



**Reflecting On Closing Civic Spaces**  
Southern Africa HRD Summit



## Meeting Report

# Reflecting on the Closing of Civic Spaces and its Impact on Marginalised Groups in Southern Africa

## Southern Africa Human Rights Defenders Summit Johannesburg, 14-16 November 2018

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## STATEMENT OF THE 2018 SOUTHERN AFRICA HUMAN RIGHTS DEFENDERS SUMMIT ON THE CLOSING OF CIVIC SPACES IN SOUTHERN AFRICA

From 14 to 16 November 2018, 100 human rights defenders from across Southern Africa gathered in Johannesburg to reflect on the closing of civic spaces in the region. The human rights defenders (HRDs) came from non-governmental and community-based organisations, the media, the legal profession, and key populations groups in Angola, Botswana, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mozambique, Namibia, South Africa, Tanzania, Zambia and Zimbabwe.

We recognise that a human rights defender is any person who, individually or in association with others, acts or seeks to act to promote, protect or strive for the protection and realisation of human rights and fundamental freedoms, at local, national, regional or international levels.

As human rights defenders, we draw attention to the closing of spaces to raise concerns around human rights violations by governments and corporations. We note in particular that during 2018, the African Anti-Corruption Year, efforts made by activists in our region to uncover corrupt activities have been met with harsh responses.

As we celebrate Human Rights Day in 2018, we note with sadness and solidarity the sacrifices made by human rights defenders throughout the Southern African region.

We are particularly concerned by the brutal treatment of human rights defenders, protesters and journalists in the Democratic Republic of Congo and the increased arrests of human rights defenders from key population groups in Tanzania. We further mourn the deaths of human rights defenders who have been killed in the course of their work, including the deaths in the past two months of three students killed in protests in the Democratic Republic of Congo and Zambia.



**As we celebrate Human Rights Day, the UN Declaration on Human Rights Defenders, and those courts which sought to protect civic spaces,**

**We call on governments to uphold the rights to freedom of assembly, freedom of expression and freedom of association.**

**We call on States to implement the following demands to facilitate the protection of these rights:**

**Reform laws to ensure freedom of expression, association and assembly:**

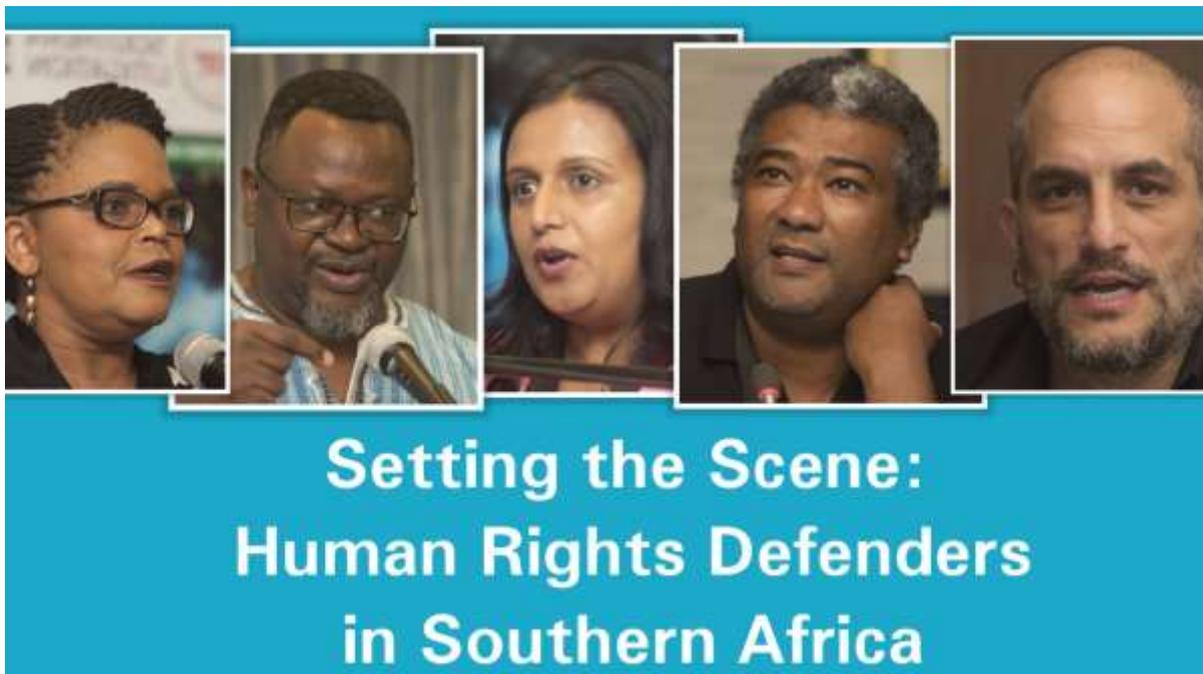
1. Reform laws relating to assemblies, associations, media, and cybercrimes, to ensure their compliance with regional and international human rights standards.
2. Repeal the offences of criminal defamation, defamation/insult of the President or public officers, sedition, spreading false news.
3. Remove stigmatising and marginalising laws including those criminalising consensual same-sex sexual acts, and outdated mental health laws.
4. Refrain from using national security or public morality as arguments to prevent the exercise of the rights to expression, assembly and association.
5. Draft and implement laws which promote access to information and data protection.
6. Improve public participation in the law-making process and ensure civil society input in the development of laws, including those relating to NGO regulation, assemblies, cybercrimes, media, hate speech, access to information and data protection.

**Ensure access to justice:**

1. Develop effective, independent and accessible complaints mechanisms that can address rights violations, including national human rights institutions, and police complaints bodies.
2. Ensure that under-resourced communities can access the courts, including by providing legal aid for human rights violations.
3. Ensure that the judiciary and police are able to execute their roles with complete independence.
4. Adhere to recent court decisions which emphasise the rights to freedom of assembly, association and expression.
5. Restore access of individuals to the SADC Tribunal.
6. Make a declaration under Article 34.6 of the Protocol to the African Charter on the Establishment of the African Court, in order to allow individuals and NGOs to access the African Court on Human and Peoples' Rights directly.

**Create an enabling environment for human rights defenders:**

1. Protect human rights defenders and journalists from attacks, surveillance and hate speech.
2. Investigate threats, assaults, abductions, murders and enforced disappearances perpetrated against human rights defenders, journalists, and other marginalised persons including gays, lesbians, transgender persons, sex workers and persons with albinism.
3. Intervene when the criminal justice system is used to persecute persons, including by withdrawing arbitrary charges against human rights defenders and journalists.
4. Provide support to human rights defenders and journalists who seek asylum as a result of persecution.
5. Promote press freedom. Facilitate the self-regulation of the media and remove onerous licensing and fee requirements for journalists, including foreign journalists, bloggers and social media users.
6. Ensure the rights to association, assembly and expression are vigorously and equally protected during election periods.



## Introduction

2018 marks the 20th anniversary since the United Nations General Assembly adopted the UN Declaration on Human Rights Defenders. In 2016, a group of experts developed a Model Law for the Recognition and Protection of Human Rights Defenders to assist States to ensure full and effective implementation of the UN Declaration on Human Rights Defenders.

In 2017, the African Commission on Human and Peoples’ Rights hosted the 2nd International Symposium on Human Rights Defenders in Africa, which adopted the Cotonou Declaration on Strengthening and Expanding the Protection of all HRDs in Africa. The Declaration specifically noted concerns about “the human rights violations targeting specific groups of human rights defenders, including women human rights defenders, human rights activists working in conflict and post-conflict States, on issues related to land, health, HIV, sexual orientation and gender identity and expression, as well as sexual and reproductive health rights”.

“We need to protect the human rights which the world agreed to. We also need to challenge the discourse that suggests that such rights are not part of our culture. It is precisely the human rights framework that gave impetus to the decolonisation agenda, and these rights were agreed to by the Organisation of African Unity and entrenched in the African Charter on Human and Peoples’ Rights. It is to protect these rights that Africa established the African Commission on Human and Peoples’ Rights and the African Court. Let us live by what we have agreed to.” *Beatrice Mtetwa, keynote speaker*

Recognising the above developments, the 2018 Southern Africa Human Rights Defenders Summit focused on the specific challenges faced by human rights defenders in the region and the need for urgent action in several countries to work against the closing of civic spaces.



The 2018 HRD Summit brought together a group of civil society activists from across Southern Africa, recognising that it is important to forge solidarity among human rights groups that face restraints on their ability to operate and to organise. This includes solidarity between different sectors including the sectors working on women, children, health, environmental, sex work, LGBTIQ, criminal justice, socio-economic, labour, disability, migrant, media, and anti-corruption. It is only through such solidarity that civil society can effectively and sustainably engage against encroachments on civic space.

The Summit defined a human rights defender as any person who, individually or in association with others, acts or seeks to act to promote, protect or strive for the protection and realisation of human rights and fundamental freedoms, at local, national, regional or international levels. The Summit noted that women, children, the elderly, persons with disabilities, key populations and other marginalised groups continue to face barriers as defenders of human rights. It is imperative to seek ways to bring the perceptions and concerns of such individuals and groups into the discussion about the future of the human rights defender community.

HRDs in the region have been the target of executions, torture, beatings, arbitrary arrest and detention, death threats, harassment and defamation, as well as restrictions on their freedoms of movement, expression, association and assembly. Defenders have been the victims of false accusations and unfair trials and convictions. There continues to be reports of torture committed by the police against human rights defenders. Only 2 countries in the region have not ratified the Torture Convention (Zimbabwe and Tanzania), yet only a few countries have dedicated legislation domesticating the Convention (e.g. South Africa) or have included offences relating to torture in their Penal Code (e.g. Mauritius) or Police Act (e.g. Eswatini).

Over the past two years, journalists have frequently been threatened when they reported on corruption-related cases or anti-government protests. Reporters without Borders estimated that in the first 8 months of 2018, there have been 22 attacks against journalists and 35 arrests of journalists in the Democratic Republic of Congo. In August 2018, 3 DRC journalists working for State media were dismissed for reporting on an anti-government demonstration and in October 2018, Democratic Republic of Congo journalist, Sylvanie Kiaku was arrested after publishing a critical article. There have been severe beatings and death threats against journalists in Mozambique, including Armando Nenane, Aunico da Silva and Ericino de Salema. Journalists were also threatened in Lesotho and one journalist was shot in July 2016 after reporting on the military.

The Summit looked specifically at the risks faced by human rights defenders who work on issues relating to key populations. Key populations in the context of HIV, TB and malaria are those that experience a high epidemiological impact from one of the diseases combined with reduced access to services and/or being criminalised or otherwise marginalised.<sup>1</sup> Stigma and discrimination toward people

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<sup>1</sup> Key populations in the HIV response: Gay, bisexual and other men who have sex with men; women, men and transgender people who inject drugs, and/or who are sex workers; as well as all transgender people are socially marginalised, often criminalised and face a range of human rights abuses that increase their vulnerability to HIV. Key Populations in the Tuberculosis Response: Prisoners and incarcerated populations, people living with HIV, migrants, refugees and indigenous populations are all groups that are highly vulnerable to TB, as well as experiencing significant marginalisation, decreased access to quality services, and human rights violations. Key Populations in the Malaria Response: The concept of “key populations” in the context of malaria is relatively new and not yet as well defined as for HIV and TB. However, there are populations that meet the criteria outlined above. Refugees, migrants, internally displaced people and indigenous populations in malaria-endemic



living with HIV, prisoners, sex workers, drug users, and LGBTI persons is a major impediment to improving health outcomes. Thus it was acknowledged that the closing of civic spaces not only impedes the ability of human rights defenders to assemble, associate and express themselves, but as a result it also negatively impacts the rights of the broader society they seek to protect, including socio-economic rights. Speakers noted that the work of human rights defenders (HRDs) is profoundly precious and must be protected. To do so, we need to ensure the broadest civic space in every country.

## Laws and Practices which Inhibit Freedom of Assembly

### Background

A number of countries in Southern Africa have laws which require the organisers of an assembly to give prior notice to the authorities. These laws are quite dated and often refer back to an era before the right to peaceful assembly was recognized in many constitutions: including Angola, Malawi (Police Act), Namibia (1989), Zimbabwe, and Zambia. A notable exception is Eswatini (2017), which has a new Public Order Act which places the right to assemble at the center of the law. This is more in line with the African Commission's Guidelines on Freedom of Association and Assembly in Africa (2018).

In some countries, the public order laws are ambiguous, and the police have often interpreted notice requirements to mean that a march without prior notice and a permit is unlawful. Limitations to freedom of assembly on the basis that a permit is required beyond mere notification, were found unconstitutional in Zimbabwe<sup>2</sup> in 1994, and in Zambia<sup>3</sup> in 1995. The South African Constitutional Court went even further to state that the notice requirement itself inhibits the right to assembly:

The South African Constitutional Court in November 2018<sup>4</sup> declared unconstitutional the provision in the Regulation of Gatherings Act which made it a criminal offence to convene an assembly of 15 or more people without first notifying the responsible officer of a municipality, even if such a gathering is peaceful and unarmed. The Court held that the provision infringed the constitutional right to assemble peacefully and unarmed. The Court held that the infringement was not justifiable and that those caught in its net faced a criminal record and exposure to the penal system. The Court noted that the offence also did not distinguish between adult and minor conveners, and for children who cannot vote, assembly is a vital form of expression. The declaration of invalidity went into effect immediately.

Countries in which a permit is needed include Botswana (1967), Lesotho, and Mauritius (1991) (appeal to judge). Countries like the Democratic Republic of Congo specifically do not allow an appeal from a decision to refuse a permit. A number of laws are also overly broad by making all protestors liable for damage caused by some protestors, as is the case in Madagascar (2004), Malawi (2009), South Africa (1996), and Zimbabwe (2002).

areas are often at greater risk of transmission, usually have decreased access to care and services, and are also often marginalised.

<sup>2</sup> *Re Munhumeso and Others* (1994) 1 LRC 282.

<sup>3</sup> *Mulundika and Others v The People* SCZ Judgment 25 of 1995.

<sup>4</sup> *Mlungwana and Others v S and Another* [2018] ZACC 45.

On 1 September, 2016, the Zimbabwe Commissioner of Police banned all public processions and demonstrations in Harare for two weeks. Subsequently, in October 2018,<sup>5</sup> the Zimbabwe Constitutional Court declared unconstitutional the provision in the Public Order and Security Act which allowed the Commissioner of Police to prohibit for a specific period all public demonstrations. The Court held that the ban stereotypes all demonstrations and condemn them as unworthy of protection. The declaration of invalidity was suspended for 6 months. In April 2018, the Madagascar government issued a similar ban on all political protests.

In Zambia, 6 activists were arrested in September 2017 when they peacefully protested the acquisition of 42 fire trucks procured by the Zambian government at a cost of 42 million USD. They were charged with “disobeying lawful orders” under the Zambia Penal Code.<sup>6</sup> A similarly framed offence exists in Botswana and Tanzania. The primary concern with the offence is its broad framing: It makes it an offence to disobey the order of any person “acting in any public capacity” even if the person who is alleged to have disobeyed the order was not aware of the public capacity of the person or his/her duty to obey that person’s orders. This amounts to a person being found guilty of conduct which they would not have known to be an offence at the time, and then being liable to 2 years’ imprisonment.

Police in the region are also quick to arbitrarily declare an assembly unlawful when no permit was obtained or conditions are not complied with, and to arrest participants. This was seen frequently in Zambia over the past year. In January 2018, Zambia police arrested a UK lawyer who was consulting with a community affected by mining operations. He was eventually charged with breach of peace. On 21 October 2018, police arrested 5 pastors and 3 officials from the Centre for Trade Policy for organising an unlawful meeting to discuss the national budget. Copperbelt Province Police Commissioner Charity Katanga said “police arrested pastors and CTPD officials who gathered to discuss the national budget because they digressed from the topic and started talking about politics, which incensed other discussants.” The 8 were initially charged with unlawful assembly, but pleaded guilty to a lesser charge of breach of peace. On 5 October 2018, a student from the University of Zambia, Vespers Shimuzhila, suffocated to death from police teargas which was thrown into her room. Police claimed protesting students violated the Public Order Act, but Vespers was not even a participant in the protest. On 27 September 2018, Maiko Zulu, was arrested under the Public Order Act after he held a lone protest outside the British High Commissioner’s Office calling for the mining company Vedanta to be delisted from the London Stock Exchange.

Participants noted that the police’s interference with meetings is heightened when political discourse becomes hostile towards key population groups. In Tanzania, LGBTI activists who attended workshops were arrested in September and October 2017.

The right to assemble is one of the most important tools for workers to assert their rights in the workplace. It is concerning when this right is impeded on. For example, in October 2018, the South African government released a draft of new picketing rules alongside other amendments to the Labour Relations Act. The draft regulations provide commissioners who mediate disputes between employers

<sup>5</sup> *Democratic Assembly for Restoration and Empowerment and Others v Newbert Saunyama NO and Others*, CCZ 5/2018.

<sup>6</sup> Section 127 of the Zambian Penal Code Act provides that: “Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or person acting in any public capacity and duly authorised in that behalf, is guilty of a misdemeanour and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience, to imprisonment for two years.”

and employees, far-ranging powers to decide what workers can and cannot do on a picket line. The new rules are contrary to international labour standards.

## Discussion

Participants noted that the right to freedom of assembly is often affected in a number of ways:

- Onerous administrative requirements;
- The deliberate targeting of movement leaders with the intention of fragmenting the movement;
- The need to review outdated laws to ensure they provide protection for the right to peaceful assembly;
- The need to consider the challenges faced by persons with disabilities which hamper their ability to participate in assemblies, including the impact of increased militarisation in the policing of assemblies;
- Misinterpretation by the police of the law and abuse of their discretion under the law, leading to wasteful expenditure of limited resources of NGOs because of ensuing litigation;
- Selective application of the law; and
- Intimidation of HRDs during assemblies.

Of concern is the insecurity caused by militias and armed groups, including in the Democratic Republic of Congo, where it was reported that 47 protestors were killed during 2017. Two students were recently shot dead during a protest in the DRC in November 2018.

Speakers raised difficulties faced by persons with disabilities when trying to participate in civic spaces, and the challenges they face during protests and in detention. One of the examples cited was when a protestor in a wheelchair was beaten by police during a protest in Angola in April 2017. Police tried to stop the peaceful protest of persons with disabilities who gathered to protest inaccessible infrastructure and inequality. A person with a hearing disability was one of the protestors who were shot during August 2018 protests in Zimbabwe.

Speakers noted that the police tend to latch onto limitation provisions in the Constitution, such as national security, public morality and public order, to limit the right to assemble. In Zambia and Zimbabwe, gatherings and protests have been prevented by police who cited the 2018 cholera outbreak.

In December 2015, the Police Commissioner of Bulawayo refused to give permission for the Sexual Rights Centre (SRC) to hold a march to observe the International Day to End Violence against Sex Workers which takes place annually on 17 December. In November 2017, the Supreme Court of Zimbabwe set aside the decision of the High Court of Zimbabwe and that of the Police Commissioner, which refused the SRC in Bulawayo the right to hold a peaceful demonstration on public morality grounds. The purpose of the peaceful demonstration was to create public awareness of ongoing violence and abuse faced by sex workers.

Furthermore, police often arrest protestors without bringing them to court or pursuing criminal prosecution. This illustrates how the laws are used as a means to harass and intimidated HRDs.

In October 2018, the Zimbabwe High Court ordered the government to pay \$150,000 in damages to HRD, Jestina Mukoko who was abducted, beaten, tortured and held in solitary confinement for weeks by state agents after elections in 2008. It was noted that access to justice in this case took ten years.

Participants noted that whether or not the police abuse their powers is influenced by the extent of their independence from the executive and ruling party and the ways they can be held accountable for their actions. To mitigate police abuse, participants emphasised the need to maintain and protect judicial independence and address impunity.

Two key lessons emerged on how to ensure HRDs are able to protect themselves from police abuse:

1. Ensure communities are organised, that the work of HRDs remains relevant to communities and that communities share the same vision of the society we wish to build;
2. Protect all human rights unconditionally, advocating for solidarity and support when rights are infringed - “we cannot select what we want out of the basket”.



## Laws and Practices which Inhibit Freedom of Expression

### Media Restrictions

Media restrictions impact civil society activism in a number of ways – it limits access to information about human rights abuses and limits the ability to hold governments and corporations accountable. Increasingly journalists and newspapers who publish stories relating to corruption are at risk of arrest and persecution. To ensure that the media retains its ability to be a watchdog and to provide information to the public, independent regulation of the media is necessary. There should be no licensing requirements for bloggers or social media administrators.

A number of countries in the region require registration of newspapers, often through dated laws, including Botswana, DRC, Lesotho, Mauritius (1837), Malawi, Namibia, Seychelles (1935), Zambia, and Eswatini (1963). What is of particular concern is when laws extend to the registration of journalists.



Countries in which journalists must be registered and in which they can be prevented from practicing as journalists, include Angola, Madagascar, Tanzania (2016), and Zimbabwe (2002).

In March 2018, Tanzania published the Electronic and Postal Communications (Online Consent) Regulations which went so far as to require the licensing of anyone providing online content, including bloggers. The Regulations empower the authorities to keep a register of bloggers, online forums, online radio and online television and to take action against non-compliance to the Regulations, including to order removal of prohibited content. The Regulations prohibit the publication of indecent content, which is defined as “any content which is offensive, morally improper and against current standards of accepted behaviour, such as nudity and sex”, thus placing certain key population groups and service providers at particular risk. Prohibited content also include “content that may threaten national security or public health and safety such as... disseminating false information with regards false content which is likely to mislead or deceive the public unless where it is clearly pre-stated that the content is- (i) satire and parody; (ii) fiction; and (iii) where it is preceded by a statement that the content is not factual.”

Foreign journalists face additional challenges. In May 2016, a foreign journalist, Coque Makuta, was beaten in Angola. In November 2018, two journalists from the Committee to Protect Journalists, Angela Quintal and Muthoki Mumo, were unlawfully detained and interrogated by Tanzanian intelligence agents about whom they had met and why. Mumo was assaulted, their electronic devices were searched and a false tweet was sent from Quintal’s social media account claiming they had been freed when they were still in detention. They were released after an international outcry, with the Tanzanians claiming the pair had violated their visa conditions, even though they had double-checked the requirements and declared the purpose of their visit on arrival. In July 2018, the Mozambique government gazetted accreditation fees for journalists. Foreign correspondents resident in Mozambique will be required to pay an accreditation fee of US\$ 8630, nationals who are correspondents for foreign media outlets must pay US\$3400, and foreign freelance journalists must pay US\$2600. In July 2017, a Ministerial Decree was issued in the Democratic Republic of Congo requiring foreign journalists to obtain authorisation to move between provinces.

Participants noted the special challenges faced by female journalists, including gender-specific attacks, online harassments, inequality in the media, and risk of gender-based violence when arrested.

In the Democratic Republic of Congo it is an offence to distribute an anonymous publication. In Seychelles, the Minister of Information can prohibit the broadcast of material believed to be against the national interest or objectionable. In Botswana and Zambia, the President retains the discretion to prohibit a publication if he or she believes it is in the public interest to do so. In Tanzania and Eswatini, the Minister has similar broad powers to prohibit a publication - In 2017, 3 newspapers were closed in Tanzania and one in Eswatini.

In June 2018, the East African Court of Justice<sup>7</sup> held that the banning of a Tanzanian newspaper for three years in terms of the Newspapers Act of 1979 immediately after it published an article relating to the President, violated the right to freedom of expression: “While it is not our place to determine whether the information published was correct or not, a knee jerk reaction to ban a publication, hours after the story hit the news stalls, cannot, in our view, be conduct that is within the parameters of the

<sup>7</sup> *Managing Editor Mseto and Another v Attorney General of United Republic of Tanzania*, Reference No. 7 of 2016.



rule of law and good governance. Worse still, it cannot be, as the Minister suggested, that the President of a Partner State cannot ever be mentioned in newspaper articles. That is the price of democracy and public watch dogs like the press must be allowed to operate freely within lawful boundaries.”

### Access to Information Laws

Access to information is limited in the region. Only 3 countries in the region have had access to information laws for more than a decade, and even with these laws, HRDs and journalists face constraints in accessing information: Angola has had a dedicated law on access to information since 2002, and in addition, the 2006 Press Law also emphasises that journalists have a right to access information; South Africa has had an access to information law since 2000 which applies to public and private bodies. Zimbabwe’s Access to Information and Protection of Privacy Act 2002 (amended 2008), is the most restrictive. It provides that there is no right to mass media which is not registered and limits access to information which may be harmful to law enforcement or national security, or relates to financial or economic interests of a public body or the State. The law does not apply to private bodies.

In 2012, the African Commission on Human and Peoples’ Rights adopted a Model Law on Access to Information. Subsequently, access to information laws were developed in some countries: Mozambique enacted a law in 2015 which applies to private bodies holding information in public interest, and to all public bodies; Tanzania enacted a law in 2016; Malawi enacted a law in 2017, although it is not yet properly implemented; and Seychelles enacted a law in 2018. Despite this progress, draft bills on access to information have been stalling in Botswana, Democratic Republic of Congo, Madagascar, Namibia and Zambia, and there appears to be no planned laws on access to information in Lesotho, Mauritius or Eswatini.

Participants noted that HRDs with disabilities faced additional challenges in accessing information which require States to ensure the right to access to information for persons with visual, hearing and intellectual impairments.

The limits in accessing corporate information was raised as a serious challenge which restricts HRDs ability to act against abuses in the corporate sector, especially against the many multi-national corporations exploiting resources in the region.

### Data and Whistle Blower Protection Laws

Protection of privacy is a concern for HRDs, especially the extent to which States are able to gather personal data on activists. To protect privacy, SADC developed a Model Law on Data Protection in 2013. Countries with a dedicated law on data protection include Angola (2011), Botswana (2018), Lesotho (2012), Mauritius (2017), Madagascar (2014), Seychelles (2002), and South Africa (2013). Some countries provide for more limited data protection in other laws.

Whilst data protection is critical, provision should be made for whistle blowers. The SADC Model Law on Data Protection includes whistle blower protections.

Currently Angola, Zimbabwe and Eswatini have no whistle blower protections in their laws, whilst some countries have limited whistle blower protections and no dedicated laws: Democratic Republic of Congo (limited protection in labour law); Lesotho (Corruption Act of 2006); Mauritius (Good



Governance law); Madagascar (Corruption Act of 2004); Mozambique (Anti-Corruption law of 2004); Malawi (Access to Information Act of 2017); and Seychelles (Anti-Corruption Act of 2016).

Countries with a specific law on whistle blower protection include: Botswana (2016), Namibia (2017), South Africa (2000) (including protection from criminal and civil liability), Zambia (2010) (including protection from criminal liability); and Tanzania (2015).

There are, however, serious concerns with Tanzania’s 2015 Whistle Blower and Witness Protection Act. It provides that disclosures of wrongdoing are not permitted if they would be likely to cause prejudice to the “sovereignty and integrity of the United Republic of Tanzania, the security of the State, friendly relations with a foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to commit an offence and the disclosure of proceedings of the Cabinet”. This list is so broad that it seriously undermines the efficacy of the entire protection framework.

Freedom of expression is also limited by laws which make it a criminal or disciplinary offence for public servants to speak to the media without authorisation (examples of countries with such criminal offences include Botswana and Malawi). In April 2017, a teacher in Angola was dismissed from work after writing an article critical of the government. In August 2018, a nurse in Zimbabwe was suspended for criticising the ruling party on social media.

In Southern Africa, journalists are often targeted when they publish articles relating to corruption. Some countries have overly broad laws which prohibit the publication of information relating to a corruption investigation, even when the public interest ought to allow such publication. Examples of countries with such laws include Botswana, Lesotho, Zambia, South Africa and Eswatini. Namibia and South Africa also both still have the Protection of Information Act of 1982, and have used it in the past year against journalists.

The Namibia High Court in June 2018,<sup>8</sup> ruled against the applicants who sought to interdict a newspaper and journalist from publishing an exposé on corrupt activities of the Central Intelligence Service. The interdict was sought on the strength of the Namibia Central Intelligence Service Act of 1997 and the Protection of Information Act of 1982 which prohibited the possession and publication of classified information and on the basis that the publication would expose and be harmful to the operations of the security service. The Court held that the law should not deny the Namibian public the right to be informed more fully, through the intended newspaper article, of matters which had already become freely available through publicly accessible court documents and the media.

### Potential Use of Cybercrime Laws against HRDs and the Media

Currently only a fraction of cybercrimes are prosecuted, and it is imperative that States put in place measures to protect society from cybercrimes. Regionally, there is a SADC Model Law on Computer Crimes and Cyber Crimes (2013) and an AU Convention on Cyber Security and Data Protection (2016).

A few countries in the region have developed cybercrime laws prior to the SADC Model law, including Botswana (2007), Democratic Republic of Congo (2002), and Mauritius (2003). These laws can likely benefit from review. Increasingly countries in the region are responding to the need for specific

<sup>8</sup> *Director General of the Namibia Central Intelligence Service and Another v Haufiku and Others* [2018] NAHCMD 174.





cybercrime legislation: Madagascar created a law in 2014, but subsequently amended it in 2016 to remove custodial sentences; Tanzania enacted a law in 2015; and Malawi enacted a law in 2016. In addition, various countries have already started developing draft laws, including Angola, Lesotho, Namibia, South Africa, Zambia and Zimbabwe.

The development of cybercrime laws requires increased consultation with civil society to ensure that the laws are not drafted and used in a way that limits freedom of expression and press freedom. Vaguely defined sections such as “contrary to morality” and “publication of false information” are problematic and over-criminalisation should be avoided. The technicality of media laws require that the judiciary is trained on these laws in the context of freedom of expression.

Participants expressed concern that the development of technology has added to their vulnerability in a number of ways, and HRDs require training on how to protect themselves.

Several countries in the region reportedly have spyware and have laws that allow for surveillance, including Angola, Democratic Republic of Congo, Mozambique, Malawi, Namibia, South Africa, Zambia, and Zimbabwe. For example, the use of the spyware called Pegasus is becoming a concern in the region. Pegasus spyware software is installed on devices running Apple’s mobile operating system and is capable of reading text messages, tracking calls, collecting passwords, microphone recording, file retrieval, e-mail and calendar retrieval, collecting information of social media and contacts, and tracing the location of the phone. A September 2018 research report by Citizen Lab identified Pegasus operators and activities in 45 countries, including Mozambique, South Africa and Zambia.<sup>9</sup>

In September 2018, the European Court of Human Rights gave judgment in a case<sup>10</sup> against the United Kingdom which dealt with three different surveillance regimes: (1) the bulk interception of communications; (2) intelligence sharing with foreign governments; and (3) the obtaining of communications data from communications service providers. The Court held, by five votes to two, that: the bulk interception regime violated Article 8 of the European Convention on Human Rights (right to respect for private and family life/communications). The Court held that the safeguards governing the selection of “related communications data” for examination were inadequate. In reaching this conclusion, the Court found that the operation of a bulk interception regime did not in and of itself violate the Convention, but noted that such a regime had to respect criteria set down in its case-law. The case included 7 INCLC members: Liberty, American Civil Liberties Union (ACLU), Canadian Civil Liberties Association (CCLA), Egyptian Initiative for Personal Rights (EIPR), Hungarian Civil Liberties Union (HCLU), Irish Council for Civil Liberties (ICCL), and Legal Resources Centre South Africa (LRC).

Participants were further concerned that governments increasingly had the ability to arbitrarily block or take down websites, in particular those relating to human rights, including through denial of service attacks, and to block social media during protests. Internet, SMS and social media was frequently blocked in the Democratic Republic of Congo and Zimbabwe during protests and in the run-up to elections.

<sup>9</sup> <https://citizenlab.ca/2018/09/hide-and-see-tracking-nso-groups-pegasus-spyware-to-operations-in-45-countries/>

<sup>10</sup> *Big Brother Watch and Others v the United Kingdom* (applications nos. 58170/13, 62322/14 and 24960/15).





Whilst cyber laws can be used against HRDs, these laws also have the potential to reduce online abuse and hate speech. Participants from key population groups were particularly concerned by the extent to which social media is used to promote hate speech, both by government leaders and ordinary members of society. There has also been an increase in online personal attacks on HRDs. Participants urged the media to refrain from inciting hatred against HRDs or civil society organisations and to promote responsible reporting.

Hate speech laws have also been abused by governments who target persons who express legitimate opinions. A lawyer in Tanzania was arrested in October 2017 for “inciting tribal hatred” after he commented on the discrimination in government appointments. Similarly, a lecturer in Zambia was charged with the same offence in October 2018.

### Public Participation and Access to Parliamentary Proceedings

Parliaments need to ensure parliamentary and portfolio committee proceedings are accessible to the public and facilitates public participation. Restrictions on reporting and broadcast of parliamentary proceedings can be prohibitive, such as ministerial censorship and accreditation and licensing fees. Demands by the media to broadcast and report on court proceedings and parliamentary proceedings are also important to human rights defenders. Tanzania has suspended live broadcasts of its parliamentary proceedings since 2016. There are some positive developments in the region. South Africa has an accessible parliamentary broadcasting service, whilst Mauritius released a report in 2015 which recommended the broadcasting of parliamentary proceedings.

A number of laws have recently been passed in Southern Africa which will have a direct impact on civil society, the media, and freedom of expression, assembly and association. Yet, these laws were passed with minimal civil society input, resulting in a public which is understandably sceptic of the new laws. Governments should facilitate and provide time for public input into legislative processes. Of concern is the draft Media Regulations in Mozambique and the draft NGO Bill in Malawi, which both did not have much civil society input. HRDs in Malawi resorted to approaching the High Court to obtain an injunction against the passing of the NGO Bill.<sup>11</sup> On 3 December 2018 the court granted an injunction restraining the respondents from tabling the NGO Amendment Bill in Parliament until a further order from the court.

### Extra-Judicial Killings, Enforced Disappearances, Torture, Inhuman or Degrading Treatment, Violence and Arbitrary Detentions

Participants expressed concern that forced disappearances are seldom investigated and little thought is spared for the families who have been left behind. Over the past three years, forced disappearances and

<sup>11</sup> *Centre for Human Rights and Rehabilitation and Others v Speaker of the Malawi National Assembly and Another*, Case No. 14 of 2018.





killings of human rights defenders and journalists have been reported in Zimbabwe,<sup>12</sup> Tanzania,<sup>13</sup> South Africa,<sup>14</sup> Mozambique<sup>15</sup> and the DRC<sup>16</sup>.

Worryingly, only 4 countries in the region have ratified the Convention on Enforced Disappearances: Lesotho, Malawi, Seychelles, and Zambia.

Where journalists and HRDs are shot, injured or killed by the State, those responsible need to be held accountable. Unfortunately there is often little redress if the police refuse to investigate. To date, few countries in the region provide effective avenues for the public to complain about police abuse. Several countries have no specific complaints bodies relating to the police and the public would have to lodge complaints with either a National Human Rights Institution or Ombud: for example, Angola, Democratic Republic of Congo, Madagascar, Mozambique, Seychelles, Zimbabwe, and Tanzania. In some countries processes are set out in the law for reporting police abuse, but these processes are often not effective or independent: for example, Botswana (Police Council), Namibia (Complaints and Disciplinary Unit), Eswatini (complaints first taken to Police Commissioner and then Police Service Commission), Lesotho (has a Police Complaints Authority which does not receive complaints directly from the public). The only countries with dedicated police complaints bodies are Mauritius, Malawi, South Africa, and Zambia.

There have also been many reports of murders and assassinations of MPs and other politicians across the region. Many times, these deaths go un-investigated, and they also have a chilling effect on the ability of people to exercise their rights in civic spaces, including their right to express criticism and their right to public participation.

SADC Member States need to ensure the availability of local funding for emergency situations to assist HRDs who face persecution. Further, they need to respect the rights of HRDs when they seek asylum.

<sup>12</sup> Itai Dzamara, Paul Chizuze.

<sup>13</sup> Wayne Lotter, Azory Gwanda, Godfrey Luena.

<sup>14</sup> Sibonelo Patrick Mpeku, Soyeso Nkqayini, Mahahu Daniel Maseko, Philela Gilwa, Sikhosiphi Rhadebe, Mthunzi Zuma, Zamuxolo Dolophni.

<sup>15</sup> Jose Macuane, Gilles Cistac.

<sup>16</sup> Alphonse Luanda Kalyamba Ngubu, Alex Tsongo Sikuliwako, Vincent Machozi, Rossy Tshimanga Mukendi, Luc Nkulua.





### Laws which Criminalise Expression

Several criminal laws and court practices have a chilling effect on media freedom and expression in the region. Journalists and HRDs are sued for civil damages for defamation when they report on the activities of corporations and politicians. Criminal and civil defamation laws, sedition and contempt of court offences are often used in a manner that seeks to deter journalists and HRDs from exposing corruption. This has a chilling effect on journalists and contributes to self-censorship and makes it difficult to interrogate, investigate and report on corruption for fear of being targeted.

The ECOWAS Community Court of Justice in February 2018<sup>17</sup> concluded that the offences of sedition, criminal libel and publication of false news were “inacceptable instances of gross violation of free speech and freedom of expression”. It emphasised that the right to freedom of expression is “not only the cornerstone of democracy, but indispensable to a thriving civil society” – “wide or vague speech-restricting provisions forces self-censorship”. The Court pointed out that these offences originated in an era when freedom of expression was not recognised as a fundamental right.

### Criminal Defamation

In the past two years, the region has seen the arrests of journalists and HRDs using the offence of criminal defamation, including Basildon Peta (Lesotho), and Rafael Marques (Angola).

Criminal defamation remains an offence throughout the region. In earlier cases around criminal defamation, courts focused on narrowing the interpretation of the offence, for example by requiring consent from the Attorney General or Director of Public Prosecutions before prosecution is instituted. Other courts have said that the offence is reasonably required in a democracy to protect the right to

<sup>17</sup> *Federation of African Journalists and Others v Republic of Gambia Judgement* ECW/CCJ/JUD/04/18.

reputation. This was the position of the South Africa Supreme Court of Appeal,<sup>18</sup> the Uganda Constitutional Court<sup>19</sup> and the Supreme Court of India.<sup>20</sup> The Seychelles Constitutional Court<sup>21</sup> held that whether there is a reasonable limitation of the right to freedom of expression would depend on the defences available to a charge of defamation.

However, some courts have gone further to say that the offence of criminal defamation is disproportionate in its limitation of freedom of expression because of the chilling effect of the offence, the existence of a civil remedy, and the severe impact of imprisonment. This position was taken by the Zimbabwe Constitutional Court,<sup>22</sup> by the African Court on Human and Peoples' Rights,<sup>23</sup> by the Kenya High Court<sup>24</sup> and by the Lesotho Constitutional Court.<sup>25</sup> The African Commission on Human and Peoples' Rights has issued a resolution calling for the repeal of criminal defamation laws and insult laws.

The offence of criminal insult still exists in Zimbabwe. The Democratic Republic of Congo's Press Freedom Bill (2015) aims to abolish custodial sentences for media offences, and a similar amendment was made to the Madagascar cybercrime law in 2016 after a court order. Despite these improvements, other countries in the region have retained custodial sentences, including Mauritius where the offence of criminal defamation attracts a sentence of 5 years. Criminal defamation has also recently been extended to online defamation in Madagascar (2014), and Tanzania (2016) – the latter had repealed it previously from Penal Code, but reintroduced it through Media Services Act (2016). Angola's 2017 Press Law also criminalises the publication of a text or image that is "offensive to individuals".

### *Defamation of the President*

The region has seen numerous arrests of journalists and HRDs for offences such as defamation of the President or of public officers. In August 2018, the President of Malawi threatened to use the offence against his detractors: "There are laws in this country about describing a President. If they don't stop, I am going to drop down on you like a ton of bricks, and I mean it."

In April 2018, 3 Angolan students were charged under the offence.<sup>26</sup> This followed the June 2017 arrest of Angolan journalists Rafael Marques and Mariano Bras where they were charged with the same offence. Marques and Bras were eventually acquitted in July 2018.

In September 2018, 4 activists from Filibi, Democratic Republic of Congo, were sentenced to a year imprisonment for allegedly participating in the planning of a December 2017 protest.<sup>27</sup>

<sup>18</sup> *Hoho v State* [2008] ZASCA 98, 2009 (1) SACR 279 (SCA).

<sup>19</sup> *Buwembo and Others v Attorney General* [2009] UGCC 5, [2009] 5 LRC 525.

<sup>20</sup> *Swamy v Union of India* (2016).

<sup>21</sup> *Sullivan v Attorney General and Another* [2013] 2 LRC 321.

<sup>22</sup> *Madanhire and Another v Attorney General* CCZ 2/2014, [2014] ZWCC 2.

<sup>23</sup> *Lohé Issa Konaté v The Republic of Burkina Faso*, (2014) App 004 of 2013.

<sup>24</sup> *Okuta and Another v Attorney General and Others*, Petition No. 397 of 2016 [2017] eKLR.

<sup>25</sup> *Basildon Peta v Minister of Law, Constitutional Affairs and Human Rights and Others* (CC 11/2016) [2018] LSHC 3.

<sup>26</sup> Afonso Muatchi Kukululu, Justino Valente, Antonio Ferrando.

<sup>27</sup> Carbone Beni, Mino Bompomi, Cedrick Kalonji, Grace Tshiunza.

In Zambia, Fresher Siwale was charged with the offence of defamation of the President in May 2018 after comments he made on Muvi TV. In July 2017, Zambia police arrested a student, Edward Makayi, for criticising the President on Facebook. In January 2018, the Mongu Magistrates Court convicted and sentenced a medical doctor, Dr Kwalela Kafunya, to seven years' imprisonment for defamation of the President. In October 2018, Dr Austin Mbozi, a lecturer from the University of Zambia was arrested and charged with defamation of the President after he wrote an opinion piece critical of the government.

The offence of defamation of the President often does not contain the explicit defences that exist in the offence of criminal defamation. Whilst the offence of defamation does not include defamation orally or by gesture, the offence of defamation of the President, often does extend to these acts. It can be argued that this offence is archaic and does not fit in a democracy where a President is elected and as a public officer should be willing to face criticism. Public figures ought to be required to tolerate a greater degree of criticism. The sanction is further so severe as to inhibit freedom of expression. Despite these concerns, the offence of defamation of the President was held to be constitutional by the Supreme Court of Zambia.<sup>28</sup>

In 2013, the Constitutional Court of Zimbabwe<sup>29</sup> considered the offence of undermining the authority of the President. The offence can lead to 1 year imprisonment. It requires intention, knowledge or realising the possibility that the statement is false, a public act, and consist of either engendering feelings of hostility towards the President, causing hatred, contempt or ridicule of the President whether in person or in respect of his office, making an abusive, indecent or obscene comment about the President whether personally or in respect of his office. The accused had referred to the President as a goblin. It was argued that basing a criminal trial on facts which if proved would not constitute an offence would be in violation of the accused's right to protection of the law. The Constitutional Court held that a patently false statement to the effect that the President is a goblin was unlikely to deceive a right thinking person into believing that it is true and such a statement cannot hold up the President to ridicule. The Court found that the prosecution was in violation of the accused's right to protection of the law.

In some countries it is an offence to insult the President (Zambia, Malawi, Seychelles and Zimbabwe), whilst other countries have extended this offence to also include insulting any public officers (Angola, Mozambique, Democratic Republic of Congo, Botswana and Madagascar). The offence has also been extended to online media in Tanzania. Notably, Democratic Republic of Congo, Botswana and Madagascar only impose a fine as sentence.

In Eswatini, it is an offence to display an image of the King in a disparaging manner or offend the dignity of the queen-mother. The latter crime can result in 12 years' imprisonment. Lesotho also prohibits infringing the dignity of the royal family.

Most countries in the region have additional offences relating to insulting the national flag, anthem or national emblem.

### *The Offence of Sedition*

Seditious intent is linked to an act of exiting disaffection against the President, government or administration of justice. However, the term "disaffection" is broad enough to include expressive

<sup>28</sup> *Fred Mmembe, Bright Mwape v The People* SCZ 4 of 1996.

<sup>29</sup> *Mwonzora v State* CCZ 88/2013.

conduct that would ordinarily constitute an essential element of democratic discourse. The vagueness of the offence makes it hard to know with reasonable certainty what conduct is prohibited and arguably violates the principle of legality.

This archaic offence of sedition remains in place throughout the region, making it an offence to “excite disaffection”: Angola (1886), Botswana, Democratic Republic of Congo, Mauritius, Madagascar, Malawi, Seychelles, Zambia (1938), Eswatini (1938). The offence is slightly narrower under the common law, in Namibia, South Africa, and Zimbabwe (as codified). The offence has also seen a revival in new media and criminal laws in Angola, Democratic Republic of Congo, Mozambique, Tanzania and Lesotho.

The offence of sedition has been held to be unconstitutional by Nigeria<sup>30</sup> and Uganda<sup>31</sup> on the basis that it was vague and rooted in the purpose that “colonialists did not want to be criticised”. The Eswatini High Court declared some sedition provisions unconstitutional in 2016.<sup>32</sup> The government has since appealed the decision.

A journalist in Botswana, Outsa Mokone, was charged under this offence after publishing an article relating to the President. He challenged the constitutionality of the offence.<sup>33</sup> In February 2018, the Botswana Court of Appeal, when confronted with a case which challenged both a warrant of arrest and the constitutionality of the offence of sedition, determined that a successful decision on the warrant issue avoided the constitutional determination. The charges against him were eventually withdrawn in September 2018.

The crime of sedition is contrary to modern principles of international human rights. For example, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1995) affirms that, “expression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”

#### *The Offence of Spreading False News*

The offence of spreading false news or rumours which causes alarm is prevalent in the region: including Angola (2006), Democratic Republic of Congo, Mauritius, Malawi, Seychelles, and Tanzania. In Tanzania, the offence of publishing false information on a computer system was criminalised in 2015.

In Uganda, the Supreme Court declared the false news offence unconstitutional in 2004.<sup>34</sup> The Court examined the offence in the context of the scope and importance of the right to freedom of expression and held that the wording of the offence was vague.

<sup>30</sup> *Chief Arthur Nwankwo v State* (1985) NCLR 228.

<sup>31</sup> *Andrew Mujuni Mwenda and Another v Attorney General* [2010] UGCC 5.

<sup>32</sup> *Maseko v Prime Minister of Swaziland and Others*, 2016 SZHC 180.

<sup>33</sup> *Outsa Mokone v Attorney General and Others* COA Civil Appeal CACGB-201-16.

<sup>34</sup> *Obbo and Another v Attorney General* [2004] 1 EA 265 (SCU).

In Zimbabwe, the Supreme Court struck down the offence of false news in 2000.<sup>35</sup> The Court discussed the subjective nature of the concept of “truth.” - “Often the line between fact and opinion is blurred. There is a danger that the accepted view becomes confused with the right or correct view.” The Court held that because the provision did not require proof of actual negative consequence, merely the likelihood of such a consequence, it was too vague and creates a chilling effect on the practice of journalism.

In Zambia, the High Court declared the false news offence unconstitutional in 2014.<sup>36</sup> The Court recognised the colonial history of the offence, and that the context in which the offence was introduced differed markedly from the present day. The Court explained that the flaw in the offence was that it presupposed knowledge of the falsity of the statement, and placed a reverse onus on an accused that, notwithstanding its objective falsity, they had made efforts to verify its truth, thus infringing the presumption of innocence. In addition, the Court highlighted that the existence of the offence can contribute to a culture of fear amongst journalists.

#### *The Use of Petty Offences to Suppress Expression*

Sometimes other similarly outdated offences are resorted to in order to intimidate activists.

In Malawi, Beatrice Mateyo was charged under the offence of insulting the modesty of a woman after participating in a demonstration against gender-based violence in September 2017. During this demonstration she was carrying a placard stating “being born with a vagina is not a sin” and “my pussy my pride”. This was a placard that many other women in the demonstration were also holding. She was arrested, questioned and detained because she had “insulted all women”.

In Zambia, Tanzania and Malawi the offence of soliciting for an immoral purpose has also been used against activists who are members of key population groups or who were speaking out in support of the rights of key populations. One such example is the case of human rights activist Paul Kasonkomona in Zambia. Kasonkomona appeared on a television show in April 2013, where he spoke about the importance of respecting the rights of sexual minorities if the State is to effectively address the HIV epidemic. He was eventually acquitted by the High Court in 2015.

Offences such as breach of peace, being a rogue and vagabond or being an idle and disorderly person are also sometimes used against HRDs.

## Laws and Practices which Inhibit Freedom of Association

### CSO Regulation

Participants raised a number of concerns relating to NGO regulation:

<sup>35</sup> *Chavunduka and Others v Minister of Home Affairs and Another* 2000 (1) ZLR 552.

<sup>36</sup> *Chipenzi v Attorney General* [2014] ZMHC 112.

- As governments increase regulation of NGOs, the information requirements of such regulation could be aimed at monitoring the donors who fund HRD’s work;
- The “global gag rule” has direct implications for CSOs working in the space of women’s rights and sexual and reproductive health rights in particular;
- Registration requirements were flagged as being too onerous, particularly in Zimbabwe, Zambia and Tanzania;
- The development of NPO laws, such as the 2018 Malawi NGO Bill, without prior consultation with civil society;
- The limitation of the right to association when mandatory registration is required for informal associations.

NGO Registration Laws in Southern Africa						
	Constitution: Freedom of Association	Statute for NGO Registration	Year	Mandatory Registration	Restrictions	Appeal Process
<b>Angola</b>	Article 48	Law of Association (6/12 Jan. 18 2012)	2012	Yes - fines or prison (1 year)	No participation in government or making policy	Appeal to Tribunal Popular Supremo
<b>Botswana</b>	Section 13	Societies Act	1972 (1983 am.)	Yes - fines or prison (7 years)	Not unlawful, contrary to peace, welfare or good order	Appeal to Minister, Judicial Review
<b>DRC</b>	Article 37	Decree-law No. 004 of July 20, 2001.	2001	No	Must have Minister approved framework	Foreign NGOs must have Presidential Authorisation
<b>Lesotho</b>	Section 16	Societies Act	1966 (1983 am.)	Yes - fines or prison (5 years)	Not unlawful, contrary to public safety, order, morality or rights	Appeal to the High Court
<b>Madagascar</b>	Article 10	NGO law	1997	No		
<b>Mauritius</b>	Section 13	Registration of Associations Act	1978 (2004 am.)	Yes – fines or prison (3 months)	Not unlawful, threat to public safety or order.	Judge in Chambers
<b>Malawi</b>	Section 32	Non-Governmental Organisation Act	2001	Yes – fines	No partisan politics	Judicial Review by High Court

<b>Mozambique</b>	Article 52	Decree 55/98	1998	Yes – for foreign NGOs	No secretive character, not contrary to public order	Appeal to the Tribunal Administrativo
<b>Namibia</b>	Article 21	Civic Organisations Partnership Policy	2005	No		
<b>Seychelles</b>	Article 23	Registration of Associations Act	1902 (1991 am.)	No		
<b>South Africa</b>	Article 18	Nonprofit Organisation Act	1997	No		Arbitration Tribunal appointed by Minister
<b>Swaziland</b>	Section 25	Companies Act	2009	Unclear	“lawful purpose”	Review by High Court
<b>Tanzania</b>	Article 20	Non-Governmental Organisations Act	2002 (2005 am.)	Yes - fines or prison (1 year)	“not in public interest”, “contrary to written law”	Board Review, appeal to Minister
<b>Zambia</b>	Article 21	Non-Governmental Organisation Act	2009	Yes - fines or prison (3 years)	not in the public interest, not repugnant or inconsistent with law	Petition to the board, appeal to Minister, appeal to the High Court
<b>Zimbabwe</b>	Article 58	Private Voluntary Organisation Act	1966	Yes - fines or prison (6 months)	Foreign NGOs: no “issues of governance”	Appeal to Minister, Appeal to High Court

There are a number of cases from the region that advanced protections for the right to association. The Malawi High Court has held that deeming controversial societies as unlawful “smacks of too much simplicity, convenience and is clearly untenable”.<sup>37</sup> The Supreme Court of Namibia has also indicated that limitations to the right to associate need to be strictly interpreted.<sup>38</sup>

Activists from Angola, Mozambique and Botswana explained how they resorted to the courts to assert their association rights. In Botswana and Mozambique, LGBTI activist groups approached the courts to facilitate registration. Both the Botswana<sup>39</sup> and Mozambique courts struck down the rationale that morality can be used as a basis to refuse registration of LGBTI groups. In November 2017, Mozambique’s Constitutional Council struck down a clause in the Law on Associations which incorporates vague terms of “moral order” and not offending the “public good”. The Angola Constitutional Court in July 2017 ruled that a Presidential Decree which required NGOs to register with

<sup>37</sup> *R v Mkandawire and Another* 2010 MWHC 5. See also *Ex parte: Mulungu and Others* 2010 MWHC 6.

<sup>38</sup> *Kauesa v Minister of Home Affairs* [1995] NASC 3.

<sup>39</sup> *Attorney General of Botswana v Rammoge and Others*, Civil Case No. CACGB-128-14.

multiple authorities, including the Foreign Ministry, was unconstitutional because it was the role of Parliament and not the President to regulate organisations.

The court processes have not been without frustration. In Mozambique, activists formed a broad-based coalition to challenge the law. They raised concerns of LGBTI, sex workers and drug users’ organisations and asked the Ombud to take the case to the Constitutional Council. The LGBTI organisation has however still not been able to register and has had to go back to the courts.

Participants felt particularly stifled by the absence of a SADC Tribunal which allows for individual access. Where courts are non-responsive or hostile, it is hard for activists to approach a regional forum to enforce their rights.



### Restrictions on the Right to Association and Access to Financing

A factor which impacts on NGO Regulation is the International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation (FATF Recommendations), which governments are encouraged to implement.

Recommendation 8 of the FATF defines a NPO as “a legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of ‘good works’”. The FATF recommends putting in place measures to protect NPOs from potential terrorist financing abuse,<sup>40</sup> and that such measures should be in line with international human rights law.

<sup>40</sup> Terrorist financing abuse refers to “the exploitation by terrorists and terrorist organisations of NPOs to raise or move funds, provide logistical support, encourage or facilitate terrorist recruitment, or otherwise support terrorists or terrorist organisations and operations.”

In defining measures necessary to prevent abuse, the FATF Recommendations recommend a risk-based, flexible, focused, proportionate approach. FATF Recommendation 8 notes that not all NPOs are inherently at risk of abuse and some might have no risk at all. Part of the risk-assessment is risk-based supervision and monitoring. The FATF recommends that NPOs be required to register and that such information be made available to the government and public, that NPOs make publicly available information on their activities and staff and board members; that NPOs issue annual financial statements and have adequate measures in place to ensure funds are accounted for; that NPOs take reasonable measures to confirm the identity of beneficiaries and associated NPOs; and take reasonable measures to identify donors. NPOs could further be required to maintain for at least 5 years records of domestic and international transactions.

Countries which have specific laws on financing terrorism are: Angola (2014), Democratic Republic of Congo (2016), Madagascar (2004), and Malawi (2006). Countries which have terrorism laws which focus mainly on risks related to internationally designated terrorist groups, are: Madagascar (2014), South Africa (2004) and Zimbabwe (2008).

### The Use of Terrorism Laws against Human Rights Defenders

In terms of the UN Security Council Resolution 1373 (2001) countries can make designations of terrorist organisations at a national level and should put in place measures to do so. The resolution states that when deciding whether or not to make a proposal for designation, countries should apply an evidentiary standard of proof on “reasonable grounds” or “reasonable basis”.

In 2017, the Cotonou Declaration on strengthening and expanding the protection of all human rights defenders in Africa noted that: “In many countries, these laws, policies and measures are enforced without any judicial scrutiny or with limited judicial oversight. Counter-terrorism measures are being increasingly used to curtail the activities and work of human rights defenders who have been unduly referred to and targeted as terrorist groups when they challenge the adverse impact of the fight against terrorism or when they make demands for good governance, democracy or for the protection of human rights in general.”

A few countries have laws aimed at designating local organisations as terrorist. These laws often have a broad definition of terrorism: Botswana (2014 - the law excludes advocacy and protest, but allows the President to declare a group terrorist with no option for appeal); Mauritius (2002 - a judge can designate a group as terrorist and such designation can be cancelled on application; Namibia (2014 - proscribed organisations can appeal), Seychelles (2004 - groups which cause prejudice to national security can be declared terrorist, declaration can be reviewed by Supreme Court); Zambia (2018 - Terrorist definition includes serious risk to national security, the Minister can declare an entity a terrorist group with no appeal specified); Tanzania (2002 - broad definition of terrorism); Eswatini (2008 - some provisions were declared unconstitutional but are currently under appeal, the Act was amended in 2017 to allow for judicial review).<sup>41</sup>

<sup>41</sup> *Maseko v Prime Minister of Swaziland and Others*, 2016 SZHC 180.

## General Recommendations Noted in Discussions

### States Should Bring Laws in Line with International Human Rights Standards

Participants noted with concern that many domestic laws on the rights to freedom of association, peaceful assembly and expression are still not in full compliance with international human rights law; they hinder rather than facilitate the exercise of these rights. States are encouraged to decriminalise defamation, including laws shielding public officials, avoid broad definitions in counter-terrorism and incitement laws, and reform laws which restrict or expose whistle-blowers.

### States Should Improve Public Participation and Access to Information

Participants emphasised the need to establish effective mechanisms to access publicly held information, and to encourage effective and equal public participation.

### States Should Protect HRDs and Remove Laws which Criminalise Key Populations

Participants were concerned by the extent to which authorities engage in the vilification of HRDs including by characterising them as criminals, “foreign agents”, terrorists or extremists, undesirables or of being morally corrupt, threats to security, development or so-called traditional values.

Participants noted the additional challenges faced by defenders who are affected by inequality, exclusion, and intersecting forms of discrimination based on gender (including identity and expression), sexual orientation, sex characteristics, ethnicity and race, language, religion or belief, disabilities, age, location, occupation, migratory status and class. HRDs noted the need for laws which protect HRDs from violence and discrimination.

Participants raised concerns about the impact of State sanctioned torture, hate speech, and homophobia and the extent to which it perpetuates stigma against LGBTI persons and HRDs working on sexual orientation, gender identity rights, and sexual and reproductive health rights. Participants were particularly concerned that countries such as Tanzania have gone further to actively persecute HRDs who stand up for LGBTI rights, sex workers’ rights and sexual and reproductive health rights.

Participants called on States to respond to the reality that the “global gag rule” is a threat to women’s health, autonomy and rights across the region. For example, the US government restricts activism on access to abortion by US government funding recipients with non-US funds. HRDs need to join forces and exert pressure for increased funding and support to affected national women’s rights organisations that have been impacted by the “global gag rule”.

Participants called on States to repeal punitive and restrictive laws, policies and practices that infringe upon the rights to freedom of association and of assembly and that stigmatise and discriminate against specific categories of human rights defenders on the basis of sex, health status, sexual orientation and gender identity and expression or any other statuses. Participants urged states to decriminalise consensual same-sex sexual acts and to remove loitering offences. In the past year, transgender women were arrested for appearing as a woman in public in Zimbabwe, Zambia, Malawi, and Mauritius and were charged with criminal nuisance, public indecency and soliciting for immoral purposes.



Criminal laws prohibiting discrimination and hate speech are often quite limited in terms of the grounds on which such discrimination is prohibited. An exception is South Africa which has wide grounds of prohibition of discrimination in its Equality Act and which is currently debating a draft Bill on Preventing and Combatting Hate Speech and Hate Crimes.

Participants and presenters noted that persons with psycho-social disabilities continue to face stigma, including as a result of the derogatory descriptions used in mental health and disability laws. Botswana is the only country in the region which has not ratified the Convention on the Rights of Persons with Disabilities (CRPD). Many countries still need to adapt their disability laws to become CRPD compliant. Countries with laws on disability which are starting to be CRPD complaint include: Angola (2016), Malawi (2012), South Africa (2002), Zambia (2012), and Tanzania (2010). Many countries however retain outdated terminology including descriptions such as “mentally defective” and “mentally disordered”. Examples of mental health laws which should urgently be reformed include: Botswana (1969), Democratic Republic of Congo (1973), Lesotho (1964), Mauritius (1998), Madagascar (1998), Namibia (1973), Seychelles (1906), Zambia (1949), Zimbabwe (1996), Tanzania (2008), and Eswatini (1978). Malawi and Zambia have both introduced mental health bills, but these require significant civil society participation to ensure that they are CRPD compliant.

In 2017, three persons with psychosocial disabilities in Zambia under the auspices of the Mental Health Users of Zambia (MHUNZA) decided to petition the Lusaka High Court seeking an order that the Mental Disorders Act be annulled on account that it violated their rights.<sup>42</sup> In October 2017, the High Court ruled that section 5 of the Act was unconstitutional, offensive and discriminatory, as it created categories for persons regarded as mentally “disordered”, “mentally infirm”, an “idiot”, “imbecile”, “feeble-minded” and a “moral imbecile”.

HRDs affected by and working against the abuses perpetrated by corporations face specific challenges from both the businesses and the State. We have seen deliberate attempts to silence HRDs. Outdated and restrictive laws are used against HRDs including the offence of trespassing when they try to consult with communities and workers on private premises. In the past year, human rights defenders have been arrested for trespassing in Malawi, Zambia and Seychelles. Corporations also use the courts as a way to intimidate HRDs, including through gag orders and civil defamation claims.

### Human Rights Mechanisms Should Hold States Accountable

Whether it is through National Human Rights Institutions or Regional and International Human Rights Mechanisms, there is a need to hold Governments accountable for human rights violations. Whilst freedom of expression is an element of the Universal Periodic Review Process, it does not reflect the reality of closing civic spaces in countries. Those leading governments in these processes are not asked the right questions and data is not interrogated. Similarly, access to information is an SDG indicator but needs proper interrogation, not just in terms of the laws which exist, but the actual implementation of those laws and the other laws, policies and practices which counter access to information. It is critical that during the UPR and SDG processes, UN Mechanisms engage States more robustly on the extent to which the rights to freedom of expression, assembly and association are protected and promoted.

<sup>42</sup> *Mwewa and Others v Attorney General and Another*, Case 2017/HP 204 (2017).





Participants identified the need to strengthen human rights institutions such as the national human rights commissions, the ombud, and police complaints bodies, through allocating sufficient resources, and guaranteeing independence. National Human Rights Institutions should specifically protect and promote the rights of marginalised groups including key populations.

### Ensuring Democratic Processes during Forthcoming Elections

Democracies require plurality and spaces for political parties to operate freely. The right to equal participation in political and public affairs refers to the ability of members of civil society to have an influence over decisions which affect them, and includes the right to vote and be elected, the right to be consulted about public affairs and the right to appointment in public service.

Seven countries in Southern Africa intend to hold elections in the coming year, including Madagascar (19 December 2018), Democratic Republic of Congo (December 2018), Malawi (May 2019), South Africa (May 2019), Mozambique (October 2019), Botswana (October 2019) and Namibia (2019).

In some countries in Southern Africa, the ability for political parties to participate in civic spaces is limited by laws and police practices. Sometimes such limitations become more pertinent in the period leading up to an elections, when the ruling party and executive might feel particularly threatened by criticism. Voices which are critical of the State are often targeted under terrorism, treason, public order and sedition laws, limiting freedom of expression, association and assembly. Participants noted the frequent arrest of leaders of opposition parties in our region. Ahead of the August 2017 elections in Angola, the Ministry of Interior banned all protests by groups not contesting in the elections. Ahead of the September 2018 elections in Eswatini, the Industrial Court interdicted a planned protest by the teachers' union (SNAT): "The strike proposal by SNAT, though lawful, is deferred to November 23, to give the new government a chance to deal with the demands of SNAT."

Even election observers are harassed, as was the case in the 2015 Tanzania elections, when the Cyber Crimes Act was used to detain and interrogate 36 members of the Tanzania Civil Society Election Consortium, including staff from the Legal and Human Rights Centre.

Freedom of expression and access to information are also inhibited by election laws in other ways. For example, in Zimbabwe, the 2013 Electoral Act prohibits CSOs from conducting voter education. In June 2018, the Zimbabwe High Court, dismissed a challenge to this law on procedural grounds.<sup>43</sup>

Some countries make the registration of political parties difficult and create challenges for opposition parties in campaigning during election periods, including their ability to voice their views on State media. Participants raised concerns that elections are used as an excuse for governments to justify limits on freedom of expression, including barring journalists from reporting on elections, and deporting foreign journalists trying to report on the elections. Participants noted with concern that in Eswatini, political parties are not allowed to participate in elections at all.

In May 2018, the Swazi Democratic Party (SWADEPA), approached the High Court for an order to clarify the role political parties can play within the current electoral system.<sup>44</sup> The case was about the

<sup>43</sup> *Veritas v the Zimbabwe Electoral Commission & 2 Others; Firinne Trust also known as Veritas v the Zimbabwe Electoral Commission & 2 Others* HH353-18, HC 11749/17, HC 4391/18.

<sup>44</sup> *Mbongiseni Shabangu and Others v Elections and Boundaries Commission and Others*, Case 805/2018.



rights to freedom of expression and association during the election campaign period. Currently, election is on the basis of “individual merit” and political parties cannot even campaign for specific candidates. The applicants sought an interdict to prevent the Elections and Boundaries Commission from interfering with the rights of candidates for election to the House of Assembly to at least be able to express their political and/or other views or policies; the rights of candidates to associate publicly with their chosen political parties; and the rights of registered voters to exercise their right to vote knowing all relevant information about the candidates running for public office. As with most cases of a political nature, the State replied saying that the applicants had no legal standing to bring the case and no right to act on behalf of its members and in the public interest. The case was summarily dismissed by the High Court in July 2018 and by the Supreme Court in August 2018 and both courts refused to hear the merits of the case despite the fundamental rights at stake.

## The Role of the Judiciary in Protecting Human Rights Defenders



Obtaining access to justice for human rights violations is often expensive. Instead, human rights defenders are often brought to court under arbitrary criminal charges. Finding lawyers who are willing to represent HRDs who are targeted by the State is difficult. HRDs often have to depend on international support for litigation costs, which increases their risk.

Participants noted that several mechanisms are employed by the judiciary to inhibit access to justice, including restrictive and conservative application of court standing rules (especially in Malawi and Eswatini), and repressive and hefty costs orders in public interest cases against HRDs and their lawyers (Malawi, Eswatini, Zambia). A further cost is when States refuse to implement court orders, forcing HRDs to go back to court to enforce the order. Repeated postponements of court dates also result in

unsustainable costs for HRDs. For HRDs with psycho-social disabilities, additional risks include electric convulsion therapy, forced treatment, detention for indefinite period at State institutions, being declared an incompetent witness or without legal standing, and hostile police and judicial attitudes.

HRDs noted the need to protect the judiciary from influence and interference. It was concerning that in the Democratic Republic of Congo, when judges did not follow orders from the Executive, they were forced to flee the country for fear of their lives. Concerns were also raised about the inherent lack of separation of the roles between the Chief Justice, Executive and Judicial Services Commission in some countries. At the same time, HRDs should consistently scrutinize and analyse the judgments of the judiciary, including providing critiques when such judgments are delayed.

Participants stressed the need for an independent judiciary so that there is no impunity for attacks against HRDs. Concerns were raised about the particular limitations faced by HRDs in Southern Africa in the absence of individual access to the SADC Tribunal. HRDs were reminded to campaign for States to make a declaration under Article 34.6 of the Protocol to the African Charter on the Establishment of the African Court in order for NGOs and individuals to access the African Court on Human and Peoples’ Rights directly. Of the 30 States which have ratified the Protocol, only 6 are from Southern Africa: Lesotho, Malawi, Mozambique, Mauritius, South Africa, and Tanzania. Of these, only Malawi and Tanzania had made the declaration recognising the competence of the Court to receive cases from NGOs and individuals.

Participants further noted that the independence of the African Commission on Human and Peoples’ Rights is under attack. When the African Commission failed to confirm the Coalition of African Lesbians’ Observer Status to the Commission, it also indicated the limitations that will be faced by HRDs working on LGBTI issues in approaching the Commission.

*Post script*

Earlier this year a corruption scandal relating to the judiciary surfaced in Zambia. An anti-corruption activist, Gregory Chifire, a pastor and a journalist each independently commented on the need for the Chief Justice to investigate the allegations of corruption. The allegations related to a judgment which had been handed down by the Court of Appeal and Supreme Court and insinuated that some judges might have been bribed. The Supreme Court charged all three with contempt of court, for scandalising the court. Two pleaded guilty whilst Gregory Chifire’s case was heard before a full bench of the Supreme Court sitting as a court of first instance. The court showed hostility towards the lawyers defending Mr Chifire, impacting on his right to a fair trial. At the Summit, Mr Chifire spoke passionately about the need to abolish the offence of scandalising the courts because it could be used against HRDs and because the courts had other remedies available to them. On 23 November 2018, he was sentenced 6 years’ imprisonment. He has no recourse of appeal in domestic courts.



## Critiquing the HRD Space

The final session of the HRD Summit was an introspective session. Experienced HRDs from various sectors took the audience through the various mistakes HRDs themselves make which impact on freedom of expression within HRD spaces and solidarity between various HRD sectors. These include stereotypes, bias, assumptions, sexual harassment, xenophobia, racism, sexism, transphobia, homophobia, discrimination against persons with disabilities, failure to accommodate HRDs who are caregivers and HRDs who are ill, the impact of stress and persecution on HRDs and their families, elitism and inherent biases in favour of persons with higher education levels, competition for resources between CSOs, and lack of accountability to beneficiaries.

Participants noted that we need to critically look at what solidarity means. Sex worker and LGBTI activists in Zimbabwe, Tanzania, Botswana, Zambia and Eswatini noted that they often fight lonely battles. It was observed that in countries where there is State repression against HRDs, other HRDs often close the doors to HRDs whom they perceive might reduce their own opportunities for engagement with the State. Participants lamented how donor priorities impact on solidarity between sectors and raised concerns about the limited support available for human rights defenders.





## Organisations which Attended the Summit

Abahlali baseMjondolo, South Africa  
 Accountability International, regional  
 AIDS and Rights Alliance for Southern Africa (ARASA), regional  
 Amnesty International, regional  
 Associação Justiça, Paz e Democracia (AJPD)  
 Association of Litigation on Human Rights, Mozambique  
 Centre for Human Rights Education, Advice and Assistance (CHREAA), Malawi  
 Centre for Strategic Litigation, Tanzania  
 Centre for Human Rights and Rehabilitation (CHRR), Malawi  
 CIVICUS, international  
 Civile Society, Madagascar  
 Coalition for the Empowerment of Women and Girls (CEWAG), Malawi  
 Coalition of Women Living with HIV/AIDS (COWLHA), Malawi  
 Committee to Protect Journalists (CPJ), international  
 COSPE, international  
 Disability Rights Watch, Zambia  
 Gender and Justice Unit, Malawi  
 Female Sex Workers Association, Malawi  
 Front Line Defenders, international  
 Institute for Democracy & Leadership (IDEAL), Eswatini  
 International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), international  
 International Commission of Jurists (ICJ), international  
 Katswe Sistahood, Zimbabwe  
 Kawelo Lawyers, Malawi  
 Kenya Legal & Ethical Issues Network on HIV/AIDS (KELIN)  
 Lambda Association, Mozambique  
 Lawyers for Human Rights, South Africa  
 Lesbians, Gays and Bisexuals of Botswana (LEGABIBO)  
 Lesbian, Bisexual Queer Rights Swaziland  
 M. Musonda and Co. Legal Practitioners and Consultants, Zambia  
 Malagasy Bar Association  
 Media Legal Defence Initiative (MLDI), international  
 MNN Centre for Investigative Journalism, Lesotho  
 Mosaiko, Angola  
 Msichana Initiative, Tanzania  
 Muchinda Royal Establishment, Zambia  
 Mulenga Mundashi Kasonde Legal Practitioners, Zambia  
 National Legal Aid Clinic for Women, Law Association of Zambia  
 Media Institute of Southern Africa-Malawi (MISA-Malawi)  
 Nyasa Rainbow Alliance (NRA), Malawi  
 Office of the High Commissioner for Human Rights: Regional Office for Southern Africa (OHCHR ROSA)  
 Open Society Initiative for Southern Africa (OSISA), regional  
 ProtectDefenders.EU, international  
 Safe Space for Children and Young Women Tanzania (Safe Space Tanzania)





Seinoli Legal Centre, Lesotho  
 Sex Worker Education and Advocacy Taskforce (SWEAT), South Africa  
 Southern Africa Centre for the Constructive Resolutions of Disputes (SACCORD), Zambia  
 Southern Africa Litigation Centre (SALC), regional  
 South African Human Rights Commissions (SAHRC)  
 Southern Africa Human Rights Defenders Network (SAHRDN), regional  
 Southern Africa Network Against Corruption (SANAC), Zambia  
 Swaziland Political Assembly  
 Swaziland Justice Forum  
 The Rock of Hope, Eswatini  
 Trans\* Research, Education, Advocacy & Training (TREAT), Zimbabwe  
 Transbantu Association, Zambia  
 University of Dar es Salaam  
 Women and Law, Eswatini  
 Youth and Society, Malawi  
 Zimbabwe Human Rights NGO Forum  
 Zimbabwe Lawyers for Human Rights (ZLHR)  
 Zimbabwe Peace Project

## About the Africa Regional Grant on HIV

This publication is funded under the Africa Regional Grant on HIV - Removing Legal Barriers. To implement the Grant, a partnership of organisations has been formed to strengthen the legal and policy environment to reduce the impact of HIV and TB on key populations in 10 countries in Africa. These countries are Botswana, Cote D'Ivoire, Kenya, Malawi, Nigeria, Senegal, Seychelles, Tanzania, Uganda and Zambia. Over the past 3 years, the project has worked to assess, strengthen and monitor legal and policy environments for HIV and has provided capacity strengthening opportunities for key stakeholders and decision makers from these countries. The UNDP is the principal recipient of the Grant, which in turn collaborates with SALC, AIDS and Rights Alliance for Southern Africa (ARASA), ENDA Santé, and Kenya Legal and Ethical Issues Networks on HIV and AIDS (KELIN).

## Acknowledgements

We would like thank the co-hosts of the event: Southern Africa Litigation Centre, Southern Africa Human Rights Defenders Network, International Commission of Jurists, Media Legal Defence Initiative and the AIDS and Rights Alliance of Southern Africa.

We would like to thank the active participation of everyone at the Summit. We would especially like to thank the hard work of Tyler Walton and Pamela Timburwa from SALC and Simphiwe Sidu from SAHRDN, arranging the Summit.

We would like to express our gratitude to the sponsors of the event: The Africa Global Grant on HIV, the Office of the High Commissioner of Human Rights and the Open Society Initiative of Southern Africa.

