Reinforcing Marginalization:

The Impact of Closing Civic Space on HIV Response in Ethiopia, Kenya, and Uganda



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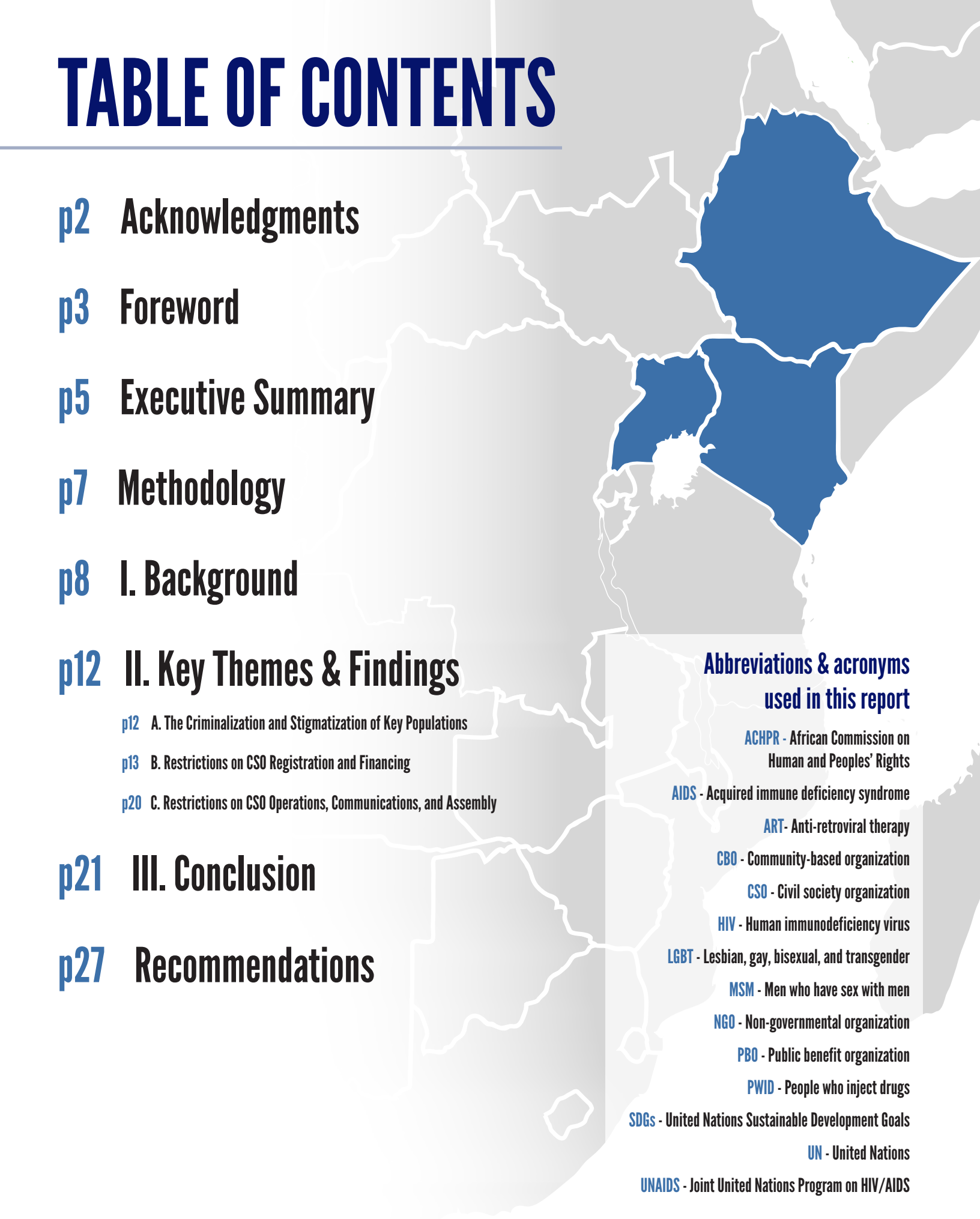

Abbreviations & acronyms used in this report

ACHPR - African Commission on Human and Peoples' Rights

AIDS - Acquired immune deficiency syndrome

ART- Anti-retroviral therapy

CBO - Community-based organization

CSO - Civil society organization

HIV - Human immunodeficiency virus

LGBT - Lesbian, gay, bisexual, and transgender

MSM - Men who have sex with men

NGO - Non-governmental organization

PBO - Public benefit organization

PWID - People who inject drugs

SDGs - United Nations Sustainable Development Goals

UN - United Nations

UNAIDS - Joint United Nations Program on HIV/AIDS

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FOREWORD

Civil society organizations (CSOs) [1] and activists have long played a leading role in the response to the human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS) epidemic in Africa. In countries lacking sufficient resources to treat all people living with HIV, activists have used their right to form organizations, march, and advocate to demand treatment and other support from their governments and the international community. Wherever public health systems have struggled to keep up with the heavy burden of the epidemic, civil society has repeatedly stepped in to fill the gap. CSOs often go where other actors and institutions cannot reach, including remote areas torn apart by conflict and natural disaster. CSOs have made life-saving health services available in the hardest-to-reach places and to the most hidden populations.

The right to the highest attainable standard of physical and mental health and freedoms of association, expression, and assembly are fundamental human rights that must be protected equally. Fulfillment of the right to health relies on respect for civil and political rights. Through community mobilization, advocacy, and litigation, civil society advocates have helped define a common practical understanding of the meaning of the right to the highest attainable standard of health. In advancing these rights, including calling for anti-discrimination and due process protections, advocates have frequently relied on domestic courts as well as regional and global human rights standards and mechanisms. Their efforts have helped propel the global response to the HIV/AIDS epidemic, which is a public health crisis demanding unprecedented political and financial commitments. In Africa, the region most affected by HIV, civil society's push for an effective response has resulted in a significant increase in access to anti-retroviral therapy (ART) and a reduction of AIDS-related deaths over the last ten years.

However, such progress risks slowing down or even stopping altogether if the space in which CSOs and human rights defenders function is tightened or closed. Barriers to progress arise when civil society actors, including those working with populations most affected by the epidemic, are not able to organize, operate, or deliver on their advocacy, accountability, service delivery, and other mandates.

States have a legitimate interest in regulating registered organizations, but they must do so in a manner that respects each person's

1 This paper uses the term "civil society organizations" to refer broadly to non-governmental, community-based, and grassroots organizations.



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right to freedoms of association, assembly, and expression. Excessive restrictions on these rights risk undermining the campaign against HIV and have a chilling effect on the very sector needed to help end the epidemic. The Joint United Nations Program on HIV/AIDS (UNAIDS) has called on states to ensure that civil society's legal and political space is protected so that it can fully support the response to the epidemic.[2] Similarly, the African Commission on Human and Peoples' Rights (ACHPR), in Resolution 376 on the Situation of Human Rights Defenders in Africa (May 2017), explicitly recognized that civil society actors working on HIV and health are human rights defenders and called on states to ensure that they are supported and protected in fulfilling their mandates.[3]

The Sustainable Development Goals (SDGs) spearheaded by the United Nations (UN) commit the international community to work together to eliminate HIV, tuberculosis, and malaria; reduce inequality; and build peaceful and just societies that provide access to justice for all. To meet these ambitious goals by 2030, UN member states must rely on strong and meaningful participation by civil society.

With millions of people waiting for HIV prevention, treatment, and care services, the global community, and Africa in particular, cannot afford to tolerate laws, policies, and practices that slow down the response to the epidemic. Without a fully engaged civil society, the end of the HIV/AIDS epidemic will remain a distant goal.

"The Sustainable Development Goals ... commit the international community to work together to eliminate HIV, tuberculosis, and malaria; reduce inequality; and build peaceful and just societies that provide access to justice for all. To meet these ambitious goals by 2030, UN member states must rely on strong and meaningful participation by civil society."

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2 Michel Sidibé, "Confronting Discrimination, Advancing Health," speech, October 2, 2017, http://www.unaids.org/sites/default/files/media_asset/20171002_SP_EXD_confronting-discrimination-advancing-health_en.pdf.

3 African Commission on Human and People's Rights, Resolution 376, "On the Situation of Human Rights Defenders in Africa," 2017, http://www.achpr.org/sessions/60th/resolutions/376/.

EXECUTIVE SUMMARY

In signing on to the UN SDGs in 2015, UN member states pledged to promote accountability; challenge inequality, stigma, and marginalization; and ensure that "no one is left behind" in global development, including access to health services. The UN General Assembly's "Political Declaration on HIV and AIDS: On the Fast Track to Accelerating the Fight against HIV and to Ending the AIDS Epidemic by 2030" calls on all member states to increase the capacity of civil society so that it can help advance the response to HIV. However, growing restrictions on civil society in some countries undermine the commitments made in the Political Declaration on HIV and AIDS and threaten to impede achievement of the SDGs.

This study focuses on the ways in which the closing of space for civil society—especially restrictions on the registration, financing, and operations of CSOs—is affecting HIV response in the East African countries of Ethiopia, Uganda, and Kenya. As in other parts of sub-Saharan Africa, the HIV/AIDS epidemic in East Africa remains a serious public health concern. Key populations, including sex workers, people who inject drugs (PWID), gay men, and men who have sex with men (MSM), bear a staggering HIV burden, with prevalence rates reaching well into the double digits among these populations. To deal effectively with the crisis and end AIDS by 2030, all stakeholders must be involved in the response. In particular, states must enlist CSOs to help put HIV response on the fast track with scaled-up prevention, treatment, and care able to reach all populations needing such services. However, as this study shows, in Ethiopia, Uganda, and Kenya, three countries with a high rate of HIV/AIDS, CSOs face restrictive laws, policies, and practices that hinder their ability to implement urgently needed programs.

In **Ethiopia**, since the introduction of the government's Proclamation on Charities and Societies in 2009, the civil society sector has shrunk by nearly half because of restrictions on its funding and operations. These restrictions have severely limited CSOs' capacity to reach key populations[4] and advocate on their behalf. In **Uganda**, recent burdensome laws have criminalized key populations and constrained organizations that seek to work with them—for example, by posing obstacles to their registration, day-to-day operations, and convening of public meetings. In **Kenya**, a thriving and vocal civil society sector has pushed back successfully against attempts to close its space, but the Non-Governmental Organizations Coordination Board (NGO Board)

> **Restrictions on and exclusions from the exercise of the rights to freedom of peaceful assembly and of association have the consequence of reinforcing marginalization. … The ability to exercise the rights to freedom of peaceful assembly and of association constitutes a key component in the empowerment of marginalized communities and individuals.**
>
> -UN Human Rights Council, "Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai," April 14, 2014, A/HRC/26/29

4 The World Health Organization defines key populations as men who have sex with men (MSM), transgender people, sex workers, and people who inject drugs. See World Health Organization, "Consolidated Guidelines on HIV Prevention, Diagnosis, Treatment and Care For Key Populations," July 2014, xii, http://apps.who.int/iris/bitstream/10665/128048/1/9789241507431_eng.pdf?ua=1.

and other government agencies have deregistered and taken other punitive measures against hundreds of organizations in recent years.

In all three countries, the criminalization of key populations has been used to justify curtailment of the work of CSOs focused on HIV. CSOs in Ethiopia and Uganda that work with key populations describe difficulties opening bank accounts, holding public gatherings, and even posting signs over their front doors. As a result, CSOs that could energetically combat HIV among hard-to-find key populations are instead tied down by bureaucratic red tape, including the filing and re-filing of paperwork, negotiations with bank and government officials, and even court cases challenging their right to exist. While organizations confront these serious obstacles, all three countries continue to have difficulty identifying and reaching key populations with effective programs that address their health and HIV-related needs.

This study finds that laws related to CSO registration and operations in Ethiopia, Uganda, and Kenya fail to meet those countries' obligations under regional and international human rights treaties. Restrictions on CSOs' registration, financing, and operations go beyond reasonable limits recognized in human rights law and create a chilling climate for organizations working on HIV response. Laws in the three countries also grant excessive discretion to regulatory bodies. The unpredictable nature of regulatory enforcement affects the degree to which organizations can plan and realize sustainable programs, build their internal capacity, and scale up to meet the needs of beneficiaries.

The right to the highest attainable standard of health cannot be fulfilled without respect for other important human rights. Fulfillment of the right to freedoms of association, assembly, and expression as well as to non-discrimination enables the right to the highest attainable standard of health to be fulfilled. While governments have a legitimate interest in regulating the civil society sector, they also bear the duty to respect international and regional norms.

The free operation of HIV-focused CSOs is a critical component of any national HIV response. To ensure that Ethiopia, Uganda, and Kenya use all available resources to address HIV, the restrictive laws, policies, and practices identified in this study should be reviewed and repealed or amended so that CSOs have space to operate freely. Achieving this goal will require the joint efforts of a range of stakeholders, including national governments, AIDS coordinating authorities, national human rights institutions, CSOs, regional and global human rights mechanisms, and donors and technical partners.



Photo: UNICEF Ethiopia

METHODOLOGY

This report focuses on Ethiopia, Uganda, and Kenya. These countries were selected for two reasons: they have a high prevalence of HIV or large numbers of people living with HIV, and they have restrictive legal frameworks that affect civil society, including CSOs working on HIV-related issues. The report draws on country-level research conducted by local experts from late 2015 to early 2016. The researchers carried out comprehensive desk reviews of human rights treaties ratified by each country, their domestic laws and regulations, case law, UN reports, reports from the ACHPR, and reports from government agencies, CSOs, and other sources.

Researchers also interviewed thirty-six experts and key informants (ten in Ethiopia, eleven in Uganda, and fifteen in Kenya). The interviewees included directors and staff of HIV-focused and development CSOs, CSOs led by key populations, and government officials, judges, and lawyers. The interviews were conducted in Amharic in Ethiopia and in English in Uganda and Kenya. The interviews were unstructured and informal and did not follow a preset protocol. The interviewers informed each interviewee about the scope and purpose of the research and the way in which the interview would be used before obtaining the interviewee's verbal consent to proceed. In some cases the interviewees requested specific measures to preserve the confidentiality of their remarks. To ensure the anonymity of all interviewees, their names and identifying characteristics are not included in this report. The interviewees received no remuneration.



I. BACKGROUND



Photo: An HIV-positive mother and her child in Ethiopia (Martha Welday/Trocaire)

In committing to the SDGs in 2016, UN member states pledged to promote accountability; challenge inequality, stigma, and marginalization; and ensure that "no one is left behind" in global development, including access to health services. In the UN General Assembly's Resolution 70/266 of 2016, "Political Declaration on HIV and AIDS: On the Fast Track to Accelerating the Fight against HIV and to Ending the AIDS Epidemic by 2030," UN member states call for increasing the capacity of civil society to meet these goals. They commit to "increased and sustained investment in the advocacy and leadership role" of community-based organizations (CBOs) and those portions of civil society that represent people living with, at risk of, or affected by HIV.[5] However, growing restrictions on civil society around the world are undermining the commitments made in the declaration and threaten the achievement of the SDGs.

From the early days of the HIV/AIDS epidemic, civil society has played a critical role in HIV response. In countries with limited state resources or destroyed essential infrastructure due to conflict or natural disasters, CSOs have stepped up to provide much needed services, including voluntary counseling and testing, ART and other clinical treatments, and mental health care and psycho-social support. Some of this work is performed in locations where government services are unable to reach.

People who work with CSOs and CBOs serving key populations are at a higher risk of HIV infection than the population at large. Sex workers, MSM, and PWID play an important role in reaching similar populations and providing them with HIV prevention, treatment, care, and support services. CSOs have drawn on human rights standards to advocate on behalf of those affected by HIV, especially for the protection of their human rights and access to HIV and health services. The UNAIDS and Lancet Commission on Defeating AIDS, a diverse group of experts, activists and political leaders, has stressed the importance of advocacy efforts by civil society and called on

5 United Nations (UN) General Assembly, Resolution 70/266, "Political Declaration on HIV and AIDS: On the Fast Track to Accelerating the Fight Against HIV and to Ending the AIDS Epidemic by 2030," June 8, 2016, paragraph 64(a), http://www.unaids.org/sites/default/files/media_asset/2016-political-declaration-HIV-AIDS_en.pdf.

states to support these efforts as a "global public good."[6] In reviewing the history of HIV response, UNAIDS found that civil society "advocacy has sparked action in the face of 'denialism' and indifference, mobilized unprecedented financial resources, and enabled communities to participate in designing health services that meet their needs."[7] UNAIDS identified human rights advocacy and legal services as among seven key programs needed to reduce stigma and discrimination and increase access to justice in national HIV responses.

Through community mobilization, monitoring, litigation, and advocacy, CSOs have played a significant role in reducing stigma and discrimination, educating the public, improving the legal environment for HIV response, obtaining reduced prices for essential medicines, and ensuring non-discriminatory access to government medical, housing, and employment services. UNAIDS's review of the evidence has found that community-based responses can have the best reach, quality, and results and can achieve larger scale while remaining flexible and cost effective.[8]

Over the thirty years of the HIV/AIDS epidemic, CSOs have complemented the work of state health services and become an essential resource in progress against the epidemic. The success of community efforts in providing HIV services, particularly to key populations, is essential to ending the HIV/AIDS epidemic.[9] Increasingly, however, this work is under threat because of the closing of space for civil society. In its May 2017 Resolution on the Situation of Human Rights Defenders in Africa, the ACHPR explicitly recognizes that civil society actors working on HIV and health, sexual orientation, and gender identity are human rights defenders. The ACHPR calls on states to ensure that they are supported and protected in their work.

Ethiopia, Uganda, and Kenya, the three countries addressed in this study, face generalized epidemics with high overall rates of HIV prevalence (see Table 1). Where data exists, it shows that HIV prevalence among key populations in these countries reaches well into the double digits (Table 2).

Table 1: HIV Prevalence Among All Adults and Female Adults, 2016

	All Adults, Ages 15-49 (%)	Female Adults, Ages 15-49 (%)
Ethiopia	1.1	1.3
Kenya	5.4	6.9
Uganda	6.5	7.7

Source: UNAIDS, "AIDSinfo," http://aidsinfo.unaids.org

Table 2: HIV Prevalence Among Sex Workers, MSM, and PWID, Various Years

	Sex Workers (%)	MSM (%)	PWID (%)
Ethiopia	24.3 (2014)	No data	No data
Kenya	No data	18.2 (2010)	18.3 (2011)
Uganda	34.2 (2013)	13.2 (2013)	24.3 (2014)

Source: UNAIDS, "AIDSinfo," http://aidsinfo.unaids.org

6 Peter Piot, et al., "Defeating AIDS—Advancing Global Health," *The Lancet* 386, no. 9989 (June 25, 2015): 171-218, http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(15)60658-4.pdf.

7 UNAIDS, "Invest in Advocacy: Community Participation in Accountability is Key to Ending the AIDS Epidemic" (Geneva: UNAIDS, 2016), 2, http://www.unaids.org/sites/default/files/media_asset/JC2830_invest_in_advocacy_en.pdf.

8 UNAIDS, "Stronger together: From Health and Community Systems to Systems for Health" (Geneva: UNAIDS, 2016), 8-10, http://www.unaids.org/sites/default/files/media_asset/JC2788_stronger_together_en.pdf.

9 UNAIDS, "Investing in Community Advocacy and Services to End the AIDS Epidemic," April 4, 2016, http://www.unaids.org/en/resources/press-centre/featurestories/2016/april/20160404_community_advocacy.

Ethiopia, located in the southern Red Sea region of East Africa, had a population of 101.7 million as of 2016.[10] General health parameters, including infant mortality rates and average life expectancy at birth, place Ethiopia among the world's least privileged nations.[11] Ethiopia bears a heavy HIV burden, with approximately 800,000 people living with HIV and about 1 million children orphaned by HIV as of 2015.[12] HIV prevalence is known to be high among sex workers, reaching 24.3 percent in 2015.[13] (Ethiopia has not reported data to UNAIDS on HIV among MSM, PWID, or transgender people.) Preventative interventions and the government's commitment to providing treatment have accelerated Ethiopia's response to the epidemic. But the country still faces key challenges—in particular, poor prevention of mother-to-child transmission and limited access to interventions by key populations, who remain largely underground because of a punitive legal environment.[14] A stable, active civil society sector could help Ethiopia reach these populations and the many children affected by HIV and combat the stigma and discrimination that they face.

Uganda is a landlocked country in East Africa with a population of 36.6 million people as of 2016.[15] In 2016 Uganda had 1.5 million people living with HIV.[16] From 1990 to the 2000s, Uganda's fight against HIV/AIDS was hailed as a success story, and the prevalence rate dropped dramatically from 30 percent to 5-10 percent.[17] However, since 2011 Uganda has experienced an increase in HIV cases. As of 2014 the overall HIV prevalence rate had stabilized at 7.4 percent,[18] with rates among key populations several times higher. Thirty-seven percent of sex workers, 18 percent of partners of sex workers, and 13 percent of MSM are HIV positive. Eighteen percent of men in uniformed services are also living with HIV. No data is available for transgender people or PWID.[19]

10 Population Reference Bureau, "2016 World Population Data Sheet," 10, http://www.prb.org/pdf16/prb-wpds2016-web-2016.pdf.

11 Ibid., 10, 15.

12 Ethiopia HIV/AIDS Prevention and Control Office (HAPCO), Planning, Monitoring and Evaluation Directorate, "Country Progress Report on HIV Response, 2012," 13, http://files.unaids.org/en/dataanalysis/knowyourresponse/countryprogressreports/2012countries/GAP%20Report%202012.pdf.

13 Data from "AIDSinfo," an interactive map on the UNAIDS website, accessed September 1, 2017, http://aidsinfo.unaids.org.

14 Ibid.

15 Population Reference Bureau, "2016 World Population Data Sheet," 11. See also Government of Uganda, "Uganda HIV and AIDS Country Progress Report 2014," viii, http://library.health.go.ug/publications/service-delivery-diseases-control-prevention-communicable-diseases/hivaids/hiv-and-aids; and Government of Uganda, Uganda Bureau of Statistics, "National Population and Housing Census 2014: Provisional Results," rev. ed. (November 2014), http://www.ubos.org/onlinefiles/uploads/ubos/NPHC/NPHC%202014%20PROVISIONAL%20RESULTS%20REPORT.pdf.

16 UNAIDS, "AIDSinfo."

17 For example, see United States Agency For International Development, "The ABCs of HIV Prevention: Report of USAID Technical Meeting on Behavior Change Approaches to Primary Prevention of HIV/AIDS" (September 17, 2002), http://pdf.usaid.gov/pdf_docs/Pnacr886.pdf.

18 Government of Uganda, "Uganda HIV and AIDS Country Progress Report 2014," 10-11.

19 Ibid., 22.

COUNTRY SNAPSHOTS

Ethiopia



Population: 101.7 million (2016)
People with HIV: 800,000 (2015)
HIV prevalence among sex workers: 24.3% (2015)
2016 CSO Sustainability Index rating*: 5.7 (impeded)

Kenya



Population: 45.5 million (2016)
People with HIV: 1.5 million (2015)
HIV prevalence rate among MSM: 18.2% (2014)
2016 CSO Sustainability Index rating*: 3.9 (evolving)

Uganda



Population: 41.5 million (2016)
People with HIV: 1.5 million (2016)
Overall HIV prevalence rate: 7.4% (2014)
2016 CSO Sustainability Index rating*: 4.3 (evolving)

* The USAID CSO Sustainability Rating is based on a scale of 1 (best) to 7 (worst). For more, see: https://www.usaid.gov/sites/default/files/documents/1866/2016_Africa_CSOSI_-_508.pdf

Like Ethiopia, Uganda criminalizes key populations, and fear of arrest is widespread. While the Ministry of Health actively works with key populations, the police and the Ministry of Ethics and Integrity have publicly targeted these groups.

Since the 1980s CSOs such as The AIDS Service Organization (TASO) have performed pioneering work to develop Uganda's HIV response. For example, CSOs have helped people living with HIV access treatment and have educated the public and advocated for a protective legal and policy environment. Their advocacy has included critical contributions to the repeal of discriminatory or punitive laws. For example, the passage of the Anti-Homosexuality Act, which prohibited the promotion, aiding, or abetting of homosexuality, was delayed for several years because of civil society resistance, despite overwhelming support for the bill in parliament. After the law was passed in 2013, CSOs challenged it in the courts, which led to its nullification by the Constitutional Court of Uganda only three months after it had come into force.[20] This and other advocacy work by CSOs has made a significant difference in combating the HIV/AIDS epidemic.

Kenya lies the coast of the Indian Ocean in East Africa and had a population of 45.5 million people as of 2016.[21] In 2015 Kenya had one of the highest HIV burdens in the world, with an estimated 1.5 million people living with the disease.[22] The HIV/AIDS epidemic in Kenya is generalized,[23] although there are concentrated epidemics in specific populations and geographic regions.[24] Studies conducted among key populations show that their HIV prevalence rates are several times higher than in the general population. For example, 18.2 percent of MSM and 18.3 percent of PWID live with HIV. Kenya has not reported HIV prevalence rates among sex workers or transgender people.[25]

Kenyan CSOs have performed important work in mobilizing local communities in HIV response. They have increased awareness and understanding of HIV and educated communities about methods of protection and critical steps to follow if exposed to or living with HIV. CSOs have also helped ensure that the communities most affected by HIV can raise their concerns and propose solutions. For instance, the African Gender and Media Initiative (GEM) and Kenya Ethical and Legal Information Network (KELIN), organizations that work closely with women living with HIV, documented the coerced sterilization of HIV-positive women and challenged the practice in court. These concerns may never have come to light without CSOs' mobilization work, as many women living with HIV were unaware that they had the right to provide informed consent to medical treatment.

20 Oloka-Onyango and Nine Others v. Attorney General, Constitutional Petition No. 08 of 2014, Constitutional Court of Uganda (August 1, 2014), Uganda Legal Information Institute (ULII), https://www.ulii.org/ug/judgment/constitutional-court/2014/14/.

21 Population Reference Bureau, "2015 World Population Data Sheet," 10.

22 See UNAIDS, AIDSinfo.

23 According to UNAIDS, an epidemic is "generalized" when prevalence is greater than 1 percent among pregnant women attending antenatal clinics. "HIV Prevention Toolkit," http://hivpreventiontoolkit.unaids.org/support_pages/faq_diff_epi_scenarios.aspx.

24 Government of Kenya, Ministry of Health, "Kenya HIV Estimates Report" (2014), http://healthservices.uonbi.ac.ke/sites/default/files/centraladmin/healthservices/HIV%20estimates%20report%20Kenya%202014.pdf.

25 Data from UNAIDS, "AIDSinfo."

II. KEY THEMES & FINDINGS

The Impact of the Closing of Civic Space



Photo: Chapter Four Uganda

In Ethiopia, Uganda, and Kenya, new laws passed in recent years have reduced the space for the registration and operation of CSOs. In particular, key populations have been criminalized and stigmatized, which poses obstacles to registering CSOs led by or working with these groups. Other restrictions have also been imposed on CSOs' registration, financing, operations, communications, and assemblies. Taken together, these restrictions have had a chilling effect on civil society and make CSOs hesitant to tackle sensitive issues, register legally, or provide health services if they will be subject to questioning by the police.

The sections below discuss these restrictions, the way in which they conflict with human rights standards, and their impact on CSOs working on HIV response.

A. The Criminalization and Stigmatization of Key Populations

According to UNAIDS, the "criminalization and stigmatization of same-sex relationships, sex work, and drug possession and use, along with discrimination in the health sector, are hindering the access of key populations to HIV prevention services."[26] The World Health Organization recommends decriminalizing same-sex sexual relations, sex work, and drug use to ensure that HIV services reach key populations.[27] However, all three countries under review have laws that criminalize same-sex sexual relations,[28] the selling of sex, the organization of commercial sex,[29] and drug possession. Penalties for the possession of drugs are high. In Ethiopia drug possession can bring

26 UNAIDS, "HIV Prevention Among Key Populations," November 26, 2016, http://www.unaids.org/en/resources/presscentre/featurestories/2016/november/20161121_keypops.

27 World Health Organization, "Consolidated Guidelines on HIV Prevention, Diagnosis, Treatment and Care For Key Populations," July 2014 (Geneva: World Health Organization, 2014), http://www.who.int/hiv/pub/guidelines/keypopulations/en/.

28 Aengus Carroll, "State-Sponsored Homophobia" (Geneva: International Lesbian, Gay, Bisexual, Trans and Intersex Association, 2016), 65 (Ethiopia), 70 (Kenya), and 89 (Uganda), http://ilga.org/downloads/02_ILGA_State_Sponsored_Homophobia_2016_ENG_WEB_150516.pdf.

29 Data from "Map of Sex Work Law," an interactive map on the website of the Institute of Development Studies, Sexuality, Poverty, and Law Program, accessed September 1, 2017, http://spl.ids.ac.uk/sexworklaw.

a sentence of five years or a fine of ETB 100,000 (approximately $4,500).[30] Uganda imposes ten to twenty-five years in prison for drug possession,[31] while Kenya imposes a sentence of ten years for the possession of cannabis and twenty years to life, an expensive fine, or both for the possession of other drugs.[32]

These laws create a high-risk climate for organizations explicitly focused on key populations. According to a sex worker advocate, "we fear being closed down because the law criminalizes sex work and we may be seen as promoting it." The criminalization of CSOs' target beneficiaries can jeopardize funding, noted another interviewee. "Some donors do not want to support the work that we do, because of the criminal laws." Some interviewees said that they had managed the risk by writing vague bylaws or using organizational names that make their work with key populations less explicit. Other interviewees stated that punitive laws and their enforcement have frightened organizations away from working with key populations. According to a CSO director in Uganda:

> After passage of the Anti-Homosexuality Act, we had to cut back on the work that we do [with MSM], especially work that involved visibility, including how much we upload to our website, media engagements, [and] stickers. Even up to now, there is no signpost anywhere at [our office].

Efforts to challenge and reform punitive laws are ongoing. In 2016 Kenya's National Gay and Lesbian Human Rights Commission filed a case seeking to challenge provisions of Kenya's Penal Code that criminalize "unnatural offenses" or same-sex sexual relations. In the last few years the ACHPR has paid increased attention to discrimination and violence based on sexual orientation and gender identity and addressed these matters in resolutions, concluding observations, guidelines, and reports.[33]

B. Restrictions on CSO Registration and Financing

The right to register an organization and raise funds to support its operation is an essential component of freedom of association. The UN

> Constitutional protections in Ethiopia, Uganda, and Kenya uphold the right to freedom of association. However, regulations governing CSO registration in these countries conflict with and infringe on that right and go beyond the limit of acceptable restrictions under human rights norms and standards.

30 Government of Ethiopia, Proclamation 414/2004, Criminal Code of the Federal Democratic Republic of Ethiopia, art. 525, available at https://www.unodc.org/cld/document/eth/2005/the_criminal_code_of_the_federal_democratic_republic_of_ethiopia_2004.html.

31 Naomi Burke-Shyne, "Four Laws That Are Devastating Public Health In Uganda," Open Society Foundations, December 15, 2014, https://www.opensocietyfoundations.org/voices/four-laws-are-devastating-public-health-uganda.

32 Government of Kenya, Act No. 4 of 1994, Narcotic Drugs and Psychotropic Substances (Control) Act, rev. ed. 2010, sec. 3, available at Kenya Law, http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NarcoticDrugsandPsychotropicSubstances_Control_Act__Cap245.pdf.

33 Wendy Isaack, "African Commission Tackles Sexual Orientation, Gender Identity," Human Rights Watch, June 1, 2017, https://www.hrw.org/news/2017/06/01/african-commission-tackles-sexual-orientation-gender-identity.

Human Rights Council,[34] the ACHPR,[35] and other human rights bodies have stated that registration and financing should be available to all CSOs without discrimination or undue restriction.[36] The UN special rapporteur on the rights to freedom of peaceful assembly and of association has highlighted the particular importance of these rights for CSOs led by marginalized populations:

> Restrictions on and exclusions from the exercise of the rights to freedom of peaceful assembly and of association have the consequence of reinforcing marginalization. . . . The ability to exercise the rights to freedom of peaceful assembly and of association constitutes a key component in the empowerment of marginalized communities and individuals.[37]

Lack of legal registration and reliable financing undermine the stability that CSOs need to build their institutional capacity, a key commitment of the UN General Assembly's 2016 Political Declaration on HIV and AIDS.

Constitutional protections in Ethiopia, Uganda, and Kenya uphold the right to freedom of association. However, regulations governing CSO registration in these countries conflict with and infringe on that right and go beyond the limit of acceptable restrictions under human rights norms and standards.

Ethiopia

Ethiopia's 2009 **Charities and Societies Proclamation** is characterized by severe restrictions on the registration and financing of CSOs.[38] Among its onerous requirements is the need for all CSOs to re-register every three years, a time-consuming process that takes time away from essential program activities.[39] For example, an interviewee who leads a national HIV network reported that to register the network was required to present evidence of its prior work, a three-year plan, a description of the organizational structure showing a minimum of seven persons, evidence of the significance of the network, evidence of financing from foreign donors, a plan for utilizing funding that met strict criteria, documentation of registered fixed assets, and much more.

Upon registration CSOs receive a legal designation based on its place of establishment, sources of income, membership composition, and members' residential status.

- **Ethiopian charities or societies** are formed under the laws of Ethiopia, have members who are only Ethiopian, generate income from Ethiopia, and are wholly controlled by Ethiopians. They may not receive more than 10 percent of their funding from foreign sources.
- **Ethiopian resident charities or societies** are Ethiopian charities or societies formed under the laws of Ethiopia having members who are residents of Ethiopia. They may receive more than 10 percent of their funding from foreign sources.
- **Foreign charities** are formed under the laws of foreign countries, or have a membership that includes for-

34 The UN Human Rights Council is responsible for interpreting the International Covenant on Civil and Political Rights. Ethiopia ratified the covenant in 1993, Kenya in 1972, and Uganda in 1995. See "Status of Ratification Interactive Dashboard" on the website of UN Human Rights Council, Office of the High Commissioner, accessed September 1, 2017, http://indicators.ohchr.org.

35 The ACHPR is responsible for protecting and promoting the rights enshrined in the African Charter on Human and Peoples' Rights. For information on countries ratifying the charter, see "Ratification Table: African Charter on Human and Peoples' Rights" on the ACHPR website, http://www.achpr.org/instruments/achpr/ratification/.

36 See, for example, the ACHPR's Guidelines on Freedom of Association and Assembly in Africa: "Every person has the right to establish an association together with another, free from limitations violating the right to equality and the guarantee of nondiscrimination." ACHPR, "Guidelines on Freedom of Association and Assembly in Africa," 2017, para 9, 11, http://www.achpr.org/files/instruments/freedom-association-assembly/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf.

37 UN Human Rights Council, "Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai," April 14, 2014, A/HRC/26/29, para 15, http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Pages/ListReports.aspx.

38 International Center for Not-For-Profit Law, "Civic Freedom Monitor: Ethiopia," last updated January 27, 2018, http://www.icnl.org/research/monitor/ethiopia.html.

39 Government of Ethiopia, Proclamation No. 621/2009, "Proclamation to Provide for the Registration and Regulation of Charities and Societies (February 13, 2009)," art. 88 (1), available at http://www.icnl.org/research/library/files/Ethiopia/CSO_Law_0309.pdf.



Photo: A former sex worker - now shop owner, with the help of a local NGO - in Ethiopia (UNICEF Ethiopia)

eigners, or are controlled by foreigners, or receive their funding from foreign sources.[40]

Only Ethiopian charities and societies may promote human and democratic rights, gender equality, and other rights-based work. However, since Ethiopian charities and societies may not receive more than 10 percent of their funding from foreign sources, the registration process actively dissuades CSOs from engaging in advocacy involving human rights standards. CSOs that obtain permission to engage in human rights advocacy describe undergoing "trainings on revolutionary democracy as the only way to the country's development." An interviewee from a development CSO noted that the "organization doesn't have permission to do rights-based projects. If the government [sees] us doing that, our license will automatically be cancelled." According to an interviewee:

> Organizations that comment on government policies are specifically targeted, because the government felt threatened by the activities of NGOs in the 2005 election. That was the driving factor for the new proclamation, which limits civil societies commenting on government policies.

Very little domestic funding is available to Ethiopian CSOs, and regulations curtail CSO's income-generating activities, leaving organizations with little recourse for finding funding their work. One interviewee noted that "we are denied [permission] to conduct a fundraising program for reasons like 'how much money do you expect to raise, from how many people, who are the people, etc.'" The interviewee added that fundraising is especially challenging in a country where close to 80 percent of the population lives on less than two dollars a day. The funding restrictions leave CSOs in a conundrum: unable to accept foreign funding but with few domestic alternatives.

> As a result of these restrictions, a total of 1,741 previously registered groups did not to re-register under the Charities and Societies Proclamation.[41] Within two years the number of registered organizations in Ethiopia fell from 3,800 to 2,059, a loss of 46 percent.[42] Consortia working on HIV were particularly affected, as the proclamation specifically prohibits CSOs of different legal types from joining together in a consortium. An HIV consortium that was compelled to re-register in one region experienced a decrease from 107 to 45 member organizations, along with cutbacks in activities related to capacity building and

40 Government of Ethiopia, "Proclamation to Provide for the Registration and Regulation of Charities and Societies," art. 2.

41 Kendra E Dupuy, James Ron, and Aseem Prakash, "Who Survived? Ethiopia's Crackdown on Foreign-Funded NGOs," *Review of International Political Economy* (2014), 14, https://faculty.washington.edu/aseem/ripe2015.pdf.

42 Ibid.

outreach.[43] This reduction in the number of CSOs led to what interviewees described as a rapid, significant loss of expertise and historical memory in the civil society sector overall.

Ethiopia's restrictions on the right to freedom of association have drawn criticism from UN human rights experts. In a report prepared for the UN Human Rights Council, the independent expert on minority issues recommended that the Ethiopian government "ensure that civil society groups are free to function without interference, harassment, undue restrictions on their registration, activities, or ability to seek and accept funding."[44] The UN special rapporteur on the rights to freedom of peaceful assembly and of association described the proclamation's impact on the ability of Ethiopians to form associations as "devastating" and expressed "serious alarm."[45] The UN's country team for Ethiopia has also highlighted Ethiopia's restrictions on foreign financing as a cause for concern.[46]

While restrictions on CSO registration have created a range of excessive burdens on HIV organizations, they have especially affected their ability to reach and advocate for the rights of criminalized key populations. Key populations are largely hidden in Ethiopia because of police crackdowns on the venues and organizations serving them, especially MSM.[47] Ethiopia lacks estimates of the size and HIV prevalence rates of key groups, except for sex workers, who show extremely high rates of HIV. In short, restrictions on registration hinder the ability of civil society to engage in Ethiopia's HIV response.

Uganda

Uganda's **National Objectives and Directive Principles of State Policy** spell out the principles upon which Uganda is governed and the objectives it seeks to achieve. CSOs and their work are clearly recognized in the policy. For example, Objective II (i) provides that "the State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance," suggesting an endorsement of civil society.[48] However, restrictive legislation governing CSOs, combined with the criminalization of key populations, have created a restrictive environment that hampers outreach to populations facing extraordinarily high rates of HIV. Perhaps for this reason, Uganda lacks estimates of the size and HIV prevalence rates of the least visible key populations: transgender people and PWID. Furthermore, the official legitimation of public homophobia enshrined in the Anti-Homosexuality Act of 2014 exacerbated risks to CSOs working with LGBT communities.[49] UNAIDS and the Global Fund to Fight AIDS, Tuberculosis, and Malaria warned that the adoption of this law would harm Uganda's HIV response.[50] The Constitutional Court of Uganda eventually invalidated the law on procedural grounds in August 2014.[51]

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43 Daniel Messele Balcha, "The Impact of Charities and Societies Proclamation No. 621/2009 on Addressing HIV/AIDS Issues in Ethiopia," *International Journal of Not-for-Profit Law* 16, no. 2 (2014): 60, http://www.icnl.org/research/journal/vol16iss2/v16n2%20Balcha.pdf.

44 UN General Assembly, "Report of the Independent Expert on Minority Issues, Gay McDougall, Addendum: Mission to Ethiopia (28 November-12 December 2006)," February 28, 2007, A/HRC/4/9/Add.3, http://www.refworld.org/docid/461f9ea82.html.

45 International Center for Not-For-Profit Law, "Civic Freedom Monitor: Ethiopia."

46 Office of the UN High Commissioner for Human Rights, "Joint Submission by the UN Country Team (UNCT) in Ethiopia for the UN Compilation Report: UNCT Report for the Universal Periodic Review of Ethiopia—Sixth Session of the UPR Working Group (30 November-11 December 2009)," http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/ET/UNCT_ETH_UPR_S06_2009_E.pdf.

47 Katie Baker, "A Graveyard for Homosexuals," *Newsweek*, December 12, 2013, http://www.newsweek.com/2013/12/13/graveyard-homosexuals-244926.html.

48 Constitution of Uganda, National Objectives and Directive Principles of State Policy, objective II(i), "Democratic Principles."

49 Human Rights Watch, "Uganda: Anti-Homosexuality Act's Heavy Toll: Discriminatory Law Prompts Arrests, Attacks, Evictions, Flight," May 14, 2014, https://www.hrw.org/news/2014/05/14/uganda-anti-homosexuality-acts-heavy-toll; and P. Semugoma et al., "Assessing the Effects of Anti-Homosexuality Legislation in Uganda on HIV Prevention, Treatment, and Care Services," *SAHARA-J: Journal of Social Aspects of HIV/AIDS* 9, no. 3 (2012): 173-176.

50 UNAIDS, "UNAIDS Expresses Deep Concern Over Impact of Ugandan Bill on the Rights of Gay Men," February 18, 2014, http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2014/february/20140218psuganda; and The Global Fund to Fight AIDS, Tuberculosis, and Malaria, "Global Fund Deeply Concerned Over Anti-Gay Law in Uganda," February 24, 2014, https://reliefweb.int/report/uganda/global-fund-deeply-concerned-over-anti-gay-law-uganda.

51 *Oloka-Onyango & 9 Ors v Attorney General* (Constitutional Petition No 08 of 2014), UGCC 14 (August 1, 2014), available at ULII, https://ulii.org/node/15891.

The **Non-Governmental Organizations (NGO) Act of 2016** and accompanying regulations promulgated in 2017 are the primary legal mechanisms for registering and financing CSOs. Overall, the NGO Act is more progressive than previous legislation, but it continues to restrict freedoms guaranteed under international law. The act leaves authorities with broad powers to refuse to register an organization if, for example, the objectives of the organization as specified in its constitution contravene the laws of Uganda or offend "national dignity."[52] This provision can be an obstacle to the registration of organizations working with or led by LGBT people, sex workers, and PWID. Already this restriction has had an impact on groups working with key populations, especially MSM and transgender people. For example, the government denied registration to two LGBT organizations—Sexual Minorities Uganda (SMUG) and Born This Way—on the grounds that they intended to promote sexual relations between adults of the same sex. Its lack of legal registration has left SMUG unable to rent office space, sign donor agreements, open a bank account, or even book hotel rooms. SMUG is also unable to advocate or engage officially with state institutions. To operate SMUG has had to obtain funding through fiscal sponsors, which may take a portion of funding received to cover administrative costs. In effect, SMUG must operate underground.[53]

To avoid restrictions a number of organizations have registered as private companies. The **Companies Act of 2012** provides that one or more persons may form a company for a lawful purpose. Section 4(2) describes various types of companies, including a company limited by guarantee, which is defined as a company in which the liability of members is limited to the amount that members undertake in their memorandum to contribute to the assets of the company if it is wound up.[54] However, Section 36(2) of the Companies Act gives the registrar of companies the power to reject an organization's name if it is considered undesirable. The authorities have in some cases referred such organizations back to the NGO Board.

Registration as a company is not ideal. In the words of one activist, "we found the procedures to register as a company limited by guarantee to be too harsh, as they would scrutinize the small print." A sex worker advocate said "we registered as a company limited by guarantee in 2008 and then as an NGO in 2013, but after our NGO certificate expired after one year, we did not go back for renewal." A third Ugandan advocate reported that while the organization had been able to register as a company limited by guarantee, the fact that the group was not registered as an NGO made it difficult to engage with key regional bodies and human rights mechanisms, especially the ACHPR. Choosing to register as a company also has financial

> Uganda's NGO Act of 2016 leaves authorities with broad powers to refuse to register an organization if, for example, the objectives of the organization as specified in its constitution contravene the laws of Uganda or offend 'national dignity.' This provision can be an obstacle to the registration of organizations working with or led by LGBT people, sex workers, and PWID.

52 Uganda, NGO Act, 2016, sec. 32(1).

53 Interviews with key informants in Uganda, 2016.

54 Government of Uganda, Act 1, Companies Act, 2012, sec. 4(2)(b), available at ULII, https://www.ulii.org/ug/legislation/act/2012/1/companies_act_no_1_of_2012_pdf_84470.pdf.



Photo: A sign for an HIV/AIDS counseling service in Rwebisengo, Uganda (Dave Proffer/Flickr)

implications, as many donors are permitted to finance registered NGOs only.

Because of these restrictions on registration, some Ugandan organizations choose to remain unregistered, which is strictly prohibited under existing regulations. The UN special rapporteur on the right to freedom of peaceful assembly and of association has noted that the right to freedom of association "applies inter alia to minors, indigenous peoples, persons with disabilities, persons belonging to minority groups or other groups at risk, including those victims of discrimination because of their sexual orientation and gender identity . . . , non-nationals, including stateless persons, refugees or migrants, as well as associations, including unregistered groups."[55] Similarly, the ACHPR has noted that criminal sanctions against people who belong to unregistered voluntary organizations are a violation of human rights. In the 2014 report of its study group on freedom of association and assembly, the ACHPR referred to the position of the UN special rapporteur in making the following recommendations:

> States should not require associations to register in order to be allowed to exist and to operate freely. States' legitimate interest in security should not preclude the existence of informal associations, as effective measures to protect public safety may be taken via criminal statute without restricting the right to freedom of association. At the same time, associations have the right to register through a notification procedure in order to acquire legal status, obtain tax benefits, and the like.[56]

A sex worker advocate reported "we have to register with every district in which we work. Our drop-in center in Gulu was closed down because we had not registered with the district, which was a problem."

Uganda's financial restrictions have also created difficulties. The **2013 Anti-Money Laundering Act** gives police the right to enter the premises of any organization engaged in work that violates the act. The act also requires financial institutions to obtain information regarding the purposes and sources of an organization's funding.[57] An interviewee working on LGBT issues reported that a bank suddenly requested information about individual directors. Another interviewee reported that a senior bank official unexpectedly visited a CSO to inquire about its work.

Kenya

The registration and financing of CSOs in Kenya is highly controversial. In 2009 a group of CSOs called the Civil Society Reference Group began a consultative process to create more enabling legal framework for the civil so-

55 UN Human Rights Council, "Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai," May 21, 2012, A/HRC/20/27, 13, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf.

56 ACHPR, "Report of the Study Group on Freedom of Association and Assembly in Africa," 30.

57 Government of Kenya, Act 9 of 2010, Kenya Proceeds of Crime and Anti Money Laundering Regulations (2013), sec. 6(c)(iv).

ciety sector. The culmination of their efforts was the **Public Benefit Organizations (PBO) Act,** which was signed into law in 2013 but never "commenced" by the government, despite a November 2016 court order mandating its implementation.[58] Since then several amendments to the PBO Act have been introduced, including:

- Additional requirements that in the name of national interests would require PBOs to uphold the security interests and cultural and religious values of Kenya, including a prohibition on the registration of any PBO involved in the promotion of indecent acts.
- A requirement that the government receive a percentage of donations to PBOs so that it can ensure effective regulation.
- A cap on foreign funding at 15 percent.[59]

In response to these proposals, CSOs mounted successful public advocacy campaigns emphasizing that if CSOs' activities and financing were severely curtailed, at least 1 million Kenyans receiving ART would be at risk.[60] Kenyan CSOs have intensely advocated for the implementation of the PBO Act without any amendments. In September 2016, in a move that was welcomed by human rights organizations and other CSOs, the cabinet secretary for devolution and planning announced that Kenya would operationalize the PBO Act without the proposed amendments.[61] However, as of February 2018 the act had yet to be implemented.

Current legislation limits the registration of CSOs working with key populations in Kenya. The **NGO Coordination Act of 1990**, which the PBO Act is intended to replace, gives the NGO Coordination Board broad latitude to refuse to register an organization whose purpose is deemed not in the "national interest," although this term is not clearly defined. The director of the bureau is given wide discretion in deciding whether or not to approve the proposed name of an organization. For instance, under the NGO Coordination Act, the director could refuse to approve a proposed name if it was judged undesirable.

Two civil society lawsuits successfully challenged these restrictions on registration. In *Eric Gitari v. Non-Governmental Organizations Co-ordination Board and Four Others* (2015), the petitioner appealed the refusal of the NGO Coordination Board to register an organization that would address the violence and human rights abuses suffered by lesbian and gay people.[62] The board had rejected the application from the organization on the grounds that same sex acts are illegal, according to the Penal Code. In deciding in the petitioner's favor the High Court of Kenya made reference to a similar case in Botswana, in which the court held that sections of the Penal Code that criminalize same-sex sexual conduct do not prevent people from associating with each other. In *Republic vs. Non-Governmental Organizations Co-ordination Board & Another Ex-parte Transgender Education and Advocacy and Three Others (2014)*, the organization Transgender Education and Advocacy sued the NGO Coordination Board because of its failure to consider the organization's application for registration.[63] The court held that to deny freedom of association on the basis of gender or sex is a violation of constitutional protections against discrimination. This decision enabled Transgender Education and Advocacy to register and successfully advocate for the protection of transgender people against police harassment and similar treatment.

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58 Maureen Kakah, "Kiunjuri Ordered to Gazette Law on Organizations in 14 Days," *Daily Nation,* October 31, 2016, http://www.nation.co.ke/news/Kiunjuri-given-14-days-to-gazette-organisations-law/1056-3436062-fx8by3/index.html.

59 Civil Society Reference Group (CSORG), "Shadow Report on Sophia Abdi Task Force [and] on PBO Act 2013 Amendments" [2014?], https://www.scribd.com/doc/266224018/Shadow-Report-Sofia-Abdi-Task-Force.

60 Houghton, Irũngũ and Stephanie Muchai , "Protecting Civic Space Against #NGOMuzzle Laws in Kenya," March 2014, http://www.civicus.org/index.php/media-center/civicus-blog/2351-protecting-civic-space-against-ngomuzzle-laws-in-kenya.

61 Freedom House, "Kenya: Freedom House Welcomes Decision to Implement PBO Act 2013," public statement, September 9, 2016, https://freedomhouse.org/article/kenya-freedom-house-welcomes-decision-implement-pbo-act-2013.

62 *Gitari v. NGO Coordination Board, Petition 440 of 2013,* High Court of Kenya (April 24, 2015), available at Kenya Law, http://kenyalaw.org/case-law/cases/view/108412/.

63 *Republic v. Non-Governmental Organizations Co-ordination Board & Another Ex-parte Transgender Education and Advocacy & Three Others,* JR Miscellaneous Application No. 308A of 2013, High Court of Kenya (July 23, 2014), available at Kenya Law, http://kenyalaw.org/caselaw/cases/view/100341/.

Despite these significant cases, many CSOs find restrictions on registration intimidating. Organizations such as the African Sex Workers Alliance have found it difficult to register with the NGO Coordination Board because of the stigma associated with sex work, and they have instead entered into hosting arrangements with other organizations. These arrangements hinder the groups' institutional growth and ability to scale up to meet the needs of key populations in HIV response. Other CSOs opt not to register at all. However, since registration is mandatory, unregistered organizations working on health issues can be considered illegal and face stiff sanctions if charged and convicted. Thus some organizations choose to register as companies limited by guarantee to avoid being subjected to the reporting requirements of the NGO Coordination Board. However, they are then subject to review by the registrar of companies.

Kenya's requirement that CSOs submit tax returns has also created problems for civil society. On December 16, 2014, the NGO Coordination Board cancelled the registration of 510 organizations, claiming that they had failed to submit tax returns. The closures were part of the government's immediate response to three separate terrorist attacks, but some of the de-registered organizations delivered HIV-related services or worked on the rights of women, children, and the disabled. Although some of these organizations were eventually reinstated, the incident created a climate of fear and uncertainty in civil society.[64] Bar Hostess Empowerment Program, Kenya Treatment Access Movement, Liverpool VCT, Doctors Without Borders, and AIDS Law Project are among the HIV-focused CSOs that have been slated for de-registration on the NGO Board's various lists. Inclusion on the lists stigmatizes these groups and forces them to expend significant effort and resources to be taken off.

In late 2016, in a move that caused concern about the future of civil society in Kenya, the president announced that oversight of CSOs would move to the Ministry of Interior and National Coordination and be under the supervision of a military general.[65] In January 2017 the Ministry of the Interior and National Coordination instructed county commissioners to close CSOs that were not properly licensed or engaged in programs that they had not been registered to implement. Civil society advocates have challenged these and other efforts to restrict their operations.[66]

> Current legislation in Kenya limits the registration of CSOs working with key populations. The NGO Coordination Act of 1990, which the PBO Act is intended to replace, gives the NGO Coordination Board broad latitude to refuse to register an organization whose purpose is deemed not in the 'national interest,' although this term is not clearly defined.

64 East and Horn of Africa Human Rights Defenders Project, "Kenya Must Address Concerns Ahead of Human Rights Council Review," press release, January 21, 2015, https://www.defenddefenders.org/2015/01/kenya-must-address-concerns-ahead-human-rights-council-review/.

65 Felix Olick, "NGOs Protest Against Being Under Interior Ministry," *Star,* December 14, 2016, http://www.the-star.co.ke/news/2016/12/14/ngos-protest-against-being-under-the-interior-ministry_c1472654.

66 International Center for Not-for-Profit Law, "Civic Freedom Monitor: Kenya," lasted updated March 28, 2017, http://www.icnl.org/research/monitor/kenya.html#glance.



Photo: Eric Gitari (at right) of Kenya's National Gay and Lesbian Human Rights Commission at a protest in Nairobi (Facebook)

C. Restrictions on CSO Operations, Communications, and Assembly

HIV-focused CSOs perform essential work on the front lines of the HIV/AIDS epidemic. They create safe spaces in which people can gather to discuss sexuality, prevention, and harm reduction; encourage vulnerable groups to come forward for testing and treatment; and in particular reach out to marginalized and stigmatized populations. Their ability to share sensitive information openly and engage in service provision and advocacy without fear of harassment is critical to promoting HIV prevention and ensuring access to treatment.

However, under restrictive laws governing CSOs the police and other authorities in Ethiopia, Uganda, and Kenya have broad powers to question, monitor, and even raid CSOs working on HIV response, thereby hampering their operations. While ministries of health may work in partnership with HIV-focused CSOs, the police do not always share a cooperative attitude. UNAIDS recommends the sensitization of police forces as a key intervention to address stigma and discrimination and promote access to justice. Positive examples of this approach exist and should be further supported and expanded.[67]

Along with the right to freedom of association, the International Covenant on Civil and Political Rights and African Charter on Human and People's Rights uphold the right to freedoms of assembly and expression. HIV-focused organizations must be able to hold meetings with people affected by HIV, including key populations and people living with HIV, to inform them of prevention and treatment options, help them resolve challenges in access to treatment, provide psychosocial support, and empower communities to engage meaningfully in health governance and financing processes. CSOs should be able to "express opinion, disseminate information, engage with the public and advocate before Governments and global bodies for human rights, for the preservation and development of a minority's culture or for changes in law, including changes in the Constitution."[68]

Under the right to freedom of peaceful assembly, governments are prohibited from placing undue restrictions on the ability of people to assemble.[69] Any requirement for prior notification for an assembly has a presumption in favor of the assembly. Notification processes should not be overly bureaucratic or require a response from the

67 UNAIDS, "Key Programs to Reduce Stigma and Discrimination and Increase Access to Justice in National HIV Responses," 2012, http://www.unaids.org/sites/default/files/media_asset/Key_Human_Rights_Programmes_en_May2012_0.pdf.

68 UN Human Rights Council, "Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai,'' May 2012, para 64.

69 See Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan (1999), ACHPR, 48/90-50/91-52/91-89/93, http://caselaw.ihrda.org/doc/48.90-50.91-52.91-89.93/.

state. Prior authorization for assemblies should not be required. To the extent that limitations are placed on assemblies, they should be narrow and proportionate to potential risks. Administrative and judicial review should be available if assemblies are restricted.[70] According to the Human Rights Council:

- At most, authorities should require notification only for large assemblies or assemblies that are anticipated to involve a certain degree of disruption.[71]
- Organizers should be able to notify the designated primary authority in the simplest and fastest way of their intention to hold a peaceful assembly—for instance, by filling out a clear and concise form, available in the main local language(s) and preferably online to avoid possible delays in the mail.[72]
- The notification procedure should be free of charge, and once notification has been submitted the authorities should expeditiously provide a receipt acknowledging that the submission was timely.[73]

States have a legitimate interest in regulating public gatherings to maintain the public order. However, as the space for civil society continues to close, organizations in Ethiopia, Uganda, and Kenya say that the process for obtaining permits for public gatherings is unclear and they believe the police have wide latitude to refuse requests.

Ethiopia

In Ethiopia HIV-specific public gatherings are less restricted than other public gatherings. The National Network of HIV Positive Women indicates that they are able to hold public marches without interference. As an Ethiopian interviewee working on HIV noted:

> We actually work on problems related to HIV. So our work doesn't require that (many) public marches. But we have never been denied (permission) to have mass events on the roads. All we did was notify the authorities in an official letter that we are working on issues related to HIV.

At the same time, organizations working more broadly on human rights report certain barriers. An Ethiopian lawyer said "it is forbidden for CSOs to have a public marches. The government officially says yes, but (in practice) it involves tiresome bureaucracy that usually results in postponement. This in turn frustrates us and leads us to give up on the whole idea." Another lawyer agreed, calling public marches "a nominal right on paper, which is denied through lots of excuses."

Ethiopia's **Computer Crime Proclamation of 2016** granted the state expanded powers to engage in surveillance and restrict online communications, with severe penalties for a variety of online activities.[74] These provisions have aroused particular concern among LGBT advocates, who rely on social media to connect to their communities.[75] Prior to the Computer Crime Proclamation, CSOs had already pointed out instances in which they believed that the government was monitoring their communications and harassing their partners. For example, an interviewee indicated that the government monitored communications despite the lack of a law permitting such an activity. Another interviewee indicated that he knew of a CSO that had been closed by the government, ostensibly because of email communications with a criminal. Other interviewees noted that their partners were

70 UN Human Rights Council, "Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies," February 4, 2016, A/HRC/31/66, para 36, http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/_layouts/15/WopiFrame.aspx?sourcedoc=/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.66_E.docx&action=default&DefaultItemOpen=1.

71 UN Human Rights Council, "Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai," April 24, 2013, A/ HRC/23/39, para. 52, http://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf&action=default&DefaultItemOpen=1.

72 Ibid., para. 53.

73 Ibid., para. 57-58.

74 Article 19, "Ethiopia: Computer Crime Proclamation" (London: Article 19, 2016), https://www.article19.org/data/files/medialibrary/38450/Ethiopia-Computer-Crime-Proclamation-Legal-Analysis-July-(1).pdf.

75 Jennifer Swan, "An Ethiopian Activist Shows How Facebook's Policies Affect a Community," Takepart, http://www.takepart.com/article/2015/07/12/facebook-lgbt.

subjected to unnecessary examinations at the airport. Finally, an interviewee believed that a CSO's website was not functioning because of government restrictions on and monitoring of Internet usage. In 2011, at the International Conference on HIV and STIs in Africa (ICASA) in Addis Ababa, local and foreign LGBT organizations and HIV-focused groups working with key populations experienced harassment and had to relocate a meeting to the UN compound because of their fear of attacks and disruption.[76]

Uganda

Uganda's **Public Order Management Act** requires CSOs to give the police notice of meetings in an exceptionally broad range circumstances, including if a meeting will be held in a public place, will address matters of public interest, will address topics outside of the legal mandate of the organization, or will include individuals who are not members of the CSO. "Public place" and "matters of public interest" are not defined. In fact, several organizations seeking to hold small meetings in hotels have been told they must notify the police in advance. Failure to notify the police of a public gathering is a criminal offense under section 116 of the Penal Code. The Public Order Management Act gives Ugandan police broad powers to refuse permission to organize public gatherings and does not allow for appeals.

The police have shut down a number of public gatherings and CSO meetings with HIV-affected populations, especially MSM and transgender people. In 2016 the police detained approximately twenty people and reportedly beat participants in a gay pride event in Kampala.[77] A CSO leader reported that this was the fourth time in three years that the police had stopped an LGBT event.[78] In February 2014 Ugandan officials shut down a meeting convened by Freedom and Roam Uganda to discuss LGBT issues in Uganda. Interviewees reported that the police shut down two other meetings organized to discuss issues of importance to LGBT persons. In reaction to these experiences, CSOs working with key populations say that they are now careful to meet only in locations that they believe are secure.

The Ugandan government has retained broad powers to monitor CSOs' operations. The Local Governments Act requires various local government authorities, including local government executive committees, parish and village executive committees, and sub-county chiefs, to monitor the activities of CSOs in their areas.[79] Police moni-

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76 IRIN News, "HIV/AIDS: MSM Meeting Stirs Controversy at HIV Conference," December 5, 2011, https://reliefweb.int/report/ethiopia/hivaids-msm-meeting-stirs-controversy-hiv-conference.

77 "Ugandan Police Raid LGBT Fashion Show," *The Guardian*, August 5, 2016, https://www.theguardian.com/world/2016/aug/05/uganda-police-raid-lgbt-gay-pride.

78 "Uganda Gay Pride Event Raided by Police, Activists Arrested and Reportedly Beatean," ABC [Australia Broadcasting Company], August 5, 2016, http://www.abc.net.au/news/2016-08-05/police-raid-uganda-gay-pride-event/7694370.

79 Government of Uganda, Local Governments Act, 1997, ch. 243, secs. 26(j), 49(f), 69(3)(k), available at ULII, https://www.ulii.org/ug/legislation/consolidated-act/243.

toring has been intrusive in some cases. A harm reduction advocate reported that "the police followed up one of our peer outreach workers when he appeared on Al Jazeera, and when he was arrested they asked him to take them to the [CSO's] offices for them to check its registration status."

After enactment of the **Anti-Homosexuality Act**, Ugandan groups working with LGBT groups experienced crackdowns and raids of their program activities. In 2014 the Office of the Prime Minister banned activities of the Refugee Law Project, an outreach initiative of the Makerere University School of Law. The Refugee Law Project had hosted the Civil Society Coalition on Human Rights and Constitutional Law, which engages in advocacy against the Anti-Homosexuality Act. The suspension of its activities forced the project to end its role as host of the coalition, which has in turn limited the coalition's activities.[80] In 2014 Ugandan police raided a U.S. military-funded HIV project known as the Makerere University Walter Reed Project for "training" young men to be homosexual.[81] Several Ugandan HIV CSOs said that the incident, though later resolved, contributed to an overall fear in the civil society sector. As one interviewee put it: "The attack on the Walter Reed Project led us to fear that if a U.S. entity could be closed, what about [our own organization]?"

Some groups working on LGBT issues have also reported monitoring of their communications or warnings to avoid sensitive topics. A Ugandan director of an LGBT organization described calls from state agents regarding his posts on Facebook and said that he believes his phone calls are monitored. The executive director of an HIV-focused CSO reported being warned by an army officer not to make public comments about the army. Afterwards the interviewee feared being attacked and chose to limit the organization's work. "We are human. I do not have any police officers around to guard me, and I am afraid for my children," the interviewee added. Another CSO director confirmed that surveillance had a chilling effect: "Sometimes we draw back on what we can say because of the legal and political environment."

A sex worker advocate revealed similar caution about her organization's public profile because of restrictions on pornography. "We had a sign post with a woman in a short dress," she reported, "but we had to remove it as soon as the Anti-Pornography Act was passed because of the fear of what would happen."

Kenya

Kenyan HIV organizations report that they are generally able to hold public events, including on issues related to key populations. For example, for several years sex workers have organized successful marches to commemorate the International Day to End Violence against Sex Workers on December 17.[82] However, several HIV-focused organizations noted that information about the process for notifying the police about a public gathering is not clearly explained or disseminated.

Sensitization of the police to HIV and the concerns of key populations is among UNAIDS' recommendations for combating stigma and discrimination and promoting access to justice. In Kenya, Keeping Alive Societies Hope (KASH) partnered with the police to bring police officers and representatives of key populations together for advocacy sessions, which improved the officers' attitudes.[83] Kenya's environment is somewhat more open to public communication on sexuality, as is illustrated by the recurring debate in the media about sexual orientation and gender identity, which sometimes positively features the voices of LGBT people.

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80 UN Human Rights Council, "Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai," May 21, 2012, A/HRC/20/27, para 56. See also Thomas I. Emerson, "Freedom of Association and Expression" (1967), Faculty Scholarship Series, Paper 2797, 74, http://digitalcommons.law.yale.edu/fss_papers/2797.

81 "Police: We Have Evidence Walter Reed Project Recruited Homosexuals," UGO News, April 9, 2014, http://news.ugo.co.ug/police-evidence-walter-reed-project-recruited-homosexuals/.

82 Phelister Wamboi Abdalla, "Kenya Must Legalize Sex Work for the Sake of Human Rights and Public Health," *The Guardian,* December 17, 2015, http://www.theguardian.com/global-development/2015/dec/17/kenya-sex-workers-legalise-human-rights-public-health.

83 "Police Sensitization on Key Populations Rights—Mombasa," Keeping Alive Societies Hope (KASH), http://www.kash.or.ke/?p=2108.

III. CONCLUSION

A Chilling Climate for HIV-Focused CSOs



Photo: A boy and his grandmother at a clinic in Nairobi, Kenya, which provides support for people living with HIV (Photo: Clare McEvoy/Trocaire)

This report finds that in their efforts to regulate civil society, states can have an adverse effect on the partnerships needed fully to implement HIV response. Restrictions on the registration, financing, and operations of CSOs in Ethiopia, Uganda, and Kenya go beyond the reasonable limits set out in human rights law and create a chilling climate for civil society's work on HIV response. This effect is particularly hard on groups working with key populations, including sex workers, gay men, MSM, and PWID.

Punitive laws that criminalize key populations have been shown to have a negative impact on HIV response. The UN special rapporteur on the right to health, the Global Commission on HIV and the Law, and numerous CSOs have compiled exhaustive evidence showing that punitive laws and the abuses that accompany their enforcement induce key populations to remain underground and avoid government-run HIV prevention, treatment, and care programs.[84] Similarly, Beyrer and colleagues report that MSM "have disproportionately high burdens of HIV infection" and link that burden in part to a "marked increase in anti-gay legislation in many countries."[85] Punitive laws that criminalize same-sex sexual relations are associated with implausibly low or absent estimates of the number of MSM and may contribute to inflated HIV service coverage reports that "paint a false picture of suc-

84 Office of the UN High Commissioner for Human Rights, "Open Letter by the Special Rapporteur on the Right of Everyone to Enjoyment of the Highest Attainable Standard of Mental and Physical Health, Dainius Pūras, in the Context of the Preparations for the UN General Assembly Special Session on the Drug Problem (UNGASS), Which Will Take Place in New York in April 2016," December 7, 2015, http://www.ohchr.org/Documents/Issues/Health/SRLetterUNGASS7Dec2015.pdf; UN Human Rights Council, "Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover," April 27, 2010, A/HRC/14/20; and Global Commission on HIV and the Law, "Risks, Rights and Health" (New York: United Nations Development Program, 2012), http://www.undp.org/content/dam/undp/library/HIV-AIDS/Governance%20of%20HIV%20Responses/Commissions%20report%20final-EN.pdf.

85 Chris Beyrer, et al., "The Global Response to HIV in Men Who Have Sex With Men," *The Lancet* 388 (July 9, 2016): 198-206, http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(16)30781-4/fulltext?rss=yes.

cess."[86] The World Health Organization and UNAIDS have called for the reform of punitive laws to improve access to HIV services by all key populations.[87] Legal reform is also urged in the UNAIDS 2016-21 strategy.[88]

The arbitrary and unpredictable nature of regulations in Ethiopia, Uganda, and Kenya affect the degree to which organizations can plan and build a sustainable set of programs, as well as their ability to build internal capacity and scale up to meet urgent demands. Restrictions on CSO registration, financing, and operations and laborious paperwork and bureaucratic procedures are especially burdensome for small organizations working on the front lines of the HIV/AIDS epidemic and impede their ability to fast-track HIV response initiatives.

While this report focuses on only three East African countries, its findings apply to other regions of Africa and many parts of the world. Research conducted in Asia, Eastern Europe, Central Asia, and the Caribbean shows that CSOs working on HIV are increasingly hampered by laws, policies, and practices that restrict their registration, operations, and funding.[89] In all of these regions, organizations conducting HIV advocacy and accountability and working on issues related to key populations are among the groups most affected by these restrictions.

Yet to date these restrictions and their impact on HIV-focused organizations and HIV response in general have received minimal attention from governments, UN agencies, donors, regional and global human rights mechanisms, and other partners involved in HIV response. In an effort to rectify this neglect, CSOs, UNAIDS, and the Office of the UN High Commissioner for Human Rights urged the ACHPR to adopt its resolution on the situation of human rights defenders in Africa in May 2017. The resolution specifically calls for the protection of civil society actors working on HIV and health, sexual orientation, and gender identity.

86 Sarah L.M. Davis, et al., "Punitive Laws, Key Population Size Estimates, and Global AIDS Response Progress Reports: An Ecological Study of 154 Countries," *Journal of the International AIDS Society* 20 (March 17, 2017): 21386, http://dx.doi.org/10.7448/IAS.20.1.21386.

87 World Health Organization, "Consolidated Guidelines on HIV Prevention, Diagnosis, Treatment and Care for Key Populations," 86, http://apps.who.int/iris/bitstream/10665/128048/1/9789241507431_eng.pdf?ua=1&ua=1.

88 UNAIDS, *On the Fast Track to End AIDS. 2016-2021 Strategy* (Geneva: UNAIDS, 2015), 64, http://www.unaids.org/sites/default/files/media_asset/20151027_UNAIDS_PCB37_15_18_EN_rev1.pdf.

89 See Human Rights Watch, "Briefing on Shrinking Space for Civil Society in Russia," February 24, 2017, https://www.hrw.org/news/2017/02/24/briefing-shrinking-space-civil-society-russia, and Meg Davis, "The Perfect Storm: The Closing Space for LGBT Civil Society in Kyrgyzstan, Indonesia, Kenya, and Hungary," April 2016, https://globalphilanthropyproject.org/2016/04/22/perfectstormreport/.

IV. RECOMMENDATIONS

Much still needs to be done to address restrictions on civic space and their impact on HIV response in Ethiopia, Uganda, Kenya, and other countries around the world. The following recommendations suggest steps that can be taken to create a more enabling environment for civil society's involvement in HIV response.

National governments are advised to:

- **Protect**, **by law and in practice, the human rights** necessary for civil society actors to operate fully, including the right to freedoms of opinion and expression, peaceful assembly, association, and participation in public affairs.
- **Review and repeal or amend legal provisions** that impede the free and independent work of civil society. In particular, ensure that all laws or regulations restricting the work of CSOs are consistent with global and regional human rights norms and standards, including the UN Declaration on Human Rights Defenders.
- **Implement rules, processes, and regulations** related to CSOs, including their registration and reporting and fiduciary obligations, in a transparent, non-discriminatory, non-abusive manner that complies with applicable human rights standards.
- **Adopt effective measures** to prevent and redress violence and human rights violations against CSO actors; refrain from criminalizing or otherwise acting against these defenders, including through reprisals and restrictions.
- **Remove punitive and restrictive laws, policies, and practices** that stigmatize, discriminate against, or restrict CSOs and individuals on the basis of sex, health status, sexual orientation, gender identity and expression, and similar considerations.
- **Repeal laws and regulations** that unduly restrict the ability of CSOs to seek, receive, or use funding and other resources, whether domestic or foreign. State institutions and businesses freely accept foreign capital investment, and the same should apply to CSOs.
- **Engage in dialogue and consultation** with human rights defenders and publicly recognize and support their work through communications and information campaigns.

AIDS coordinating authorities (in particular, national AIDS commissions and country coordinating mechanisms)[90] are advised to:

- **Attend to legal, regulatory, and other challenges** affecting the registration and work of CSOs working on HIV and other health-related issues.
- **Support, promote, and protect CSOs** working on HIV-related issues, including those engaged with criminalized populations. Such support should involve dialogue and consultation with CSOs and public recognition and endorsement of their work.

National human rights institutions are advised to:

- **Effectively use their promotion and protection mandates** to hold states accountable for restrictions imposed on CSOs and violations committed against human rights defenders.
- **Establish focal points** within national human rights institutions to protect civil society actors and human rights defenders and ensure that they are adequately resourced.
- **Engage actively** with all CSOs, including those working on health, sexual orientation, and gender identity.

90 National AIDS commissions are bodies established to provide overall leadership and coordination of national responses to HIV and AIDS, and country coordinating mechanisms are national committees that submit funding applications to the Global Fund to Fight AIDS, Tuberculosis, and Malaria and include representatives from government, the private sector, technical partners, civil society, and communities living with the diseases. A great majority of African countries have created national AIDS commissions, and national committees are considered a key element of the Global Fund partnership.

CSOs are advised to:

- **Build alliances** with diverse groups of CSOs affected by restrictions on civic space and violations against human rights defenders. These alliances should include groups working on health, HIV/AIDS, governance, the media, sexual orientation, gender identity and expression, and sexual and reproductive health and rights.
- **Engage with national, regional, and UN human rights mechanisms** to prevent and respond to restrictions on civil society and human rights violations against actors working on health and HIV-related issues.
- **Document and disseminate information** about the restrictions that CSOs face in their work on health and HIV.

African and UN human rights mechanisms are advised to:

- **Fully utilize their protection and promotion mandates** to monitor state compliance with all human rights norms and standards related to civil society and human rights defenders, including through country visits, fact-finding missions, recommendations issued in state reports, and urgent appeals.
- **Analyze legislation and policies** that impose restrictions on public liberties and curtail the role and operations of civil society actors because of non-compliance with human rights law.
- **Ensure effective implementation** of the ACHPR's Guidelines on Freedom of Association and Assembly in Africa, so that the rights enshrined in these regional legal norms are protected in practice.
- **Monitor and document,** through constant research, the impact of the closing of civic space on organizations and individuals working on HIV, health, and sexual and reproductive rights.

Donors and technical partners are advised to:

- **Raise and discuss the concerns** documented in this report through regular contact with authorities in the three countries.
- **Support and conduct research** on the impact of restrictions on civil society's HIV response.
- **Support and engage in other efforts** to prevent and address restrictions on civil society, especially those that affect its work on health, HIV, and development more broadly.



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