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*Southern Africa  
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# CIVIL SOCIETY REGULATION IN SOUTHERN AFRICA:

## Key trends and analysis

### INTRODUCTION

The right to freedom of association is enshrined in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights (ACHPR) and other international treaties.<sup>1</sup> It is an essential component of democracy as it empowers people to express their opinions, engage in economic, social and cultural activities, form and join trade unions and associations; elect leaders to represent their interests and hold them accountable.<sup>2</sup> Such interdependence and interrelatedness with other rights make this right a valuable indicator of a State's respect for the enjoyment of many other human rights. The Special Rapporteur on freedom of peaceful assembly and association has emphasized that the right to form and join an association, but also the right to operate freely and to be protected from undue interference, the right to access funding and resources is an inherent part of the right to freedom of association.<sup>3</sup>

The right to freedom of association is not an absolute right under Article 4 of the ICCPR. However, any restrictions on the exercise of this right must meet three conditions, which are cumulative: 1) It should be 'prescribed by law', in language that is sufficiently clear and accessible, and that does not allow for arbitrary application; 2) It should serve a legitimate public purpose as recognised by international standards, namely national security or public safety, public order, the protection of public health or morals, and the protection of the rights and freedoms of others; and 3) The restrictions must be necessary and a proportionate means of achieving a well-defined purpose within a democratic society, with a strong and objective justification.

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All the States in the sub-region<sup>4</sup> (except Comoros<sup>5</sup>) have ratified the ICCPR. Therefore, they have a legal obligation to respect, protect and promote the right to freedom of association, including by adopting laws or any other measures that are necessary to give domestic effect to the right.<sup>6</sup> State parties are also obliged to ensure that the domestic legal system is compatible with the obligations and duties related to the right to freedom of association provided in the Covenant. In addition, all the States in Southern Africa have ratified the African Commission on Human and Peoples Rights (ACHPR) which also provides for the right to freedom of expression and freedom of association and should also be given full effect at the domestic level.

Accordingly, most States in Southern Africa have recognized the right to freedom of association in their Constitution or Bill of Rights and enacted various pieces of legislation to govern the establishment and functioning of non-governmental organisations and other kinds of associations.

In the recent past, some States in Southern Africa have revised or sought to revise laws and regulations governing non-governmental organisations (NGOs) and civil society organisations operating in their territories, mainly – or officially - to combat money laundering, corruption and the financing of terrorism.<sup>7</sup> While the revised legislation often introduces new regulatory measures in this regard, it also introduces restrictions that pose risks to not just civic space but also freedom of association and directly contravene international human rights standards. At times, the legislation is drafted and passed without meaningful consultation with civil society and the public, in contradiction of the right to participation and the United Nations Guidelines for States on effective implementation of the right to participate in public affairs.<sup>8</sup>

This advocacy brief provides an overview of four trends and risks posed by NGO laws and regulations to civic space adopted recently in various countries across Southern Africa: i) Burdensome registration procedures; ii) Loss of NGO autonomy and excessive State oversight iii) Restricted/limited access to funding and resources; iv) Harsh penalties for non-compliance. The brief also makes recommendations on how to address associated risks in accordance with international human rights law.



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Image credit: Pexels/Ketut-Subiyanto





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# KEY RISKS AND CHALLENGES POSED BY RECENT LAWS AND REGULATIONS OF CIVIL SOCIETY IN SOUTHERN AFRICA

## 1. BURDENSOME REGISTRATION PROCEDURES

Some of the legislations adopted in the sub-region set out lengthy and burdensome registration procedures for associations, such as the requirement to obtain approvals from multiple government entities, the requirement for re-registration once material changes occur in the structure of the association; and the requirement to have minimum number of members. *The United Nations Human Rights Council Resolution 22/6*, calls upon States to ensure that procedures governing the registration of NGOs are transparent, accessible, non-discriminatory, expeditious and inexpensive, allow for the possibility to appeal, and avoid requiring re-registration, and are in conformity with international human rights law.<sup>9</sup> Although States enjoy a margin of discretion in establishing the rules and procedures for registering and granting legal personality to an association, it is vital that the responsible authorities act in good faith, expeditiously and in a non-selective manner.<sup>10</sup>

Some of the new laws also require associations to pay excessive fees for registration that may be simply prohibitive or make it difficult for some of them to become operational. The *Special Rapporteur on the right to freedom of peaceful assembly and association* considers procedures to establish associations, which are simple, non-onerous or even free of charge as best practice.<sup>11</sup> Additionally, the Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples' Rights (ACHPR Guidelines on Freedom of Association and Assembly) underscore that while a registration fee may be imposed to cover administration fees, authorities must ensure that "this fee is modest and does not have the effect of deterring associations from registering in practice."<sup>12</sup>

Additionally, most States also opt for a pre-approval authorisation regime that requires associations to produce multiple documents for registration including a requirement to maintain a prescribed minimum of

members before they can be legally registered. The *Special Rapporteur on the right to freedom of peaceful assembly and association* and the *ACHPR Guidelines on Freedom of Association and Assembly* state that States should adopt a "notification procedure" rather than a "prior authorization procedure" that requests the approval of the authorities to establish an association as a legal entity.<sup>13</sup> Under this notification procedure, associations are automatically granted legal personality as soon as the authorities are notified by the founders that an organization was created.<sup>14</sup> In most countries, such notification is made through a written statement containing a number of elements of information clearly defined in the law, but this is not a precondition for the existence of an association. It is rather a submission through which the administration records the establishment of the said association.

Lastly, nearly all recent legislation governing NGOs require mandatory registration of associations before they can operate legally. Often, the law also prescribes severe criminal and civil penalties for operating an unregistered NGO. However, the *Special Rapporteur on the rights to freedom of peaceful assembly and association* highlights that the right to freedom of association equally protects associations that are not registered, and that members of non-registered associations should be free to carry out any activities, including the right to hold and participate in peaceful assemblies, and should not be subject to criminal sanctions: 'This is particularly important when the procedure to establish an association is burdensome and subject to administrative discretion, as such criminalization could then be used as a means to quell dissenting views or beliefs'.<sup>15</sup>



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## 2. LOSS OF NGOS' AUTONOMY AND EXCESSIVE STATE OVERSIGHT

Some laws and regulations governing NGOs in Southern Africa grant broad and discretionary powers to the State's administrative NGO Supervisory Body to interfere in the affairs of the associations, including regulating various aspects of their internal functioning such as the internal composition and functioning of their internal governing/management organs and voting procedures. Sometimes the legislations require that NGOs' objectives/operations should conform to 'traditional customs and public morals of the environment in which they operate or 'public interest.' This could allow for the denial of rights of marginalized communities. The *Special Rapporteur on the rights to freedom of peaceful assembly and association* emphasizes that while the formation of associations embracing minority or dissenting views or beliefs may sometimes lead to tensions, the State should still ensure that everyone can peacefully express their views without any fear.<sup>16</sup>

Furthermore, the *Special Rapporteur* stresses that States have the obligation to abstain from unduly obstructing the exercise of the right to freedom of association. Members of associations should be free to determine their statutes, structure and activities and make decisions without State interference.<sup>17</sup> Associations should be self-governing and free to determine their internal management structures, rules for selecting governing officers, internal accountability mechanisms and other internal governance matters.

Additionally, some legislations impose overly burdensome reporting requirements including the requirement for associations to transmit regular detailed information concerning internal management issues and a wide range of reports to the State's administrative NGO Supervisory Body, such as quarterly, semi-annual and annual reports outlining activities undertaken and details of the organisation's office bearers, etc.

Where it's legitimate to establish reporting requirements to registered NGOs, these requirements should not inhibit associations' functional autonomy and operations by adding costly and protracted burdens. State oversight needs to be carefully delimited in accordance with international human rights standards. The *Special Rapporteur on the rights to freedom of peaceful assembly and association* recognizes the right of independent bodies to examine the associations' records as a mechanism to ensure transparency and accountability, but such a procedure should not be arbitrary and must respect the principle of non-discrimination and the right to privacy as it would otherwise put the independence of associations and the safety of their members at risk.<sup>18</sup> The ACHPR Guidelines on Freedom of Association and Assembly highlight that reporting requirements shall be constructed on the basis of the presumed lawfulness of associations and their activities, and shall not interfere with the internal management or activities of associations.<sup>19</sup> Where reporting is required, reporting requirements shall be simple and shall not be overly burdensome.

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### 3. RESTRICTED/LIMITED ACCESS TO FUNDING AND RESOURCES

Some States in the sub-region have adopted legislations that place unjustified restrictions that may make it difficult or impossible for NGOs to access funding/resources, such as provisions that place limitations on the way NGOs can obtain donations; and ways in which they can dispose of their immovable property especially property acquired from foreign donations.

The ability of associations to access funding and resources is an integral and vital part of the right to freedom of association. The United Nations *Special Rapporteur on the freedom of peaceful assembly and association*, clarifies that States have a responsibility to address money-laundering and terrorism, but this should never be used as a justification to undermine the credibility of the concerned association, nor to unduly impede its legitimate work.<sup>20</sup> In order to ensure that associations are not used/abused by terrorist organizations, States should use alternative mechanisms to mitigate the risk, such as through banking laws and criminal laws that prohibit acts of terrorism. Similarly, the ACHPR Guidelines on Freedom of Association and Assembly reiterate that associations shall be able to seek and receive funds from local private sources, the national State, foreign States, international organizations, transnational donors and other external entities.<sup>21</sup> States shall not require associations to obtain authorization prior to receipt of funding.

Financial Action Task Force (FATF) recommendation no. 8 on the Non-Profit Organisations Sector (NPOs) provides for a broad requirement to regulate the non-profit sector for greater transparency and accountability. It requires all States to “review the adequacy of laws and regulations that relate to NPOs, which the country has identified as being vulnerable to terrorist financing abuse.” It also emphasizes the need for countries to “apply focused and proportionate measures, in line with the risk-based approach, to such NPOs to protect them from terrorist financing abuse.”<sup>22</sup>

Even though FATF recommendation no. 8 recognizes the importance of regulating the NPO sector, it stresses the importance of avoiding the adoption of blanket measures that would risk impairing the effectiveness of the sector. In fact, the interpretative note to FATF recommendation no. 8 states that “a risk-based approach applying focused measures in dealing with identified threats of terrorist financing abuse to NPOs is essential given the diversity within individual national sectors, the differing degrees to which parts of each sector may be vulnerable to terrorist financing abuse, the need to ensure that legitimate charitable activity continues to flourish, and the limited resources and authorities available to combat terrorist financing in each country.” Recommendation 8 also indicates that focused measures adopted by countries to protect NPOs from terrorist financing abuse should not disrupt or discourage legitimate assistance activities.<sup>23</sup> Hence, the level of risk needs to dictate the application of mitigation measures. There is no one-size-fits-all approach; therefore, the risk-based approach needs to be regularly reviewed to capture the real and evolving context of the sector with the view to adapt anti-money laundering and counter-terrorist financing (AML/CFT) measures accordingly. This approach aims to ensure that States do not over-regulate unnecessarily, which may lead to unintended consequences for the NPO sector, including operational difficulties that affect the right of association to access funding.

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#### 4. HARSH PENALTIES FOR NON-COMPLIANCE

Another key trend in legislation governing NGOs in Southern Africa is the provision for harsh, excessive or unclear penalties for associations that fail to comply with the provisions of the legislation, for example, the suspension of the association or cancellation of its registration. Specifically, some of the provisions grant powers to the State's administrative NGO Supervisory Body to suspend or terminate the registration of an association that among others, failed to submit activity reports for a specified consecutive period, failed to comply with the suggested number of membership requirements; failed to "preserve and respect the customs and traditional habits of the environment in which they operate". Some of the legislation also imposes civil penalties in addition to any other criminal or monetary fines for noncompliance. Provisions to this effect may contradict limits set by international standards for suspension of associations.

The *Special Rapporteur on the freedom of peaceful assembly and association* indicates that suspension and involuntary dissolution of an association are the most severe types of restriction on the right to freedom of association. As a result, such restrictions should only be possible when there is a clear and imminent danger resulting in a flagrant violation of national law. They should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient.<sup>24</sup> Similarly, the *ACHPR Guidelines on Freedom of Association and Assembly* stipulate that sanctions shall be applied only in narrow and lawfully prescribed circumstances, shall be strictly proportionate to the gravity of the misconduct in question, and shall only be applied by an impartial, independent and

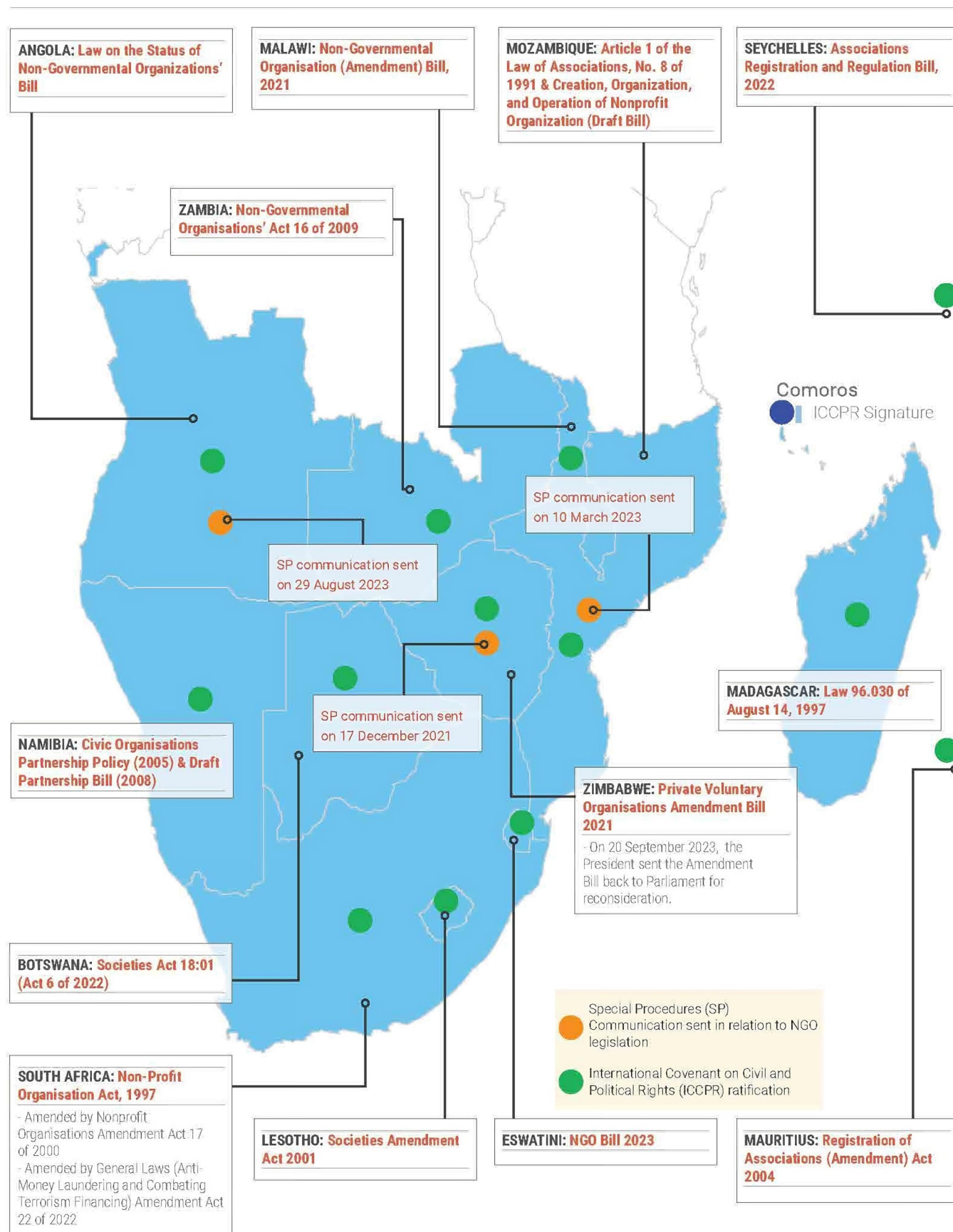
regularly constituted court, following a full trial and appeal process. In addition, sanctions should be avoided and be replaced by a warning with information on how a violation may be rectified, giving ample time to the association to repair the violation.

The *Special Rapporteur on the right to freedom of peaceful assembly and association* has noted that a best practice is to ensure that legislation that stipulates that drastic measures of dissolving an NGO should only be taken by an independent and impartial court, and that judgments are determined on the basis of clear legal criteria in accordance with regional and international human rights law and made publicly available.<sup>25</sup>

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# STATUS OF ICCPR RATIFICATION AND OVERVIEW OF NGO LEGISLATION IN SOUTHERN AFRICA



The boundaries and names shown and designations used on the maps in this document do not imply official endorsement or acceptance by the United Nations.

# CONCLUSIONS AND RECOMMENDATIONS

The right to freedom of association plays a decisive role in the emergence and existence of effective democratic systems.<sup>26</sup> As States endeavour to adopt legislation that is necessary to give domestic effect to the right to freedom of association, they should ensure that such legislation is compatible with their obligations and duties under international human rights law. This is even more important as we commemorate 25 years of the United Nations Declaration on Human Rights Defenders and 75 years of the Universal Declaration of Human Rights. With is in mind;

## STATES ARE REQUIRED TO ENSURE THAT:<sup>27</sup>

- Any restrictions on the right to freedom of association should be prescribed by law, necessary in a democratic society, and proportionate to the aim pursued, and should not harm the principles of pluralism, tolerance and broadmindedness. Any restrictions should be subject to an independent, impartial, and prompt judicial review.
- A regime of notification to establish an association should be in force. Associations should be established after a process that is simple, easily accessible, non-discriminatory, and non-onerous or free of charge. Registration bodies should provide a detailed and timely written explanation when denying the registration of an association. Associations should be able to challenge any rejection before an impartial and independent court.
- Any association, which includes unregistered associations, should be allowed to function freely, and their members operate in an enabling and safe environment.
- Associations should be free to determine their statutes, structure, and activities and to make decisions without State interference.
- Associations should enjoy the right to privacy.
- Associations should be able to access domestic and foreign funding and resources without prior authorization.
- Suspension or involuntarily dissolution of associations should be sanctioned by an impartial and independent court in case of a clear and imminent danger resulting in a flagrant violation of domestic laws, in compliance with international human rights law.

## ENDNOTES

1. United Nations General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, U.N. Doc. A/HRC/20/27 (2012), para. 53.
2. United Nations General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, U.N. Doc. A/HRC/20/27 (2012), para. 12.
3. United Nations General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, U.N. Doc. A/HRC/20/27 (2012), para. 65-67.
4. These refers to all states covered by the OHCHR Regional Office of Southern Africa (Angola, Botswana, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Zambia, and Zimbabwe).
5. Comoros has signed but not ratified the ICCPR, which means that the State has obligation to refrain from acts which would defeat the object and purpose of the treaty.
6. Article 2 of the International Covenant on Civil and Political Rights.
7. United Nations Convention against Transnational Organized Crime of 2000, United Nations Convention against Corruption, Terrorist Financing Convention of 1999, Security Council resolution 2462 (2019), e Financial Action Task Force (FATF) International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (2018, updated 2020).
8. United Nations Guidelines on the effective implementation of the right to participate in public affairs <https://www.ohchr.org/en/documents/tools-and-resources/guidelines-effective-implementation-right-participate-public-affairs>
9. Human Rights Council Resolution, Protecting Human Rights Defenders, A/HRC/RES/22/6 para 8.
10. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai, A/HRC/20/27, para 57.
11. Ibid
12. African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly Para 18.
13. A/HRC/20/27 para 58; See also, ACHPR, Guidelines on Freedom of Association and Assembly, para. 13
14. Ibid
15. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai, A/HRC/20/27, para 56.
16. Ibid, para 64
17. Ibid para 64.
18. A/HRC/20/27 Para 65.
19. African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly, para. 47-49
20. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai, A/HRC/20/27, para 70.
21. African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly, para. 38.
22. <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>, p. 13.
23. <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>, pp. 58-63.
24. A/HRC/20/27 Para 75
25. ACHPR Guidelines para 58
26. A/HRC/20/27 Para 84.
27. A/HRC/20/27 Para 84-100