

Protecting Civil Society, Faith-Based Actors, and Political Speech in Sub-Saharan Africa

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Good afternoon, Honorable Chair Smith and Esteemed Members. It is my great honor to be here with you today on behalf of the International Center for Not-for-Profit Law.

ICNL focuses on the legal environment for civil society, so I have been asked to address the first theme of this hearing “protecting civil society.” I will leave it to the other distinguished panelists to address specific issues related to faith-based actors and political speech, but I will use the term civil society broadly to include non-governmental organizations, people’s movements, community-based organizations, charities, cooperatives, social and sports clubs, professional associations, faith-based organizations, and not-for-profit media.

At ICNL, we have worked with partners in civil society, government, and the diplomatic community in over 100 countries, including 20 nations in Africa, to improve laws relating to the freedoms of association, assembly, and expression. We are grateful to the United States Agency for International Development (USAID) and the State Department’s Bureau for Democracy, Human Rights and Labor for their continued support of our work in Africa and around the globe. In particular, the USAID-funded Legal Enabling Environment Program has facilitated ICNL’s rapid response interventions in more than 10 African countries when draft laws related to civil society were under consideration.

Why do we do this work? We have seen that people working together are capable of great things. From the struggle against apartheid in South Africa, to preserving urban forests in Nairobi; from insisting on peace in war-ravaged Liberia to fighting disease and poverty throughout the continent; civil society has been at the front lines of positive change.

Global Trend

Unfortunately, we are in the midst of a global trend of increasing legal restrictions on civil society. Since 2012, 72 governments have proposed or enacted 144 laws restricting civil society and the rights to freedom of association and assembly.¹ In sub-Saharan Africa, we've seen at least 38 restrictive initiatives in 19 countries.

Disaggregating the data on legislation restricting the freedoms of association and assembly:

1. 47% of the restrictive initiatives limit the ability of people to form or operate civil society organizations (so-called “**lifecycle legislation**”);
2. 28% of the restrictive initiatives limit the ability of organizations to **access funding** from the United States and other international sources; and
3. The remaining initiatives restrict the right to **peaceful assembly**.

In addition to restrictions on the freedoms of association and assembly, we are also finding countries curtailing the **freedom of expression**. For example, in Tanzania a citizen was convicted under the *Cybercrimes Act, 2015* for calling the president an “imbecile” on Facebook.²

Africa in Focus

The four countries that are the focus of this hearing: Sudan, South Sudan, Democratic Republic of the Congo, and Rwanda, have not been immune to this global trend.

In **Sudan**, civil society organizations are regulated under the *Voluntary and Humanitarian Work Act, 2006*. According to this law, organizations must receive prior approval from the government before they can receive foreign funding. A 2013 policy explicitly limited foreign funding to humanitarian projects, prohibiting international support for human rights, environmental advocacy, or economic development. Given that local support for independent civil society groups is virtually nonexistent, restrictions on foreign funding significantly impede the viability of these groups. There are currently amendments to the Act under consideration, but they would increase the barriers to freedom of association. Among the proposed changes is an increase in the minimum number of members of an organization from 30 to 60—a change that would make it more difficult for small organizations or those that have missions disfavored by the government to form.³ In

¹ “Infographics: Civic space explained”, *SUR 26* (2017), accessed May 6, 2018, <http://sur.conectas.org/en/infographics-civic-space-explained/>

² See, *Republic v. Isaac Habakuk Emily*, as reported by the Centre for International ICT Policy in East and Southern Africa (CIPESA), “State of Internet Freedom in Tanzania 2016,” p. 11, https://cipesa.org/?wpfb_dl=229

³ ICNL, “Civic Freedom Monitor – Sudan,” <http://www.icnl.org/research/monitor/sudan.html>.

practice, the government harasses and arrests civil society advocates, media professionals, and participants in public assemblies. The most recent example is the January 2018 protest over proposed austerity measures in the national budget during which at least 8 civil society leaders were arrested and held incommunicado.⁴

In **South Sudan**, advocacy is not among the permissible objectives of civil society organizations, making it unclear what rules apply to organizations involved in advocacy activities. Express government approval is required for all activities carried by civil society organizations, severely limiting the independence of the sector. The commission in charge of registering civil society organizations has excessively broad authority to deny registration if an organization is involved in “tribal and political differences in the country.”⁵ For example, in 2016 the government sent letters to several civil society organizations that are outspoken on policy issues, advising them that they should register as political parties.⁶ This type of enforcement action can have a chilling effect, discouraging organizations from participating in policy-making processes.

In the **Democratic Republic of the Congo**, freedom of assembly has been under threat as public protests related to the delayed presidential elections have spread. The UN found that 47 protesters had been killed in the 13 month-period ending January 31, 2018.⁷ According to a 1999 decree, prior government authorization is required to hold a peaceful protest, even though this requirement is contradictory to international and regional law.⁸ The African Commission on Human and Peoples’ Rights has issued Guidelines on Freedom of Association and Assembly in Africa and emphasized that, “participation in and organizing assemblies is a right and not a privilege, and thus its exercise does not require the authorization of the state.”⁹ In 2016, the Mayor of Lubumbashi in southern DRC went further and banned all public demonstrations involving civil society organizations. Meanwhile, our partners report that a new law governing civil society organizations is currently being drafted and would target human rights defenders by requiring them to be certified by the government and carry human rights defender identification cards in orders to engage in human rights promotion. Allowing the government to decide who can advocate for human rights would severely compromise civil society’s ability to hold the government accountable for rights violations.

⁴ FIDH, “Urgent Appeal: Sudan” (February 8, 2018), <https://www.fidh.org/en/issues/human-rights-defenders/sudan-incommunicado-detention-of-8-human-rights-defenders-lawyer-and>.

⁵ USAID, Civil Society Sustainability Index (2016), p. 219, <https://www.usaid.gov/africa-civil-society>.

⁶ Ibid.

⁷ United Nations, “DR Congo: freedom of assembly curtailed by force” (March 21, 2018), <https://news.un.org/en/story/2018/03/1005581>.

⁸ ICNL, “Civic Freedom Monitor – DR Congo,” http://www.icnl.org/research/monitor/congo_drc.html.

⁹ ACHPR, “Guidelines on Freedom of Association and Assembly in Africa” (2017), para. 71, http://www.achpr.org/files/instruments/freedom-association-assembly/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf.

In **Rwanda**, the existing legal framework for civil society is relatively enabling, but in practice regulatory officials often impose additional requirements and restrictions on organizations that are not in the law. For example, the law requires new organizations to submit four simple documents to obtain a certificate of registration.¹⁰ The implementing guidelines on the government agency's website list three additional requirements including a letter of collaboration from the Mayor¹¹ and Rwandan organizations have reported being asked for many more documents, creating a significant administrative burden and leaving organizations unable to know what might be required of them. The government is currently drafting amendments to the 2012 laws governing local non-governmental organizations, international organizations, and faith-based organizations to align these laws with changes to the structure of the administrative body in charge of regulating civil society. The government has held consultations with all three constituencies over the last six months regarding the proposed amendments and we hope that the concerns raised by civil society organizations, including clarifying registration requirements, will be incorporated into the final drafts of the bills before they are presented to parliament.

A few other laws bear mention:

- In **Ethiopia**, the *Charities and Societies Proclamation, 2009* prohibits organizations working on human rights and other related areas from receiving more than 10% of their funding from international donors. This has led to the closure of all but a few rights-based advocacy organizations.
- In **Burundi**, in 2014 in preparation for a controversial election, running clubs were banned by presidential decree based on the suspicion that exercise groups were in fact unauthorized public demonstrations.
- In **Uganda**, a civil society organization is required to obtain six separate approvals from government entities before it can commence activities, posing a substantial administrative burden on organizations and contradicting the international legal principle that the freedom of association must include the right to participate in informal, unregistered organizations.

Success Stories

In the face of this negative trend, though, African civil society has achieved some important victories. In 2014, the parliament of **Kenya** sought to introduce a 15% cap on foreign funding for civil society organizations following the model of the Ethiopian

¹⁰ Article 18, Law No. 04/2012 of 17/02/2012 governing the organisation and functioning of national non-governmental organisations. <http://www.icnl.org/research/library/file//s/Rwanda/Rwanda%201.pdf>

¹¹ <http://rfgb.rw/non-governmental-and-faith-based-organisations/non-government-organisations/registration/>

proclamation. However, civil society activists formed a broad and well-organized advocacy coalition against the proposed amendments, and strategically partnered with the US embassy in Nairobi and other diplomatic partners, to pressure the government of Kenya to change course. Eventually, members of parliament were convinced that if the foreign funding cap were introduced, thousands of Kenyans receiving anti-retroviral treatments for HIV would be without medication. The amendments were withdrawn.

In **Nigeria**, a 2015 bill regulating social media would have criminalized online criticism of the government; the law's terms were so vague that they could have been read to prohibit private messages disparaging political leaders or their policies. Here again, a well-coordinated advocacy effort by Nigerian civil society, in collaboration with the diplomatic community, convinced members of parliament that the bill was ill-advised, and it was withdrawn.

Just last week, **Tanzanian** civil society and independent media advocates successfully challenged the so-called "Bloggers fee" in court. The *Online Content Regulations, 2018* require anyone posting information online to pay a fee of over \$900. After a suit was filed, the court issued a preliminary injunction to prohibit the government from enforcing the law while the case is ongoing.¹²

Recommendations

I humbly offer a few recommendations for how this subcommittee can help support these kinds of victories in the effort to secure fundamental freedoms for people in Africa:

- *Appropriations and Funding.* At least 10 African countries are currently considering laws to restrict civil society. As stated in a recent Congressional Research Service Report, very little funding is invested in advancing civil society legal reform. Congress should address this issue through the appropriations process, and the starting point is to preserve current funding for democracy and governance programs, which for the past three years has included \$2.3 billion for Democracy Programs and \$170 million for the National Endowment for Democracy, and to protect enacted funds for democracy assistance from rescissions.
- *Oversight of Agencies and Departments.* Congress should conduct oversight of federal agencies and departments, including those involved with counter-terrorism, national security, defense, and international trade, to assess the extent to which different parts of the government are supporting – or undermining – the legal space for civil society.

¹² <http://www.bbc.com/news/live/world-africa-43947259>

- *Legislation and Resolutions.* Congress should include language supporting independent civil society in legislation and resolutions. An example is the “Brownback amendment,” stating that democracy and governance activities shall not be subject to prior approval by the government of any foreign country.
- *Fact-Finding and Dialogue.* Members and staff should continue to meet with civil society representatives in the United States and internationally. Congress might also consider a fact-finding mission to gather information on this issue, similar to the fact-finding mission undertaken by staff of the Senate Committee on Foreign Relations in 2006 that addressed Non-Governmental Organizations and Democracy Promotion, “Giving Voice to the People.”¹³
- *Engagement with Legislative Counterparts.* Members should engage on civic space issues with their parliamentary counterparts in Africa.
- *Leading by Example.* Congress should continue to engage directly with civil society through hearings such as this one and ensure that laws and policies support civil society and philanthropy both in the United States as well as internationally.

I thank the Subcommittee for the opportunity to testify and for its interest in these important issues.

¹³ https://fas.org/irp/congress/2006_rpt/democracy.pdf