tolerates only the activities of organizations under the control of the country's ruling party, the People's Front for Democracy and Justice (PFDJ). Ethiopia followed suit in 2009. The CSO law in Ethiopia forced more than 70% of its CSOs to register as non-advocacy NGOs, whereas only 14% actually qualify as advocacy NGOs.

Due to its restrictive CSO laws, Ethiopia has not been fulfilling its special responsibility as host of the AU and IGAD to support African CSOs. As Africa's diplomatic center, hosting many of the most important of AU organs and pan-African institutions, Ethiopia should be setting a more positive example. Due to the new CSO laws and an absence of any enabling environment, however many African CSOs engaging with the AU have either moved to less restrictive states like Kenya or Tanzania or closed down altogether. In the absence of special arrangements for African CSOs working with these institutions, Ethiopia's current legal and policy framework effectively contradicts the spirit and substance of the continental and regional organizations headquartered in the country.⁴

The second wave began in 2015 and its impact continues today, as CSOs become seriously affected by a lack of sufficient funding to cover their operations. CSOs that successfully withstood the first wave are now facing acute financial problems. In part, more stringent legal requirements for the operation of CSOs have made it very difficult and less attractive for nationals to exercise their freedom of association and actively work in those CSOs. At the same time, the EU and other key donors have shifted their funding priorities away from governance in the region in favor of addressing their own migration problems and internal economic crises (since 2008). This has drastically reduced the availability of funding for CSOs in the region.

For all these reasons, CSOs face binding constraints at two levels: during the time of their establishment and in their operations. CSOs face difficult, bureaucratic and unreasonable registration procedures at the time of their establishment. Operationally, they face government interference through restrictions on the solicitation and allocation of funding, onerous reporting requirements and, at times, government approval of their operations.

3 International Center for Not-for-Profit Law, "Closing Civic Space: Impact on Development and Humanitarian CSOs, Global Trends in NGOs," Volume 7, Issue 3, 2009 available at <http://www.icnl.org/research/trends/Global%20Trends%20Vol.%207%20Iss.%203%20Challenges%20to%20Development%20Organizations%20final.pdf> (accessed June 11, 2017).

4 Ibid.

Due to restrictive legislation, and the regressive practices of HoA governments, some CSOs are forced to work under the cover of acceptable development programs, such as health projects. Other CSOs have left to establish themselves in neighboring countries where they can operate more freely. Others have had to forego the benefits of recognition as CSOs and register as other types of organizations in order to avoid government interference.

The report concludes with recommendations for how CSOs in the region, their allies and regional governments can work to reverse these worrying trends and reclaim space for their own operations and for enjoyment of freedom of association across the region.

1. Background

In order to understand the situation for CSOs in the HoA, it is critical to understand both the development of civil society globally and also some of the key political and social dynamics in the region which have an impact on CSOs. This section gives an overview of some of these dynamics, from development patterns to governance indicators.

1. The development of CSOs

There has been substantial progress in developing human rights and development standards at the international level since World War II. To a certain extent these gains were through a long and protracted struggle by social and political movements, some of whom were constituted into CSOs. Among those rights that have been articulated are some which are particularly vital for the functioning of civil society such as freedom of association, assembly and expression. Thus, fundamental human rights are vital for free and effective functioning of civil society, just as these organizations are vital to ensuring that civil and political rights are enjoyed in practice. Despite this, CSOs have faced sporadic and systematic hostilities due to historical, political and economic factors.

CSOs have existed since the advent of socially and politically organized communities and religions in Africa. Early on, they took the form of traditional, community and religious associations that served their communities in various ways. More recently, a sub-type of CSO known as a non-governmental organization (NGO) has taken root. These organizations tend to have more formal structures, whereas the broader term CSOs encompasses informal institutions such as church groups, etc. NGOs have gained greater prominence, partly as a result of the foundation of the

United Nations (UN) in 1945, as the UN Charter states that NGOs may be granted consultative status within the UN.⁵ CSOs have also played an important role in consolidating the rule of law and democracy and the dissemination of various socio-economic and political values in the developing world, including in the greater HoA. Due in part to their particular status, and their importance in developing and upholding democracy, these organizations are protected and regulated by international law, as well as most national domestic legal systems.

Nonetheless, the goals and institutions of modern NGOs, in the form of those that exist in the Western world, are new for the African continent and for the HoA. The development of Africa's NGOs can be traced to the advent of three periods of political and economic change: the end of colonialism; the end of the Cold War; and the emergence of the multi-polar international political era, including the associated rising influence of Chinese and other Asian models of governance. The origins of NGOs in Africa and the HoA date back to the early post-independence era. The end of colonialism led to a proliferation of Pan African and national CSOs, mostly affiliated with the liberation movements, political organizations and, in some cases, individual citizens aiming at promoting social transformation beyond the struggle for independence.⁶ Such NGOs contributed to the end of colonialism and filled an important vacuum that was created when colonialism ended. They began with the need to mobilize communities, advocate change and develop the capacity to produce policy alternatives. With the collapse of the communist eastern bloc, the end of the Cold War left the USA as the world's sole super power and champion of western democratic values. With this came the attempt by global, regional and domestic forces to transform the political economy and instill democratic values in Africa and elsewhere. The end of the Cold War also coincided with the infamous structural adjustment programs that brought development of the private sector to the forefront and tried to limit the role and place of the state to that of a guardian dedicated to ensuring the implementation of effective regulation. Global financial institutions such as the World Bank and the International Monetary Fund worked tirelessly to transform the economic governance of African countries. Donor money was also used to help instill democratic values. Interventions by global financial institutions and donor financing led to a proliferation of modern NGOs formed along a Western model along with a surge of activity dedicated to asserting various individual and organizational rights, including freedom of association, freedom of expression and freedom of the press.

This unipolar period did not last long and a new multi-polar world has emerged. In this world, China plays an important role. The rapid development experienced by China, along with the so called "Asian tigers" namely South Korea, Taiwan, Singapore and Hong Kong, have challenged some of the traditional western assumptions about economic growth. The cornerstone of this discourse was the idea that it was possible to achieve development through the model of the developmental state⁷, without the robust role of CSOs as part of the establishment of an incipient liberal democracy. This discourse was very influential among governments in the greater HoA. In this context, CSOs, and in particular western funded NGOs were perceived as obstacles to the concept and operationalization of a developmental state and the perceived

5 UN Charter, Chapter X, Article 71.

6 Stone, Diane, and Andrew Denham, eds. *Think Tank Traditions: Policy Research and the Politics of Ideas*, (Manchester: Manchester University Press), 2004.

7 Mkandawire describes the two components of the developmental state; the ideological and the structural. In terms of ideology the state is "developmentalist" in that it aims at ensuring economic development, which tends to be understood by high rates of accumulation and industrialization. In terms of structure, the developmental state's capacity to effectively implement economic policies is emphasized.

need for continuity, and lack of political transformation for economic stability and growth.

During the Cold War and immediately after its end, states lost significant legitimacy due to their inability to address important issues, including their inability to provide basic services. These failures were due to the deeply flawed existing state structures, the inability or unwillingness to promote structural adjustment and the phenomenon of deliberate attacks by neo-liberal forces on the role of the state in society. With the aim of regaining some of the legitimacy states had lost, governments began to reclaim their roles in providing some key basic services to the people. Thus, the hostility towards CSOs began as the government started to offer social services that CSOs were also providing and from which they were gaining legitimacy. This proved to be another factor inhibiting the development of CSOs in the HoA. Nevertheless, CSOs, particularly western funded NGOs, were branded as anti-government agents of the western world. They were seen as the Trojan Horse of neo-liberals and other perceived agitators. The changes of governments that occurred in Eastern European countries that began with, for example, Georgia and Ukraine, also reinforced a fear of governmental vulnerability to the potentially disruptive activities of foreign funded CSOs.⁸ A variety of counter-measures were taken by Egypt, Eritrea, Ethiopia, Rwanda, Sudan, Uganda, Zimbabwe, Algeria, Russia, Moldova, Venezuela, and Uzbekistan, all of them faced with grave weaknesses in their various governmental dispensations.

In the HoA region, in the three decades since the end of the Cold War, the development of CSOs in the greater HoA cannot be seen outside their political economies, economic development and the nature of social development.

2. Regional Engagement with CSOs

Regional organizations have sought to engage formally with CSOs.

Within IGAD, the organization's eighth Assembly decided in 2002 to establish an CSO forum that would "provide a framework for civil society consultation and cooperation with IGAD."⁹ Initially, the forum was considered to be a valuable and cost-effective intermediary between central agencies and local communities in the IGAD priority areas, particularly in regard to peace and security, agriculture, the environment, economic cooperation and social development. However, the constitutive document of the forum established that the Ministry of Foreign Affairs of each member state would select which national CSOs could become members of the forum. The membership process became a bone of contention with major donors, in particular the EU, who saw the forum as lacking in independence as a result.¹⁰

In the East African Community, civil society engagement is organized through the East African Civil Society Forum (EACSOF) which was formed in 2008. It is run by a governing council of ten

8 Rebecca Vernon, "Closing the Door on Aid," The International Center for Not-for-Profit Law, available http://www.icnl.org/research/journal/vol11iss4/special_1.htm (accessed February 12, 2017).

9 Statutes of the IGAD-NGO/CSO Forum, 2003; In 2002, a Consultative Meeting of IGAD/CSO's and NGO's Meeting held in Addis Ababa reached a decision to convene the first assembly of the CSOs Forum.

10 Interview with key informant, May 24, 2015.

organizations. The network is embedded in the EAC Consultative Dialogue Framework, which serves as a point of contact for CSO concerns.¹¹ Although the network is well organized, CSOs in the region are still working to ensure more effective and coordinated collaboration with the regional institution.

3. Governance Indicators

Even though improvements have been made with regard to governance in the region, they are relatively modest compared with the rest of the continent. IGAD's low performance with regard to governance drives and in turn is driven by, in part, the fact that some of the lowest ranking countries in terms of the UNDP Human Development Index are to be found in the region. A number of these UNDP indices reflect mixed performance pertaining to governance and related areas of development. Among the factors that drive low scores on these indices, including the Mo Ibrahim index on democratic governance in Africa, are:

1. instability and violent conflicts;
2. extreme poverty;
3. weak and unresponsive governance;
4. exclusive development;
5. group-based grievances; and
6. highly fragmented political, military and economic elites.

In 2016, the Mo Ibrahim Foundation Governance report¹² attributed a regional average governance score of 37.5 out of 100 to the IGAD region. The region's governance score improved slightly from 2014, but has shown an overall decrease of only one point since 2006.

The IGAD score is well below the African average (50). Member states of the East African Community (which includes some states, such as Tanzania, outside the scope of this research) was higher than the continental average at 55.2. Within the region covered by this report, Rwanda scored highest, with a governance score of 62.3 (ranked 9th on the continent). Rwanda's score has improved by 8.4 points since 2006.¹³ Somalia ranks dead last in governance on the continent with a score of 10.6, and its score has remained virtually unchanged since 2006 (there was a 0.3-point improvement).¹⁴ The lowest ranking country in Africa is Somalia (8.6). South Sudan comes in second to last, with a governance score of 18.6, but that score has declined by 11 points since 2011.¹⁵ Eritrea's overall governance has decreased by 5.6 points and has been reduced to the status of a "garrison state".¹⁶

In the category of political participation and human rights, all of the target countries with the exception of Eritrea have improved their performance since 2006. Despite high participation in

¹¹ Morris Odhiambo and Rudy Chitiga, *The Civil Society Guide to Regional Economic Communities in Africa*, (South Africa: African Minds) 2016.

¹² Mo Ibrahim Foundation Governance Report 2016, available at <http://www.moibrahimfoundation.org/iiag/> (accessed March 23, 2017).

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid. and Kjetil Tronvoll and Daniel Mekonnen, *The African Garrison State: Human Rights and Political Development in Eritrea*, (James Currey) 2014.

the public sphere, IGAD member states are actually facing low levels of political competition in their elections. In April 2015, Sudan had uncompetitive elections characterized by the lowest voter participation in its electoral history. Since December 2013, with no end in sight, the South Sudan has descended into total civil war. Responsive and accountable governance will remain vital for the overall improvement of the region's peace and security, socioeconomic development and integrative opportunities.

The IGAD-PAP under the Peace and Security Division has been tasked with contributing to ensuring peace and security in the region through preventive diplomacy, focusing on democracy, governance, elections and human rights, thereby paving the way for the gradual political integration of the region. IGAD, and the EAC, the two regional organizations to which states covered by this report belong, have developed detailed instruments aimed at promoting good governance and democracy. IGAD has a draft protocol in line with the AU Charter, while the EAC has also has a binding instrument in effect that is not necessarily in line with the Charter. IGAD needs to speed up the ratification of the draft Protocol and its new draft treaty. In this regard, the HoACS Forum could play an important advocacy role.

4. Elections as Governance Indicators: from Participatory to Competitive Elections

Among the elements that are often advanced as a prerequisite for good governance are participatory and competitive elections. IGAD member states, except Eritrea, have been holding elections with regularity. However, IGAD member states sometimes hold elections that are highly contested after the results are announced, leading to diminished legitimacy of the government (Kenya, Uganda) or might be participatory, but uncompetitive (Ethiopia, Djibouti). In Sudan, elections are neither competitive nor participatory while in Somalia, due to security concerns and other institutional limitations, elections are conducted through clan representatives.¹⁷ Eritrea has never had elections. While elections have sometimes been considered as a guarantee for the legitimate exercise of power, they have also been known to trigger conflict and violence. This was the case in Ethiopia (2005), Kenya (2007), Uganda (2011), Djibouti (2010), and Sudan (2005, 2015). Regardless of the current mixed nature of the elections, ranging from purely participatory to highly contested, the trend is that elections will become more competitive and will be more likely to fall under the strict purview of the public, IGAD, the AU, the media and the international community. Shortcomings may be endemic to the evolution of a relatively new African political culture, but they must be subjected to corrective measures so that they become the exception, rather than the norm. The AU's African Governance Architecture provides entry points to election challenges resulting from a lack of good governance.

Most of the governance, peace and security problems in the greater HoA, as in many African states, emanates from the nature of state and political parties as well as external interference.

17 Although a one person, one vote system had been promised for 2016, this was scrapped due to security concerns. The presidential election held in 2017 allowed clan elders to designate delegates to participate in an indirect election process. See Al Jazeera, "Explaining the Somali Election Process," February 7, 2017, available at <http://www.aljazeera.com/indepth/interactive/2017/02/explaining-somali-election-process-170207102621524.html> (accessed June 11, 2017).

Currently all protracted conflicts and challenges to governance in the region relate to a lack of legitimacy either due to unpopular governance and intolerance for diversity or a lack of capacity and the absence of political will in order to ensure effective performance to deliver public goods and services. States are strong about the wrong tasks, and weak about attending to the right core functions. They are effective only when maintaining regime security, the interest of the governing political parties and the interests of the ruling elite. They are vigorous and resourceful in deception, intimidation, and repression. At the same time these states are very weak and reluctant to ensure human security and the well-being of their populations. Human security has two aspects: hard security, which refers to the absence of direct risks to physical survival, including war, violence and destructive conflicts; and soft security, which would entail the eradication of the root causes of war and violent conflicts.

Economically, the IGAD region has shown remarkable progress. Some of the fastest growing economies in the world, albeit from a low economic base line, are to be found in the IGAD region.¹⁸ A stark exception was South Sudan, whose gross domestic product (GDP) shrank by 6.3 in 2015.¹⁹ Despite deep concerns regarding growth sustainability, various forecasts, including by international and regional development and financial institutions such as the World Bank and the International Monetary Fund, have confirmed the IGAD region's high economic growth rate.²⁰ This focus on growth has driven IGAD region's focus on improving human development, accompanied by infrastructural development and good diplomatic relations with the international community.²¹ While the will to improve human and economic development is a positive feature, the developmental state²² tends to focus on service delivery giving democracy a subordinate role. An example in this regard has been the developmental state of Ethiopia that aims at becoming a "UNDP-like" service delivery government. A by-product of these delivery-focused politics is that the focus should be on electing politically popular and democratically accountable leaders with political and economic vision through peaceful, free and fair elections. For governments banking their legitimacy on performance, the potential for widespread "delivery protests" is high when governments fail to meet the demands for quality and quantity delivery. As noted in the Mo Ibrahim Index, IGAD member states have performed better in safety and the rule of law and human development. Increasingly, states need to ensure that security and delivery should go hand in hand with the legitimacy of the authority exercised. However, developmental states are not compelled to be weak when it comes to governance. In contrast, developmental delivery and economic performance should rely on and determine popular legitimacy through democratic participation and contribute to promoting good governance. As such, performance legitimacy through economic delivery could provide the basis for high revenue generation that will serve as a sustainable base for the other pillars of the state.

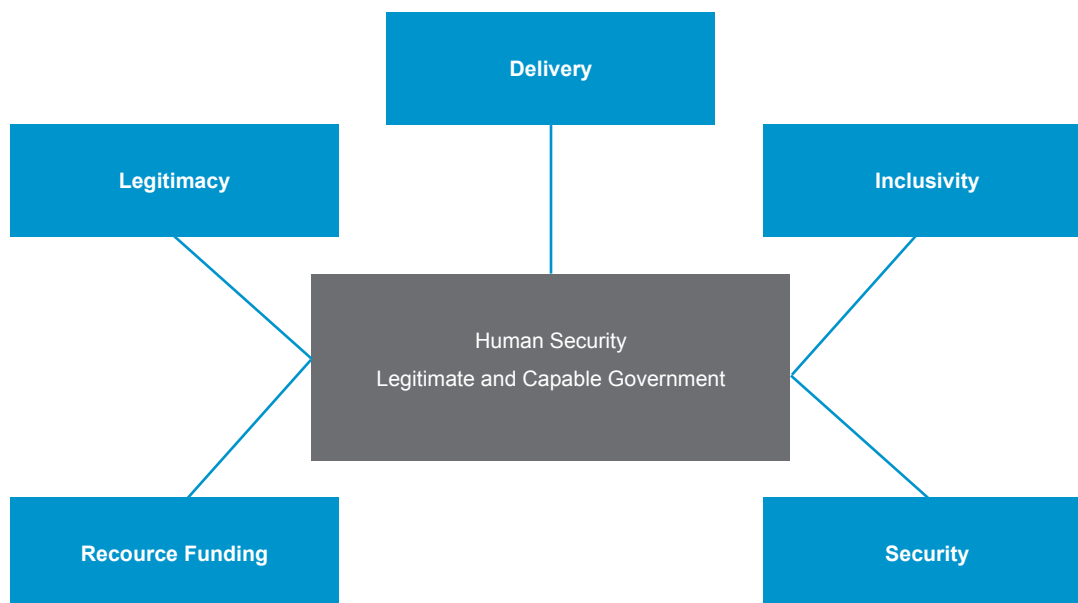
18 World Bank (2013), Country Overview-IGAD Region, available from [http://www.worldbank.org/en/country/IGAD Region/](http://www.worldbank.org/en/country/IGAD%20Region/) (accessed 02 June 2015) also World Bank data for 2015, available at <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?view=chart>, (accessed March 23, 2017).

19 World Bank data for 2015, available at <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?view=chart>, (accessed March 23, 2017).

20 World Bank, "Country Overview-IGAD Region," available from [http://www.worldbank.org/en/country/IGAD Region/](http://www.worldbank.org/en/country/IGAD%20Region/) (accessed June 2, 2015).

21 Measuring Peace and Assessing Country Risk, Institute for Economics and Peace, 2014.

22 Mkandawire describes the two components of the developmental state; the ideological and the structural. In terms of ideology the state is "developmentalist" in that it aims at ensuring economic development, which tends to be understood by high rates of accumulation and industrialization. In terms of structure, the developmental state's capacity to effectively implement economic policies is emphasized.



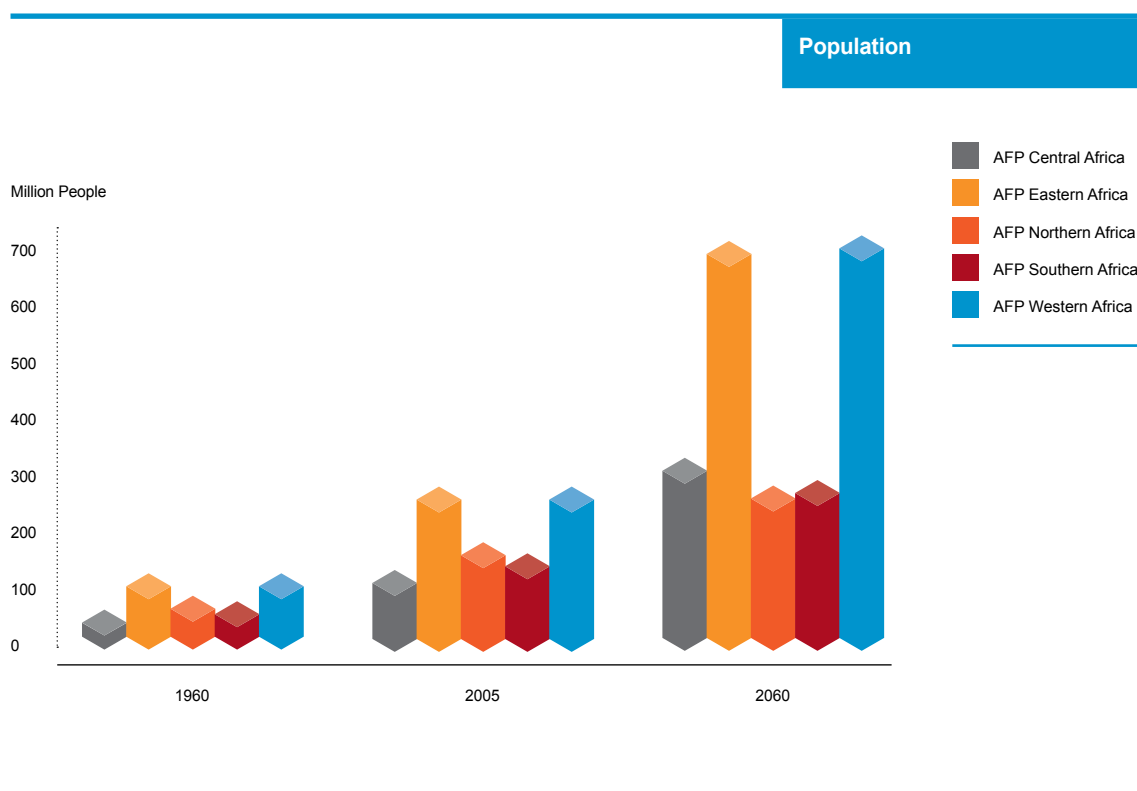
Source: Mehari 2014

5. Decentralization, Devolution and Federalism

The surge in decentralized, devolved and federal constitutional dispensations in many IGAD member states, including Ethiopia, Sudan, Kenya, Somalia, Djibouti and potentially South Sudan, have resulted in a paradigm shift with the potential for remarkable improvements in governance. Based on the principle of subsidiarity, this trend, if consolidated, would bring power closer to where it belongs - the community. Devolution helps tackle the long-standing and deep-rooted challenges related to diversity governance. In addition to the shift in state power allocation, decentralization could not only address the challenge in diversity governance, but would also empower citizens at local level and help ensure accountability of the government. Decentralization has had an impact also on cross-border governance and bilateral relations among IGAD member states. The issues of decentralization and the need for collaboration and cooperation among cross-border local authorities have been covered by the AU Convention on Cross-Border Cooperation (known as the Niamey Convention).²³ With thriving infrastructural development and extractive industries, resources such as land, mining, and water will be contested in future, as they already have been. Without effective collaboration among states and national regulatory and enforcement capabilities in cross-border governance, natural resources have a high potential to trigger national and regional wars. In the light of such threats, pre-emptive measures in the form of collaborative cross border governance that promote peace and order are urgently needed.

With these discernible federative trends in the region, the prominence of the greater HoA will continue

²³ See Articles 8 and 9 of Niamey Convention, Annette Weber, "Boundaries with Issues, Soft Border Management as a Solution," FES Eastern Africa (2012).



Source: Africa Futures, Institute for Security Studies

to grow, both in capacity and the legitimacy it enjoys, both from within the region and beyond. Over the next 30 years, the population of Africa is expected to grow to more than two billion people. With a 3% rapid population growth, the current HoA population of 250 million is expected to grow to 360 million by 2025. More than 55 per cent of this population will be relatively young (below 20 years old).²⁴ With an urbanized population of 54%, as compared to today's figure of 38%. According to the African Development Bank, the greater HoA region, as in the rest of Africa, will have an annual increase of 10 million people joining the middle class. By 2050, 47% of Africa's emerging middle class of 313 million will be in the greater HoA region. The GDP of the IGAD countries will also increase from the current figure of 0.7 trillion US dollars to 1.2 trillion US dollars by 2030 and 5.1 trillion US dollars by 2050.²⁵ With this growth, average per capita income is expected to increase from 1,700 to 4,100 US dollars by 2030, thereby enabling many citizens to attain upper middle-income status by Western measures.²⁶

According to the Fragile State Index 2016, the countries covered in this report are among the most fragile in the world. Three of the focus countries, Somalia, South Sudan and Sudan rank among the top four most fragile states globally. All of them are in the bottom third of the rankings, with Djibouti ranking least fragile in the region in 39th position.²⁷

²⁴ Ibid.

²⁵ Mo Ibrahim Foundation Governance Report, available at <http://www.moibrahimfoundation.org/downloads/2013/2013-IIAG-summary-report.pdf> (accessed January 24, 2014).

²⁶ African Development Bank, Africa in 2050, available from <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Africa%20in%2050%20Years%20Time.pdf> (accessed January 24, 2014).

²⁷ The Fund for Peace, Fragile State Index 2016, available at <http://fsi.fundforpeace.org> (accessed March 23, 2017).

6. Increasing Demand for Local CSOs

In light of these trends, demand for civil society will remain in high demand for the following reasons: demand for local expertise, geographic proximity to the population at the grassroots level, as a result of increased legitimacy.

High Demand for Local Expertise

The need for local expertise to mobilize populations has increased in almost all aspects of norm setting and implementation. Most challenges to development and threats to peace and security have become extremely complex and highly intertwined in the local political, socio-economic and anthropological context. It is widely accepted now that the global agenda of development, governance and peace cannot exist and be separated from the local agenda of development, governance and peace. Hence, local expertise is in high demand to identify challenges, local causes, regional triggers and global accelerators and to develop and “particularize” policy options. In short, the idea of “African Solutions to African Problems” cannot be achieved without African CSOs.

Geographic Proximity

Local presence significantly helps ensure the relevance of issues identified by CSOs. Proximity also helps to build the local expertise necessary to ensure that projects are effective. Geographic proximity makes the engagement of the local CSOs cost-effective. Proximity therefore helps in efficiency and effectiveness due to relevance and responsiveness to issues at grassroots or regional levels and helps in cost reduction. For this reason, increasingly, CSOs at the local level will be in high demand.

Legitimacy

The popular legitimacy of CSOs also depends on the affiliation and the constituency they aim to represent. The fact that non-African CSOs deal with many African issues has been a source of discontent for many Africans. Thus, the idea of “African Solutions to African Problems” expresses both the frustrations of Africans and a proposed solution. This catchphrase is more than a slogan; it refers to the sources of the solutions, bestows legitimacy and emphasizes that the source of the solutions to African problems needs to be African. Indeed, the causes and consequences of African problems cannot be limited to Africans and Africa only; thus, the solutions to these problems could not be entirely African. Rather, “African Solutions to African Problems” embeds the principle of subsidiarity that all other partners are backup support for mainly African efforts to solve its own problems. A constituency gap exists when non-African CSOs cover African issues and propose policy solutions. Such an approach would also alleviate the motivational and representation gap that emanates from a lack of accountability due to the mismatch between the actions of non-African CSOs and the absence of any accountability mechanism within Africa.



Albaqir Alafif and Mehari Maru present the research on civil society space in Nairobi, April 2017



Presentation of research on civil society space in Somaliland, May 2017

2.

Methodology and notes

2.1 CSOs and NGOs

CSOs were defined by the 2007-2008 Advisory Group on CSOs and Aid Effectiveness as:

all non-market and non-state organizations outside the family in which people organize themselves to pursue shared interests in the public domain. Examples include community based organizations and village associations, environmental groups, women's rights groups, farmers' associations, faith-based organizations, labour unions, cooperatives, professional associations, independent research institutes and the not-for-profit media.²⁸

The term non-governmental organization is often used in a way similar to CSO, referring to organizations that advance particular social causes. Although both terms have mutable definitions, NGOs are generally thought of as a subset of CSOs either because some CSOs, such as church groups or unions do not self-identify as NGOs or because they are not defined as such under national law. NGOs on the other hand are generally seen to be more formal institutions, whereas CSOs may be more informal. NGOs form an important part of civil society, and an integral part of any society as they allow citizens to organize themselves and pursue common goals and objectives. NGOs may engage in the promotion of human rights, gender equality, environmental or socio-development work, or the creation/strengthening of self-supporting humanitarian associations.

28 See UNDP, Working with Civil Society in Foreign Aid, available at <http://www.cn.undp.org/content/dam/china/docs/Publications/UNDP-CH03%20Annexes.pdf> (accessed March 19, 2017).

2.2 Purpose

This report is intended to provide a baseline overview of the legal framework governing CSOs in the HoA region. As such, it is intended to serve as a resource for CSOs in the region as well as to policy makers in governments and intergovernmental organizations who wish to promote the development of vibrant and effective civil society. It provides evidence to persuade the relevant HoA governments, CSOs and international partners, to improve the governance of CSOs in the region and potentially throughout Africa.

While assessing the past and present state of affairs concerning the governance of CSOs in the region, the ultimate purpose of the study remains future-oriented, aiming at identifying the areas of focus for IGAD, AU, UN and development partners to follow up and act upon. The findings, insights and lessons derived from this study will likely serve as useful inputs for the determination of priority areas of partnership between the HoACS Forum, other civil society in the region, governments in the region and development partners.

2.3 Approach and Methodology

The report applies the following four key frameworks of governance: the normative framework (referring to instruments in the form of decrees and regulations that provide policy, legislation, regulations, strategies and guidelines aimed at governing CSOs); institutional frameworks (regulatory or supervisory bodies, self-imposed peer reviews and similar oversight mechanisms); collaboration frameworks (focusing on bringing national stakeholders together); and the capability framework (referring to the financial, human and other resources, including the will, determination and legitimacy to effect projects and programs). Analysis of primary legal sources was complemented by a literature review and key informant interviews. The legal analysis is integrated with political and economic analyses using the **PESTLE** (Political, Economic, Social, Technological and Legal Environment) scanning method and the **PEGA** (Political, Economic and Governance Analytical) approaches as two complementary analytical instruments.

The **snowball method** of conducting interviews with key informants and field visits was adopted as the study progressed, in which key informants suggested other new informants and potential sources of information. In most cases, snowballing also helped in accessing new informants who would otherwise have been difficult to gain access to or meet.

2.4 Guiding Questions

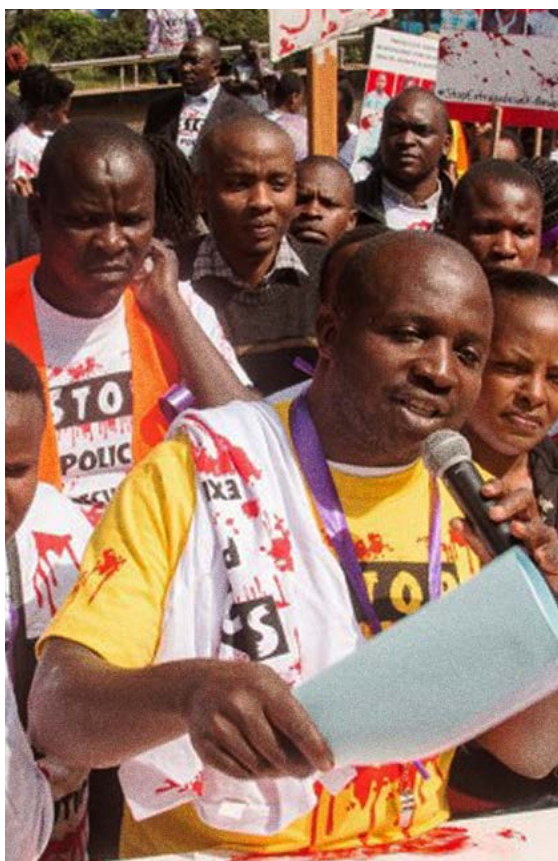
This report is guided by an analysis of the legal and practical constraints for CSOs in the greater HoA. The report examined the legal frameworks and also enquired about practical dynamics related to the implementation of laws, but also funding, etc. to assess the impediments to the effective functioning of CSOs.

2.5 Limitations and Lessons

As the first report on the legal framework overseeing and determining the state of governance of CSOs in the region, it suffers from a lack of comprehensive data in virtually all areas. The study depended heavily on official documents that were available, as well as visits to the target countries, and interviews with relevant stakeholders. Thus, the study exhibits the following limitations:

Although the study covers ten countries in the greater HoA, not all countries were exhaustively covered due to limitations in accessing official documents and legislative instruments, especially in countries which proved hostile to this research.

Some of the countries that were subjected to research did not possess fully-developed legal instruments about the governance of CSOs.



Lawyers protest extrajudicial killings in Kenya, July 2016. Photo: National Coalition of Human Rights Defenders - Kenya.

3.

Normative frameworks: international, continental and national constitutions

3.1 International and Continental Instruments

The freedom of association is widely recognized as a universal value,²⁹ and is also enshrined in various international instruments, most notably in the Universal Declaration of Human Rights (UDHR) Article 20, the International Covenant on Civil and Political Rights (ICCPR) Article 22 and the ACHPR, Article 10. UDHR Article 20 provides that “Everyone has the right to freedom of peaceful assembly and association.”³⁰

The ICCPR elaborates on the content of these rights, saying that:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the *interests of national security or public safety, public order (l'ordre public), the protection of public health or morals or the protection of the rights and freedoms of others*. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.³¹

²⁹ ACHPR, “Report of the Study Group on Freedom of Association & Assembly in Africa,” p. 8.

³⁰ Universal Declaration of Human Rights, Article 20.

³¹ International Covenant on Civil and Political Rights, Article 22.

The regional human rights law of Africa embodies the principle in the ACHPR, stating that:

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted *in the interest of national security, the safety, health, ethics and rights and freedoms of others*.³²

Freedom of association ensures the right of persons to assemble and organize themselves with others, and as such, the ability to form and maintain CSOs is one of the clearest practical applications of freedom of association.

As a human right, freedom of association is an inalienable, fundamental right to which a person is inherently entitled, simply because he or she is a human being. Although a right on its own, freedom of association is also an enabling right, that is, its enjoyment can enable groups to advocate for, access and protect other fundamental rights. Thus, its importance for democratic societies cannot be overestimated. The jurisprudence of the African Commission on Human and Peoples' Rights underscores the importance of the right of freedom of association and its ability to safeguard multiple rights that are necessary for the viability of democratic society. This right has been interpreted to provide a safeguard against the banning of political parties.³³ It has also been understood to prevent the deportation of political opponents.³⁴ And it has been used to fight the persecution of people on the basis of their political opinions and ideological convictions.³⁵

Freedom of association, and the closely associated freedom of assembly, are thus universal values with strong legal support in core human rights documents. Although international law permits derogations of this right, these are, as all exceptions to general principles, to be read restrictively. Such restrictions must be appropriate both substantively (they must be necessary for democratic society) and procedurally (they must be prescribed by law).

The African Charter on Democracy, Elections and Governance (ACDEG) is also provide standards relevant to CSO operations in Africa, calling on governments to support them.³⁶ Under Article 12 of ACDEG:

State Parties undertake to implement programmes and carry out activities designed to promote democratic principles and practices as well as consolidate a culture of democracy and peace.

To this end, State Parties shall create conducive conditions for civil society organizations to exist and operate within the law.³⁷

³² African Charter of Human and Peoples' Rights, Article 11.

³³ *Jawara vs The Gambia* (2000) AHRLR 107 (ACHPR 2000).

³⁴ *Amnesty International vs Zambia* (2000) AHRLR 325 (ACHPR 1999).

³⁵ *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000) and *Law Office of Ghazi Suleiman v Sudan (II)* (2003) AHRLR 144 (ACHPR 2003).

³⁶ Mehari Taddele Maru and Sahra El Fassi, "Can the regional economic communities support implementation of the African Governance Architecture (AGA)? The Case of the Intergovernmental Authority on Development (IGAD)," ECDPM Discussion Paper No 181, October 2015, available www.ecdpm.org/dp181 (accessed February 17, 2017).

³⁷ ACDEG, Article 12, available at <http://www.achpr.org/instruments/charter-democracy/> (accessed March 19, 2017).

Similarly, under Article 28, “State Parties shall ensure and promote strong partnerships and dialogue between government, civil society and the private sector.”³⁸ More specifically, under Article 27, state parties are expected to “foster popular participation and partnership with civil society organizations” in order to advance political, economic, and social governance.³⁹ Further, ACDEG calls on the AU Commission and Regional Economic Communities (RECs) to promote engagement with civil society calling on them to “ensure massive participation of stakeholders, particularly civil society organizations.”⁴⁰

Further, guidance to states on their reporting under ACDEG call for the facilitation of participation by non-state actors. The Rules of Procedure of the African Governance Platform (the Platform) also calls on states to ensure maximum possible participation of stakeholders, particularly civil society organizations.

All of the countries in this study have some obligation to respect these international norms. The UDHR is considered by some legal scholars to be part of customary international law, binding on all states. Each of the countries discussed in this study is a state party to the ICCPR and ACHPR, with the exception of the relatively new nation of South Sudan. Although ACDEG provides useful international standards and indicates developing consensus in Africa, it has only been ratified by two of the countries of focus in this report, Rwanda and Ethiopia.

3.2 Constitutional Frameworks

In addition to international law, states are bound by their own constitutional frameworks that guarantee their citizens certain basic human rights. The constitution of a state is always placed above other laws in the legal hierarchy, meaning that the domestic laws and regulations of individual states must adhere to the rights set forth in their respective constitutions in order to be legal and acceptable. All countries covered in this report, with the exception of Eritrea, which has no written constitution, have provide constitutional protections for the right to freedom of association.

3.2.1 DJIBOUTI

Djibouti is a constitutional republic. It has a multi-party constitution approved by referendum in September 1992 and amended in 2010 to abolish the death penalty. Its legal system is based on combination of the French civil law system (Code Napoleon) and the Islamic tradition (sharia). Freedom of speech, assembly, religion, and association are protected under the constitution. Article 15 of the constitution provides that all citizens “have the right to constitute associations and trade unions freely, under reserve of conforming to the formalities ordered in the laws and regulations.”⁴¹ Workers may join unions and strike, and other forms of association can be established. The 1992 Constitution initially limited the number of political parties to four, but this restriction was lifted in September 2002.

³⁸ Ibid., Article 28.

³⁹ Ibid., Article 27.

⁴⁰ Ibid., Article 44(2)(b).

⁴¹ The Constitution of Djibouti, 1992 as amended, Article 15 available at https://www.constituteproject.org/constitution/Djibouti_2010.pdf?lang=en (accessed March 19, 2017).

3.2.2 ERITREA

Upon independence, Eritrea began the process of drafting a national constitution. A constitutional commission was set up in 1994 and a draft was adopted in 1997. However, the constitution was never implemented. As a result, Eritrea is not bound by any constitutional obligation to respect freedom of association, although it is bound at the international level.

3.2.3 ETHIOPIA

The Federal Constitution of Ethiopia provides that treaties that Ethiopia has ratified are part and parcel of the country's domestic law. The constitution of Ethiopia recognizes that "[e]very person has the right to freedom of association for any cause or purpose."⁴²

Beyond this, the freedom is not elaborated on or further protected through the constitution. The same section does however include the somewhat unusual specification that: "[o]rganizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are however prohibited."⁴³

The formulation of the above constitutional provision in referring to "every person" follows the UDHR and other international instruments. As per the wider interpretation of this provision, even foreigners are allowed to form organizations and enjoy the rights of freedom of association, freedom of assembly and freedom of expression.

3.2.4 KENYA

The 2010 Kenyan Constitution recognizes that the rights and fundamental freedoms contained in the Bill of Rights belong to each individual and are not granted by the state, but are subject only to the limitations contemplated in the constitution itself.⁴⁴ It further stipulates that the Bill of Rights applies to all law and binds all state organs and all persons.⁴⁵

Article 36 of the constitution provides for freedom of association:

1. Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.
2. A person shall not be compelled to join an association of any kind.
3. Any legislation that requires registration of an association of any kind shall provide that:
 - a. registration may not be withheld or withdrawn unreasonably; and
 - b. there shall be a right to have a fair hearing before registration is cancelled.⁴⁶

Like other constitutions in the region, the Kenyan constitution recognizes that rights are not absolute and in Article 24, provides that rights can be limited but only where this is done through the law and after consideration of a series of test including whether the limitation is reasonable and justifiable in an open and democratic society.

⁴² The Constitution of Ethiopia, 1995, Section 31.

⁴³ Ibid.

⁴⁴ The Constitution of Kenya, 2010, Article 19 (3).

⁴⁵ Ibid., Article 20 (1).

⁴⁶ Ibid., Article 36

3.2.5 RWANDA

The current constitution of Rwanda was adopted in 2003 and amended four times. The most recent amendments followed the 2015 referendum that enabled President Paul Kagame to run for a third term of office in the elections scheduled for August 2017. The constitution and subsequent legislative and presidential elections officially ended the post genocide transition process.⁴⁷

In its preamble, the 2003 Rwandan Constitution commits itself to the principles of human rights as contained in the AU and the UN systems. Rwanda has signed and ratified most human rights treaties including the ICCPR and the ACHPR.

The Rwandan constitution explicitly guarantees freedom of association under Article 39 and freedom of assembly in Article 40. These articles provide:

Freedom of association is guaranteed and does not require prior authorisation. This right is exercised under conditions determined by law.⁴⁸

The right to freedom of peaceful and unarmed assembly is guaranteed. This right is exercised in accordance with the law. This right does not require prior authorisation, except when provided for by the law.⁴⁹

However, informed by its recent history of violence and genocide, freedom of association and expression face some limitation. Article 37 of the constitution, in establishing freedom of conscience and religion, also emphasizes that the “Propagation of ethnic, regional, or racial discrimination or any other form of division, is punishable by law.”⁵⁰ Article 38 places limitations on the freedom of speech: “Freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy.”⁵¹

3.2.6 SOMALIA

Somalia is a quasi-parliamentary federal republic. The 2012 Provisional Federal Constitution of Somalia, under Article 21, provides for freedom of association as follows:

A person has the right to associate with other individuals and groups. This includes the right to form and belong to organizations, including trades unions and political parties. It also includes the freedom not to associate with others.⁵²

Similarly, Article 25 also defines freedom of assembly as follows:

47 International Center for Not-for-Profit Law, “Civic Freedom Monitor: Rwanda,” last updated November 29, 2016, available on <http://www.icnl.org/research/monitor/rwanda.html>, (accessed March 21, 2017).

48 Constitution of Rwanda, as amended 2015, Article 39, available at http://www.minijust.gov.rw/fileadmin/Law_and_Regulations/Official_Gazette_no_Special_of_24.12.2015__2__1_.pdf (accessed June 10, 2017).

49 Ibid., Article 40.

50 Ibid., Article 37.

51 Ibid., Article 38.

52 The Provisional Constitution of the Federal Republic of Somalia, 2012, Article 16, available at <https://unpos.unmissions.org/LinkClick.aspx?fileticket=RkJTO-SpoMME=> (accessed March 19, 2017).

A person has the right to gather together peacefully with others, and to demonstrate and to protest peacefully, without the necessity to seek prior authorization, if it will not contravene the laws protecting the public morality or stability.⁵³

Article 38 of the constitution deals explicitly with the limitation of rights in Title Two. Such limitations must be “demonstrably reasonable and justified according to the values underlying this Constitution.”⁵⁴ These values include human dignity and equality.⁵⁵ Article 38 further stipulates that:

3. In deciding whether a limitation is reasonable and justifiable, all relevant factors must be taken into account.

4. The relevant factors in terms of Clause 3 include the nature and importance of the right (that has been) limited, the importance of the purpose to be achieved by the limitation, whether the limitation is suitable for achieving the purpose, and whether the same purpose could be achieved while being less restrictive of the rights limited.⁵⁶

In 2017, the Somali government kicked off a constitutional revision process intended to draft a new constitution to replace the provisional constitution.⁵⁷ The process will seek to build consensus on some key state function. It is anticipated that a new constitution will be approved in a public referendum before general elections in 2020.

3.2.7 SOUTH SUDAN

Drafted in 2011, the Transitional Constitution of South Sudan enshrines the freedom of assembly and association in Article 25(1-3). The relevant articles recognize and guarantee “the right to peaceful assembly”, as well as each person’s “right to freedom of association with others”. The rights to form or join political parties, associations and trade or professional unions are specifically mentioned, although it is recognized that the right to peacefully assemble extends beyond these associations and thus also incorporates NGOs.⁵⁸

Article 25(2) states that the “formation and registration of political parties, associations and trade unions shall be regulated by law as is necessary in a democratic society”, thereby facilitating the legal regulation of NGOs, but also limiting state interference to doing only what is necessary in a democratic society.⁵⁹

3.2.8 SUDAN

In Sudan’s Interim National Constitution of 2005, incorporates all of Sudan’s international obligations, including those provided for under the ICCPR and ACHPR discussed above, into

⁵³ Ibid., Article 25.

⁵⁴ Ibid., Article 12.

⁵⁵ Ibid., Article 10-11.

⁵⁶ Ibid, Article 38(3-4).

⁵⁷ UNDP, “Constitutional review process kicked off in Somalia,” May 21, 2017, available at <http://reliefweb.int/report/somalia/constitutional-review-process-kicked-somalia> (accessed June 2, 2017)

⁵⁸ The Constitution of South Sudan, 2011, Article 25, available at http://www.sudantribune.com/IMG/pdf/The_Draft_Transitional_Constitution_of_the_ROSS2-2.pdf (accessed March 19, 2017).

⁵⁹ Ibid.

national law. Article 27(3) reads “All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill.”⁶⁰

The right to freedom of assembly and association is enshrined in Article 40, which stipulates that:

1. The right to peaceful assembly shall be guaranteed; every person shall have the right to freedom of association with others, including the right to form or join political parties, associations and trade or professional unions for the protection of his/her interests.
2. Formation and registration of political parties, associations and trade unions shall be regulated by law as is necessary in a democratic society.⁶¹

In a standard manner of stipulation, Sudan's imposes constitutional restrictions on freedom of association for reasons that are necessary in a democratic society. Also, Articles 48 and 211 jointly state that derogations from the rights enshrined in the constitution are only permitted in states of emergency.⁶²

3.2.9 UGANDA

Article 29 of the 1995 Constitution of Uganda enshrines the right to freedom of association which reads:

1. Every person shall have the right to:
 - e. Freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organizations.⁶³

This stipulation, although not as specific as the Kenyan constitution, defines a clear and undeniable right to the freedom of association. The constitution also provides for derogation of rights in some circumstances. Article 43 provides for the restrictions of rights “no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.” Section 43 goes on to stipulate that measures taken for the “public interest” cannot permit persecution nor go further than “what is acceptable and demonstrably justifiable in a free and democratic society.”⁶⁴ Article 44 specifies that limitations of the right to freedom of association are acceptable by not including it in the list of non-derogable rights.⁶⁵

⁶⁰ The Interim Constitution of Sudan, Article 27 (3), available at https://www.constituteproject.org/constitution/Sudan_2005.pdf?lang=en (accessed March 19, 2017).

⁶¹ Ibid., Article 40.

⁶² Ibid., Articles 48, 211.

⁶³ The Constitution of Uganda, 1995, Article 29, available at <http://www.ulii.org/node/23824> (accessed March 19, 2017).

⁶⁴ Ibid., Article 43.

⁶⁵ Ibid., Article 44.



Boys play football at an IDP camp near Mogadishu. Photo: UN

4.

Legislation governing CSOs

4.1 Overarching Issues in National Law

National laws governing CSOs impose obligations and offer benefits on the organizations that they regulate. Although regulating the operations of such organizations is not in and of itself a violation of the right to freedom of association, any restrictions unfettered enjoyment of the right to freedom of association, must be compliant with international and constitutional protections.

International law does allow derogation of the right to freedom of association in certain circumstances. The ICCPR permits derogations only when deemed “necessary in a democratic society in the interests of national security or public safety, public order (l’ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”⁶⁶ The ACHPR only allows for derogations in accordance with Article 27(2), which states “the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”⁶⁷

As the African Commission on Human and Peoples’ Rights, the body set up to monitor the ACHPR has stated, “While the Commission is sympathetic to all genuine attempts to maintain public peace, it must note that too often extreme measures to curtail rights simply create greater unrest. It is dangerous for the protection of human rights, and for the executive branch of

⁶⁶ ICCPR, Article 22(2).

⁶⁷ ACHPR, Article 27(2)

government to operate without such checks as the judiciary can usefully perform.”⁶⁸

This section examines some common forms of regulation on CSOs and discusses the extent to which such regulations are compatible with international law.

4.1.1. BASIC ORGANIZATIONAL FORMS

CSOs are often classified in different categories depending on their rationale and the purpose of their establishment, as well as the interests and services they aim to render. Types of CSOs include public benefit organizations, charities, trusts, and think tanks. The categorization of CSOs is important because it allows governments to impose different obligations on different classes of organizations. These obligations as it may have an impact on the legality, reporting, resource mobilization, accountability and practical capability of NGOs to register and carry out their activities, as will be further explored in the following sections.

4.1.2. REGISTRATION

While regulating the establishment, registration and operation of organizations, states must be mindful of the need to respect for the rights of freedom of association and assembly. Although these rights can be limited in some instances, as an exception to a general rule, these exceptions must be interpreted narrowly.

The African Commission on Human and Peoples’ Rights has offered specific guidance on how registration requirements should be understood in line with international law. In its “Report of the Study Group on Freedom of Association and Assembly in Africa,” it recommended the following:

11. States should not require associations to register in order to be allowed to exist and to operate freely. States’ legitimate interests in security should not preclude the existence of informal associations, as effective measures to protect public safety may be undertaken by criminal statute, without restricting the right to freedom of association.

12. At the same time, associations have the right to register through a notification procedure in order to acquire legal status, tax benefits and other similar advantages.

13. Blanket restrictions on those who wish to establish associations, whether based on age, nationality, sexual orientation, gender identity or other discriminatory pretexts are unlawful. In addition, past criminal conduct should only be a bar to the formation of an association where the nature of that conduct directly raises reason for concern relative to the purpose of the association.⁶⁹

Registration per se does not constitute a violation of the right to freedom of association, according to the commission, but registration needs to be simple and cannot be so burdensome or delayed as to obstruct an NGO’s ability to freely establish itself in practice.⁷⁰ As expressed by the Special

68 Constitutional Rights Project and Another v Nigeria, Comm Nos 143/95 and 150/96 (1999).

69 African Commission for Human and “Report of the African Commission on Human and Peoples’ Rights Study Group on Freedom of Association,” 2014, p. 20, available at http://www.achpr.org/files/special-mechanisms/human-rights-defenders/report_of_the_study_group_on_freedom_of_association__assembly_in_africa.pdf (accessed March 20, 2017).

70 Ibid.

Rapporteur on the rights to freedom of peaceful assembly and freedom of association, “registration should not be viewed as an exercise in asking permission.”⁷¹ The commission has stated that “[the] registration should be governed by a notification procedure, in which the association is able to register itself simply by informing an impartial administrative body of its existence and supplying certain basic information.”⁷² Viewing the registration process as one of notification rather than authorization implies that registration should not be something that can be denied.

In addition, states and registrars need to ensure that there is clarity regarding the procedures and requirements for registration and that other obstacles such as cumbersome documentation requirements, long delays or high registration fees do not effectively prevent organizations from exercising their right in terms of freedom of association.⁷³

Finally, although international human rights law allows for the registration of NGOs, it is important to note that the right of freedom of association applies to registered and unregistered organizations alike.⁷⁴ Lack of registration can thus never be seen as an acceptable reason for limiting the ability of persons to organize themselves in a CSO and carry out (otherwise lawful) activities.

4.1.3 RESTRICTIONS BASED ON OBJECT AND PURPOSE

The legislation of most of the countries covered in this report restricts the operations of CSOs based on their activities. Although like any other organization, it is reasonable to expect CSOs to respect the law, regulations should not undermine the operations of CSOs or restrict their access to other rights such as freedom of expression. In the words of the African Commission on Human and Peoples’ Rights, CSOs “must be free to pursue a wide range of activities, including exercising their rights to freedom of expression and assembly.” They must be able to “express opinion, disseminate information, engage with the public and advocate before Governments and international bodies for human rights, for the preservation and development of a minority’s culture or for changes in law, including changes in the Constitution.”⁷⁵

4.1.4 CANCELLATION

National legislation in a number of countries under review by this report allows governments to revoke permission to operate in a number of ways. This can occur through introduction of reporting requirements to maintain status, demanding renewal of registration, or explicit cancellation of registrations. To cancel the registration of an NGO means dissolution of the organization, which places a serious limitation on the freedom of association of its members. The African Commission on Human and Peoples’ Rights’ guidance recommends that “once registration is granted, it should not be necessary to have it reviewed.”⁷⁶ The Commission has

71 United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, “The Right to Freedom of Association: Best Practices Fact Sheet, (published Nov. 2014), available at <http://freeassembly.net/wp-content/uploads/2014/11/Association-rights-factsheet-final-v2.pdf>.

72 Report of the African Commission on Human and Peoples’ Rights Study Group on Freedom of Association, 2014, p. 32, available at http://www.achpr.org/files/special-mechanisms/human-rights-defenders/report_of_the_study_group_on_freedom_of_association__assembly_in_africa.pdf (accessed March 20, 2017).

73 Ibid., p. 33.

74 United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai (published Nov. 2014), The Right to Freedom of Association. Best Practices Fact sheet.

75 Report of the African Commission on Human and Peoples’ Rights Study Group on Freedom of Association, 2014, p. 24, available at http://www.achpr.org/files/special-mechanisms/human-rights-defenders/report_of_the_study_group_on_freedom_of_association__assembly_in_africa.pdf (accessed March 20, 2017).

76 Ibid., p.23

also recommended that “[c]ivil sanctions, suspension or dissolution of an association should only be considered in grave offenses. In all cases, such action may only be taken following court judgment, and the exhaustion of all available appeal mechanisms.”⁷⁷

National legislation, as we shall see below, all too often fails to respect these principles.

4.1.5 FUNDING AND FINANCIAL RESTRICTIONS

Legal restriction of the funding sources for NGOs has become a common way for states in the region to control and limit the actions of civil society.⁷⁸ It is an effective measure since organizations are dependent on funding for carrying out their programs and for their very existence. The commission has indeed referred to control through funding restrictions as a “marked trend” throughout the region.⁷⁹ The Observatory for the Protection of Human Rights Defenders focused on this issue in its report, *Violations of the right of NGOs to funding: from harassment to criminalisation*. The report stated that:

[...] these restrictions on access to funding, which are more or less embedded in national legislation, together with the defamatory manoeuvres of States that often rely on pro-government media, contravene international law and the obligations of States. As stated earlier, access to funding for NGOs is a right, and any State applying restrictions to the exercise of that right, that are unjustifiable under international law, are in violation of the latter. Restrictions on this right to funding are indissociable from those that impede the right to freedom of association because the former is a component of the latter.⁸⁰

International experts have recognized a number of legitimate concerns which might lead states to regulate access to funding, including efforts to counter terrorism and money laundering, but have emphasized that such restrictions must conform to international human rights standards and only be employed within the bounds of the narrow criteria for limiting rights provided for in international law. Too often, these restrictions are used in an overly expansive way designed more to restrict CSOs than to advance these legitimate objectives.

4.2 National Legislation and Practice

The section below lays out the challenges for CSOs in the ten target countries in both law and practice, focusing on the legal and practical challenges to operation.

4.2.1 DJIBOUTI

Although Djibouti is bound to respect the right to freedom of association through its international legal obligations as a state party to the ICCPR and ACHPR and its constitution, there have been serious obstacles to the enjoyment of this right in practice.

⁷⁷ Ibid., p. 73.

⁷⁸ Ibid., p.42.

⁷⁹ Ibid., p. 42.

⁸⁰ Observatory for the Protection of Human Rights Defenders (FIDH-OMCT), “Violations of the right of NGOs to funding: from harassment to criminalization,” Annual Report 2013, March 2013.

Generally speaking, there are four categories of CSOs operating in Djibouti including, organizations affiliated with the government; ethnically-oriented organizations; secular organizations working towards social change; and Islamic relief associations.⁸¹

There is no law covering the regulation and organization of CSOs. While this means that CSOs don't have to deal with restrictive legislation, it also means that they can be subject to the whims and caprices of the government, without being able to resort to any legal framework.⁸² The Ministry of the Interior arbitrarily requires permits for peaceful assembly and association, and monitors the activities of CSOs and their applications for permits, which are generally approved.⁸³ One reason for this arbitrary practice in the registration of associations and restrictions on promoting their activities arose as a result of a lack of a proper legal framework that could make the country's legal environment for CSOs far more predictable.

The Djiboutian government imposes financial restrictions on independent organizations. There are some very strict restrictions on funding, imposed on national and international CSOs working on human rights, good governance and women rights issues. According to veteran CSO leaders in Djibouti, fierce competition between the government on one hand and CSOs on the other, emanates in from the small size of the country. More than 70% of the population live in the capital city. This creates an open space for rivalry between state and non-state actors and fierce competition for resources.

In general, the environment for civil society in Djibouti is quite hostile. Members of civil society has been subject to harassment, arrest, torture and incommunicado detention.⁸⁴ Some high-profile examples of the targeting of CSOs include a series of attacks on the *Ligues Djiboutiennes des Droits de l'Homme* (LDDH). The organizations' Secretary General, Said Houssein Robleh was publicly attacked by police forces in December 2015. On December 29, 2015, the organization's offices were raided. In January 2016, another LDDH member, was sentenced for inciting public hatred and reporting false news in apparent connection with efforts to document the violent break up of a religious event in December 2015.⁸⁵ One justification for repression advanced by the government has been the proliferation of religious CSOs and the fear that this may contribute to a rise in religious fundamentalism. However, this cannot be allowed to justify indiscriminate attacks on CSOs.

The United Nation's Human Rights Committee has expressed concern about reports of widespread threats, harassment and intimidation of human rights defenders and journalists and the negative impact this has had on CSOs.⁸⁶ Furthermore, the committee recommended that Djibouti, as a state party to ICCPR and other international human rights instruments, should give space to civil society organizations to promote their activities and prosecute those who threaten, harass or intimidate such organizations and human rights defenders as well as journalists.⁸⁷

⁸¹ Interview with key informant.

⁸² Interview with key informant.

⁸³ United Nations Department of Economic and Social Affairs, Republic of Djibouti Public Administration Country Profile, Jan 2005.

⁸⁴ KACE interviews with Djiboutian CSOs, 2015.

⁸⁵ CIVICUS, "Attacks on Civil Society Increased Ahead of Djibouti Election," Monitor: Tracking Civic Space, May 8, 2016.

⁸⁶ UN Human Rights Committee, Concluding Observations on initial report of Djibouti, Nov. 2013.

⁸⁷ Ibid.

4.2.2 ERITREA

Although Eritrea is a signatory to the ICCPR and the ACHPR and is obligated under both to respect the right to freedom of association, their observance is severely restricted in Eritrea.

Proclamation No 145/2005, A Proclamation to Determine the Administration of Non-Governmental Organizations (NGO Proclamation), governs all CSOs in Eritrea. The law is extremely restrictive. It limits the activities of CSOs, recognizing only those that are humanitarian in nature, limiting activities to relief and rehabilitation. In addition, the proclamation imposes onerous reporting requirements including quarterly reporting to the government and annual renewal of licenses. Ministerial permission is required to shift programs.⁸⁸

The proclamation further imposes a number of crippling financial restrictions. It requires that organizations demonstrate that they have considerable funds available for programs in Eritrea in order to be authorized to operate: one million US dollars for national NGOs and two million US dollars for international NGOs.⁸⁹ The same proclamation creates an obligation on NGOs to ensure that they do not spend more than 10% of their budget on overheads and restricts local NGOs from taking UN money earmarked for Eritrea. NGOs are also required to disclose all donors.⁹⁰

Indicative of the repressive nature of the NGO proclamation, religious organizations are forbidden from engaging in any activities that are not directly religious in nature, such as social work. Nevertheless, due to the strong social base and popular legitimacy enjoyed and demanded by religious organizations and also demanded from local authorities, the government has been unable to stop religious organizations from carrying out social assistance programs despite the legal prohibition. The Act Alliance, composed of Orthodox and Catholic churches and some local organizations, continue to offer much-needed assistance in collaboration with local authorities, particularly through congregational and educational humanitarian operations.⁹¹

This law is part of a generally hostile environment for CSOs in the country. They have come under attack from the president, who is on record as stating that, “anyone who takes aid is crippled. Aid is meant to cripple people.”⁹² As a result, CSOs have largely disappeared from the country. With the introduction of this legislation, many organizations were denied registration and consequently closed down. By 2011, most of the few CSOs remaining in the country, the International Rescue Committee, Samaritans’ Pursue, Oxfam GB, Irish Refugee Trust and Norwegian Church Aid were closed.⁹³ The International Committee of Red Cross (ICRC) is now the only international organization operating in Eritrea. Even the ICRC operates within a significantly narrow scope of operations. Only a few organizations that could be considered as CSOs, such as the National Confederation of Eritrean Unions, the National Union of Eritrean Women, and the National Union of Eritrean Youth and Students are allowed to operate. These organizations, however, are not independent. They are not only affiliated with the government,

88 NGO Proclamation No 145/2005 to determine the Administration of Nongovernmental Organizations, available at <https://www.ilo.org/dyn/natlex/docs/ELEC-TRONIC/81435/88425/F975805266/ERI81435.pdf> (accessed March 19, 2017).

89 Ibid.

90 Ibid.

91 Interview with key informant.

92 Ezili Danto, “US NGOs Kicked out of Eritrea: Foreign Aid is Meant to Cripple People,” Global Research, April 5, 2015.

93 Interview with key informant.

they actively sustain its domestic power and influence. According to the UN Special Rapporteur on the situation of human rights in Eritrea, by late 2016 there was “no free press and no NGOs, except for government sponsored ones.”⁹⁴ Apart from CSOs and NGOs, the Eritrean government has also placed strict controls on UN operations in the country, preventing staff from leaving the capital for rural areas.⁹⁵ This has made it extremely difficult for external human rights defenders to monitor the human rights situation in Eritrea.⁹⁶

The hostile environment for CSOs is part of a broader hostility to human rights in Eritrea, one of the most repressive states in the world. 25 years after independence, there is no freedom of expression, no independent media and no civil society. Only four religions are recognized by the state. Only one political party, the ruling PFDJ, is permitted to operate in the country.⁹⁷ Non-governmental public gatherings of over seven persons are prohibited. In practice, there is no free collective bargaining.⁹⁸

The international community and various developmental, human rights and aid organizations have expressed concerns about conditions in Eritrea, but the regime has remained defiant. In 2015, the UN Human Rights Council launched a yearlong investigation into allegations of human rights violations identified by the UN Special Rapporteur, Shelia Keetharuth, including Eritrea’s system of national military service and harsh penalties for citizens attempting to avoid such service. The investigation found strong evidence that officials in Eritrea have committed crimes against humanity, including enslavement, rape and torture, over the past 25 years.⁹⁹

In response to this dire situation, Eritrean human rights activists and citizens in the diaspora have created forums and networks through which they engage in advocacy. Given the difficulty in obtaining information on Eritrea from abroad, these activists rely those who have recently fled from the country for information. These networks and activists use this information to raise awareness. Eritrean human rights networks in the diaspora also collaborate with regional and international human rights organizations to lobby for resolutions on Eritrea at the African Commission on Human and Peoples Rights (ACHPR) and the United Nations Human Rights Council (UNHRC).

While the severe restrictions on the right to peacefully organize and assemble in Eritrea mean that much resistance is led from outside its borders, seeking to leave Eritrea also bears considerable risk. For example, Eritrean Forum Radio, an opposition radio station operating in exile, reported on the arrests of two journalists working for the state-owned Eritrean Radio and Television Agency on 19 February 2017. The two journalists were detained on suspicion that they were attempting to flee the country, considered by Eritrean authorities as an act of treason,

94 “Statement by Sheila B. Keetharuth,” 71st session of the General Assembly, October 27, 2016, available at <http://statements.unmeetings.org/me-dia2/7663364/keetharuth-rev.pdf>, accessed March 20, 2017.

95 Freedom House, “Eritrea,” Freedom in the World, available at <https://freedomhouse.org/report/freedom-world/2015/eritrea>, (accessed March 21, 2017).

96 Ibid.

97 Amnesty International, “Eritrea 20 Years of Independence, but still no Freedom,” 2013.

98 Survey of Violations of Trade Union Rights, “Eritrea no Freedom of Association no Collective Bargaining,” 2012, available at <http://survey.ituc-csi.org/No-freedom-of-association-no,10782.html> (accessed March 21, 2017).

99 Report of the Commission of Inquiry on Human Rights in Eritrea, UN doc. no. A/HRC/32/47, available at <http://www.ohchr.org/EN/HRBodies/HRC/ColEritrea/Pages/2016ReportColEritrea.aspx>, (accessed March 21, 2017).

punished with indefinite imprisonment and forced labor.¹⁰⁰

4.2.3 ETHIOPIA

In February 2009, the Ethiopian parliament passed into law the Charities and Societies Proclamation (No.621/2009) (CSP). This law runs contrary to Ethiopia's commitments to freedom of association under international law and its own constitution and is one of the most restrictive in the region.

According to the CSP, NGOs in Ethiopia are categorized by: purpose (charities vs societies); funding and control (domestic vs foreign); and activities (rights-based advocacy vs development). While "charities" work for the benefit of third parties, "societies" work for the benefit of their own members.¹⁰¹ Domestic charities or societies are controlled by Ethiopian nationals, consist of Ethiopian members, and generate no more than 10% of their operating funds from foreign sources.¹⁰² Ethiopian resident charities are those established by Ethiopian nationals or residents under Ethiopian law, but which receive more than 10% of their operating funds from foreign sources. Foreign charities are those organizations that are established under foreign law or by foreign members or who receive money from foreign sources.¹⁰³

Under Article 14 of the CSP, foreign charities not allowed to engage in a number of charitable activities, such as advancement of human rights, promotion of national, religious or gender equality, the rights of children and disabled persons, promotion of tolerance and conflict resolution and enhancing the efficiency of the justice system.¹⁰⁴ Given that CSOs, particularly those working in human rights and advocacy, depend almost entirely on foreign sources of funding, this provision, especially in the absence of other mechanisms for fundraising, has drastically reduced the number of such organizations able to operate in Ethiopia.

The African Commission on Human and Peoples' Rights has referred to the Ethiopian legislation in this respect as "some of the most extreme funding restrictions for associations of any country in the world."¹⁰⁵ The commission has expressed grave concerns about this:

In a country where 95% of local NGOs received more than 10% of their funding from abroad in 2009, and in which local sources of funding are virtually non-existent, this doubly restrictive legislation directly affects the ability of domestic human rights NGOs to conduct their activities. Numerous NGOs have had to abandon their activities due to the "suspension" ordered by the authorities. Others have been forced to operate from abroad, making it all but impossible to conduct meaningful and independent human rights monitoring.¹⁰⁶

¹⁰⁰ Correspondence with key informant, May 25, 2017.

¹⁰¹ Proclamation to Provide for the Registration and Regulation of Charities and Societies, 2009, Articles. 14(1) and 55(1), available at <http://www.refworld.org/docid/4ba7a0cb2.html> (accessed March 20, 2017).

¹⁰² Ibid., Article 2(2).

¹⁰³ Ibid., Article 2(4).

¹⁰⁴ Ibid., Article 2(5).

¹⁰⁵ Report of the African Commission on Human and Peoples' Rights Study Group on Freedom of Association, para 28.

¹⁰⁶ Ibid., p. 42.

Exceptions to this rule do exist. Organizations considered international and for which the government is prepared to grant special permission, can sign an agreement or Memorandum of Understanding with Ethiopia's Ministry of Foreign Affairs. With such an agreement, an international organization can be exempted from the CSO law and allow it to receive funding from external or internal sources without restriction. Such a CSO might also benefit from functional immunities and privileges such as reduced taxation. While allowed in principle, in practice maintaining the MoU may lead them to avoid delving into the domestic political situation of Ethiopia. USAID, the GIZ, Oxfam International, IDEA, the Institute for Security Studies, Crisis Action, and other similar NGOs operate under such arrangements. In general, an organization cannot both work on local issues and maintain liaison or coordination offices with the AU.¹⁰⁷

There are also restrictions on income generation at the local level. CSOs can only engage in income generating activity in an area related to its purpose. So, for example, a human rights CSO can only engage in human rights consultancy, training or research, which is unlikely to have significant local demand.¹⁰⁸

The governmental body known as the Ethiopian Charities and Societies Agency (ECSA) is mandated to register and supervise NGOs. Registration of organizations in Ethiopia is mandatory and thus "any Charity or Society shall apply for registration within three months of its formation."¹⁰⁹ Failure to register within the prescribed period may lead to suspension of the relevant charity or society. Moreover, the ECSA has been given wide power to refuse registration and it can invoke very vague reasons in order to exercise that power. The ECSA may for instance refuse registration if "the proposed Charity or Society is likely to be used for unlawful purposes or for purposes prejudicial to public peace, welfare or good order in Ethiopia."¹¹⁰ It may also deny registration if the proposed name is "considered to be contrary to the public morality or illegal", creating yet another barrier.¹¹¹

As noted above, international standards on registration recommend that such processes simply note the existence of organizations, rather than grant permission for their creation. In this context, the broad discretion given to the ECSA to refuse registration is problematic. This problem is exacerbated by the vague language used to describe the bases for these refusals, which would seem to encourage abuse.

The ECSA has considerable powers and functions, including the power to determine the details of the CSO applicant's charitable purposes and the public benefit,¹¹² as well as the minimum amount of dedicated funding required for registration of charities.¹¹³ The ECSA can also institute inquiries with regard to charities or societies.¹¹⁴

¹⁰⁷ Correspondence with key informant, June 3, 2017.

¹⁰⁸ Ibid.

¹⁰⁹ Charities and Societies Proclamation, Article 64.

¹¹⁰ Ibid., Art 69(2).

¹¹¹ Debebe Hailegebriel "Ethiopia," International Centre for Not-for-Profit Law Journal, Volume 12, Issue 2, February 2010, http://www.icnl.org/research/journal/vol12iss2/special_2.htm.

¹¹² Charities and Societies Proclamation, Section 14.

¹¹³ Ibid., Section 28.

¹¹⁴ Charities and Societies Proclamation, Section 84.

In addition to the extensive and broad mandate of the agency, determining what is legitimate and illegitimate, some decisions of the ECSA have created an even more restrictive environment. The ECSA has issued several detailed directives about the internal financial and other accountability procedures of CSOs. They have also taken the position all professional associations are “Ethiopian societies” under the CSP (although this is not explicit in the law) and hence cannot access foreign funds beyond 10% of their budget. ECSA has also stated that professional associations cannot engage in income generation activities as they only work for their membership (although again this is not explicit in the CSP).¹¹⁵ What is more, the absence of an effective and independent judicial review leaves the ECSA without any kind of accountability for its actions.

Amnesty International (AI) has raised concerns regarding the far-reaching authority of the ECSA, stating that it was:

particularly concerned by the power of the Agency to demand any document in an organisation’s possession. This could include the testimonies of victims of violations, contravening the essential principle of confidentiality and potentially further endangering victims of human rights violations.¹¹⁶

In addition, AI has noted with alarm the wide range of powers allowing the government to conduct surveillance and have direct involvement in the running of organizations, along with the power to suspend licenses and confiscate and transfer the assets of any organization.¹¹⁷

In addition, there are concerns about the independence of the ECSA. It is established as a separate legal entity, but accountable to the Ministry of Justice, which is in turn accountable to the Council of Ministers. Therefore, body falls directly under the executive branch, which is clearly a breach of the independence that supervising bodies should enjoy in order to be in compliance with international human rights law.

According to the NGO Proclamation Articles 8-9, the board of ECSA is mainly composed of government appointees. Even CSO representatives are appointed by the Ministry of Justice (now Attorney General). The ECSA board is composed of seven members, including its chairperson, to be nominated by the government. Among the board members who are appointed, two of them are nominated from charities and societies, giving them a permanent minority in representing the CSOs. The same can be said with the Review and Oversight Board of the ECSA, which also depends on the government. This arrangement violates the independence and impartiality of the agency.

It is also noteworthy that NGOs are limited to spending 30% of their total budgets on administration, whereas the remaining 70% must go to program activities. A very broad interpretation of “administrative costs” includes all core expenses as administrative, even goods and services used to run an advocacy program. Fees to consultants, salaries to project staff per diems for

¹¹⁵ Correspondence with key informant, June 3, 2017.

¹¹⁶ Amnesty International’s written statement to the 20th Session of the UN Human Rights Council (18 June – 6 July 2012): “Ethiopia: The 2009 Charities and Societies Proclamation as a serious obstacle to the promotion and protection of human rights in Ethiopia”, p. 1.

¹¹⁷ Ibid.

trainers and expenses for organizing. The implementation of the law and the directive that stipulates the use of funding under the 70/30% rule for program and administrative costs has also affected the implementation capacity of CSOs. Human rights CSOs were especially hard hit by the directive since most of their expenses were classified as administrative.¹¹⁸

The 70/30% rule discourages the operation of consortiums. The consortium approach, whereby CSOs are pooled together for non-operational purposes, focuses on coordination, joint lobbying and advocacy, joint fund raising, research, training, monitoring and evaluation. Because of the nature of their work, they can be considered to have only administrative costs, and could be excluded from operation by the rule. In practical terms, this approach effectively prevents any operational resource allocations for CSO networks. Thus, the rule threatens the existence of CSO consortiums in Ethiopia. In addition, the Consortium Directive imposes undue restrictions on networking between CSOs. In addition, the consortium directive imposes additional undue restrictions. Charities are not allowed to establish networks with societies, and Ethiopian charities/societies cannot network with foreign or Ethiopian resident charities/societies. Because charities cannot establish networks with societies, despite the fact that both might have the same constituency, human rights CSOs have been forced to withdraw from some existing networks. For example, EWLA had to withdraw from the Network of Ethiopian Women's Associations on the grounds that it is a charity while the other members of the network are societies, despite the fact that all work on gender equality and women's rights issues.¹¹⁹ According to at least one study, as a result of these actions consortiums will soon cease to exist.¹²⁰

As a result, 417 foreign charities (international NGOs) are being forced to implement programs directly.¹²¹ The restrictions in funding have affected many of the rural and least developed regions of the country. Even for the purposes of local revenue generation, Article 130 of the CSP imposes several barriers that compound the difficulty of local fundraising. CSOs are not allowed to pursue revenue generation activities unrelated to their core missions and cannot use such income to cover administrative costs.¹²² CSOs engaged in legitimate revenue generation are required to pay taxes and fulfil other requirements. All these requirements and hurdles make local revenue generation impractical.

In response to the law, several organizations changed their mandate from human rights to development. As a result, organizations working on socio-economic rights, civic and voter education, rights of disabled persons and child rights were forced to change their mandates, and currently there are almost no organizations working on these issues. Very few tried to survive as human rights CSOs with very diminished capacity. The Human Rights Council, for instance, was forced to close 9 of its 12 offices in the country and reduce more than 70% of its staff. The Ethiopian Women Lawyers Association (EWLA) also had to close most of its branch offices and continue with volunteer committees. The drastic impact was further exacerbated by the actions of the ECSA which blocked the bank accounts of the Ethiopian Human Rights Council and EWLA on the grounds that the money they accessed before the law was passed

118 Correspondence with key informant, June 3, 2017.

119 Correspondence with key informant, June 3, 2017.

120 Ethiopian Charities and Societies Forum, A Research on Charities and Societies (ChS) Resource Challenges, Sintayehu Consult, August 2016, p. 46.

121 Ibid., p. 47.

122 Ibid., p. 53-58.

constitute foreign funds under the law and hence cannot be used by the organizations as Ethiopian charities. This amounts to a retroactive application of the CSP, and ignores the fact that a significant part of this money was generated locally from members and other local sources. The CSOs appealed to court, but lost.

Due to the new CSO law and the 70/30 directive, in Ethiopia, more than 108 CSOs were closed in 2014-2016, constituting 6% of the total number of registered CSOs.¹²³ Most of these are newly established and local CSOs in remote areas, carrying out much needed humanitarian work that has now been gravely and negatively affected by the new legislation. As a result, there are now 2191 registered CSOs in Ethiopia, constituting one CSO for almost 42,000 people. In the next three to five years, the very existence of most CSOs in Ethiopia may be in jeopardy.

The door for foreign funding for advocacy purposes is not totally closed. There are exceptions to the rule where donors negotiate their operational parameters at the highest levels of government. In some cases, some foreign funds are considered to be local funds by an act of negotiation and agreement between donors and the government of Ethiopia. Four foreign funding projects have been initiated to help Ethiopian CSOs adapt to the new laws: these include the Civil Society Support Programme, the Civil Society Fund, the European Instrument for Democracy and Human Rights,¹²⁴ and the Ethiopian Social Accountability Program and the Protection of Basic Services (PBS). Nonetheless, the Civil Society Support Programme and the European Instrument for Democracy and Human Rights are still considered foreign funds subject to the 10% limit. On the other hand, the Civil Society Fund and PBS can be accessed by human rights CSOs under a special arrangement with the Ethiopian government. The PBS, by focusing on facilitating public engagement, accountability and rights based advocacy for public services at local level, could cultivate rapid, consensual and constructive growth at the national level.

4.2.4 SPECIAL RESPONSIBILITIES OF THE CITIES HOSTING THE AU AND IGAD

Africa's diplomatic center, Addis Ababa, hosts the most important of AU organs and pan-African institutions. Chief among these include, the AU Commission, the Permanent Representatives Committee of all AU member states, the Peace and Security Council, and the Committee of Intelligence and Security Services in Africa. Other pan-African institutions include the United Nations Economic Commission for Africa, the UN office to the AU, the East African Brigade Headquarters, and the Eastern African Standby Force Logistic Base, the pan-African Chamber of Commerce, IGAD programs such as the Conflict Early Warning and Response Mechanism, the IGAD Security Sector Program, and the Liaison Offices of the RECs.¹²⁵ Other accredited diplomatic representatives to the AU include those of the United States, the EU, China, India and Brazil, as well as UN agencies and other international multilateral and humanitarian organizations. While the US and EU have two heads of mission, bilateral embassies to Ethiopia and Permanent Missions to the AU, China and other countries are still considering whether or not to establish separate missions to the AU. On average, Addis Ababa also hosts more than

¹²³ The Ethiopian Charities and Societies Forum, Brief Minutes of Validation Workshop of Research on Charities and Societies Resource Challenge, August 19, 2016, Saro Maria Hotel.

¹²⁴ Ethiopian Charities and Societies Forum, A Research on Charities and Societies (ChS) Resource Challenges, Sintayehu Consult, August 2016.

¹²⁵ Mehari Taddele Maru and Abel Abate, "Ethiopia's Policy towards the AU: Ad Hoc Approach or Grand Strategy", a chapter in a book to be published by ZED Publishers, UK, 2015.

1,100 meetings annually that are related to pan-African issues.¹²⁶ During the recurring January AU regular summits, Addis Ababa hosts an average of 7,200 delegates, and more than 40 heads of state.¹²⁷ This pan-African community should include CSOs to offer quality Africa-wide forums, publications and deliberations on continental and global issues.

As the capital of the AU and Ethiopia, the number of CSO groups in Addis Ababa, supporting the decision-making process of these international organizations and the government of Ethiopia, are very few. The limitations become more apparent when we note that Brussels, the de facto diplomatic capital of Europe and headquarters of the EU, is overstocked with CSOs working on a multitude of topics ranging from financial markets to common defense policies and diplomatic strategies. The same could be said for Geneva and New York, both of which host UN and other multilateral international entities. Thus, the establishment and launching of more CSOs in Addis Ababa would be a useful addition to the limited number of African CSOs that provide research and analysis, forums for deliberation and publications reflecting on various policy issues. In the absence of any special arrangement for African CSOs working on IGAD or pan-African issues, Ethiopia's current laws and directives relating to CSOs contradict the spirit and substance of the approaches of leading pan-African entities such as the AU, IGAD and the ECA, which call for engagement with CSOs. The same applies to Djibouti, which hosts the IGAD Secretariat. Although Djibouti is not hostile it does not provide an enabling environment for CSOs to work with IGAD.

4.2.5 KENYA

In Kenya, CSOs were previously regulated by the 1990 Non-Governmental Organizations Coordination Act. This was replaced in 2013 by the Public Benefit Organisations Act (PBO Act). However, the PBO requires that the Cabinet Secretary publish notice in the Gazette to become operational.¹²⁸ There has been a long delay in making this notification and, in October 2016, a judge of the High Court ruled that the government contravened the constitution by failing to publish such notice. Nonetheless, the government continued to delay. Contempt of court proceedings were filed for failure to operationalize the PBOA within the given timeframe and on 13 May 2017, the court ordered the Ministry of Interior and Coordination of National Government to comply with the October 2016 judgement within 30 days. It is unclear, at the time of writing, how the government will respond.

The Kenyan law recognizes six different organizational forms of CSOs:

1. NGOs, which are legally defined as “private voluntary groupings of individuals or associations not operated for profit or for other commercial purposes but which have organized themselves nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development, charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry, and the supply of amenities and services”.¹²⁹ This category would appear to be replaced

¹²⁶ Interview with staff member of the AU Commission Conference Services Directorate, 10 May 2014.

¹²⁷ Mehari Taddele Maru, “Ethiopian Diplomacy and its Regional Influence: a regional power in the making”, a chapter in a book to be published by SAIIA, 2015.

¹²⁸ The Public Benefit Organizations Act, 2013, Article 1, available at <http://www.icnl.org/research/library/files/Kenya/pbo2013.pdf> (accessed March 20, 2017).

¹²⁹ The Non-Governmental Organizations Co-ordination Act, 1990, section 2 available at <http://www.icnl.org/research/library/files/Kenya/coord2.pdf> (accessed March 20, 2017).

by the category of public benefit organization (PBO) under the new law. PBOs are defined in the law as organizations constituted nationally, regionally or internationally to carry out activities for the public benefit in a wide range of areas laid out in schedule six of the Act.¹³⁰ Concern could be raised about this formulation because although the list is extensive, it is not necessarily exhaustive, and could be restrictive.

2. Trusts and foundations are established by families, groups or individuals, to improve peoples' well-being and to engage in mobilizing resources. Trusts are incorporated under the Trustees (Perpetual Succession) Act.¹³¹

3. Societies and professional clubs and associations of ten or more persons are registered as societies under the 1998 Societies Act.¹³²

4. Cooperative societies and unions are regulated by the 2004 Cooperative Societies Act and are societies that work for "the promotion of the welfare and economic interests of its members".¹³³

5. Grassroots organizations such as self-help groups and community-based organizations are organizations that work at the community level.¹³⁴

6. Finally, certain companies that promote public causes may be registered under the Companies Act. These companies are limited by guarantee and by not having share capital.¹³⁵

Under the 1990 Non-Governmental Organizations Co-ordination Act,¹³⁶ it is an offence to operate an NGO in Kenya without registration and a certificate, although some types of organizations were exempted.¹³⁷ This is no longer the case under the PBO Act. Under the new law, registration for PBOs is no longer mandatory, but it is necessary if the organization wants to claim the benefits associated with being a public benefit organization. The sixth schedule of the lists fields of activity that can be considered to the public benefit, although it specifies that this list is not exhaustive. The Public Benefit Organization Regulatory Authority (PBORA) can also bestow on any unregistered organization the status of a public benefit organization.¹³⁸

Under the 1990 NGO Coordination Act (NGO Act), the registration process requires an application with a generally reasonable level of accompanying documentation. However,

130 The Public Benefit Organizations Act, 2013 (PBO Act), available at <http://www.icnl.org/research/library/files/Kenya/pbo2013.pdf> (accessed March 20, 2017).

131 Trustees (Perpetual Succession) Act; International Center for Not-for-Profit Law, "Civic Freedom Monitor: Kenya," last updated December 10, 2016, available at <http://www.icnl.org/research/monitor/kenya.html> (accessed March 23, 2017).

132 The Societies Act, 1998.

133 Cooperative Societies Act, 2004, Article 4(a).

134 International Center for Not-for-Profit Law, "Civic Freedom Monitor: Kenya," last updated December 10, 2016, available at <http://www.icnl.org/research/monitor/kenya.html> (accessed March 23, 2017).

135 Companies Act, Laws of Kenya, Chapter 486; ICNL NGO Law Monitor: Kenya.

136 The Non-Governmental Organizations Co-ordination Act, 1990, available at <http://www.icnl.org/research/library/files/Kenya/coord2.pdf> (accessed March 20, 2017).

137 The International Journal of Not-for-Profit Law. Volume 12, Issue 2, February 2010. Faith Kisinga Gitonga: Kenya.

138 PBO Act, 2013, Section 7.

the authority of the Non-Governmental Coordination Board has wide discretion to deny such applications. The objectives of the NGO are examined in the registration process. Under the NGO Act, the board may refuse registration if it is satisfied that the NGO's proposed activities or procedures are not in the national interest, if the applicant has falsified information submitted, or if it "is satisfied, on the recommendation of the Council, that the applicant should not be registered."¹³⁹ The vague grounds provided in the NGO Act for denial of registration have opened the door for wide governmental discretion. The PBO act still requires the applicant to clearly explain the intended public benefits that will accrue as a result of its operations. The NGO also needs to elaborate all of the principal activities that it intends to engage in as a public benefit organization.¹⁴⁰ However, the act does not specify any ground for denial of an NGO's registration application on account of its intended purpose.

Under the PBO Act, registration procedures and requirements appear to be simple and reasonable. Such registration gives the PBORA the power to add other requirements by requesting particulars or other information to assist it in order to determine whether or not the organization meets the requirements for registration.¹⁴¹ This power could potentially be abused to add restrictions on the right to form an organization, although it remains to be seen how the law will be implemented in practice. The Act makes it mandatory for the PBORA to make a decision on application for registration within 60 days after receiving the application.¹⁴² If the PBORA refuses registration, it must notify the applicant of the refusal in writing and give the reasons for the refusal within the number of days remaining in the original 60-day period for making a decision.¹⁴³

Both provisions are in compliance with existing international principles, but the fact that the PBORA is granted wide discretionary powers to refuse to register an association, is not compatible with those principles. Without prejudice to its right to apply to the PBORA for review of its decision, an applicant who is aggrieved by a decision of the PBORA may, within 30 days of receiving a written notice of the decision, appeal to the Tribunal.

The PBO Act allows a public benefit organization to engage freely in research, education, publication and advocacy with respect to any issue affecting the public interest, including criticism of the policies or activities of the state or any officer or organ thereof.¹⁴⁴ It may also express its views on any issue or policy that is or may be debated or discussed in the course of a political campaign or election.¹⁴⁵ Nonetheless, it may not engage in fundraising or campaigning to support or oppose any political party or candidate for appointive or elective public office, nor may it propose or register candidates for elective public office.¹⁴⁶ These rules show a liberal approach.

¹³⁹ The Non-Governmental Organizations Co-ordination Act, 1990, Article 14.

¹⁴⁰ PBO Act, 2013, Section 9.

¹⁴¹ Ibid., Section 8.

¹⁴² Ibid., Section 9(1).

¹⁴³ Ibid., Section 9(5)(b).

¹⁴⁴ Ibid., Section 66(1)(a).

¹⁴⁵ Ibid., Section 66(2)(a).

¹⁴⁶ Ibid., Section 66(3)(a).

One point to consider is whether the religious beliefs and moral convictions of the majority population can be used as a reason to limit the right of association of those who do not conform to them. This point was addressed by the high court of Kenya in a case where an NGO was denied registration because the NGO sought to promote the human rights of the gay and lesbian community.¹⁴⁷ The NGO Coordination Board referred to the criminalization of homosexuality as the basis for its rejection of the registration. The court found that there were no grounds to deny the NGO registration and stated that:

[...] in a representative democracy, and by the very act of adopting and accepting the Constitution, the State is restricted from determining which convictions and moral judgments are tolerable. The Constitution and the right to associate are not selective. The right to associate is a right that is guaranteed to, and applies, to everyone. As submitted by the petitioner, it does not matter if the views of certain groups or related associations are unpopular or unacceptable to certain persons outside those groups or members of other groups. If only people with views that are popular are allowed to associate with others, then the room within which to have a rich dialogue and disagree with government and others in society would be thereby limited.¹⁴⁸

The administrative and regulatory framework within which PBOs previously operated under the NGO Coordination Board is to be transferred to PBORA under the 2013 PBO Act. However, the latter office has yet to become operational. Under the PBO Act, the National Federation of Public Benefits Organizations serves the self-regulation forums of public benefit organizations recognized by PBORA.¹⁴⁹ The National Federation of Public Benefits Organizations comprises all public benefit organizations registered under the act. As a self-regulation body, its function is to promote the highest standard of work, ethics and legality by PBOs, to facilitate the building of the capacity of CSOs for the enhancement of the effectiveness of these organizations; and to monitor the performance of the self-regulation forums and advise the PBORA about the monitoring and enforcement of compliance by these forums and their respective PBO members in terms of the provisions of this act. The forum can also develop regulations and a general code of conduct.

It is obvious, however, that the real power lies with the PBORA. The majority of the members of the Board are ex officio civil servants and its chairman is appointed by the cabinet secretary,¹⁵⁰ one of only three members elected by the federation of registered PBOs.

PBORA has a wide regulatory jurisdiction over the NGOs that includes the powers to receive and review annual reports of public benefit organizations, and institute inquiries to determine if the activities of public benefit organizations do not comply with the act or any other relevant law. It can also register and de-register public benefit organizations in accordance with the act.¹⁵¹ Most alarming, however, is the fact that the act gives the cabinet secretary, on the recommendations of the PBORA, the power to make regulations which can limit the rights

¹⁴⁷ Eric Gitari v. Non-Governmental Organisations Co-ordination Board, Petition 440 of 2013.

¹⁴⁸ Ibid.

¹⁴⁹ Public Benefits Organizations (PBO) Act, 2013, Section 21.

¹⁵⁰ Ibid., Section 35.

¹⁵¹ Ibid., Section 42.

of CSOs. These regulation-making powers could be used to infringe the right to freedom of association, as any restriction of this right must be carried out through law.¹⁵² The regulatory authority lacks independence from the government, and fails to fulfil the international standards of independence and lack of conflict of interest. It also does not provide the necessary guarantees for safeguarding the freedom of association to which CSOs should be entitled.

The PBO Act also establishes a tribunal known as the Public Benefit Organizations Disputes Tribunal, to hear and determine complaints arising out of any breach of the provisions of the act, any matter or appeal made to it pursuant to the provisions of the act, and such other functions as may be conferred upon it by any written law in force.¹⁵³ The tribunal consists of members appointed by the chief justice upon the approval of the National Assembly. According to Article 50 it includes: a chairperson who shall be an advocate of the high court, of not less than seven years standing, two advocates of the high court, of not less than five years standing, and two persons having such specialized skills or knowledge necessary for the discharge of the functions of the tribunal.

Though the tribunal is an arbitral court and not a regular court of the judiciary, it has all the powers of a subordinate court of the first class. More importantly it is an independent tribunal appointed by the chief justice upon the approval of the National Assembly which implies sufficient guarantee of its neutrality.

According to the 2013 PBO Act, Section 19, the PBORA may cancel or suspend an organization's registration certificate if it commits the following transgressions:

- a. the public benefit organization has committed violations of this Act;
- b. the public benefit organization is carrying out its activities in a manner which is contrary to its constitution.¹⁵⁴

Deregistration has become an important topic in Kenya, particularly after a total of 959 organizations were threatened with deregistration in late 2015. They were accused of not meeting the criteria of the NGO Coordination Board, mainly in terms of financial mismanagement. This was widely criticized by human rights organizations. However, some advocates, stated that many of the named organizations were simply being harassed.¹⁵⁵ CSOs accused the NGO Coordination Board with revoking their registrations for political motives. After numerous complaints, the deregistration campaign was suspended, and the affected organizations were given further time to comply with the regulations set up by the Board.¹⁵⁶ The harassment and disruption of the work of hundreds of NGOs was still criticized though, by organizations such as CIVICUS, due to the damage that the organizations suffered throughout the deregistration

¹⁵² Ibid., Section 69.

¹⁵³ Ibid., Section 51.

¹⁵⁴ Ibid., Section 19.

¹⁵⁵ IRIN, "NGOs in Kenya protest threatened deregistration of 959 organisations," October 31, 2017, available at <http://www.irinnews.org/report/102174/ngos-kenya-protest-threatened-deregistration-959-organisations> (accessed March 20, 2017); William Mwangi, "Kenya: Read List of 959 NGOs to be Deregistered," The Star, October 29, 2015, available at <http://allafrica.com/stories/201510291631.html> (accessed March 20, 2017).

¹⁵⁶ Hussein Mohammed, "Devolution CS Waiguru revokes deregistration of NGOs," Citizen TV, October 30, 2015, available at <http://citizentv.co.ke/news/devolution-cs-waiguru-revokes-deregistration-of-ngos-104570/> (accessed March 20, 2017).

process.¹⁵⁷

In Kenya, a public benefit organization may engage in lawful economic activities as long as the income generated is used solely to support the public benefit purposes for which the organization was established. According to the PBO Act:

2. the income of a public benefit organization may include:

- a. donations of cash, securities, and in-kind contributions;
- b. bequests;
- c. membership fees;
- d. gifts;
- e. grants;
- f. real or personal property; and
- g. income generated from any lawful activities undertaken by the public benefit organization through its property and resources.

3. A public benefit organization may own and manage property and assets for the accomplishment of its not-for-profit purposes.¹⁵⁸

However, Kenya is not immune from the wave of legislative measures against foreign funding in the region. In 2013, the Statute Law Miscellaneous (Amendment) Bill attempted to place a 15% limit on foreign funding for NGOs, similar to the Ethiopian law. It also accorded discretionary power to the Minister of Finance, who would have the ability to allow greater foreign funding that he or she deemed appropriate.¹⁵⁹ The bill was criticized by a group of UN special rapporteurs, who stated that it was “evidence of a growing trend in Africa and elsewhere, whereby governments are trying to exert more control over independent groups using so-called NGO laws.”¹⁶⁰ The Kenyan parliament rejected the bill on December 4, 2013.

4.2.6. RWANDA

Even though Rwanda has registered remarkable economic growth and transformation in the aftermath of tragic genocide that claimed the life of more than 800,000 of its citizens, the country scored considerably lower when it comes to the general markers of a free and democratic society, such as a free and open election process and freedom of the media and freedom of association.¹⁶¹

¹⁵⁷ CIVICUS, “Intimidation of Kenyan NGOs unwarranted,” November 3, 2015, available at <http://www.civicus.org/index.php/media-resources/news/936-intimidation-of-kenyan-ngos-unwarranted> (accessed March 20, 2017).

¹⁵⁸ PBO Act, Section 65.

¹⁵⁹ Library of Congress, “Kenya: Rejection of Bill Capping NGO Funding and Giving Spy Agency Broadened Surveillance Powers,” Global Legal Monitor, December 12, 2013, available at <http://www.loc.gov/law/foreign-news/article/kenya-rejection-of-bill-capping-ngo-foreign-funding-and-giving-spy-agency-broadened-surveillance-powers/> (accessed March 21, 2017).

¹⁶⁰ Office of the High Commissioner for Human Rights, “Kenya: Statute Law Bill Poses Grave Threat to Civil Society and Must Be Rejected – UN Rights Experts,” December 3, 2013, available at <http://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14055&LangID=E> (accessed June 11, 2017).

¹⁶¹ International Non-Profit Law Monitor, “Civic Freedom Monitor/ Rwanda,” last updated March 28, 2017, available at <http://www.icnl.org/research/monitor/rwanda.html> (accessed June 10, 2017).

The most recent report of the UN Human Rights Council notes that Rwanda has made significant progress, especially in the area of social and economic rights. Despite this success, Rwanda still faces shortcomings in realizing some human rights objectives, particularly in terms of promoting and protecting civil and political rights.¹⁶²

The situation of civil society is a reflection of this reality. Rwandan civil society is considered to be a recent phenomenon.¹⁶³ Previously, in Rwanda, almost all CSOs were established under the auspices of the Protestant and Catholic churches. These churches were actively involved in the social and economic life of Rwanda before the 1994 genocide. During the authoritarian situation that characterized pre-and post-colonial Rwanda, these churches and the offices of CSOs were the only venues where the humanitarian activities could evade state control.¹⁶⁴ In Rwanda, most of the CSOs are now engaged in service delivery or religious activities. Very few churches and CSOs are engaged in policy advocacy and the promoting oversight of the government.¹⁶⁵

Further to the constitution that establishes the general principles on freedom of association and its limitations, an array of national laws and regulations affect the NGO sector in Rwanda. The government claims that the current legal framework has been put in place to encourage an autonomous and vibrant civil society that can serve as a platform for citizens' participation. However, CSOs and others have expressed serious concern about the ability of CSOs to act independently in practice.

The legal framework for CSOs in Rwanda is multi-faceted, as different laws regulate the activities of NGOs (national and international) and other kinds of citizens' collective actions and organizations. In 2008, the government enacted Organic Law no. 55/2008 governing non-governmental organizations in Rwanda. The organic law governing NGOs (Law 55/2008 of 10/09/2008) defines the framework for the other legislation discussed here. The law defines NGOs as organizations whose aims are to improve economic, social and cultural development and advocate public interests or the interests of certain groups, natural persons or organizations, or with a view to promoting the common interests of their members. With the purpose of making the law operational, Rwanda undertook legislative reforms in 2011 affecting the operating environment of both national and international NGOs. This process included lengthy consultation with Rwandan and international NGOs.¹⁶⁶ Proposals that were advanced by CSOs were partially included in the formulation of that law. The outcome of the 2011 legal reform was three laws governing different types of organization the national NGOs Law, and international NGOs law, and the law governing religious organizations all passed in 2012. Overall, the following laws govern civil society engagement:

¹⁶² GIZ, "Promoting a right-based approach in civil society organizations in Rwanda," available at <https://www.giz.de/en/downloads/giz2014-en-rights-based-programme-rwanda.pdf> (accessed March 20, 2017).

¹⁶³ CCOAIB, "The State of Civil Society in Rwanda in National Development. Civil Society Index Rwanda Report," UNDP – CIVICUS, 2011.

¹⁶⁴ CCOAIB, *Société Civile Rwandaise, Problèmes et perspectives*, Kigali, 2003.

¹⁶⁵ Joint Governance Assessment (2009), page 42.

¹⁶⁶ Rachel, Angela, Joan and Sarah, "The Legal Framework and Political Space for Non-Governmental Organizations: An Overview of Six Countries," July 2013, available at <https://www.intrac.org/wpcms/wp-content/uploads/2016/09/Legal-Frameworks-and-Political-Space-for-NGOs-Phase2.pdf> (accessed June 10, 2017).

- Organic Law 55/2008 of 10/09/2008 governing non-governmental organizations
- Law Number 04/2012 of 17/02/2012 governing the organization and functioning of national NGOs (the National NGO Law);¹⁶⁷
- Law Number 05/2012 of 17/02/2012 governing the organization and functioning of international NGOs (the International NGO Law);¹⁶⁸
- Law Number 06/2012 of 17/02/2012 governing the organization and functioning of religious-based organizations;
- Ministerial Order No 001/07.01 of 14/01/2013 determining additional requirements for the registration of religious-based organizations
- Organic Law Number 10/2013/OL of 11/07/2013 governing political organizations and politicians
- Law N°56/2016 of 16/12/2016 establishing the Rwanda Governance Board

Cooperatives, faith-based organizations and other organizations are treated differently by Rwanda's laws. In addition to the NGO Law, there are other regulations that influence the development of CSOs in Rwanda, particularly at the grassroots level. These laws include:

- **Legislation affecting cooperatives in Rwanda** whose national policies promote the transformation of grassroots organizations within such cooperatives. Cooperatives in Rwanda are mainly meant to have economic objectives regulated by the Rwanda Cooperative Agency, which registers them and provides them with support.
- **Law N.06/2012 concerning faith-based organizations.** This law is relevant to the life of many CSOs (particularly community based organizations (CBOs)) that function under the umbrella of churches and other religious institutions. In addition to faith-based CSOs, churches and other religious institutions are often places where people meet and discuss emerging issues that sometimes include development, access to public services and even the implementation of public policy at the local level.
- **Law N° 02/2013 regulating media.** This law regulates not only “commercial media” but also “community media” and defines the rules for the exercise of journalism and publishing activities. The law provides for wide autonomy for journalists and publishers, but provides that the dissemination of information can be limited due to national interest and public order.

¹⁶⁷ Law No. 04/2012 of 17/02/2012 Governing the Organisation and Functioning of National Non-Governmental Organisations, available at <http://www.icnl.org/research/library/files/Rwanda/Rwanda%201.pdf> (accessed March 20, 2017).

¹⁶⁸ Law No 05/2012 of 17/02/2012 Governing the Organisation and Functioning of International Non-Governmental Organisations, available at <http://www.icnl.org/research/library/files/Rwanda/Rwanda%202.pdf> (accessed March 20, 2017).

- **The body of legislation and regulations concerning decentralization.** While NGOs and other CSOs are not required by their own regulations to take part in bodies set up for promoting local development, existing decentralization regulations (and particularly recent ministerial orders) require that CSOs participate in the Joint Action Development Forum. They are required to do so by contributing to the implementation of the district and sector development plans and signing a “performance contract” that must be periodically evaluated. Compliance with these rules can be a condition for issuing the “collaboration letter” required by the Rwandan government for maintaining the registration of INGOs.
- **The legal provisions concerning credit,** under the control of the Ministry of Finance, regulates micro-finance institutions, including “saving groups” at the grassroots level. In some cases, these groups are transformed into cooperatives to facilitate their further development, and in many cases these groups carry out activities and functions in addition to providing credit.
- **The education and health service regulations,** which provide for the existence of semi-formalized “users’ committees” which can collaborate in the provision of services, and in the case of schools for the existence of semi-formalized “clubs” that can engage in several activities. Youth and students’ clubs particularly engage in managing and mediating conflicts. In these cases, clubs are recognized by the service management body or are created in the framework of CSO actions. When these groups assume a more independent status, they are requested to register, as a CSO or as a cooperative.
- **The law establishing the Rwanda Governance Board (RGB),** which is “responsible for the promotion and monitoring of good governance principles and practices in all sectors.” The RGB is responsible for registering CSOs and also for monitoring their service delivery and adoption of principles of good governance.¹⁶⁹

National NGOs are required to register with, and be granted legal personality by, the RGB. Under the current law, NGO registration is a drawn out and bureaucratic process. Obtaining legal personality is a two-stage process, requiring application first for a temporary certificate, and then permanent status nine months later.¹⁷⁰ Under the current law, NGO registration suffers from extensive bureaucratic requirements, and obtaining legal personality is not easy since it depends upon RGB’s schedule of field visits and monitoring. Domestic CSOs must present many documents to the authorities, including authenticated statutes, an action plan with a budget, and the names and curricula vitae of the organization’s legal representative and his or her deputy. Despite the burdensome process, however, the number of CSOs registered by the RGB has drastically increased to more than 2,046 at the end of January 2017 and about 176 International NGOs received license to operate in the country.

¹⁶⁹ The Rwanda Governance Board website, available at http://www.rgb.rw/fileadmin/templates/Documents_pdf_word_jpeg/RGB_Citizen_ServiceCharter_Final.pdf (accessed June 8, 2017).

¹⁷⁰ International Center for Not-for-Profit Law, “Civic Freedom Monitor: Rwanda,” available at <http://www.icnl.org/research/monitor/rwanda.html#snapshot> (accessed March 20, 2017).

In addition, there is concern that there is no appeal body provided for in the law in case a given civil society organization is receives a negative decision from RGB. The failure to observe due process standards and to allow for review of the RGB opens the door to abuse of power by the body. While the new law establishing the RGB and determining its mission, organization and functioning might contribute in increasing its operational independence and hence lift up the credibility of their research reports, it also has the potential to restrict the civil society space in Rwanda.¹⁷¹

As stipulated under Articles 20 and 24, national NGOs may be denied registration or subjected to termination for failure to comply with the registration legislation or in the face of “convincing evidence that the (applicant) may jeopardize security, public, order, health, morals, and human rights”.¹⁷² These broad grounds have the potential to be selectively applied so as to temporarily or permanently disrupt the work of human rights NGOs and interfere with the right to freedom of association guaranteed by under international law and under Article 39 of the Rwandan constitution.¹⁷³ In addition, the law requires that the leaders of national NGOs be persons of good moral character and that they not have been convicted for “genocide ideology.”¹⁷⁴ While this may seem like a reasonable restriction, Rwanda’s law on genocide ideology has been criticized as vague and open to abuse to restrict free speech.¹⁷⁵

The National NGO Law limits the power of government to deny registration.¹⁷⁶ The law also contains provisions to strengthen NGOs to participate in policy and legislative development. The National NGO law also abolished the need for annual registration.

The International NGO Law also imposes bureaucratic hurdles on NGOs. The Immigration Directorate registers and monitors international NGOs. Registration requirements are complex. International NGOs are required to submit a long list of documentation and information, including the implementation schedule and its various stages of planning, detailed cost estimates, an indication of who will continue activities launched by international NGOs after they have completed their work and “all information relating its geographical establishment throughout the world.”¹⁷⁷

According to this law, registration is valid for five years, but each year authorities require the submission of specific reporting documentation and information, including updated planning and cost estimates. These reports also require information about international NGO staff members after they have completed their work assignments.

171 Correspondence with key informant, on file with author.

172 Ibid.

173 East and Horn of Africa Human Rights Defenders Project (EHAHRDP) and Civicus, “Submission to the Universal Periodic Review, 23rd session of the UPR working group, Republic of Rwanda,” submitted March 23, 2015, available at http://www.civicus.org/images/Joint_UPR_Submission_on_Rwanda_-_CIVICUS_and_EHAHRDP_-_23rd_Session.pdf (accessed June 10, 2017).

174 Law No. 04/2012 of 17/02/2012 Governing the Organisation and Functioning of National Non-Governmental Organisations, Article 8, available at <http://www.icnl.org/research/library/files/Rwanda/Rwanda%201.pdf> (accessed March 20, 2017).

175 See, for example, Filip Reyntjens, *Political Governance in Post-Genocide Rwanda*, (Cambridge University Press, 2015), p. 75.

176 Law No. 04/2012 of 17/02/2012 Governing the Organisation and Functioning of National Non-Governmental Organisations, Article 8, available at <http://www.icnl.org/research/library/files/Rwanda/Rwanda%201.pdf> (accessed March 20, 2017).

177 Ibid

NGOs are exempt from tax on most categories of income. NGOs are permitted to engage in income generating activities, provided that any profits earned are used in activities related to their primary objectives.

Another improvement is that the RGB, which was under the Ministry of Local Government, is now established as an independent institution. Articles 4-5 of the law establishing the RGB tasks the body with ensuring indigenous research and solutions are conducted and to oversee research body. RGB the power to register, suspend and revoke, without any room for judicial review. Depending how it discharges its mandate, the RGB could shrink the space for CSOs.

In Rwanda, there are no legal barriers against foreign funding for CSOs. Furthermore, CSOs are also permitted to engage in income generating activities, provided that any profits earned are used in activities related to their primary objectives. However, the law does impose financial restrictions on CSOs. International NGOs must spend no more than 20% of their total budgets on overheads.¹⁷⁸ Also, while NGOs are exempt from tax for most categories of income, the tax laws do not provide incentives for donors to provide donations to NGOs. More progressively, NGOs are permitted to compete for government funds and, in some cases, are encouraged to do so. As the most exemplary funding mechanism, the government is required to include funding for NGOs in the national budget, in addition to normal ministry-level support and government contracts granted to NGOs.

One particular aspect of the RGB law that has raised concern has been the requirement that the RGB give pre-authorization and follow up studies and research carried out in Rwanda on governance and home grown solutions whether by Rwandans or foreigners. This has raised concerns among some civil society actors especially research and advocacy organizations that such permission may inhibit critical research. If institutions publish research that contradicts research of the RGB or is critical of the government, will those institutions be able to obtain future permits?

Unlike many other countries in the region, there is no legal provision expressly prohibiting advocacy or purpose based restrictions on NGOs, but tight restrictions on freedom of speech and political space in general remain in place, especially in relation to sensitive issues such as ethnic relations, reconciliation, and discussion of abuses committed by the current regime. A UNDP final program evaluation report¹⁷⁹ showed that Rwandan CSOs embrace constructive and positive values, such as anti-corruption, gender equality, poverty eradication, political tolerance and democracy promotion. An assessment conducted by USAID Rwanda indicated that civil society groups in Rwanda rarely take an active role in shaping government policy, even in areas of concern for CSOs. At the same time, CSOs often take on the role of helping to implement government initiatives, and remain highly dependent upon the government for authorization, funding and access to land and other resources.¹⁸⁰ While there is a dialogue between the government and CSOs, the agenda is mainly determined by government and public authorities. At the same time, these spaces of consultation constitute a set of opportunities to be capitalized

178 Law No. 04/2012 of 17/02/2012 Governing the Organisation and Functioning of National Non-Governmental Organisations, Article 8, available at <http://www.icnl.org/research/library/files/Rwanda/Rwanda%201.pdf> (accessed March 20, 2017).

179 End of the Program Evaluation "UNDP Support to Inclusive Participation in Governance" (IPG) Program (2014).

180 USAID Rwanda, "Civil Society in Rwanda: Assessment and Options," available at http://pdf.usaid.gov/pdf_docs/Pnacm181.pdf (accessed March 21, 2017).

upon and further developed in fostering CSO engagement in governance and policy.¹⁸¹ It has also been revealed that Rwandan civil society has weak spots, particularly in regard to encouraging governmental transparency and environmental protection.

The current legal environment is seen as imposing burdensome requirements for CSOs to operate.¹⁸² The European Union's Election Observer Mission Report in 2008 recommended significant changes in order to promote a vibrant CSO community in Rwanda. Some of these changes urged liberalization of the political system, the pursuit of meaningful dialogue to promote reconciliation between ethnic groups, and more importantly, the building of the capabilities of CSOs and encouraging them to critically engage with the government.¹⁸³

4.2.7. SOMALIA AND SOMALILAND

Somalia has yet to develop effective legislation on CSOs, while Somaliland's CSOs are regulated by the Law on Non-Governmental Welfare (or Charitable) Organizations, namely Law no. 43/2010.¹⁸⁴ This legislation stipulates, as per Article 9(7) (a-g), a long list of documents which need to be provided to the registrar in order to register an CSO.

Although some of the legal requirements for registration in Somaliland are in line with international norms, there are some areas of concern. One is the requirement that employees of the applicant CSO should demonstrate experience and knowledge in the sector in which they want to work.¹⁸⁵ This seems to be an unnecessary restriction of the rights of individuals to organize themselves. The third requires that aims and objectives of CSOs should be consistent and in agreement with the constitution, rules and regulations of the country.¹⁸⁶ This requirement is overly expansive, and interferes with freedom of expression which clearly protects the rights of individuals and CSOs to advocate for changes in law. The Somaliland law also gives the Minister of National Planning and Development the power to make decisions on registration. Although this could be seen as problematic as it gives a government minister the power to decide on registration. However, on the positive side, the law is quite specific that decision not to register is justified only when application is incomplete or fraudulent, which should minimize this concern. Unfortunately, the decision of the minister to reject registration is final, and not subject to judicial review, which is clearly a limit to access justice and put the right to freedom of association under the full authority of the executive body.¹⁸⁷

Another problematic element of the law is that prohibits CSOs from using "financial resources against the national interest, religious rights of religious proselytizing, value of the society, security,

¹⁸¹ Gianfrancesco Costantini, Stefabi Verdecchia and Fidele Rutaysire, "Mapping of Civil Society and Project Identification of a Support Program to the Civil Society in Rwanda," December 2013, available at http://eeas.europa.eu/archives/delegations/rwanda/documents/press_corner/mapping-of-the-civil-society-and-project-identification_en.pdf (accessed March 21, 2017).

¹⁸² Ibid.

¹⁸³ EU Election Observers Mission, Final Report Legislative Elections to the Chamber of Deputies, 2008, available at http://www.eods.eu/library/FR%20RWANDA%202008_en.pdf (accessed March 21, 2017).

¹⁸⁴ Law on Welfare (or Charitable) Non-Governmental Organizations, informal English translation available at http://www.somalilandlaw.com/NGO_LAW_ENGLISH_VERSION_FINAL.pdf (accessed March 21, 2017).

¹⁸⁵ Ibid., Article 13 (5).

¹⁸⁶ Ibid., Article 13 (6).

¹⁸⁷ Ibid., Article 31.

tribalism and discrimination.”¹⁸⁸ Although these restrictions are on some level understandable, as we have seen elsewhere, such terminology can be interpreted so expansively as to come into conflict with freedom of expression by being read to prohibit criticism of government actions and/or discussion of ethnic relations.

The law also imposes at least some government interference in CSO affairs. The law requires international NGOs to enter into a memorandum of understanding with the relevant line ministry in the area within which they want to work.¹⁸⁹ Changes to this document are not allowed without permission from the government, potentially impeding the ability of the NGO to respond to changing needs and conditions. The law also provides for the assets of completed projects to be handed over to the partner ministry listed in the original MoU.¹⁹⁰

Although the situation of CSOs in Somalia is not regulated under a specific law but the Federal Government of Somalia is currently conducting consultations to promulgate CSO law, CSOs are required to register with the Ministry of the Interior of the federal government. The government of Somalia is, however, in the process of drafting a new NGO Act and is conducting consultations on that draft with relevant line ministries and federal authorities. In light of the restrictive trends in the region, CSOs are watching the process attentively.

Overall, the relationship between the government and Somali CSOs is cooperative. However, CSOs in Somalia face numerous challenges including targeting by Al Shabaab; competition over funding between the government and CSOs and government efforts to silence CSOs discussing sensitive issues such as gender based violence.¹⁹¹

Somaliland is much more secure than the rest of Somalia,¹⁹² and CSOs report working in a peaceful and stable legal environment. They face challenges, however accessing international funding.

4.2.8. SOUTH SUDAN

CSOs in South Sudan are governed by the 2016 NGO Act.¹⁹³ The act was signed into law by President Salva Kiir on February 11, 2016.¹⁹⁴ This law functions alongside the 2016 Relief and Rehabilitation Commission (RRC) Act, passed the same month, which sets up the regulatory body overseeing civil society activities.¹⁹⁵ This legislation replaced the 2003 NGO Act, passed by the rebel authorities in South Sudan during the North-South civil war. A previous version of the act had been passed in 2015, but was returned to parliament after President Kiir refused to sign it.

¹⁸⁸ Ibid., Article 11.

¹⁸⁹ Ibid., Article 33.

¹⁹⁰ Ibid., Article 36.

¹⁹¹ Human Rights Watch, “Somalia: Free Journalist, Others, Unlawfully Detained,” January 22, 2013, available at <https://www.hrw.org/node/248561> (accessed January 31, 2016).

¹⁹² KACE, Interviews with Somaliland CSOs, 2015.

¹⁹³ NGO Act, 2016, available at <http://www.icnl.org/research/library/files/South%20Sudan/NGOBILL.pdf> (accessed March 21, 2017).

¹⁹⁴ The International Center for Not-for-Profit Law, “Civic Freedom Monitor: South Sudan,” available at <http://www.icnl.org/research/monitor/southsudan.html> (accessed March 21, 2017).

¹⁹⁵ Relief and Rehabilitation Commission Act, 2016, available at <http://www.icnl.org/research/library/files/South%20Sudan/RCCBILL.pdf> (accessed March 21, 2017).

The 2016 NGO Act defines an NGO as “a non-profit voluntary Organization formed by two or more persons not being Public bodies, with the intention of undertaking voluntary or humanitarian projects.”¹⁹⁶ This would appear to exclude CSOs with advocacy and research aims. This aim appears to extend to Article 7 of the Act, which provides for the objectives of NGOs. All of these are humanitarian in nature,¹⁹⁷ again appearing to restrict the ability of advocacy and research based institutions to function. An additional concern in this area can be found in Article 6, which outlines the principles of voluntary work, calling for “[r]espect for the sovereignty of the Republic of South Sudan, its institutions and laws.”¹⁹⁸ Although much will depend on how this provision is applied in practice, as noted above, similar provisions have been used elsewhere to prohibit criticism of the government.

The 2016 NGO Act also, like many laws in the region, makes registration mandatory, in violation of international standards. The 2016 NGO Act is particularly harsh in this respect, however, actually criminalizing operation without registration and imposing a stiff fine of up to 50,000 South Sudanese pounds or three years in prison for violation of this provision.¹⁹⁹ The registration process is also particularly onerous, requiring registration with both the Ministry of Justice and the Relief & Rehabilitation Center (with relatively hefty fees being payable to both authorities). In practice, NGOs are sometimes also required to register with the RRC at the state level and the Ministry of Social Welfare. Registration processes vary from state to state, creating additional confusion and complications for CSOs. In addition, CSOs that had already been registered under the previous law were required to re-register under the new law within three months of it being passed a tight deadline given the complex and multi-tiered processes created by the new law. Further, although the law is unclear on the frequency with which registration must be renewed, it has been applied in practice to mean that re-registration is required annually.²⁰⁰

In addition, the new legal framework allows for government interference into CSO activities. Article 14 of the Act allows the RRC to “evaluate” the performance of CSOs, although it is unclear what the consequences of a negative evaluation would be.²⁰¹ The RRC Act further empowers it to “supervise, monitor and evaluate the activities of NGOs” and “organize and coordinate the work and programs of the organisations with geographical and sectorial limits”.²⁰²

Space for civil society in South Sudan has been shrinking for some time, and this trend has been exacerbated by the outbreak of civil war in December 2013. Not only are CSOs hampered by the insecurity and economic crisis that the war has created, attacks have taken on a political and ethnic form. There is a marked lack of respect for CSOs from the government, fueled by the efforts of some to document and demand accountability for serious violations of international

¹⁹⁶ NGO Act, 2016, chapter 1.

¹⁹⁷ Ibid., Article 7.

¹⁹⁸ Ibid., Article 6.

¹⁹⁹ The International Center for Not-for-Profit Law, “Civic Freedom Monitor: South Sudan,” available at <http://www.icnl.org/research/monitor/southsudan.html> (accessed March 21, 2017).

²⁰⁰ Ibid.

²⁰¹ NGO Act, 2016, Article 14.

²⁰² The International Center for Not-for-Profit Law, “Civic Freedom Monitor: South Sudan,” available at <http://www.icnl.org/research/monitor/southsudan.html> (accessed March 21, 2017).

humanitarian and human rights violations committed in the context of the conflict.²⁰³ Many CSO leaders have been forced to flee the country and some have been threatened or abducted by government operatives in their countries of asylum.

4.2.9. SUDAN

CSOs in Sudan are regulated by the Sudanese Voluntary and Humanitarian Work Act of 2006 (VHWA).²⁰⁴ The law recognizes three different forms of national organization:

- A “charitable organization” which is defined as an “organization that may be established by citizens, groups or individuals and having the financial ability to establish and sustain charitable activities.”²⁰⁵
- A “civil society organization” which is “a civil society organization that practices voluntary and humanitarian work for not-for-profit purposes and which is registered in accordance with the provisions of” the VHWA.²⁰⁶
- A foreign voluntary organization operating as a “non-governmental, or semi-governmental organization, having international, or regional capacity, which is registered under the provisions of the act, or licensed to work in the Sudan, in accordance with a country agreement”.²⁰⁷

As in some other countries, the focus of the act is on humanitarian action and groups that are focused on advocacy and research are not explicitly recognized. Other types of registrations are made possible by other acts like the Cultural Group Act 1996 and the Companies Act which provides for the registration of companies limited by guarantee. Although these are not specifically intended to cover CSOs, it is possible that some CSOs could register under these alternative laws.

As elsewhere in the region, the VHWA requires registration in contravention of international standards. As in South Sudan, operating the organization without registration can attract a serious penalty, in this case a fine and/or confiscation of the organization’s assets.²⁰⁸

The application for registration requires a number of documents, most of which are fairly similar to those requested in other countries. In Sudan, however, an organization must present a list of not less than 30 members.²⁰⁹ Organizations may be granted exemption from this rule by the Minister for Humanitarian Affairs. This provision may inhibit the work of organizations in two ways. First, for an organization in the initial stages of its development, it may be difficult to mobilize 30 members. Second, this may violate the rights of groups of less than 30 persons to freedom of association. Finally, this may pressure organizations to adopt a membership

²⁰³ Ibid.

²⁰⁴ Voluntary and Humanitarian Work Act, 2006, available at <http://www.refworld.org/docid/4c0370272.html> (accessed March 21, 2017).

²⁰⁵ Ibid., Article 4.

²⁰⁶ Ibid.

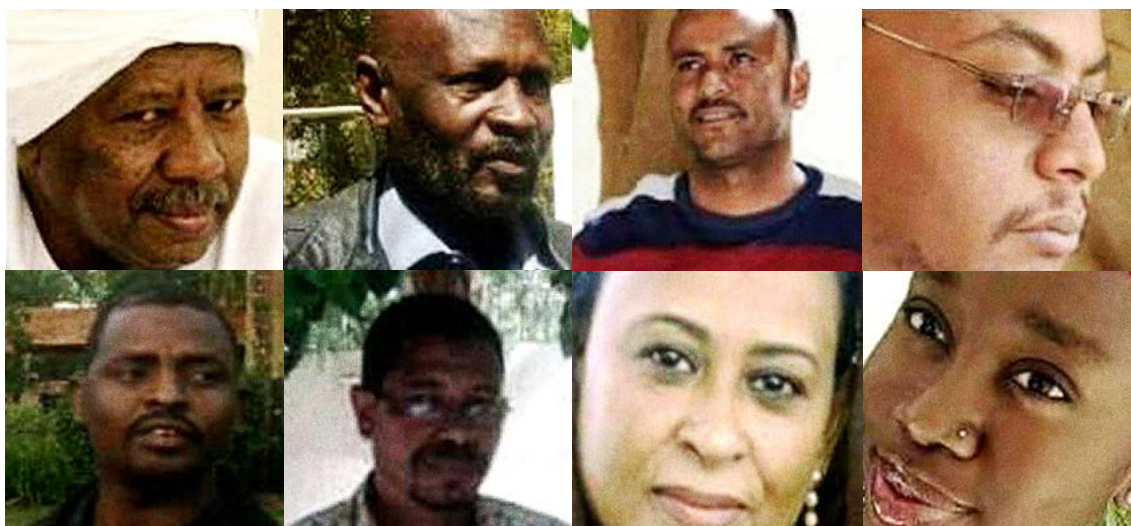
²⁰⁷ Ibid., Article 4

²⁰⁸ Ibid., Article 23, Article 24.

²⁰⁹ Ibid.

structure, which can complicate management by requiring consultation with a large number of members.

The application should also include proof of financial and technical ability. Although no specific standards are set, this might in practice hinder new organizations from obtaining registration as they will not have yet had time to mobilize very much in the way of resources.²¹⁰



Eight defendants affiliated with TRACKs center were detained in May 2016. Some remained in prison for ten months.

NGOs are required to renew their registrations annually, which adds an unnecessary burden for those organizations. Another obstacle for the registration of NGOs is the time limit established for the process. Although there is a set limit of one month for the registrar to issue a registration certificate (three months for foreign organizations), there is no safeguard that this will actually take place, e.g. through de facto consideration of registration or automatic issuing of the registration if the process drags on beyond the prescribed time.²¹¹ Instead, as pointed out by KACE and the International Center for Not-for-Profit Law (ICNL):

The language used by the Act makes it clear that the period of one month for NGOs to receive a registration certificate starts when the applicant organization satisfies the requirements of registration. This provision allows the registrar to keep the applicant waiting forever without any remedy by requesting more documentation.²¹²

The objectives of registered CSOs are regulated by legislation, the VHWA lists a number of services that NGOs may provide. Services include a long list of possible activities, such as emergency relief, care for internally displaced persons, reconstruction of infrastructure, building of

210 KACE and the International Center for Not-for-Profit Law, "A Study of the Sudanese Voluntary and Humanitarian Work Act 2006, 2015, http://www.sudan-consortium.org/darfur_consortium_actions/reports/2015/Humanitarian%20Law%20StudyF.pdf, (accessed March 21, 2017).

211 Voluntary and Humanitarian Work Act, 2006, Article 10(2).

212 KACE and the International Center for Not-for-Profit Law, "A Study of the Sudanese Voluntary and Humanitarian Work Act 2006, 2015, p.20-21, http://www.sudanconsortium.org/darfur_consortium_actions/reports/2015/Humanitarian%20Law%20StudyF.pdf, (accessed March 21, 2017).

local capacities, and implementing humanitarian projects.²¹³ The list is, however, not exhaustive.

Although some argue that the list should be read as indicative, rather than exhaustive, experience shows that the Humanitarian Aid Commission (HAC) tends to regard this list of activities as exhaustive. Such an interpretation excludes those NGOs working on good governance, advocacy or research as their main objective or activity.

In a far-reaching stipulation, the VHWA bans foreign funding of CSOs without government permission, stating:

1. Grants and funding for organizations shall be through a project instrument to be approved by the commission, as the regulations may elaborate.
2. No civil society organization, registered in accordance with the provisions of this act, shall receive funds or grants from abroad, from an alien person internally or from any other body, save upon approval of the ministry.²¹⁴

This amounts to wide discretion to oversee projects. As noted by KACE and ICNL:

HAC has used this article selectively targeting governance and human rights organizations that are truly seeking to fulfil their purposes.²¹⁵

This power has also been used in order to drastically restrict organizations' access to funding, which to a great extent tends to come from foreign sources. In 2016, a new draft bill regulating CSOs began to circulate. The bill is very similar to the VHWA, but introduces additional restrictions in some areas. At the time of writing the bill remained under discussion.

The legal framework has been used in a number of instances to deliberately target CSOs. In 2009, following the issuance of an arrest warrant against Sudanese President Omar al-Bashir, the government expelled 13 international CSOs and shut down three national ones, with devastating impact for humanitarian action in Darfur and elsewhere in the country. In December 2012, the government shut down four more organizations: the Sudanese Studies Centre,²¹⁶ an organization working to promote dialogue on culture and democracy, the ARRY Organization for Human Rights and Development, an organization working on human rights monitoring in South Kordofan and KACE.²¹⁷ The Registrar of Companies similarly struck many enterprises off the list of companies.

These actions constitute a violation of the right to freedom of association. Indeed, the African Commission on Human and Peoples' Rights explicitly found that the cancellation of the Khartoum Centre for Human Rights and Environmental Development's registration in 2009 was a violation

213 Voluntary and Humanitarian Work Act, 2006, Article 6.

214 Voluntary and Humanitarian Work Act, 2006, Section 7.

215 KACE and the International Center for Not-for-Profit Law, "A Study of the Sudanese Voluntary and Humanitarian Work Act 2006, 2015, p.33, http://www.sudanconsortium.org/darfur_consortium_actions/reports/2015/Humanitarian%20Law%20StudyF.pdf, (accessed March 21, 2017).

216 Registered under the Cultural Groups Act 1996

217 African Centre for Justice and Peace Studies, "Civil Society Organisations Closed in Renewed Clamp Down on Freedom of Association in Sudan," January 9, 2013, available at <http://www.acjps.org/civil-society-organisations-closed-in-renewed-clamp-down-on-freedom-of-association-in-sudan/> (accessed March 21, 2017).

of the right to freedom of association as protected under Article 10 of the ACHPR.²¹⁸

Unfortunately, attacks on the legal status of CSOs is not the only form of attack on CSOs in Sudan. CSOs have also had their bank accounts frozen, their premises raided and their members arrested and tried on dubious charges. Altogether, this creates an incredibly hostile environment for CSOs in the country.

4.2.10. UGANDA

CSOs in Uganda are regulated by the 2016 Non-Governmental Organizations Act (2016 NGO Act)²¹⁹ and the 1939 Trustees Incorporation Act. These laws recognize three types of different categories of not-for-profit organizations, according to their function and purpose:

- NGOs are defined in a fairly broad way in the 2016 NGO Act, as an organization which “may be a private voluntary grouping of individuals of associations established to provide voluntary services to the community or any part, but not for profit or commercial purposes.”²²⁰
- Trusts and foundations that serve as organizations offering grants and loans at beneficial rates to organizations such as NGOs and CBOs. This should be done in support of the organizations’ objectives. Ugandan trusts are regulated by the 1954 Trustees Act, Cap 164 and the 1939 Trustees Incorporation Act Cap 165. Foundations are regulated either under the Trustees Incorporation Act or under the 1961 Companies Act, Cap 110, in which case they function as “companies limited by guarantee”.²²¹
- Community based organizations (CBOs) working for the benefit of a community, but which are generally smaller in size and, as explained by the ICNL, are “predominantly self-help oriented, with the principal aim of improving individual or household welfare, although a few groups take a wider community development role.”²²² A CBO is defined in the 2016 NGO Act as “an organisation operating at a subcounty level and below whose objectives is to promote and advance the wellbeing of the members of the community.”²²³

As elsewhere in the region, registration under the 2016 NGO Act is mandatory, in violation of international standards. Organizations cannot operate in Uganda unless they have been duly registered with the National Bureau for Non-Governmental Organisations and have been issued

218 Communication 379/09 – Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan, 2014, available at http://www.achpr.org/files/sessions/15th-eo/communications/379.09/achpr15eos_decision_379_09_eng.pdf (accessed March 21, 2017).

219 The Non-Governmental Organisations Act, 2016, available at <http://chapterfouruganda.com/sites/default/files/downloads/The-Non-Governmental-Organisations-Act-2016.pdf>, (accessed March 21, 2017).

220 Ibid., Article 3.

221 International Centre for Not-for-Profit Law, “Civic Freedom Monitor: Uganda,” last updated November 26, 2016, available at <http://www.icnl.org/research/monitor/uganda.html>, (accessed March 21, 2017).

222 Ibid.

223 NGO Act 2016, Article 3.

a valid permit.²²⁴ There are penalties in place for carrying out activities through unregistered organizations, in the form of both fines and up to three years imprisonment.²²⁵ Ugandan law also requires CBOs to register with the district local government.²²⁶ The NGO Act lists what is to be included in an application for registration of an NGO, but also states that “[a]n application for registration under this section shall be in a form as the Minister may by regulation prescribe.”²²⁷ This may be used to grant discretionary power to the executive branch in terms of altering or tightening the requirements for registration.

The registration procedures under the 2016 NGO Act are also burdensome. For example, NGOs must submit a registration application to the NGO Board which, as described by the ICNL, must include:

specification of the operations of the organization, area of intended operation, staffing of the organization, geographical area of coverage, location of the organization’s headquarters and date of expiry of the previous permit.

In the case of a foreign organization, a recommendation is required from the diplomatic mission in Uganda of the country from which the organization originates.²²⁸

In addition, any foreign staff recruited to work in Uganda must submit their credentials and a certificate of good conduct to the Ugandan diplomatic in their home country before they assume their respective responsibilities and duties.²²⁹

These restrictions and requirements imposed by the Ugandan government significantly limit the ability of groups to register as NGOs, especially if they are small organizations and lack resources and personnel. The NGO Bureau does not have any time limit within which they must review an application,²³⁰ meaning that the process can be delayed indefinitely at its discretion. This also increases the possibility of authorities denying registration based on formalities. For example, there is the possibility that the registration will be revoked or refused on grounds such as being “prejudicial to the interests of Uganda”. The power to close down organizations will be entirely at the discretion of the NGO Bureau.

CBOs face similar difficulties. The district local governments through which where they should register have no time frame within which they are required to review applications. There are also specified reasons for denying CBO applications for registration.²³¹ This is left entirely to the discretion of the district local government, which is a political body.

²²⁴ NGO Act, 2016, Article 29.

²²⁵ NGO Act, 2016, Article 40.

²²⁶ NGO Act, 2016, Article 20(5).

²²⁷ NGO Act, 2016, Article 31(4).

²²⁸ International Centre for Not-for-Profit Law, “Civic Freedom Monitor: Uganda,” last updated November 26, 2016, available at <http://www.icnl.org/research/monitor/uganda.html>, (accessed March 21, 2017).

²²⁹ NGO Act, 2016, Article 45.

²³⁰ International Centre for Not-for-Profit Law, “Civic Freedom Monitor: Uganda,” last updated November 26, 2016, available at <http://www.icnl.org/research/monitor/uganda.html>, (accessed March 21, 2017).

²³¹ Ibid.

Further, the 2016 NGO Act requires that CSOs get permission from the local authorities in any area to carry out activities and that they sign a memorandum of understanding with those authorities before beginning work.²³² The act also includes inter alia the prohibition of any act “which is prejudicial to the security and laws of Uganda,” or which is “which is prejudicial to the interests of Uganda and the dignity of the people of Uganda.”²³³ The vague nature of this language, like that in other laws in the region, could be abused to target NGOs who are critical of the government.

Additional interference can be seen in the area of staffing. As described by the ICNL:

It is a requirement for every organization to submit to the National Bureau for NGOs a chart showing its structure and staffing and specifying the following: its foreign workforce requirements; requirements for Ugandan counterparts of foreign employees; planned period to replace foreign employees with qualified Ugandans; and compliance with the labour laws of Uganda.²³⁴

The NGO Bureau plays an important part in regulation, having the power to accept or decline the registration of organizations. The Bureau also has the power to “summon and discipline” registered organizations through warnings, suspension of registration, exposing the organization to the public, blacklisting or revocation of registration.²³⁵ Article 9(2)(c) of the NGO Act provides that there should be two NGO representatives on the board of the Bureau. As per the Article, the Minister Internal Affairs General Jeje Odong wrote a letter to two national CSO Networks: Uganda National NGO Forum (UNNGOF) and Development Network of Indigenous Voluntary Associations (DENIVA) to nominate two persons to sit on the NGO Bureau. A process of selecting the two persons was put in place through an online voting process and two persons were finally selected.²³⁶ The names were submitted to the Minister who had promised to table the names in cabinet for final approval, but instead he wrote another letter indicating that the UNNGOF and DENIVA should submit at least 6 names from which cabinet will chose the NGO representatives. Government seem to have been uncomfortable with the names submitted and the process has since stalled.

The NGO Act also establishes NGO Monitoring Committees at the district and sub-county level where security personnel serve as members. These are to be headed by the Chief Administrative Officer. According to Freedom House, this “indicates that there will be limited transparency and credibility, especially when appeals need to be made to a higher level. Several NGOs have noted existing challenges posed by working with RDCs, who often restrict their work.”²³⁷ The bodies also include security officers with limited understanding of NGO

²³² NGO Act, 2016, Article 44.

²³³ Ibid.

²³⁴ International Centre for Not-for-Profit Law, “Civic Freedom Monitor: Uganda,” last updated November 26, 2016, available at <http://www.icnl.org/research/monitor/uganda.html>, (accessed March 21, 2017).

²³⁵ NGO Act, 2016, Article 7.

²³⁶ The two elected CSOs representatives were Ms. Margaret Sekaggya, Executive Director of Human Rights Center, and Mr. Arthur Larok, Country Director of Action Aid Uganda.

²³⁷ Rowena Kamasai Kagaba, “Uganda’s Restrictive New Bill”, Freedom House Blog, July 8, 2015, available at <https://freedomhouse.org/blog/uganda-s-restrictive-new-ngo-bill> (accessed March 21, 2017).

work serving on the committees.²³⁸ There is also provision for inclusion of “a representative of organizations in the district.” Although inclusion of CBO perspectives on the committee is welcome, the wording of the bill is ambiguous and could allow anyone to be included and the selection process these representatives is unclear.

Freedom House has further stated that:

These discretionary and undefined powers are of grave concern to NGOs. The board is free to interpret the law subjectively and punish organizations for virtually any reason, such as criticism of the government. As a possible solution to these problems, the interpretation clause should be revised to define the permissible disciplinary actions, specify the circumstances under which they can be imposed, and provide for judicial oversight to review these actions.²³⁹

In Uganda, an organization’s certificate can be revoked by the Bureau if:

- the organization does not operate in accordance with its constitution;
- the organization contravenes any of the conditions or directions specified in the registration permit.²⁴⁰

In addition, the regulations provide that an organization may also be dissolved by order of the High Court if it is:

- defrauding the public;
- threatening national security; or
- grossly violating the laws of Uganda.²⁴¹

Before a decision is made by the Bureau to revoke the registration of an organization, they are required to give 30 days’ notice to the organization to appear before it and show cause why it should not be dissolved.²⁴² Where an organization fails to satisfy the Bureau as to the need for its continued existence, or fails to appear, the it shall be dissolved.

The 2016 NGO Act introduced the right of appeal to the District Non-Governmental Monitoring Committee, the Bureau, or the Adjudication Committee.²⁴³ In addition, an aggrieved person may invoke Article 42 of the 1995 Constitution which guarantees the right to be treated fairly and justly and the right to apply to a court of law in respect of any administrative decision taken against that person. Article 28 of the Constitution provides for the right to a fair and speedy hearing before an impartial and independent court or tribunal. Thus, it would seem that the decisions of these bodies are appealable in regular courts.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ NGO Act, 2016, Article 33.

²⁴¹ NGO Act, 2016, Article 50.

²⁴² NGO Act, 2016, Article 33(2).

²⁴³ NGO Act, 2016, Article 52-53.



Civil society leads a protest against sexual violence in Kenya, November 2016. Photo courtesy of the National Coalition of Human Rights Defenders.

Photo: National Coalition of Human Rights Defenders - Kenya

The NGO Act has been controversial and much debated, as it is seen to further restrict the freedom of association of NGOs.²⁴⁴ It has been criticized by many commentators for aiming at contracting space for civil society.²⁴⁵

Although the environment for CSOs in Uganda is still relatively open, cases of harassment have been increasing. In particular, LGBTI events have been raided or blocked by police and activists have been harassed.²⁴⁶ The Public Order Management Act has been selectively applied by the police to restrict peaceful protests. A series of repressive measures, including the blocking of social media, were also undertaken around the 2016 elections. Efforts by CSOs in Uganda to seek redress through courts of law have not yielded fruit. For example, Human Rights Network Uganda, Anti-Corruption Coalition Uganda, Advocates Coalition for Development and Environment, Development Network for Indigenous Voluntary Associations, Uganda National NGO Forum, Uganda Women's Network, Uganda Land Alliance, and Environmental Alert jointly petitioned the court in 2009 under Article 137 (3) (a) of the Constitution challenging sections of the previous Non-Governmental Organizations Registration Act but lost the case in 2015 after a long wait.

244 Lizabeth Paulat, "Ugandan Parliament Passes Controversial NGO Bill," VOA News, December 15, 2015; Karen Attiah, "Uganda's NGO bill: Another threat to freedom in East Africa," Washington Post, September 11, 2015.

245 Karen Attiah, "Uganda's NGO bill: Another threat to freedom in East Africa," Washington Post, September 11, 2015, available at https://www.washingtonpost.com/blogs/post-partisan/wp/2015/09/11/ugandas-ngo-bill-another-threat-to-freedom-in-east-africa/?utm_term=.7b0e1329f357 (accessed March 21, 2017).

246 CIVICUS, "LGBTI Activists, Protestors and Journalists Targeted in Uganda," October 7, 2016, available at <https://monitor.civicus.org/country/uganda/>, (accessed March 21, 2017).

5.

Key findings, policy implications and recommendations

CSOs in the HoA are facing an increasingly restrictive legal environment. Although states have a legitimate interest in fostering values of integrity, transparency and accountability among CSOs, the laws that have been adopted to date are ineffective in advancing these goals. Indeed, the legislation seems more focused on limiting unwanted criticism than on advancing legitimate aims. In a number of countries, the legislation has discriminated among CSOs, favoring those distributing humanitarian aid over advocacy and research institutions. Further discrimination occurs in practice, where legal actions disproportionately target those that work on particularly controversial issues such as human rights, governance, rule of law and corruption. Even where implantation is targeted, however, legislation has a significant impact on all CSOs.

The government of Djibouti rarely tolerates independent CSOs. Most government affiliated organizations enjoy more freedom and greater cooperation, including funding of their activities.²⁴⁷ This tension is exacerbated by the lack of a clear legal regime, which makes it the system subject to caprice and subjective determinations.

Eritrea is the only country in the region that is ruled without a constitution, and run without elections. Eritrea was also the first to set the trend of shrinking space for CSOs in the HoA. The legal standing of CSOs is non-existent, and even UN agencies and very established international organizations like the ICRC find it very difficult to operate in Eritrea.

²⁴⁷ Interview with key informant.

Eritrea's 2005 Proclamation on Non-Governmental Organizations reflects this antagonism towards CSOs, even those devoted to aid and development, let alone policy and advocacy. No political or civic organizations are permitted apart from those controlled by the regime.

Since the 2009 CSOs law, Ethiopia has the among most restrictive normative, institutional and implementation frameworks on CSOs. Some of the mechanisms of control adopted by Ethiopia, such as limiting international funding, are increasingly being adopted the region, something that can only be threatening to civil society and to human rights generally in the Horn of Africa.

Kenya has taken a leading role by adopting a relatively progressive law, but this leadership is undermined by the fact that the law is not yet operational. Nonetheless, civil society in the country is able to operate relatively freely, but one needs to recognize the contribution of civil society and the Kenyan judiciary in protecting the operating space for CSOs. Organized CSO engagement has blocked attempts to make regressive amendments to the bill and the judiciary has ruled in favor of CSO rights in calling for implementation of the new law and also requiring registration of some controversial organizations.

The current legal environment in Rwanda is nominally supportive of CSOs, but in practice there are serious restrictions on operations, especially on controversial or contested topics. Practical experiences in Rwanda portray most NGOs as policy implementers due to the fact that they have limited capability and the space does not encourage them to influence policy or shape the country's political and legal framework. In the Rwandan legal system, there are very few normative limitations on the registration, funding and activities of CSOs. CSOs are not taxed. But in practice, few CSOs are able to work on governance issues. The overwhelming majority of Rwandan CSOs work on social development projects and hardly ever participate in advocacy programs.²⁴⁸

In Somalia, CSOs face a wide range of threats. Although many CSOs enjoy a productive working relationship with the government, those that have raised controversial issues have been subject to harassment. CSOs are also subject to attack by non-state actors in an extremely insecure environment. There is no CSO regulating legislation in Somalia, but organizations are required to register with the government.

In South Sudan, the situation for civil society has been deteriorating rapidly amidst an extremely worrying human rights situation. Although civil society space had been contracting for some time prior to its passing, the 2016 NGO Act represents a worrying step backward. The law created labyrinthine registration requirements and a framework for government monitoring and control of CSOs. In addition, CSOs have had to dodge both reprisals from the government and rebels in an increasingly divided society.

The government of Sudan oversees a hostile environment for CSOs. Not only is the 2006 VHWA Act among the most restrictive in the region, forbidding access to foreign monies without permission and creating onerous registration requirements, CSOs are also subject to other forms of harassment, from arrest, interrogation and prosecution on politically motivated charges.

²⁴⁸ Gloria Tengera, Rwanda, available from http://www.icnl.org/research/journal/vol12iss2/special_5.htm (accessed February 12, 2017).

The government has forcibly closed many organizations, while others have moved out of the country under pressure.

Uganda, which had previously been known as a relatively open space for the operation of CSOs, passed restrictive legislation in late 2015. This legislative change appears motivated by a desire to better control civil society. However, it is only through application of the law over time that the full extent of its impact will be understood.

In some sense this attack comes as a result of the increased funding, prominence and legitimacy accorded to CSOs by the international community. This status has contributed to a backlash from many African states. In some sense, this is a response by states to the success of those same CSOs in garnering international attention and respect. In other cases, this is an attempt to reclaim functions that are traditionally ascribed to the state. The current legislation does not distinguish between the organic CSOs that are part and parcel of society, such as traditional and faith-based associations, and those externally driven NGOs that are concerned primarily with development and human rights.

Another pattern of attack against CSOs in the region has been built around the notion that CSOs are motivated and propelled by foreign interests. The roles of CSOs and NGOs are at times highly politicized.²⁴⁹ Governments in the region tend to associate Western NGOs with the political economic power structure of their home countries. For ideologically-driven groups in the region, globalization is a means to propagate Western values and promote those interests. Western NGOs are seen as tools to promote these interests. In addition, the resources that some CSOs are able to raise abroad and bring to bear in resource-poor countries can create tensions. These may be driven both by jealousy and by legitimate concerns about the possible distorting effects of these cash inflows. Some international NGO staff are paid extremely well by local standards, sometimes more than their government or private sector colleague (and often more than local staff as well). Thus, they are sometimes considered as “rich” and exposed to allegations of corruption and abuses of funding collected in the name of the public. Low visibility and weak communications by CSOs resulted in limited resource bases, limited leadership and limited operational capacity.

Due to the damaging legacies of Western policies such as colonialism and structural adjustment programs, among others, African societies have considerable reason to treat foreign intervention with suspicion. Restrictive governments, however, are exploiting these concerns to undermine locally led and founded CSOs who seek international support. In some countries, these attacks have been legal, requiring government permission to receive foreign funding (as in Sudan), or restricting CSOs to a certain percentage of foreign funding (as in Ethiopia). In other contexts, attacks have been rhetorical with governments mobilizing citizen concerns about international meddling to discredit CSOs raising legitimate concerns about government performance.

NGOs are often viewed by governments as encroachers and threats to the status quo. Consequently, in some African countries, the political hostility has increased. This backlash from governments against CSOs aims at “muting” advocacy from organizations that are critical of incumbent governments. CSOs have been inventive in trying to adapt to these restrictions. In some countries,

249 James McGann, Think Tanks and the Transnationalisation of Foreign Policy, Foreign Policy Research Institute, May 2008.

organizations may register as for profit companies or other types of organizations, foregoing the tax and other benefits of not for profit status in an effort to avoid these restrictive provisions. In other circumstances, they have sought to develop new income generation strategies less dependent on international partners.

A vital requirement of a viable democracy is the active participation of the citizenry in social and political movements. Democracy is best served by a healthy relationship between the government and CSOs but in the countries of study, this relationship is often problematic, especially as governments and CSOs usually do not tend to share a common vision or world view. Relations are characterized by what one may call “mutual assured distrust”. Public interest that requires regulating NGOs is best achieved by making them accountable to an independent body that should not act under the direction or control of the government. This is not however the trend that prevails in the region.

Each of the states reviewed above recognizes, at least to some extent, freedom of association as a right. These states are legally bound by international treaties, and the freedom of association provisions of the ACHPR, ICCPR and UDHR. With the exception of Eritrea, they also all recognize freedom of association and assembly in their national constitutions, with varying safeguards against derogations. Under international law, such derogations are justifiable only if “necessary in a democratic society” and similar language is included in some constitutional frameworks.

These guarantees are, however, only as strong as the national normative and institutional framework that enforce them at the domestic level. Too many regressive and repressive new laws have eroded the actual value of these constitutional norms by putting in place obstacles to NGO registration and reregistration, operation, funding and onerous reporting procedures. Gravely undermining these constitutional and legislative norms, the regulatory and institutional frameworks affecting CSOs are conferred broad discretionary powers, sometimes without oversight by effective judicial review mechanisms.

While registration by itself is not illegal from the perspective of international law, the registration requirements of many countries in the region make CSOs establishment and operations practically very difficult. Registration should not be mandatory, but it is in many countries. The registration procedures of individual states are extremely cumbersome, and the requirements are deliberately designed to be practically impossible to fulfil. The frequency with which renewal of registration is required and the broad circumstances in which cancellation of registration are possible, constitute additional mechanisms to keep CSOs intimidated and weak, and to impose self-censorship in their work. Moreover, the legislation imposes restrictions on CSOs based on their objectives and the purposes for which they were established. Most of the limitations and restrictions on fundamental freedoms are rationalized in terms of public security, public order, public health and safety, and the freedoms of others.

CSOs in countries of the HoA region face similar challenges, as well as opportunities in their work. While the trend towards shrinking civil society, space is real, it is not irreversible. Regional governments, CSOs, regional and continental institutions and international partners can reverse this trend through coordinated action. The recommendations below are a first step towards building a shared platform for action.

5.1. Recommendations

5.1.1 TO REGIONAL GOVERNMENTS

Governments in the region should:

1. Review their laws and policies relating to the operation of CSOs to ensure that these respect legal protections in respect of freedom of association under international law, AU and RECs policy instruments and their own national constitutions;
2. Ensure that registration procedures at the national level based on notification procedures rather than discretionary;
3. Provide enabling an environment for CSOs to establish self-regulatory mechanisms to ensure transparency and accountability of CSOs to the population;
4. Enable CSOs to engage in revenue generation schemes, tax exemptions, local resource mobilization;
5. Ensure that bodies carrying out registration and oversight are independent and transparent administrative bodies not subject to political interference; and
6. Ensure that decisions made by administrative bodies with regards to CSOs are subject to judicial review in the courts.

5.1.2 TO REGIONAL CIVIL SOCIETY

Civil society organizations in the region should:

1. Work to ensure their own relevance, integrity, accountability and legitimacy in regard their own local areas and constituencies;
2. Share research and best practices on how CSOs should address the peculiarities of their operational circumstances, promote local expertise, exhibit greater efficiency and effectiveness, create meaningful engagement with youth and local communities, and promoting a transformative gender agenda;
3. Expand existing local and social accountability programs that hold government authorities accountable for better service delivery;
4. Build local and national revenue generation capacity;
5. Work closely with the AU, IGAD, EAC, UN, ACHPR and other actors to make use of their mandate in influencing governments in the region, including challenging the validity of new legislation under regional and international law;
6. Actively participate in regional and continental forums for ensuring CSO engagement;

7. Bring cases related to the treatment of CSOs to the African Commission on Human and Peoples' Rights;
8. Advocate with the African Union organs to ensure the full participation of CSOs from the HoA in the African Governance Platform its reporting process elaborated in the AU Charter;
9. Regularly exchange information, research, analysis and expertise with the AU, IGAD and the EAC, including through the invitations of the AU, IGAD and the EAC when convening conferences, seminars and workshops, as well as study tours;
10. Continue carry out evidence-based advocacy for alternative governance frameworks on CSOs at local, national, regional, continental and global levels; Assist member CSOs to establish potential strategic partnerships with IGAD, EAC and the AU;
11. Report and draw attention to attacks on civil society and shrinking space for civil society in the region;
12. Share strategies for coping with repressive environments across the region.

5.1.3 AFRICAN UNION, IGAD AND EAC

The AU, IGAD and EAC should:

1. Ensure that regional CSOs are able to actively participate in decision making at the regional and continental level, including by consulting regional CSO forums and ensuring that CSOs with expertise are invited to relevant regional meetings;
2. Engage with the national governments which host them to ensure that national laws and policies create an enabling environment for CSO engagement;
3. Partner with CSOs to promote ratification, domestication and implementation of relevant continental and regional legal instruments, particularly the African Charter on Democracy, Elections and Governance;
4. Consider developing model laws on the regulation of CSOs at the regional and continental level to encourage the adoption of progressive laws and policies;
5. Jointly develop projects for funding joint projects with CSOs; and
6. Encourage partners to support CSOs.

5.1.4 TO INTERNATIONAL PARTNERS

International partners should:

1. Advocate with regional governments to make a progressive environment for CSOs a priority.
2. Take the lead in the creation of a basket fund that would enable CSOs to enjoy multi-year funding for carrying out long-term strategic institutional and financial reforms that would assure financial sustainability;
3. Politically and financially support the AU, IGAD, EAC and national governments as well as local institutions to support CSO efforts by encouraging them to develop African-owned processes and develop model national laws governing CSOs;
4. Jointly consult and plan with CSOs at local and national levels as well as regional platforms to ensure that transparency and actual solidarity are promoted and strengthened in the face of adversity from governments;
5. Apply a simplified grant application and reporting process; and
6. Increase the funding size dedicated to supporting CSOs, both at local and national levels where possible.



Sint Jacobsstraat 12
3511 BS Utrecht
The Netherlands

www.paxforpeace.nl
info@paxforpeace.nl
+31 (0)30 233 33 46

P.O. Box 19318
3501 DH Utrecht
The Netherlands