

**EXPLORING THE POSSIBLE MISAPPLICATION OF ANTI MONEY LAUNDERING AND COUNTER-TERRORISM
FINANCING (AML/CFT) LEGISLATION IN THE UPCOMING ELECTION CYCLES IN AFRICA**

An Overview of Key Concerns and Possible Actions for a Resilient Civic Space

Briefing Note

October 2020

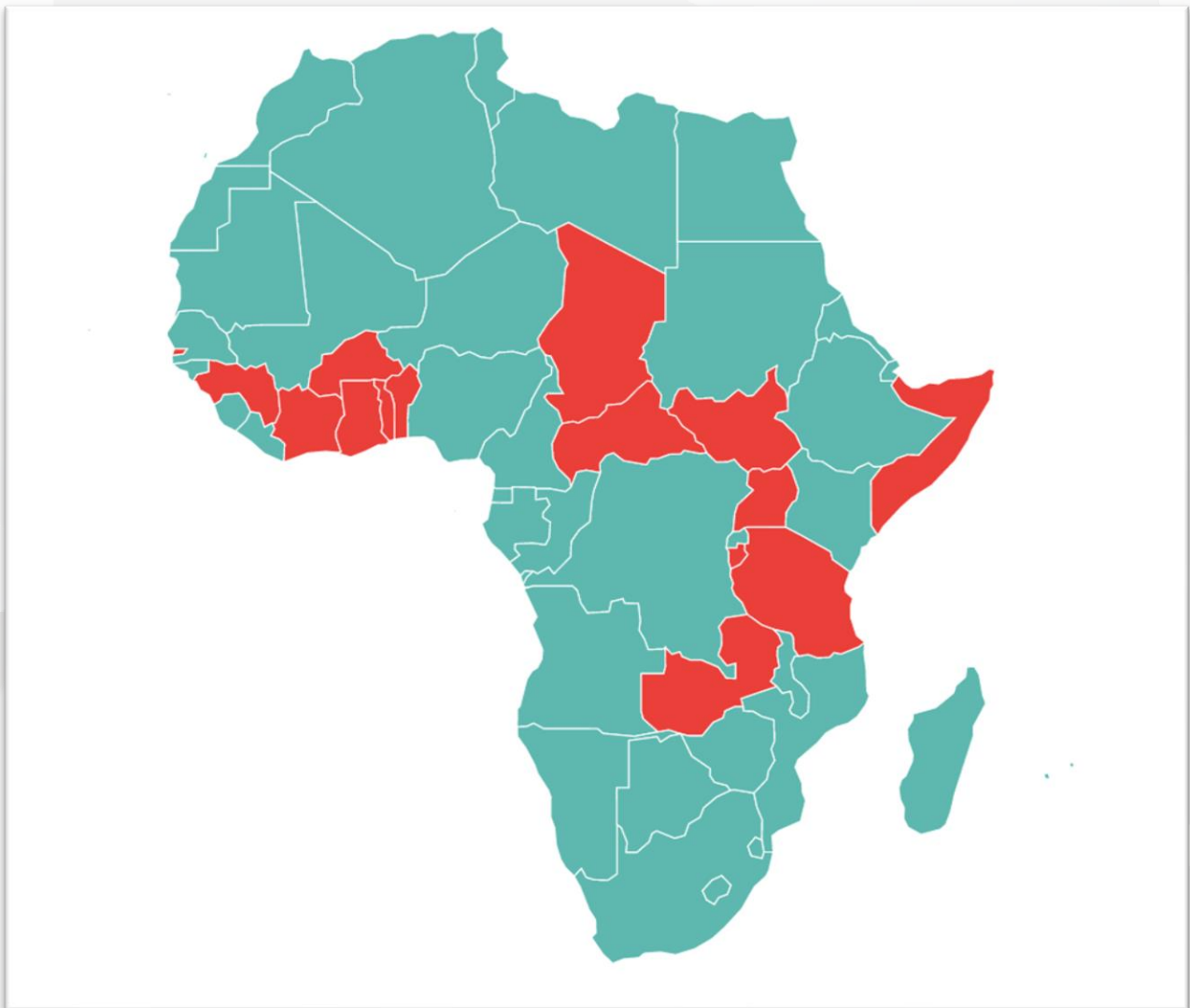


TABLE OF CONTENTS

| | |
|--|----|
| Executive Summary | 3 |
| 1. Introduction | 4 |
| 2. FATF Style legislation on AML/CFT in African Countries with Upcoming elections | 7 |
| 3. Fundamental human rights concerns arising from similarities between AML/CFT legislation in Africa..... | 9 |
| 4. Exploring possible scenarios resulting from the enforcement of AML/CFT legislation in the upcoming election cycle..... | 11 |
| 4.1 Select scenarios..... | 12 |
| 5. Recommendations..... | 14 |
| A. Creating awareness on domestic AML/CFT legislation with a focus on possible implications on NGOs..... | 14 |
| B. Establishing and strengthening local structures to pushback against the unintended consequences of AML/CFT legislation on civic space | 15 |
| C. Enhancing dialogue between NGOs with local regulators and regional FATF style bodies | 16 |

Executive Summary

As the percentage of African countries holding democratic elections increased from 7 to 40 per cent, participatory politics rose in the 1990s and 2010s, multiple forms of violence and irregularities have marred elections in various African states.¹ Such deficits have led to the development and implementation of civil society initiatives to promote democratic governance and the rule of law leading to clashes and opposition from various state actors. Strong civil society is essential in to challenge the systemic disparities that which arise from the elevation of specific interests, voices or values over others.

Also, by continuing to track, influence and speak out on governance issues, civil society plays a vital role in the time between elections. However, laws and policies that constrain civil society have flourished, most frequently through overt efforts to unduly limit the rights to freedom of peaceful assembly and association. Stigmatisation, excessive funding obstacles, and the wilful misapplication of anti-terrorism and other laws are techniques that have been used by states to regulate and limit civil society behaviour.² Unfortunately, elections also pose a heightened period of danger for human rights defenders (HRDs). For instance, Counter-terrorism laws are continually being misused to target the legitimate work of civil society, mostly with broad and ambiguous language; NGO and Media Bills are increasingly being passed, promoting judicial prosecutions under the guise of ‘threatening national security’ against independent human rights organisations and media outlets. Furthermore, NGOs have been met with organisational and legal limitations in recent years due to anti-terrorism legislation. For example, banks have blocked or closed accounts of organisations operating in war zones; laws have been enforced to restrict foreign funding or impose burdensome standards for governance and audit; human rights defenders have been arrested, and the freedom to dissent has been restricted, among others.³

This briefing note focuses on the upcoming election cycle in eighteen (18) African countries between late 2020 through 2021. It explores possible misapplication of national AML/CFT legislation to restrict legitimate activities of civil society actors further. Furthermore, it highlights examples of existing AML/CFT legislation in select African countries scheduled to have elections between 2020 and 2021. Additionally, it highlights critical human rights concerns arising from such legislation; and further explores possible scenarios of a restrictive application of AML/CFT legislation during the election cycle on the continent. The brief identifies three priority areas for action for NGOs, donors and regulators, thus: 1) Creating awareness on domestic AML/CFT legislation with a focus on possible implications on NGOs; 2) Establishing and strengthening local structures to pushback against the unintended consequences of AML/CFT legislation on civic space, and 3) Enhancing dialogue between NGOs with local regulators and regional FATF style bodies.

¹ See generally, Freedom House, "Electoral Democracies," in Freedom in the World 2010, available at www.freedomhouse.org/uploads/fiw10/ElectoralDemocraciesFIW2010.pdf

² A/HRC/40/52 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the role of measures to address terrorism and violent extremism on closing civic space and violating the rights of civil society actors and human rights defenders para 1-4

³ See generally, Amnesty International "Laws designed to silence: The global crackdown on civil society organizations" (2019)

I. Introduction

In many of Africa's 'modern' democracies, the democratic process has been marked by brutality. However, recent electoral violence forms have assumed unparalleled significance and change in both form and character with negative repercussions for political stability and consolidation. The rising electoral violence in Africa is closely connected with the African states' neo-patrimonial character, the nature of contestation for power, and the weak institutionalisation of democratic architectures. Furthermore, judicial systems and civil society face significant challenges in promoting redress access when governance and electoral democracy deficits have been registered. International human rights instruments and frameworks recognise all people's right to be actively involved and significantly impact the public decision-making processes that concern them.⁴

Even in developed democracies, there is a need for a robust civil society to challenge systemic disparities that may arise from the elevation of certain interests, voices or values over others. Besides, by continuing to track, influence and speak out on governance issues, civil society plays a vital role in the time between elections. For those who are unable to vote due to factors such as age, a past criminal record, gender or migration status, this position is particularly significant.⁵ Laws and policies that constrain civil society have flourished, most frequently through overt efforts to unduly limit the rights to freedom of peaceful assembly and association. Stigmatisation, excessive funding obstacles, and the wilful misapplication of anti-terrorism and other laws are techniques that have been used by states to regulate and limit civil society behaviour.

In the world today, the rise of fundamentalism, violent extremism and terrorism is of great concern. It challenges democracy and the capacity of people to engage in their communities, form their destinies, communicate their concerns and enhance their lives. Civil society is a victim in the war against terrorism in many nations, by design or default. In the pretext of fighting extremism or terrorism, the rights to freedom of peaceful assembly and association are curtailed, and freedom of speech, expression and other rights are suppressed. Like in other parts of the world, various African countries are set to hold presidential and parliamentary elections in the later months of 2020 and through 2021, as highlighted in Exhibit A and B.

⁴ Dorina Bekoe, "Trends in Electoral Violence in Sub-Saharan Africa," Peace Brief 13, United States Institute of Peace, March 10, 2010, available at <http://www.usip.org/files/resources/PB13Electoral%20Violence.pdf>

⁵ International Peace Institute "Elections in Africa: Challenges and Opportunities" 5 (2011)



Exhibit A: Upcoming elections scheduled for late 2020 across Africa

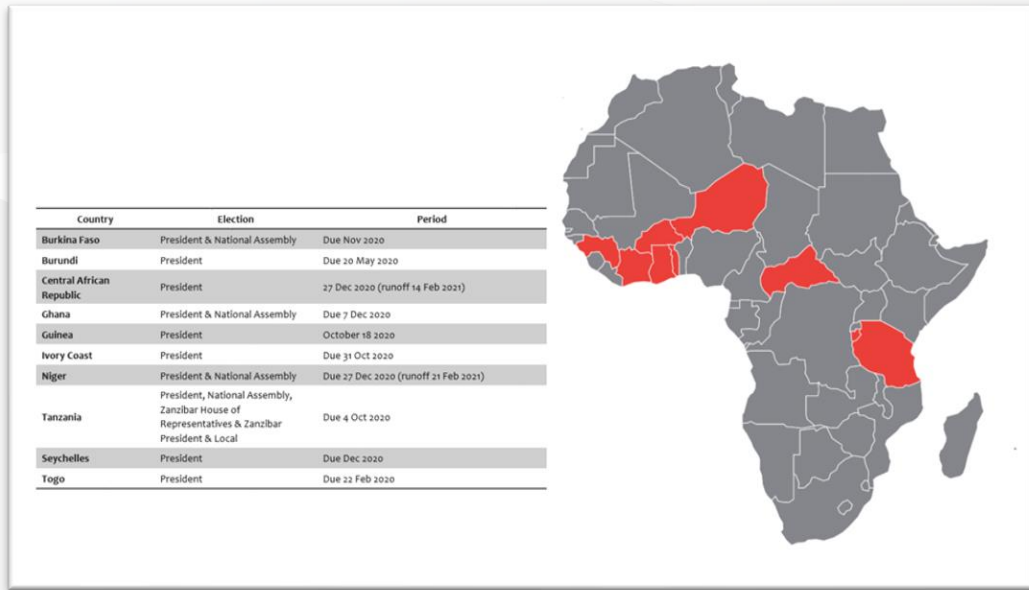
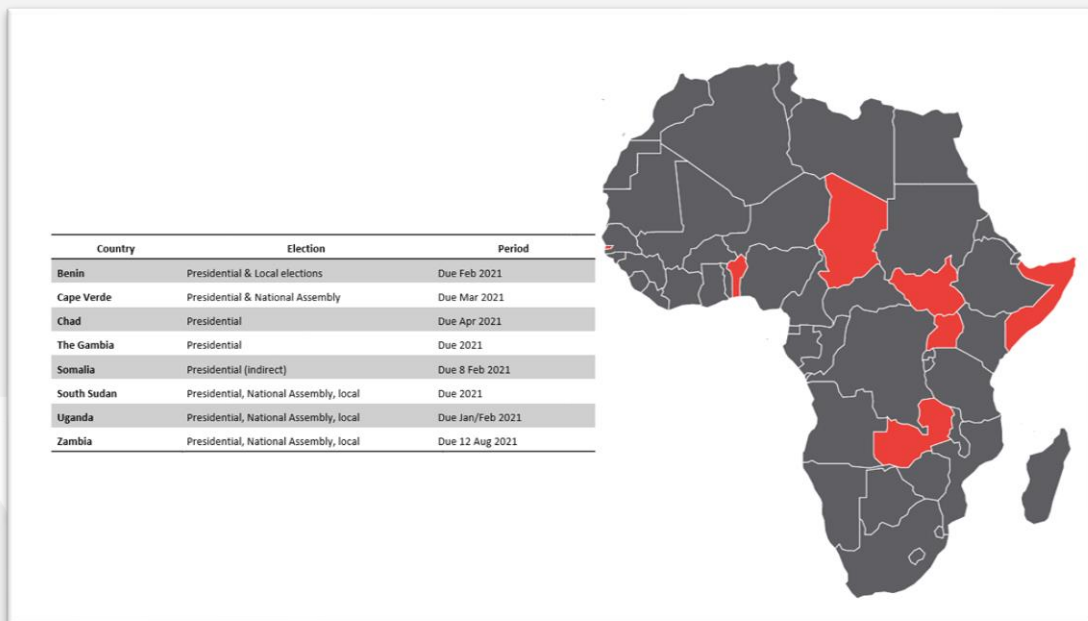


Exhibit B: 2021 Election Cycles in Africa



Data on election dates is extracted from the website of Electoral Institute for Sustainable Democracy in Africa (EISA), <https://www.eisa.org/index.php>

Civil society actors in various African countries set to hold elections through 2020 and 2021 have indicated possible challenges likely to face the sector, including:

- a) **Freedom of association:** NGO registration, lobbying rules and limitations on advocacy; counter-terrorism and emergency laws; changes in legal status, officer and member responsibility and scope of activities; lawsuits in the public interest and restrictions on entry.
- b) **Freedom of thought, expression, and information:** legislation on defamation and limits on speech content.
- c) **Right of peaceful assembly:** assembly policing, parallel communities, rules of counter-terrorism, and emergency.

2. FATF Style legislation on AML/CFT in African Countries with Upcoming elections

Human rights defenders and people, more generally, make use of their fundamental rights to freedom of speech, association, and peaceful assembly during election times to actively engage in building their countries' future. Unfortunately, as civil society, space becomes increasingly small, elections also pose a heightened period of danger for HRDs. Regressive legislation has been introduced in many nations, limiting people's rights to free speech and peaceful assembly.

Counter-terrorism laws are continually being misused to target the legitimate work of defenders of human rights. With broad and ambiguous language, NGO and Media Bills are increasingly being passed, promoting judicial prosecutions under the guise of 'threatening national security' against independent human rights organisations and media outlets. Administrative and bureaucratic abuse is used throughout the country to undermine defenders' work of human rights and journalists.⁶

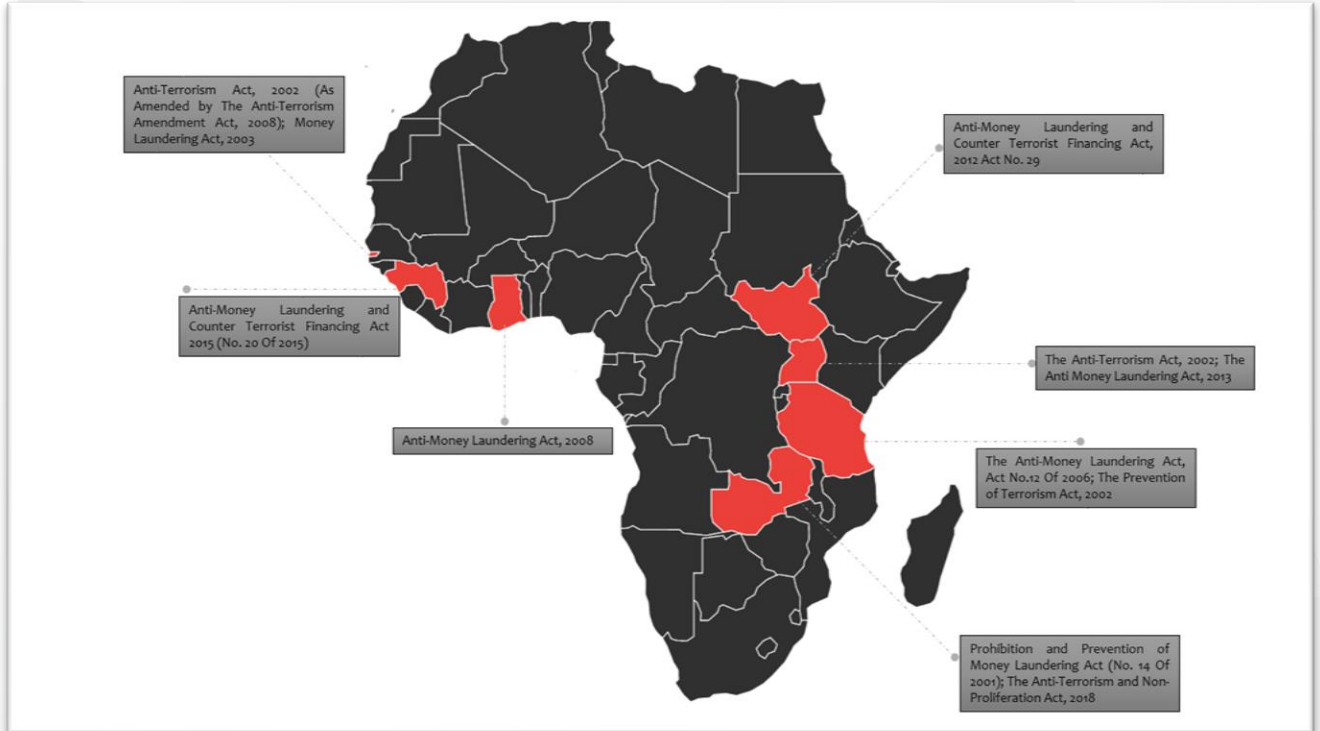
Similarly, Covid-19 pandemic and state response to it has dramatically challenged multi-faceted governance elements, including the planning and management of upcoming presidential and parliamentary elections on the continent. This situation could also pose risks to democracy and fundamental rights and freedoms in sub-Saharan Africa, with several countries expected to hold national elections this year and early next year.

The Sub-Saharan African region's overall analysis, where elections are scheduled in several countries, shows different approaches in response to the Covid-19 crisis and elections and various challenges and threats for credible, peaceful, and secure elections. In some instances, the pandemic has led States to make decisions that may affect the legitimacy, stability, and security of elections and cause them to take them. Decisions to schedule or delay elections have already been taken in some nations, although others are still pending.

As the African States are gearing towards late 2020 and 2021 elections, there could be possible misuse of anti-terrorism and anti-money laundering legislation to target legitimate activities of non-profit organisations on the continent. The table below indicates the various types of AML/CFT legislation in such countries:

⁶ See for example, Defend Defenders "Caught Up in Bitter Contests: Human Rights Defenders working in the Context of Elections in Sudan, Ethiopia, Burundi and Uganda." (2011)

Exhibit C: AML/CFT Legislation in Select African Countries with Upcoming Elections



Legislation on Anti-Money Laundering and Counter Terrorism Financing Legislation from select African countries scheduled to have elections in late 2020 and through 2021

3. **Fundamental human rights concerns arising from similarities between AML/CFT legislation in Africa**

Generally, collective analysis of the AML/CFT architecture highlighted above reveals two broader concerns. Firstly, the anti-money laundering legislation contains general and overarching provisions under which the assets and business transactions of persons and organisations of interest may be closely monitored and curtailed under the guise of public interest. Secondly, Anti-terrorism legislation contains several broad provisions that leave it open to abuse. These include such general offences as the ‘promotion of terrorism’ that may catch a wide range of legitimate activities within its ambit, especially in the areas of human rights advocacy.

Specifically, AML legislation reveals the following areas of concern for civil society:

- i. In some countries like Uganda, provisions impose duties and obligations on NGOs to prevent and detect transactions that could be used by criminals in money laundering. This could mean NPOs ought to inquire from their donors about their sources of funding.
- ii. The imposition of a series of due diligence obligations on ‘accountable persons’ places additional work-load responsibilities on NGOs where they have to keep detailed documentation of their current and past activities for lengthy periods – for up to ten years in some cases.
- iii. Provisions that allow governments to heavily monitor and scrutinise money transfers and other transactions of NGOs. If those transactions exceed specific amounts, states could use the information obtained to seize or freeze NPOs or activists’ assets with divergent political views under the guise of ‘public interest,’ thus curtailing their access to resources.

Concerning Counter-terrorism legislation, the following key issues arise from a closer look at the legislation of various countries:

- The definition of terrorism is mostly broad and vague. Therefore, it could be subjectively interpreted to undermine fundamental rights guaranteed under various constitutions, including freedom of expression, freedom of assembly, and association.
- Provisions on aiding and abetting terrorism are mainly broad and could be subjectively interpreted to restrict fundamental rights guaranteed under the constitution.
- In most cases, the absence of judicial oversight creates an opportunity for the broad interpretation and misuse of the powers, resulting in the violation of organisations’ right to privacy and individuals operating non-profit activities.

About the nature of the AML/CFT legislation in Africa, there are concerns about the possibility of misusing the law to restrict NGOs' operations, especially those that are critical to governments on issues relating to governance, accountability, and democracy. The examples below indicate the past instances where such legislation has been used before, during, and after elections, as shown in Table 1:

Table 1: Select Examples of AML/CFT Use on NGOs in Africa During Previous Election Cycles

| Country | Case Study |
|----------|--|
| Ethiopia | In Ethiopia, abuses of freedom of speech and the press have become prevalent. It has repeatedly been used to silence the media since the Anti-Terrorism Proclamation was implemented in 2009, and at least 24 journalists have been charged with terrorism. Solomon Kebede, the former editor-in-chief of the Ye Muslimoch Guday newspaper, who has been detained on counter-terrorism charges since January 2013, was sentenced to at least three years and ten months in prison on 10 March. ⁷ |
| Uganda | In Uganda, In September 2017, ActionAid Uganda and three of its member organisations were raided by Ugandan police backed by government warrants. Raids also confiscated office equipment and belongings. All things taken stay with the police in our case. The bank accounts of ActionAid Uganda were frozen on 6 October on charges of illegal financial transactions, money laundering, conspiracy to commit a crime and support for subversive activities aimed at destabilising Uganda. ⁸ |
| Burundi | The elections in Burundi have had a devastating effect on the once vibrant HRD community in the region. Numerous HRDs were targeted for speaking out against the third mandate of President Pierre Nkurunziza. Civil society and journalists were harshly attacked in the aftermath of the elections. After their accounts were frozen, at least 15 influential NGOs had to suspend their operations, and independent media were silenced altogether. ⁹ |
| Kenya | Judicial and administrative steps have been used by the government to limit further the right to freedom of association in the country, and 957 organisations were threatened with closure in October 2015. Administrative steps have also been used by the government to limit operational space for civil society. The Kenyan NGO Registration Board adopted a resolution on 28 October 2015 to de-register 957 Kenyan organisations, including the Kenya Human Rights Commission (KHRC), if they failed to send audited accounts within 14 days to the Board. KHRC was charged with failing to account for approximately KES 1.2 billion (roughly EUR 10 million), handling four fraudulent accounts, and distributing false financial statements. The freezing of the bank accounts for MUHURI, and HAKI Africa was revoked on 12 November 2015 by the High Court sitting in Mombasa. Justice Emukule claimed in his ruling that the acts of Inspector General of Police (IGP) Joseph Boinnet to freeze the bank accounts of the organisations were illegal and thus invalid. In April 2015, the bank accounts of MUHURI and HAKI Africa were frozen after being classified under the Prevention of Terrorism Act (2012) as defined entities. "The Judge ruled that, if pleased with the IGP's advice, only the Cabinet Secretary has the powers to appoint" listed organisations. ¹⁰ |

⁷ Amnesty International "Op-ed: The world must not forget the jailed journalists of Ethiopia" (2011) Available at <https://www.amnesty.org/en/latest/news/2015/12/op-ed-the-world-must-not-forget-the-jailed-journalists-of-ethiopia/>

⁸ A Larok "Our civic space is shrinking. Here's how we've responded — and you can, too" (2018) Accessed at <https://actionaid.org/opinions/2018/our-civic-space-shrinking-heres-how-weve-responded-and-you-can-too>

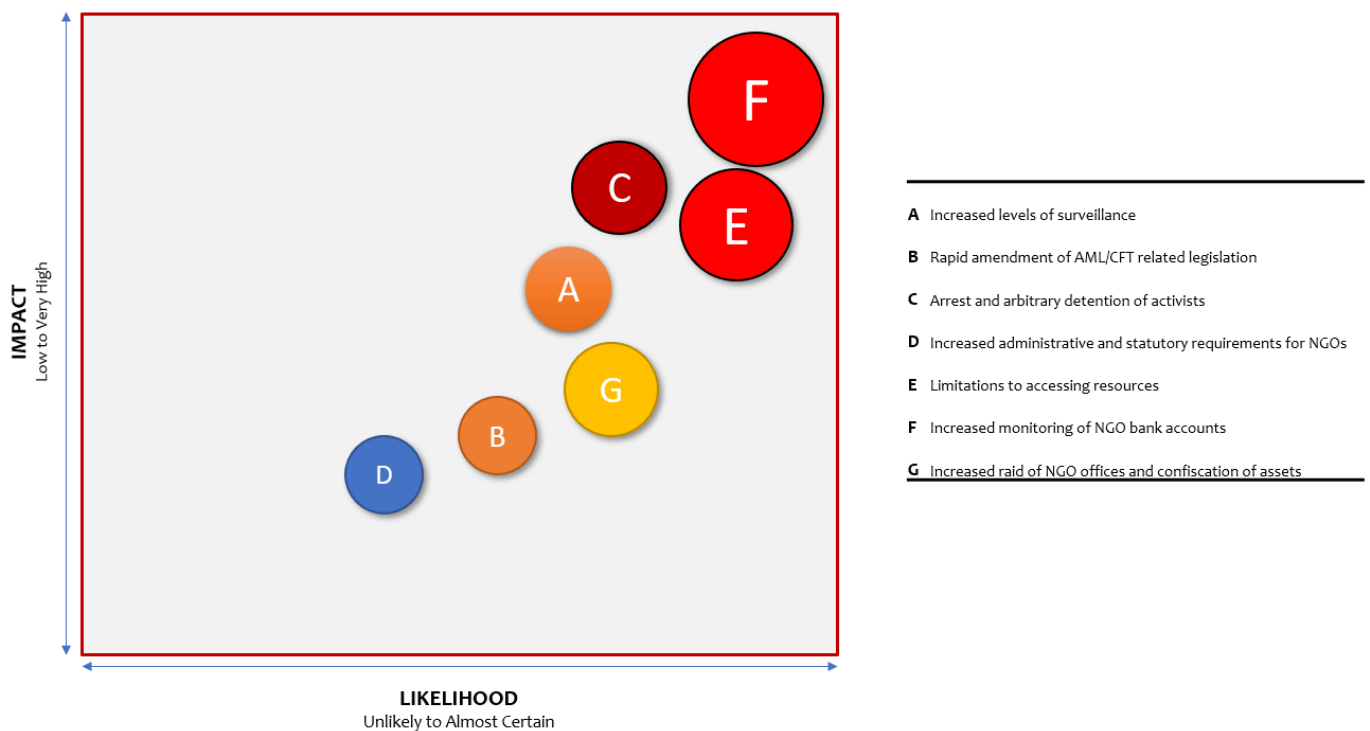
⁹ FIDH "Burundi: temporary suspension of 10 NGOs defending human rights" (2015) Accessed at <https://www.fidh.org/en/region/Africa/burundi/burundi-temporary-suspension-of-10-ngos-defending-human-rights>

¹⁰ MUHURI "Haki Africa, Muhuri accounts still frozen" (2015) Accessed at <https://muhuri.org/publication/haki-africa-muhuri-accounts-still-frozen/>

4. Exploring possible scenarios resulting from the enforcement of AML/CFT legislation in the upcoming election cycle

Since 2001, space in civil society across the globe has been diminishing. As a whole, civil society is stigmatised, often discriminated against, its actors are subjected to smear campaigns, slander, physical assault, spuriously prosecuted and convicted under different laws, its nonviolent acts are criminalised, and its members are unable to carry out their work, either because they are arrested, punished, or challenged or subjected to various limitations on their work. The decreasing space for civil society is a global systemic problem. At least 140 governments introduced counter-terrorism legislation between 2001 and 2018. By reference to new or perceived challenges, or to comply with new international standards, new and various legislative as well as administrative steps are defended. At least 47 countries have passed legislation relating to international terrorist fighters since 2013, according to Human Rights Watch, the most significant surge of counter-terrorism initiatives since the immediate aftermath of 9/11.¹¹

Exhibit D: Top eight scenarios that have been identified by 56 civil society actors from 11 countries across Africa.



¹¹ See generally, CSIS, “Counterterrorism measures and civil society: changing the will, finding the way”(2018) Accessed at <https://www.csis.org/analysis/counterterrorism-measures-and-civil-society>

4.1 Select scenarios

Table 2: Scenarios generated from interactions with 56 civil society actors from 11 countries across Africa

| Scenario | Possible Drivers | Effect on Civic Space |
|---|--|---|
| Increased levels of surveillance | <ul style="list-style-type: none"> Broad and vague AML/CFT legislation The implementation of increased monitoring recommended actions The perceived political affiliation of NGO leaders Past activities of the organisation Sources and purpose of Incoming funds | <ul style="list-style-type: none"> Self-censorship of NGOs and their leaders on critical governance issues. Disruption, halting or cancelling of proposed projects and programs which may be deemed risky for the continuity of the organisation. |
| Amendment of Legislation | <ul style="list-style-type: none"> Compliance with international and domestic AML/CFT standards Limited strategic advocacy to negotiate amendment or enactment of fair laws. | <ul style="list-style-type: none"> Over-regulation of the NGO sector Compliance fatigue resulting from new burdensome administrative requirements |
| Arrests and Arbitrary Detention of Activists | <ul style="list-style-type: none"> Direct participation in partisan politics by NGOs or their leaders Implementation of activities deemed to be partisan or promoting violence by the state Inadequate risk assessment and management capacities especially relating to internal AML/CFT policies The nature of past activities Broad and vague AML/CFT legislation Location of organisational activities (implementation sites) | <ul style="list-style-type: none"> Suspension of NGO activities Reputational damage especially in cases where NGOs have been accused of financing terrorist activities NGOs are likely to be abandoned by donors trying to avoid backlash from governments. Organisational leaders could be forced to resign, especially in instances where their lives are at a greater risk or as a result of intimidation. |
| Increased administrative and statutory reporting requirements | <ul style="list-style-type: none"> Selective implementation of AML/CFT standards at national levels Political exposure of organisational leaders and staff | <ul style="list-style-type: none"> Possible freezing and closure of accounts leading to either disruption or total suspension of projects Increased work-load to finance and program support responding to new or enhanced reporting requirements to regulatory bodies |
| Limitations to accessing resources | <ul style="list-style-type: none"> Activities of the organisation or proposed actions of incoming grants Nature of donor funding activities Shifting donor priorities Excessive application of AML/CFT standards Substantial amounts of incoming funds especially during periods deemed to be sensitive | <ul style="list-style-type: none"> Intrusive requests from financial institutions relating to specifics of the purpose of funds Lengthy processing of funds withdrawal requests, leading to delayed implementation Closure of organisations in cases where operating licences are revoked. |



| | | |
|---|--|---|
| <p>Increased monitoring of NGO bank accounts</p> | <ul style="list-style-type: none"> • Regulatory compliance by financial institutions enforcing Know Your Customer (KYC) standards. • NPOs holding multiple accounts due to donor demands. • Nature of NGO activities, e.g. governance-related, democracy, election monitoring, etc. | <ul style="list-style-type: none"> • Delayed disbursement of funds hence affecting the implementation of activities. • Privacy concerns, where banks are asking for additional information relating to the purpose of funds. |
| <p>Possible raid of NGOs' office premises</p> | <ul style="list-style-type: none"> • Selective application of the AML/CFT legislation. • Inadequate internal governance and accountability systems. • Inadequate documentation systems for retrieving information about past activities. | <ul style="list-style-type: none"> • Disruption of NGO operations • Lengthy law suites • Possible revocation of operating licences |
| <p>Disruption, Blocking and Interception of Communications</p> | <ul style="list-style-type: none"> • Securitisation of the election period/process • Deliberate communication sabotage in the interest of 'national security.' | <ul style="list-style-type: none"> • Privacy concerns • Limited capabilities of NPOs to mobilise their constituencies • Increased attacks on individual activists resulting from information acquired from intercepted communications. |
| <p>Limited or lack of Emergency response services to HRDs and activists targeted with AML/CFT legislation</p> | <ul style="list-style-type: none"> • Absence of a dedicated emergency response fund to support activists wrongfully targeted with AML/CFT legislation • Withdrawal or wilful blindness by donors in fear of the state's reaction to their involvement with targeted civil society actors. | <ul style="list-style-type: none"> • Withdrawal of civil society actors from meaningful advocacy. • Inabilities of NGOs to push back against the selective or wrongful enforcement of AML/CFT legislation • Disruption of program activities |

5. Recommendations

A. Creating awareness on domestic AML/CFT legislation with a focus on possible implications on NGOs

| Ref. | Recommendation | Priority | Responsibility |
|------|---|-----------|--|
| 1.1 | As an interim measure, design and deliver workshops geared towards creating awareness on the multi-faceted architecture of FATF, its processes and how they influence the enactment and amendment of AML/CFT legislation and the possible effects on civic space within various jurisdictions | Immediate | National and regional NPOs implementing FATF related programs, donors, national FIUs |
| 1.2 | Linked to the workshop, design user-friendly templates for undertaking rapid AML/CFT risk assessments, developing interim policies, and putting in place rapid response mechanisms/protocols (the templates can be filled out at the workshop). | Immediate | National and regional NPOs implementing FATF related programs, donors, national FIUs |
| 1.3 | Design and develop simplified materials in both print and video formats to enhance clear understanding of AML/CFT related aspects, domestic obligations and possible implications on civic space. | Immediate | National and regional NPOs implementing FATF related programs, donors, national FIUs |
| 1.4 | Mobilise short term technical support to assist organisations in addressing critical gaps in their internal AML/CFT policies | Immediate | Donors, National Working Groups |

B. Establishing and strengthening local structures to pushback against the unintended consequences of AML/CFT legislation on civic space

| Ref. | Recommendation | Priority | Responsibility |
|------|--|------------------|-------------------------------------|
| 1.1 | Facilitate the set up of domestic NGO Working Groups on FATF which would provide a collective, coordinated and cohesive assessment of critical issues relating to the enforcement of AML/CFT legislation | Immediate | DPI, Donors |
| 1.2 | Establish, structure and finance in-country emergency response mechanisms to aid activists and NGOs that have been wrongfully targeted with AML/CFT legislation throughout the upcoming election cycle | Immediate | DPI, Donors |
| 1.3 | Convene regular reflection meetings to discuss any developments in the application of domestic AML/CFT legislation | Midterm | National NGO Working Groups, Donors |
| 1.3 | Work with funders to include requirements for AML/CFT policies and plans for all funded programmes. Where needed, funders may assist applicants to source technical support to meet such requirements. | Mid to long-term | Donors, National NGO Working Groups |

C. Enhancing dialogue between NGOs with local regulators and regional FATF style bodies

| Ref. | Recommendation | Priority | Responsibility |
|------|--|--------------------------|--|
| 1.1 | Facilitate the development of national NGO position papers on the practical and rightful application of Recommendation 8 in combatting money laundering and countering the financing of terrorism. | Immediate | Donors, DPI |
| 1.2 | Convene NGO – Regulator dialogues focused on reflecting on better and inclusive standards for enforcing domestic AML/CFT frameworks. | Immediate to medium term | National NGO Working Groups, Donors |
| 1.3 | Scale-up and sustain high-level advocacy and dialogue with national regulators responsible for enforcing AML/CFT legislation. | Mid to long-term | National NGO Working Groups, Donors |
| 1.4 | In addition to domestic advocacy, support and empower national NGO working groups to engage with respective regional FATF style bodies | Mid to long-term | Donors, Regional and International Organisations |