

BEATING THE HUMAN RIGHTS DRUM

**Applying Human Rights
Standards to NGOs' Governance**

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Beating the human rights drum: Applying human rights standards to NGOs' governance

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FOREWORD

This book is based on the author's doctoral thesis, which I was privileged to supervise, with Professor Joe Oloka-Onyango from Makerere University as co-supervisor. Dr Nassali was awarded the degree from the University of Pretoria for the thesis titled 'Non-governmental organisations, governance and human rights in South Africa and selected East African countries: Conceptual and strategic questions'. The thesis has subsequently been reworked into this manuscript, after having undergone peer review.

The end result is a passionate and well-informed plea for human rights-based NGO governance. Dr Nassali's work provides a set of yardsticks against which the operation and role of NGOs may be assessed. Also those who beat the human rights drum have to pause, to reflect on their legitimacy, efficiency and accountability. By drawing importance to and by providing substantive markers and yardsticks for this process of reflection, Dr Nassali's work aims to improve the functioning and enhance the legitimacy of NGOs. This book infuses the human rights discourse with a new rhythm, ultimately aimed at strengthening the beating of the human rights drum.

This book appears against the background of ever-shrinking spaces for civil society in many African countries. Paradoxically, but perhaps predictably, greater prominence and impact of human rights activism in many incomplete democracies has seen governments responding with casting aspersions on civil society organisations and questioning their legitimacy, cost-effectiveness and motives. Such actions create an environment for restrictive legal regulation, for example, limiting sources of 'foreign' funding. *Beating the human rights drum* investigates this process in a balanced way.

Frans Viljoen
Director, Centre for Human Rights

Below are comments from scholars who have perused the manuscript:

Typically, non-governmental organizations (NGOs) provide the focus and critique for much that is wrong in the arena of governance and democratization in contemporary Africa. They are the proverbial 'hunters' and are unsparing and relentless in quest of their prey, viz., unaccountable governments, dominating multinational corporations and authoritarian social and political majorities. In this penetrating examination of the extent to which NGOs apply some of the basic principles of good governance and human rights to themselves, Maria Nassali's *Beating the Human Rights Drum* offers a penetrating and instructive study of the issue of governance and democracy within non-governmental organizations (NGOs). Nassali provides a sharp and deeply analytical survey of the

issues of accountability, transparency, inclusiveness and empowerment that NGOs point to in others, but are founding wanting when applied to themselves. *Beating the Human Rights Drum* is an important book with cross-disciplinary application and is bound to influence the debate over NGO governance and accountability for decades to come.

J. Oloka-Onyango
Professor of Law, Makerere University

“Before pointing the finger at others – you should point it at yourself first! Says the old adage and that is exactly what Dr. Maria Nassali’s *Beating the Human Rights Drum* very successfully does. Over the years across the globe NGOs have been up in arms against States which are not accountable and violate human rights left, right and centre. However, little time is spent on self-evaluation on the part of NGOs and other members of the civil society. Founders’ syndrome – through which those establishing NGOs remain in leadership positions forever, is rampant across the globe. NGOs criticises politicians for amending constitutions to remain in office forever without posing to look at their own governance! In *Beating the Human Rights Drum*, Dr. Nassali confronts the bull by the horns – without fear of being ostracised and expulsion from the ‘Club’. This is a major scientific work which tremendously contributes to knowledge. The time of silence on governance and accountability in civil society is over – gone and gone forever. With the Drum beating, it is clarion call for NGOs to stand up to be counted as in accountability, rule of law and good governance there are no sacred cows!”

Chris Maina Peter
Professor of Law and Member, UN International Law Commission (ILC)

Putting your own house in order, in the quest to promote and protect human rights, demands a deep level of responsiveness and openness to the gaze of outsiders. Dr. Maria Nassali turns her gaze on NGOs and asks them to look at, analyze, and reflect on their human rights practices and the legitimacy thereof, as they work at the national, regional and international levels.

The book ‘*Beating the Human Rights Drum*’ aspires to shed light, through both theoretical and empirical research, on the governance and human rights practices of NGOs. Speaking truth to power, the book makes an important contribution to debates on self-regulation and governance that is transparent, responsive, participatory and accountable on multiple levels, in order to enhance the practice of human rights internally and externally. It does so in a constructively critical way, but with empathy and acknowledgement of the value and much-needed work of NGOs, but it does demand that they must also turn their gaze inwards in order to reflect on their own practices.

Rashida Manjoo
Professor of Law, University of Cape Town (South Africa)
UN Special Rapporteur on Violence against Women

PREFACE

After belabouring for hours to explain to my grandmother, Evelyn Nakitto, the subject of my doctoral studies, she summed it up in one sentence: 'Ooh! You are going to study good manners.' I then began to question why human rights is a concept that is almost exclusively confined to regulating state power. And yet, despite NGOs' effort to dismantle existing power structures of especially hierarchies and patriarchies, NGOs inadvertently repeat the same structures within their organisations and relationships. I began to explore the concept of human rights based approaches.

While upholding that the state is the main human rights duty bearer and legal systems are critical to the enforcement of rights, I utilise the sociology of law discourse that conceptualises human rights as a normative principle to contain abuse of power. Drawing from the rights-based approach which is aimed at holding all actors accountable for the human rights implications of their actions, I evaluate how NGOs have applied the human rights principles and standards to their governance and operations, as they demand of others.

It is the main contention of this book that NGOs have the obligation to empower themselves internally before they can champion the empowerment of others. This entails being knowledgeable in the area of work; forging linkages with broader civil society and academia, building on the positive cultural values that resonate with human rights to stimulate mass support and balancing the different accountabilities to the law, boards, membership, self-regulatory mechanisms, public and donors. Further NGOs have the obligation to safeguard the autonomy of their mission; have transparent and participatory processes to enhance collective strength, legitimacy and ownership of consensus decisions; as well as promote and demand equal and equitable relationships based on mutual respect, shared responsibility and achievements while simultaneously enabling the weaker party to act on their own agency.

I argue that all NGOs have to mainstream human rights in their work, because they exist in the public trust and work to promote human dignity and societal wellbeing. Applying the human rights principles to NGOs enhances their moral legitimacy to measure up to the challenges of being a watchdog of the governance process and custodians of the better promotion and protection of human rights. Significantly, it advances the credibility of human rights to offer protection from any abuse of power. NGOs must lead by example by beating the human right drum for themselves.

ACKNOWLEDGMENTS

This book emerged out of and is largely based on my LLD research at the Centre for Human Rights, Pretoria. I thank the LLD class for the collegiality and sacrifice of reading and peer reviewing the very raw and often chaotic first drafts of the chapters and for posing the hard questions; Umar Kakumba, Frederick Jjuuko and Jane Barry for reading and editing my scripts; the Founding Board of Urgent Action Fund-Africa, Hope, Vahida, Jane, Betty for your empathy and encouragement. I am also grateful to Busingye Kabumba for serving as my copy editor. Emerson Sykes and Ezra Mbogori I thank you for the critique and relevant information towards making this book up to date.

I am grateful to Chris Maina Peter for authorising Kituo Cha Katiba (KCK) to promote my PhD studies and for the books donated to me to launch my academic life. His appreciation of the need to grow the individuals within the organisation is further demonstrated by his endorsement of International Governance Alliance (iGA) to support my academic growth by enabling me to translate the academic thesis into this book.

I am also thankful to the Ford Foundation through the auspices of then Resident Representative, Tade Aina for his confidence in my capabilities and mentorship; Joseph Gitari for having introduced the concept of NGO governance to me; Willy Mutunga and Nikki Naylor for the field research grant; Alice Brown for the friendship and having bought me my first proper meal in South Africa and Maurice Makoloo and Monica Aleman for the financial resources and enthused encouragement that made this book a reality.

Prof Frans Viljoen, this is a journey walked together. I am indebted to your thorough and no-nonsense critique always given with the necessary kindness to cushion it while stretching my brain beyond imagination. Prof Oloka-Onyango, for comradeship in the struggle and for polishing up my original thesis, I am thankful. I have also learnt from my supervisors the need for a meticulous eye for detail and the importance of doing the right thing – however boring or insignificant. Your encouragement to revise the thesis to meet contemporary realities and for the solidarity demonstrated in refining the manuscript of this publication, goes beyond the call of duty and has challenged me to give the same to those who may seek my favours. Many thanks for mentoring me by example.

Both my families from Uganda, USA and Nigeria (Mr and Mrs Ihonvbere) I thank you for the fraternity, love and support. My children, Jacque, Alice, Marita and Kevin, I am indebted to your patience and understanding during my absence and importantly for cherishing me as the ‘best mum’.

To the activists, I honour your work. May you continue to beat the human rights drums for yourselves and dance to it with abandon.

ABOUT THE AUTHOR

Maria Nassali obtained her doctorate (LLD) in Human Rights from the University of Pretoria and Master in Law and Development from the University of Warwick, UK. She currently teaches at the School of Law, Makerere University in Uganda. She is also employed as the Chief Executive Officer of International Governance Alliance (iGA), an East African think-tank that links theory to practice in governance in the thematic areas of women, media and resources.

DEDICATION

To my parents, Esta Namayanja and Mikaili Kalimali, both 'illiterate' but rich in earthly wisdom who strived to academically educate me.

I am relieved that I have achieved our mutual dream of being a scholar.

I now know for sure that human rights is about good behaviour by using power in ways that treat others the way oneself would like to be treated.

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ACRONYMS

AA	Action AID
ACC	Anti-Corruption Coalition
ACFODE	Action for Development
ACHPR	African Charter on Human and Peoples' Rights
ACODE	Advocates Coalition for Development and Environment
AI	Amnesty International
ALPS	Accountability, Learning and Planning Systems
ANGOZA	Association of Non-Governmental Organisations Zanzibar
ANPPCAN	African Network for Prevention and Protection against Child Abuse and Neglect
AWDF	African Women Development Fund
AWID	Association of Women in Development
BAWATA	Baraza la Wanawake wa Tanzania
BOCONGO	Botswana Council for Non-Governmental Organizations
BONGOs	Business-oriented NGOs
BRINGOs	Briefcase NGO – BRINGO
CAFSA	Charity Aids Foundation Southern Africa
CBOs	Community-based organisations
CEDAW	Committee for the Elimination of all forms of Discrimination against Women
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CERIMIDE	Centre for Minority Rights Development
CHR	Centre for Human Rights
CIDRI	Cooperation for Integrated Rural Development
CISO	Confederation of Informal Sector Organisations
CLARION	Centre for Law and Research
CLO	Civil Liberties Organisation
CODESRIA	Council for the Development of Social Science Research in Africa
COWE	Children, Orphans and Women Empowerment
CPDA	Christian Partners Development Agencies
CPRs	Civil and Political Rights
CONOB	Coalition on the NGO Bill
COPAW	Coalition for Political Accountability to Women
COSATU	Coalition of South African Trade Unions
CRC	Committee on the Rights of the Child
DENIVA	Development Network of Indigenous Associations
DC	District Commissioner

DONGO	Donor Organised NGOs
DNGO	Development organisations
EABC	East African Business Council
EAC	East Africa Community
EAJMA	East African Judges and Magistrate's Association
EALS	East Africa Law Society
EASSI	East African Sub-Regional Support Initiative for the Advancement of Women
EATUC	East Africa Trade Union Coordinating Council
ECOSOC	Economic and Social Council
ECWD	Education Centre for Women in Democracy
ESCC	Economic, Social and Cultural Council
ESCRs	Economic, Social and cultural rights
FCS	Foundation for Civil Society
FEMACT	Feminist Activism
FEMNET	African Women's Development and Communications' Network
FHR	Foundation for Human Rights
FHRI	Foundation for Human Rights Initiatives
FIDA-Kenya	Federacio International de Abogadas-Kenya
FIDA-Uganda	Federacio International de Abogadas-Uganda
FOWODE	Forum for Women in Development
GBM	Green Belt Movement
GEAR	Growth, Employment and Redistribution
GONGOs	Government NGOs
HMDS	Help Mission Development Services
HPA	Homeless People's Association
HRC	Human Rights Committee
HRSC	Human Sciences Research Council
HRW	Human Rights Watch
HRQ	Human Rights Quarterly
HURINGO	Human Rights NGOs
HURINET	Human Rights Network
HURIPEC	Human Rights and Peace Centre
HURISA	Human Rights Institute South Africa
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ICJ	International Commission of Jurists
ICNL	International Centre for Not for-profit Law
IDASA	Institute for a Democratic Alternative for South Africa
IDS	Institute of Development Studies

IEC	International Executive Committee
IED	Institute of Education in Democracy
IGOs	Inter-governmental Organisation
IHRIP	International Human Rights Internship Program
INGOs	International NGOs
IPPR	Institute of Public Policy Research
KHRC	Kenya Human Rights Commission
KCK	Kituo Cha Katiba
KNCHR	Kenya National Commission of Human Rights
KWPC	Kenya Women Political Caucus
LAP	Legal Aid Project
LASPNET	Legal Aid Service Providers Network
LAWA	Law and Women Advocacy
LCC	Legal Coordinating Committee
LCHR	Lawyers Committee for Human Rights
LGBTI	Lesbian, Gay, Bisexual, Transsexual and Intersexuals
LHR	Lawyer for Human Rights
LHRC	Legal and Human Rights Centre
LPM	Landless People's Movement
MEW	Men for Equality
MONGO	My Own NGO
MPAEC	Mandela Park Anti-Eviction Campaign
NALAF	National Land Forum
NARC	National Alliance Rainbow Coalition
NFLS	Nairobi Forward Looking Strategies
NGO	Non-governmental organisation
NGOPADEO	Ngorongoro Pastrolist Development Organisation
NGOSC	Non Government Organisation GO Steering Committee
NHRI	National Human Rights Institutes
NLC	National Land Committee
NNGOs	Northern NGOs
NOCEM	National Organisation for Civic Education and Electoral Monitoring
NY	New York
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
ORAP	Organisation for Rural Association for Progress
PONGOs	Privately-organised NGOs
PRAG	Practical Rules and Guidelines Procedures
RADDHO	<i>Rencontre Africaine pour la Defense des Droit de L'homme</i>
RDI	Rural Development Initiative
RECINET	Regional Integration Civil Society Network

SADC	Southern Africa Development Cooperation
SAGA	South African Grantmakers Association
SAHRC	South African Human Rights Commission
SAHRiNGON	Southern Africa Human Rights NGOs Network
SANCO	South African National Civic Organisations
SANGOCO	South African NGO Coalition
SANGONET	South African NGO Network
SECC	Soweto Electricity Crisis Committee
SERAC	Social and Economic Rights Action Centre
SID	Society for International Development
SNGOs	Southern Non Governmental Organisations
TAC	Treatment Action Campaign
TACOSODE	Tanzanian Council for Social Development
TANGO	Tanzania Association of NGOs
TANLET	Tanzania Legal Education Trust
TCHRGG	Tanzania Commission on Human Rights and Good Governance
TGNP	Tanzania Gender Networking Programme
UAF-A	Urgent Action Fund-Africa
UCRN	Uganda Child Rights Network
UDHR	Universal Declaration of Human Rights
UJCC	Uganda Joint Christian Council
UNASO	Uganda National Aids Service Organisations
UNDP	United Nations Development Programme
UWONET	Uganda Women Network
VAW	Violence against Women
WCAEC	Western Cape Anti Eviction Campaign
WCAR	World Conference on Against Racism
WILDAF	Women in Law and Development in Africa
WNGOs	Women organisations
ZAFELA	Zanzibar Female Lawyers' Association
ZLSC	Zanzibar Legal Service Centre

CONCEPTUALISING THE ROLE OF NGOs IN THE HUMAN RIGHTS MOVEMENT

1 Introduction and overview

Non-Governmental Organisations (NGOs) have contributed to the institutionalisation of a human rights culture and enjoy growing influence and resources. Consequently, there is mounting attention paid to how NGOs manage their power and privileges within their internal governance. This book articulates the human rights standards of NGOs, arguing that the improved governance of NGOs is critical to the strengthening of the human rights movement. Indeed, the struggle for human rights is one of the legitimate struggles for equality and justice in the contemporary world.¹ Since the end of the Cold War in the 1990s, there has been a movement towards making all actors accountable to human rights, as popularised by the rights-based approach. The rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of all actors and stakeholders.² According to the Office of the High Commissioner for Human Rights (OHCHR), ‘participation, empowerment, accountability, equity, non-discrimination, and express linkages to international human rights norms and standards’ are widely recognised principles that are central to the enhanced observation and protection of human rights.³ While upholding the point that the state is the main human rights duty bearer, the idea that human rights are ‘a common standard of achievement for all peoples and all nations’ implies that individuals have both rights and the obligation to respect the human rights

- 1 A Sarat & TR Kearns ‘The unsettled status of human rights: An introduction’ in A Sarat & TR Kearns (eds) *Human rights: Concepts, contests, contingencies* (2001) 4; M Mutua *Human rights: A political and cultural critique* (2002) 2 & 4; L Henkins *The age of rights* (1990) ix & 1.
- 2 M Robinson ‘What rights can add to good development practice’ in P Alston & M Robinson (eds) *Human rights and development: Towards mutual reinforcement* (2005) 38.
- 3 As above.

of others.⁴ Being advocates of human rights imposes a moral obligation on NGOs to adhere to the same human rights principles for which they advocate in their own organising and functioning: To beat the human rights drum for themselves. Importantly, failure to do so negatively affects the general enjoyments of human rights within society.

As a normative concept human rights is useful to restrain the exercise of power by all actors and at all levels of society.⁵ NGOs are growing power holders and they therefore have to reflect on how they address the power imbalances in their policies, strategies and relationships and accept similar responsibilities, follow agreed principles and be accountable.⁶ Analysing power as the ability to either influence or dominate others, power is a dilemma of human rights in that whenever human rights violations occur, negative power is prevalent. Hence, this book is written in a spirit of hope rather than despair, with the aim of strengthening a human rights culture.⁷ It is mainly motivated by the need to re-examine, critique and rebuild a legitimate and vibrant NGO sector in the sub-Saharan African countries, with a focus on Kenya, Tanzania, Uganda and South Africa. It assesses how NGOs have addressed human rights principles in their internal governance practices. In the spirit of the old proverb, I ask that the NGO 'doctor' heals itself before it turns attention to healing the patient.

This book acknowledges that the term 'NGO' is complex, culturally specific and lacks a commonly accepted definition. Indeed, the term is often used interchangeably with the term 'voluntary association', 'public benefit', 'public interest' or 'non-profit' organisation. The most common approach of defining NGOs is by identifying four negative criteria: non-governmental, non-corporate, non-profit and non-electorate.⁸ By way of contrast, I define 'NGO' as any grouping with the following characteristics:

- (a) It is established by legal authority or through voluntary association;

4 www.ohchr.org/EN/issues/Pages/WhatareHumanRights.aspx (accessed 24 June 2007).

5 See IG Shivji *The concept of human rights in Africa* (1989); P Alston 'Introduction: The "not-a-cat" syndrome: Can the international human rights regime accommodate non-state actors?' in P Alston (ed) *Non-state actors and human rights* (2005).

6 ICHRP Deserving trust (2003) www.ichrp.org/credo.md/archiva/documente/HumanRightsNGOAccountability.doc (accessed 2 August 2006).

7 A human rights culture means a norm where human rights are enjoyed as well as respected by each individual and actor. See F Butler 'Building a human rights culture' in C Harvey (ed) *Human rights in the community: Rights as agents for change* (2005) 64; S Spencer 'Partners rediscovered: Human rights and equality in the UK' in Harvey (as above) 36.

8 MT Kamminga 'The evolving status of NGOs under international law: A threat to the inter-state system?' in P Alston (ed) *Non-state actors and human rights* (2005); JC Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (2004); USAID et al *The 2009 NGO sustainability index for Sub-Saharan Africa* (2009) 2; Commonwealth Foundation *Non-Governmental Organisations: Guidelines for good policy and practice* (1995) Guideline 1.

- (b) It is aims to advance human rights or improve the welfare of the human person;
- (c) Its methods of operation are neither criminal nor negate the human rights of others;
- (d) It is not engaged in profit making for private gain, though it may undertake profit seeking activities for sustainability;
- (e) It is non-partisan irrespective of whether it is political or apolitical in orientation; and
- (f) It is not a trade union, cooperative, church, political party or university.

2 The concealed and unchecked power of NGOs: A background discussion

Neo-liberal ideology – which advocates the extension of public choice, while rolling back the frontiers of the state in the socio-economic and political spheres of public life – has fronted civil society in general and NGOs in particular as the custodians of good governance in the new millennium.⁹ Thus, the participation by NGOs is promoted as a response to the failures of the contemporary nation state, which are also closely associated with the phenomenon of poor governance. As the designated ‘guardians’ of the notion of good governance, NGOs must be exemplary and exhibit the virtues of human rights and good governance principles in their internal organisation and practices. The concern is that without good internal governance, the potential of NGOs to advance human rights principles at the broader state and local level is limited.

I specifically focus on NGOs because they have played a pivotal role in securing the inclusion of human rights in the UN Charter, the establishment of the Commission on Human Rights and the Economic and Social Council (ECOSOC)¹⁰ and in the development and functioning of the Human Rights Committees and the UN Human Rights Council.¹¹ NGOs are considered a necessity in the fulfilment of the UN’s agenda.¹² Secondly, NGOs are not only the fastest growing sector of civil society, but also discussions about global civil society are dominated by NGOs.¹³ By September 2013, 3900 NGOs had consultative status with the UN

9 JO Kuye & U Kakumba ‘Governance perspectives in emerging and developing nations of the world: Reflections on the G8 and recent development initiatives in Africa’ Paper presented at the IASIA Conference, Abu Dhabi, 9-14 July 2007, 3.

10 ME Keck & S Sikkink *Activists beyond borders: Advocacy network in international politics* (1998) 85-86.

11 http://en.wikipedia.org/wiki/united_Nations_Rights_Council (accessed 12 June 2007); L Nader ‘The Role of NGOs in the UN Human Rights Council’ (2007) 7 *Sur – International Journal on Human Rights* 9 www.surjournal.org/eng/index7.php?artigo=7,artigo_nader.htm (accessed 17 October 2008).

12 <http://www.un.org/dpi/ngosection/brochure.htm#top> (accessed 28 June 2007).

13 M Edwards ‘Introduction’ in M Edwards & J Gaventa (eds) *Global citizen action* (2001) 2.

ECOSOC, while over 29000 others were working with the United Nations.¹⁴

Thirdly, NGOs are vested with considerable resources. Internationally, by the 1990s, 75 per cent of British foreign aid, 40 per cent of Swedish spending, 46 per cent of French emergency funding and 50 per cent of European Union humanitarian funding was spent through NGOs.¹⁵ In 2003, globally, NGOs' annual budget was estimated at US\$ one trillion,¹⁶ making them powerful global actors. It is even suggested that NGOs collectively deliver more aid than the entire United Nations system.¹⁷ In Kenya, NGOs annually spend US\$270 million, contributing 2,5 per cent of the GDP and providing 42,6 per cent of all public employment.¹⁸ In Uganda, in 2009, NGOs spent about US\$200 million, which is comparable to the World Bank Poverty Support Credit (PRSP) budget.¹⁹

Initially, NGOs were rarely criticised but rather praised as the 'nervous system'²⁰ of human rights, the 'gate keepers' of human rights,²¹ the 'engine for the advancement of human rights,'²² and the 'curious grapevine' that has made human rights part of the international discourse.²³ The contribution of NGOs to world peace is illustrated by the winning of the Nobel Peace prize by Amnesty International (AI) in 1977.²⁴ Likewise, Sean McBride of the International Commission of Jurists (ICJ)²⁵ and Jody Williams of Human Rights Watch (HRW)²⁶ have both been recipients of the Nobel Peace Prize. In Africa, the Treatment Action Campaign (TAC) of South Africa was nominated for the Nobel Prize in 2003.²⁷

14 <http://csonet.org/?menu=100> (accessed 3 Jan 2015).

15 I Smillie 'At sea in a sieve? Trends and issues in the relationship between Northern NGOs and Northern governments' in I Smillie & H Hendricks (eds) *Stakeholders government-NGO partnership for the international development* (1999) 9.

16 Sustainability 'NGOs in the 21st Century: In the market for change' (2003) 2 www.sustainability.com/insight/research-article.asp?id=51 (accessed 3 July 2008).

17 Kamminga (n 8 above) 98.

18 USAID (n 8 above) 74.

19 Uganda Government, Ministry of Finance, Planning and Economic Development & Belgian Technical Cooperation *Data collection on donor support in local government and the development of a tool for tracking donor support at the micro level* (2009) 33 & 37.

20 CE Welch 'Human rights and development in Africa: NGOs' in PT Zelaza & PJ McConnaughay (eds) *Human rights, the rule of law, and development in Africa* (2004) 200.

21 ST Orlin 'The local non-governmental organization: The human rights gatekeeper' in SS Akermarck et al (eds) *Human rights education: Achievements and challenges* (1998) 130.

22 P Baehr 'Human rights NGOs and globalization' in K Arts & P Mihyo (eds) *Responding to the human rights deficit: Essays in honour of Bas De Gaay Fortman* (2003) 31.

23 W Korey *NGOs and the universal declaration of human rights: A curious grapevine* (2001) ix; Kamminga (n 8 above) 110.

24 Korey (n 23 above) 24.

25 CE Welch 'Amnesty International and Human Rights Watch: A comparison' in CE Welch (ed) *NGOs and human rights: Promise and performance* (2001) 92.

26 W Brown 'Human Rights Watch: An overview' in Welch (n 25 above) 83.

27 S Friedman & S Mottair 'The rewarding engagement? The treatment action campaign and the politics of HIV/AIDS' (2004) 1 www.ukzn.ac.za/ccs (accessed 7 July 2006).

The growth of the NGO sector notwithstanding, hitherto the work of NGOs has mostly been situated within the development and political discourses and not within the framework of law or human rights. For example, the World Bank traditionally applied good governance principles to NGOs as only necessary in terms of facilitating public consultations, catalysing public debate and holding governments accountable.²⁸ Viewed from this perspective, NGOs were regarded as inputs for effective service delivery. A comparative review of organisations in East and South Africa reveals that a majority of them work in the development sector using a welfarist approach that addresses human rights in an apolitical and technical manner.²⁹ Hence, the human rights movement in East Africa has been characterised as nascent, weak, *ad hoc* and episodic.³⁰ Likewise, the post-apartheid era in South Africa has witnessed the shrinking of the NGO sector due to the exodus of the human and financial resources towards government.³¹

Within the legal and human rights sphere, governance issues are alluded to in discussing the effectiveness of human rights organisations in fulfilling their mandates. The capacity of the NGO sector has mostly either been taken for granted or heavily idealised masking the inequalities and abuse of power within the sector. Furthermore, the donor community traditionally narrowly interpreted good governance in respect of NGOs to mean the creation of boards of directors, which are not directly involved in management and the submission of audited reports.

NGO work is often trivialised as purely voluntary, temporary and transient but not as serious work. A majority of the leadership of NGOs confess to learning on the job without adequate guidance about their governance roles and responsibilities. As such, while many NGOs are fairly well managed in terms of programme implementation, their legitimacy and governance are seriously contested. The result has been a negative image for the sector, burn out, low organisational life-expectancy, high turnover of personnel, with the performance of a particular organisation highly contingent on the personalities in leadership. Moreover, most NGOs confine their democratic and human rights credentials to having written constitutions, membership and frequent

28 J Clark 'The state and the voluntary sector' Human Resource Development and Operations Policy, World Bank Report, October, HROWP 12 (1993) 15 http://www-wds.worldbank.org/servlet/WDSCContentServer/WDSP/IB/1993/10/01/000009265_3961005082045/Rendered/PDF/multi_page.pdf (accessed 19 August 2013).

29 LM Salamon et al 'Global civil society: An overview' in LM Salamon et al (eds) *'Global civil society: Dimensions of the non-profit sector' Vol 2* (2004) 50; USAID (n 8 above) 3 & 5; Research on Poverty Alleviation (REPOA) *Tanzania Non-Governmental Organisations – Their perceptions of the relationship with government of Tanzania and donors, and their role in poverty reduction and development* (2007) 9.

30 M Mutua 'Human rights NGOs in East Africa: Defining the challenges' in M Mutua (ed) *Human rights NGOs in East Africa: Political and normative tensions* (2009) 15.

31 H Kotze 'Responding to the growing socio-economic crisis? A review of civil society in South Africa' in *Development Update, The deepening divide: Civil society and development in South Africa Annual Review 2001/2002* (2003) 18.

elections which are often viewed as technical rather than substantive requirements.

The above indifference about the issue of the internal governance of NGOs is the case in spite of the recognition that their poor governance ultimately results in the infringement of human rights. Furthermore, poor governance has adverse effects on the organisational capacity of these groups to positively contribute to the promotion of a culture of human rights.

With the advent of the rights-based approach, NGOs' lack of democratic structures, transparency and legitimacy are increasingly being exposed. Mbogori contends that 'many NGOs fall short of the standards expected of them to observe the basic tenets of democracy and rights'.³² Yet unless NGOs effectively self-regulate themselves, government may manipulate their weaknesses to legitimate its interferences in the internal functioning of NGOs through the monitoring role of NGOs regulatory Boards.³³ Furthermore, the lack of openness about money, evaluations, complexities and the uncertainty of development makes NGOs vulnerable to attack.³⁴ It is also alleged that non-profit organisations in general are more susceptible to hiding costs than the corporate sector.³⁵

While NGOs have to balance accountability to the different stakeholders that they serve, accountability is mostly geared towards donors and governments, at the cost of the beneficiaries and the Board. Of critical concern is the shrinking of the space for civic engagement in favour of organisations with greater resources, more access to decision-makers in capital cities as well as the ability to tender in well-written donor proposals. Although some NGOs are membership organisations, the democratic nature of the decision-making processes in many NGOs is often questionable, with hardly any formal rules to ensure representativeness, transparency or accountability.³⁶ It is such lack of accountability that has evoked a range of derogatory acronyms, namely, BONGO (business NGO), BRINGO (briefcase NGO), GONGO (government NGO),

32 E Mbogori 'Electronic Round Table: "Democracy and Human Rights"' (February, 2000) 50 www.africaaction.org/rtable/rtb2.pdf (accessed 2 August 2006).

33 Tanzania NGO Act (2002) secs 6 & 7; South African Nonprofit Organisations Act 71 of 1997, sec 4; Uganda NGO Amendment Act (2006) secs 3 & 7; Kenya PBO Act (2013) sec 42; Uganda Local Government Act (2006) secs 18(b), 27 & 50 (f); Uganda NGO Policy (2010) 43-45.

34 Smillie (n 15 above) 26.

35 D Shulman 'More lies than meet the eyes: Organizational realities and deceptions in nonprofit organizations' (2008) 10 *International Journal on Not-for-Profit Law* 5.

36 Baehr (n 22 above) 40.

DONGO (donor organised NGO) and MONGO (My NGO), to mention but a few.³⁷

The right to freedom of association is increasingly illuminated in the international human rights arena, as demonstrated by the adoption of the Human Rights Defenders Declaration by the General Assembly in 1998 and the establishment of the mandate of Special Rapporteur on the same issue in 2010.³⁸ With the global trend of clamping down on independent civil society spaces under the guise of combating terrorism or defending government sovereignty, there is more clarity about the need to protect civil society from government arbitrariness as encapsulated in the International Principles Protecting Civil Society.³⁹ However, the precise parameters of civil society's international obligations remain ambiguous. Hence there is need for a comprehensive articulation of the normative principles to strengthen the building of a coherent international civil society.⁴⁰ Accordingly, any organisation or actor with influence and power must be subjected to pressure for accountability.⁴¹ Cognisant that power dynamics are in continuous flux, NGOs as the promoters and defenders of human rights are also capable of being the violators of human rights principles. Acknowledging and addressing these power imbalances is essential in strengthening NGOs. In the words of Anwar, 'accountability is about civilising power for the preservation of freedom and justice,' particularly the power one wields.⁴² Conversely, hiding the act of power shields it from critical scrutiny to improve the use of power in a manner that advances the interest of all parties. Alarming, the failure of NGOs to self-regulate may justify governments' restriction of their right to freedom of association.

The foregoing background has highlighted the opportunities and shortcomings of NGOs' internal governance which point to the challenges of the NGO sector in promoting good governance and human rights. The following discussion provides the theoretical lenses through which I will assess the governance of NGOs.

37 I Anwar 'Accountability and the Future of Freedom' A Presidential Fellows Lecture (2006) <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/EXTPRESIDENT/EXTPASTPRESIDENTS/EXTOFFICEPRESIDENT/0,,contentMDK:20977460~menuPK:64343277~pagePK:51174171~piPK:64258873~theSitePK:1014541,00.html> (accessed 3 November 2008).

38 International Centre for Not-for-Profit-Law (ICNL) & World Movement for Democracy (WMD) *Defending civil society report* Second Edition, June (2012) 3 & 9.

39 ICNL & WMD International Principles Protecting Civil Society <http://www.defendingcivilsociety.org/en/index.php/principles> (accessed 12 July 2013).

40 B Kingsbury 'Ascriptive groups and the problems of the liberal NGO model of international civil society' in CL Eisgruber & A Sajó (eds) *Global justice and the bulwarks of localism: Human rights in context* (2005) 129.

41 M Edwards *Civil Society* (2004) 17; Robinson (n 2 above) 36.

42 Anwar (n 37 above).

3 Linking rights, governance and development

The theoretical foundation of this study applies an integrated approach that views human rights as a multifaceted discourse involving the socio-economic, political, technological and legal domains. The notions of NGOs, governance and rights – which form the main themes of this book – are hinged on a multidisciplinary approach cutting across the social sciences and legal discourses.

Although traditionally the contemporary meaning of ‘governance’ narrowly refers to the exercise of public power, governance is not a preserve of the state but rather, a partnership between the leaders and the led to promote the well-being of the entire society.⁴³ As a normative concept it places human rights at the core of the realisation of good governance in order to enhance the welfare and dignity of the human person.⁴⁴ In applying the notion of good governance to non-state actors, the International Law Association Committee on Accountability of International Organisations identifies the core principles of good governance to include accountability, transparency and participation.⁴⁵ Organisational governance entails exercising power on a basis to shared values and utilising resources in an accountable manner to optimally achieve the mission of the organisation.⁴⁶

Making a case for the interrelation between NGOs, governance and rights, I draw from the rights-based framework. The rights-based approach to development is a conceptual framework for the process of human development that integrates the norms, standards and principles of the international human rights system into the processes, policies and strategies of all actors and stakeholders.⁴⁷ These principles include equality and equity, accountability and transparency, participation and inclusion, equity, non-discrimination and empowerment, which are concurrently key tenets of good governance.⁴⁸

The debate is further enhanced by the inter-relationship between rights, good governance and NGOs, which is two-pronged. First of all, it

43 Kuye & Kakumba (n 9 above) 1.

44 HO Sano ‘Good governance, accountability and human rights’ in HO Sano & G Alfredsson (eds) *Human rights and good governance: Building bridges* (2002) 137.

45 A Reinisch ‘The changing international legal framework for dealing with non-state actors’ in Alston & Robinson (n 2 above) 49.

46 See P Camay & AJ Gordon *CSOs practicing what they preach: A composite report on the civil society governing boards in South Africa* (2002) 1-2; RT Ingram *Ten basic responsibilities of Non Profit Boards* (2003); M Wyatt *A handbook of NGO governance, the Central and Eastern European Working Group on non-profit governance* (2004); RP Chait *How to help your Board govern more and manage less* (2001).

47 UNOHCHR <http://www.unhchr.ch/development/approaches-01.html> (accessed 3 June 2007); Robinson (n 2 above) 38.

48 P Alston & M Robinson ‘The challenges of ensuring mutuality of human rights and development endeavours’ in Alston & Robinson (n 2 above) 4.

entails affording NGOs the space to organise as independent legal entities; and secondly, it imposes an obligation on NGOs to subscribe to human rights principles in their organising. In sum, the principles of good governance that are demanded of the state should equally apply to NGOs in order to enhance their moral legitimacy and the public trust in them.

The interrelation of NGOs, governance and rights also borrows from the three schools of thoughts about civil society identified by Edwards, namely: (i) civil society as associational life; (ii) civil society as good society; and (iii) civil society as public sphere.⁴⁹ This thinking is now applied to NGOs. The first and most dominant view of civil society is that of voluntary associations or organisations that are situated between the family and the state, but, though autonomous of the state, interact with it to advance their interests.⁵⁰ The second school conceptualises civil society as 'good society': a desirable social order in which all institutions operate in ways that nurture positive social norms, such as tolerance, non-discrimination, non-violence, trust, cooperation and rights.⁵¹ In its social role, civil society is seen as the reservoir of social capital and positive social norms that foster community building, bonds of trust, cooperation and reciprocity and enriches human condition.⁵² The third school of thought perceives civil society as part of the public sphere: an arena for argument and deliberations, as well as for associational and institutional collaboration.⁵³ The public sphere is an arena where societal differences, social problems, public policy, government action, cultural and common identities are debated and developed. In this political role, civil society serves as a crucial counterweight to the state and corporate power as well as an essential pillar in promoting good governance.⁵⁴ Civil society also provides channels through which people can have their voices heard in government decision-making and sharpens skills for political leadership.⁵⁵ Thus, as part of civil society, NGOs have influenced, altered and shaped the political discourse and the human rights terrain. Ostensibly, an integrated approach of the concept of civil society is useful in attacking all forms of inequity and in the promotion of democratic spaces.⁵⁶ These frameworks are used to examine whether NGOs observe human rights and good governance principles in their internal organising.

49 Edwards (n 41 above).

50 Edwards (n 41 above) 2; also see P Uvin *Human rights and development* (2004); J Oloka-Onyango *Civil society, democratisation and foreign donors in contemporary Uganda: A conceptual and literature review* (2000); M Swilling & B Russell *The size and scope of the non-profit sector in South Africa* (2002).

51 Edwards (n 41 above) 39.

52 Edwards (n 41 above) 14; Salamon (n 29 above) 23.

53 Edwards (n 41 above) 55.

54 Edwards (n 41 above) 14-15.

55 Edwards (n 41 above) 15.

56 Edwards (n 41 above) 96.

4 Book overview

Chapter 1 introduces the book. The theoretical foundation of whether or not NGOs are obliged to respect human rights principles in their internal governance, and the nature of the obligations is addressed in Chapter 2. While upholding the dominant view that the state is the main human rights duty bearer and legal systems are critical to the enforcement of rights, I adopt the sociology of law discourse that recognises the moral obligations of NGOs to respect and promote human rights. Therefore, as proponents of good governance and human rights, NGOs have to apply the human rights principles of express linkage to rights, accountability and transparency, participation and inclusiveness and empowerment and non-discrimination to their internal governance. Each of these principles form the basis of Chapters 3 to 6. Importantly, the chapters demonstrate that the human rights principles are not only linked, but are actually key pillars in promoting good governance.

In discussing the principle of express linkage to rights, Chapter 3 examines the extent to which NGO practices support the characteristics of human rights as universal, inalienable and indivisible. It highlights the tension between culture and rights to underlie the point that human rights are present in every culture. Similarly it analyses the false dichotomy between development NGOs and human rights NGOs reaffirming that human rights are indivisible, interrelated and interdependent and that Development NGOs (DNGOs) and Human Rights NGOs (HURINGOs)' work is mutually reinforcing.

The issue of the multiple accountabilities of NGOs is addressed in Chapter 4. The discussion begins with a comparative analysis of the national laws regulating NGOs, underscoring the fact that the state has the obligation to provide an enabling environment for the independent existence and governance of NGOs. Cognisant that the primary duty of the governance of NGOs vests in the Board, it scrutinises how these central organs of NGO governance have ensured accountability to the public trust. It makes the case for strengthening the self-regulation of the sector. Further, it examines how NGOs have fulfilled their obligations with the regional and continental human rights mechanisms under the African Union, African Commission, SADC and the EAC, particularly when granted observer status. It further explores the potential of these mechanisms as sites for the further development of NGO human rights obligations.

Chapter 5 examines the nature of participatory and inclusive management within the NGO, problematising the role of founders in furthering participation and the resultant management of conflict as an integral element of diversity. In interrogating NGOs' strategies of engaging

the state, it calls for more political consciousness on the part of the NGO sector.

Chapter 6 underlines that NGOs have an obligation to empower themselves through acquisition of requisite skills and resources and to empower marginalised groups such as women, sexual and racial minorities and the youth. It highlights the North-NGOs (NNGOs) and South-NGOs (SNGOs) relationship to address the challenges, dilemmas, opportunities and lessons learnt in negotiating power.

CHAPTER 2

THE HUMAN RIGHTS OBLIGATIONS OF NGOs IN THE INTERNATIONAL ARENA

1 Introduction

Persistent poverty and civil strife have influenced the reconsideration of the development and governance debates in order to re-orient their focus to human rights. Human rights are generally understood as the rights that one has simply as a human being.¹ They are universal, inherent to all human beings, enjoyed equally, inalienable, interrelated, interdependent and indivisible.² This chapter conceptualises NGOs within the human rights discourse. In other words, it asks the key question: Do NGOs have human rights obligations? If the answer to this inquiry is in the affirmative, then what is the source and content of these obligations? In answering this question, the approach is threefold. In the first instance, I examine the human rights obligations of NGOs from both a legal and a moral perspective. Secondly, in seeking to expand the rights discourse to non-state actors in general and to cover NGOs in particular, the chapter traces the genesis and rationale of the rights-based approach as one of the strategies that extends the human rights obligations to NGOs. Thirdly, it elaborates on the implications of the rights-based approach to the governance of NGOs. Nonetheless, in so doing I neither prescribe nor offer a single comprehensive definition of the rights-based approach for all purposes. Doing so would reduce the rights-based approach to a technical concept. Rather, I adopt the principles identified by the Office of the High Commissioner of Human Rights, and clarify their meaning in respect to NGO governance.

1 Encyclopaedia Britannica <http://www.britannica.com/EBchecked/topic/275840/human-rights#>; (accessed 24 June 2006).

2 www.ohchr.org/EN/issues/Pages/WhatAreHumanRights.aspx (accessed 24 June 2006).

2 NGOs' obligations under international law

The question of whether or not NGOs in particular and non-state actors in general have human rights duties under international law is highly contested and has attracted more resistance than support. There are three schools of thought on this issue. The first argues that NGOs neither have legal nor moral duties under international human rights law. The second one holds the view that NGOs have the specific legal duty to respect and promote human rights. Premised on rights as a normative concept, the third school of thought contends that NGOs have a moral duty to respect and promote rights. The following section offers an in-depth discussion on each of these propositions.

2.1 NGOs do not have legal obligations under international human rights law

The school of thought that argues that NGOs do not have legal duties under international human rights law, is also the dominant one, and is grounded in legal liberalism. Legal liberalism puts an emphasis on the law to achieve rights.³ Legal liberalism is premised on the concept of the free market, liberal democracy and the rule of law.⁴ A state is obliged to ensure and promote the respect of human rights by legislating or penalising the negative behaviour of non-state actors under its jurisdiction.⁵ The majority of international lawyers are reluctant to extend human rights obligations to non-state actors in general because what makes human rights distinguishable from other breaches of law is that it only relates to abuses of state power.⁶ Put differently, human rights protect the individual from the arbitrary use of power by the omnipotent state as well as oblige the state to ensure the realisation of rights of the individual citizen.⁷ They are apprehensive that imposing duties on non-state actors would dilute the state's responsibilities to secure rights for all under its jurisdiction and detract attention from the state's violations.⁸ Inadvertently, extending obligations to non-state actors runs the risk of over shadowing the human rights violations by the state.⁹

3 As above.

4 M Mutua *Human rights: A political and cultural critique* (2002) 2.

5 V De Feyter *Human rights, social justice in the age of the market* (2005) 49.

6 Clapham *Human rights obligations and non-state actors* (2005) 42; A Reinisch 'The changing international legal framework for dealing with non-state actors' in P Alston & M Robinson (eds) *Human rights and development: Towards mutual reinforcement* (2005) 43 & 70.

7 MT Kamminga 'The evolving status of NGOs under international law: A threat to the inter-state system?' in P Alston (ed) *Non-state actors and human rights* (2005).

8 De Feyter (n 5 above) 3; Clapham (n 6 above) 42.

9 Mutua (n 4 above) 90; Clapham (n 6 above) 2.

The legal liberalism school insists that human rights claims must be justiciable by having a credible accountability mechanism that identifies a duty bearer to redress the human rights violation.¹⁰ The Human Rights Committee has emphasised that the International Covenant on Civil and Political Rights (ICCPR) obliges the state to protect individuals not just against violations of the Covenant rights by the state and its agents, but also against acts committed by private actors that violate human rights.¹¹ In other words, the state is required to ensure that private actors do not violate human rights. However, the Human Rights Committee was not prepared to affirm that in the absence of effective action by the state, international law imposes a direct obligation on private actors.¹² According to the legal liberalism school of thought, human rights law is adequate without need of further evolution, given that the state is already accountable for the human rights obligations of the non-state actors. Despite the state's withdrawal from the provision of goods and service, its human rights obligations remain with a duty to oversee the activities of those who provide services and to intervene when the performance of a service provider results in a human rights violation.¹³

Likewise, the African Commission on Human and Peoples' Rights (African Commission) has never reviewed any case alleging the non-fulfilment of obligations by private actors. In practice, communications against non-state parties to the African Charter have been declared inadmissible. This is primarily because it is the states and not individuals that are parties to the African Charter. For example, in *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights v Nigeria*,¹⁴ where it was alleged that the oil extraction by the National Petroleum Company and Shell Petroleum Development Company had caused environmental degradation to the Ogoni people, the case was brought against Nigeria, cognisant of the fact that the Nigerian government was the major shareholder of the National Petroleum Company. Similar to the position of the Human Rights Committee, the Commission did not impose a direct human rights obligation against a non-state actor, in spite of Shell's economic and political power in the Delta region.¹⁵ Nonetheless, the approach towards holding human rights violators accountable has evolved, moving from the state to transnational

10 De Feyter (n 5 above) 23 & 220.

11 See General Comment 31 on art 2 of the Covenant: The nature of the general legal obligations imposed on State parties to the Covenant UN Doc, CCPR/C/21/Rev.1/Add 13 <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=478b26ae2&skip=0&query=comment%2031> (accessed 4 November 2006).

12 P Alston 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 770.

13 Clapham (n 6 above) 12; De Feyter (n 5 above) 22.

14 Africa Human Rights Law Reports (AHRLR) (2002) 60.

15 J Oloka-Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) 18 *American University International Review* 905.

corporations (TNCs) and Multilateral Financial Institutions (MFIs) such as the World Bank and IMF.¹⁶ Progressively, in 2006, the African Commission was urged to address the human rights violations by non-state actors.¹⁷

Although NGOs are associations of individuals, the liberal legalism school of thought does not recognise that NGOs have rights or duties under human rights and international public law. To qualify as a legal entity under international law, an entity must have the capacity to make claims in respect of breaches of international law, make treaties and agreements valid on the international plane and enjoy the privileges and immunities from national jurisdiction.¹⁸ Only the International Committee of the Red Cross (ICRC) has been accorded international juridical capacity and assigned some responsibility under the Geneva Convention.¹⁹ The Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Defender's Declaration)²⁰ does not outline any significant obligations on the part of NGOs.²¹ Similarly, there is some ambivalence concerning whether the recommendations of the Eminent Persons panel aimed at strengthening the role of civil society in general and NGOs in particular in the UN system would in fact yield a more enhanced and precise role.²² Given that international public law results from the willingness of states to make rules that bind them,²³ it is rather ambitious to expect states to allow non-state actors to undermine the state-centric discourse of rights. Consequently, NGO participation is only permitted in so far as it strengthens the hegemony of the state in the human rights system.²⁴

16 United Nations Sub-Commission on the Promotion and Protection of Human Rights *Human rights as the primary objective of international trade, investment and finance policy and practice* Working paper submitted by J Oloka-Onyango & D Udagama, in accordance with Sub-Commission resolution 1998/12, UN Doc E/CN.4/Sub.2/1999/11 (17 June 1999) [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.1999.11.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1999.11.En?OpenDocument) (accessed 5 May 2005); Clapham (n 6 above) 28 & 58.

17 African Commission, 20th Annual activity Report (2006) recommendation (g), 30 www.chr.up.ac.za/hr_docs/documents/20th%20Activity%20report.doc (accessed 4 August 2008).

18 I Brownlie *Principles of international law* (1998) 57.

19 Kamminga (n 7 above) 99.

20 See GA Res 53/144, annex, 53 UN GAOR Supp, UN Doc UN Doc A/RES/53/144 (1999) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement> (accessed 11 August 2013).

21 As above.

22 See P Alston 'Introduction: The "not-a-cat" syndrome: Can the international human rights regime accommodate non-state actors?' in P Alston (n 7 above) 28; Alston cites the *We the people, civil society, the United Nations and global governance: Report of the Panel of Eminent Persons on the United Nations-Civil Society Relations* UN doc A/58/817(2004).

23 International Court of Justice (1946) art 38(1).

24 Kamminga (n 7 above) 110.

2.2 NGOs legal obligations to respect and promote human rights

2.2.1 NGOs' duties in the global human rights discourse

The second school of thought argues that both the State and NGOs have human rights obligations under international law. Although the State remains the bedrock of the human rights discourse and non-state actors do not have powers to make laws, a creative and elastic interpretation of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR) make both state and non-state actors addressees of human rights obligations.²⁵ The two Covenants bar 'any State, group or person to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein'.²⁶ Furthermore, the ICCPR provides that the

individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.²⁷

It is therefore possible that the above articles proclaim rights for everyone including NGOs.²⁸ In this respect, human rights are viewed as entitlements enjoyed by everyone to be respected by everyone, as complementary to the dominant state-centric human rights discourse.

It is noteworthy that the ICCPR specifically refers to the obligation of 'promotion and observance of rights'. Under international law, human rights obligations are considered to be of five major types, namely:²⁹

- 'Respect' by avoiding actions that hinder or prevent the enjoyment of rights;

25 Alston (n 22 above) 21; Reinisch (n 6 above) 70; Clapham (n 6 above) 28.

26 International Convention of Civil Political Rights (ICCPR) (1966), adopted and opened for signature, ratification and accession by GA resolution 2200A (XXI), 21 UN GAOR, Supp (No 16) 52, UN Doc A/6316, 999 UNTS 171, entry into force 23 March 1976, art 51; International Convention of Economic, Social and Cultural Rights (CESCR) GA resolution 2200A (XXI), 21 UN GAOR, Supp (No 16) at 49, UN Doc A/6316, 993 UNTS 3, entry into force 3 Jan 1976 (1966) art 5(1).

27 (ICCPR) (note 26) Preamble.

28 Clapham (n 6 above) 34; Oloka-Onyango & Udagama (n 16 above) 6.

29 Compilation of General Comments and General Recommendations adopted by human rights treaty bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 6 www.ohchr.org/EN/issues/Pages/WhatAreHumanRights.aspx (n 58 above); J Oloka-Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) 18 *American University International Review* 867; *SERAC and Centre for Economic and Social Rights v Nigeria* AHRLR 60 ACHPR (2001) 54; Paris Principles, United Nations Commission on Human Rights Resolution 1992/54 www.ohchr.org/english/laws/parisprinciples.htm (accessed 21 January 2006).

- 'Protect' by providing an appropriate regulatory framework to penalise or bring to justice those who commit rights violations;
- 'Fulfil' by facilitating an enabling environment through appropriate legislation, policies and institutions for the realisation of rights and secondly by the state being the actual provider of the rights, such as basic free education;
- 'Promote' human rights through education and awareness; and
- 'Recognise' by incorporating international human rights obligations in domestic law.

Therefore, in discussing the legal obligations of NGOs, I confine myself to the obligation to respect and abstain from violating or undermining rights in the course of NGOs' work and the obligation to promote human rights through information and practice.

For decades women criticised the fallacy of the private/public dichotomy on grounds that the majority of women are located in the private sphere, with violations committed by non-state actors. Moreover, international law is not exclusively public-centred. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) covers all violations against women irrespective of whether committed by the state, individuals or private organisations or enterprise.³⁰ Similarly, the Convention on the Rights of Child (CRC) places responsibility on parents and guardians to provide for the welfare of the child³¹ as well as to provide direction and guidance.³²

Globalisation as a process driven by non-state actors renders the state too small a unit to control and organise international relations.³³ The state is no longer the only centre of power in ensuring rights. Furthermore, the phenomenon of privatisation has transferred the provision of major essential goods and services to the private arena.³⁴ Although privatisation of state social services on its own is not a violation of human rights, the non-state actor in control of the privatised activity shares the human rights responsibilities of the state.³⁵ Therefore the solution lies not in abandoning state responsibilities or in demonising globalisation, but devising creative

30 Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted 18 Dec 1979, GA Res 34/180, UN GAOR, 34th Sess, Supp No 46, UN, Doc A/34/46(1980) entered into force 3 Sept 1981, reprinted in 19 ILM 33 (1980), art 2(e).

31 Convention on the Rights of the Child (CRC), adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49 <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed 13 July 2006), (1989) art 27(2).

32 CRC (note 31 above), art 5.

33 J Donnelly 'Human rights, globalising flows and state power' in A Brysk (ed) *Globalisation and human rights* (2002) 227; Clapham (n 6 above) 6 & 28; Reinisch (n 6 above) 74.

34 Clapham (n 6 above) 8 & 44; De Feyter (n above 5) 17.

35 Clapham (n 6 above) 12.

ways of holding both the state and non-state actors accountable for human rights violations.

However, this does not necessarily diminish the state's obligation to provide Economic, Social and Cultural Rights (ESCRs), but rather changes its obligations from that of a major 'provider' to a 'supervisory' role.³⁶ Conversely, maintaining the state as the only duty bearer shields and fosters impunity for powerful private violations. Impunity refers to the lack of punishment for, or the lack of acknowledged accountability of violations of human rights as well as a lack of an effective remedy for the victims of human rights violations.³⁷

In effect, the international human rights regime's ability to ensure accountability for all human rights violations will be severely compromised by the failure to address violations by all actors.³⁸ As postulated by Philip Alston:³⁹

A refusal to recognise and accommodate the new realities in relation to non-state actors will only serve to marginalize the existing arrangements and underscore the need to bypass it in devising future arrangements ... An international human rights regime which is not capable ... of ensuring that private actors are held responsible, will not only lose credibility in the years ahead but will render itself unnecessarily irrelevant in relation to important issues.

The issue is not to encourage the state to abdicate its human rights responsibility, but rather to extend the responsibility to the private actor. Consequently, the desired change lies not in restricting the accountability of non-state actors, but in broadening the legal framework by widening the application of substantive norms, procedures and institutions available to mediate the enforcement of human rights norms.⁴⁰ A critical concern amongst development organisations is how to avoid being drawn into the role of 'surrogate or substitute for the failed duty holders'.⁴¹ While Development NGOs (DNGOs) may complement the state they are required to concurrently monitor it as the primary duty holder to deliver rights.⁴² Amongst International NGOs (INGOs), there is a consensus that NGOs complement, but do not replace the primary responsibility of the state to promote equitable human development and uphold human rights.⁴³

36 De Feyter (n 5 above) 2; Clapham (n 6 above) 5.

37 S Gutto *Human and people's rights for the oppressed: Critical essays theory and practice from the sociology of law perspectives* (1993) 18.

38 De Feyter (n 5 above) 19; Alston (n 22 above) 19.

39 Alston (n 22 above) 19.

40 Reinisch (n 6 above) 42.

41 A Fowler 'NGO futures: Beyond aid: NGDOs values and the forth position' (2000) 21 *Third World Quarterly* 595.

42 As above.

43 INGO Accountability Charter (2005) 1 www.amnesty.org/resiurces/downloads/INGO_Accountability_charter.pdf (accessed 3 June 2007).

In summary, in the event that an NGO seeks to assist the state in fulfilling its obligation to fulfil rights, it must do so in a manner that respects the beneficiaries' rights and enhances the respect of human rights rather than as mere charity or discretionary practice.

2.2.2 *NGOs' obligations under the African human rights system*

At the African continental level, the African Charter on Human and Peoples' Rights (African Charter) provides a more expansive framework for legitimising individuals as rights and duty bearers. The Africa Charter combines African values with international norms by incorporating collective rights and individual duties. The Preamble to the Africa Charter collates rights to duties by stipulating that the '... concept of the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone'. The Charter dedicates a whole chapter to the duties of individuals.⁴⁴ A duty is placed on every individual to consider fellow beings without discrimination and to reinforce mutual respect and tolerance.⁴⁵ The principle that rights and duties are reciprocal and complementary is reiterated under the provision that the 'rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'.⁴⁶ Similarly, the African Charter reiterates the individual duties on the part of the child.⁴⁷

For Africa, the struggle for human rights is not confined to primarily between the state and a 'single' individual, but it is rather a societal obligation based on reciprocal undertaking of duties towards each other.⁴⁸ Thus the responsibility for human rights promotion, defence and protection is not solely the duty of the state but of society as a whole. The individual as a social being and part of the community is a bearer of both rights and duties.⁴⁹ The African concept of duty is based on the presumption that the full development and enjoyment of rights of an individual's action impacts on the rights and collective survival of others.⁵⁰

44 African [Banjul] Charter on Human and Peoples' Rights (African Charter) adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), *entered into force* 21 October 1986, (1981) chap 2.

45 African Charter (n 44 above) art 28.

46 African Charter (n 44 above) art 27(2).

47 The African Charter on the Rights and Welfare of the Child (1990) adopted in Addis Ababa, Ethiopia in July 1990 and entered into force in November 1999, (1990) art 31.

48 Gutto (n 37 above) 153; IG Shivji *The concept of human rights in Africa* (1989) vii.

49 Mutua (n 4 above) 73.

50 Mutua (n 4 above) 88; J Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) accords women protection in both the public and private sphere thus imputing duties by non-state actors. It also recognises that individuals can violate the rights of others, particularly with reference to the right to dignity, life, integrity and security of person.⁵¹ Further, the African Commission has established the practice of requesting states to report on what is being done to ensure that individual duties are observed as well as the efforts undertaken by states in protecting their citizens against domestic violence.⁵²

I argue that although the individual is the principal and central subject of human rights, NGOs as a collection of individuals who come together for collective action also have the same responsibilities as the individuals therein. However, it is my contention that the conceptual orientation of the second school is weak. I therefore support the third school which argues that the obligations of NGOs are moral.

2.2.3 NGOs have a moral obligation to respect and promote human rights

While accepting the first proposition that NGOs do not have legal obligations under international law, the third school of thought supplements this point of view by pointing out that NGOs and wider non-state actors have a moral responsibility to promote and respect human rights.⁵³ The socio-legal perspective school of thought criticises the dominant legal liberalism discourse of human rights for conceptualising human rights as merely legal rights in the sense of entitlements, with the law perceived as separate and abstracted from both the state and society.⁵⁴ Such an individualistic and a historical approach to human rights concentrates on human rights violations as legal rights, without addressing the root causes of such violations.⁵⁵ Consequently, rather than questioning the efficacy of the dominant legal approach, the usual response is to clarify legal rules by drafting more international laws.⁵⁶ And yet in the real world law is not insulated from the socio-political power struggles and value systems, but is the very product of such on-going struggles and processes.⁵⁷ Hence, law is conceptually and functionally inter-related to the social

51 Protocol on the African Charter on Human and Peoples' Rights on the rights of women in Africa (2003) art 3 & 4, http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf (accessed 13 July 2006).

52 R Murray 'A feminist perspective on reform of the African human rights system' (2001) 1 *African Human Rights Law Journal* 216.

53 See Alston (n 22 above); De Feyter (n 5 above); Shivji (n 48 above).

54 Shivji (n 48 above) 50.

55 Shivji (n 48 above) 53.

56 T Evans 'International human rights law as power/knowledge' (2005) 27 *Human Rights Quarterly* 1047; U Baxi *The future of human rights* (2002) 7.

57 M Darrow & A Tomas 'Power, capture and conflict: A call for human rights accountability in development cooperation' (2005) 27 *Human Rights Quarterly* 485.

anthropological and political sciences.⁵⁸ Thus the ICHRP recommends that because 'NGOs are powerful, they should accept similar responsibility to report on their activities, follow agreed principles of behaviour and be accountable'.⁵⁹ Grounded in the sociology of law (also known as the socio-legal perspective), human rights are conceptualised as a normative concept. Indeed, the Preamble to the Universal Declaration of Human Rights (Universal Declaration) obliges 'every individual and every organ of society to strive to ... promote and respect these rights and freedoms'.⁶⁰ Further, the Universal Declaration also recognises that 'everyone has duties to the community in which alone the free and full development of his personality is possible'.⁶¹

The lack of justiciability of human rights claims of non-state actors within the international arena should not be a ground of refusal to acknowledge their human rights responsibilities. While initially the legislative framework of human rights was located within the international arena, currently there are many institutions and mechanisms that address human rights, such as human rights commissions, the judiciary, commissions of inquiry and ombudsman institutions, to mention but a few. Increasingly, non-state actors are drafting codes of conduct for self-regulation.

Although the traditional discourse of human rights provides a powerful tool for addressing state abuses by focusing on individual cases it hides the societal power imbalances and marginalisation. Consistently, the UN Special Rapporteurs on Violence against Women observe that the human rights framework is still not fully applied to the concerns of women and often ignores the structural aspects that breed inequality and discrimination making certain human rights violations invisible.⁶² Further, by treating everyone the same, the law masks the discrimination of marginalised groups such as women, particularly when the standard used is that of men.⁶³ For example, within East Africa, offences against women are characterised as offences against morality.⁶⁴ Worse still,

58 Darrow & Tomas (n 57 above) 484-485.

59 ICHRP Deserving trust (2003) www.ichrp.org/credo.md/archiva/documente/HumanRightsNGOAccountability.doc (accessed 2 August 2006).

60 Universal Declaration on Human Rights (1948), GA res 217A (III), UN Doc A/810 (1948), Preamble.

61 Universal Declaration (n 60 above) art 29(1).

62 Human Rights Council, Reports of the Special Rapporteur on violence against Women, its causes and consequences *Intersection between culture and violence against women: Implementation of General Assembly Resolution 60/251 of 15 March 2006, A/HRC/4/34 G* (2007) 21 and *Multiple and intersecting forms of discrimination and violence against women*, 2 May 2011, A/HRC/17/26 (2011) 2, 13 & 14. <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A-HRC-17-26.pdf> (accessed 4 September 2013).

63 F Banda *Women, law and human rights: An African perspective* (2005) ix & 30.

64 S Tamale 'Law, sexuality and politics in Uganda: Challenges for Women's Human Rights NGOs' in M Mutua (ed) *Human rights NGOs in East Africa: Political and normative tensions* (2009) 55-58.

women's freedom to bodily integrity is 'written out of the conceptualisation of rights', by drawing a distinction between the private and public sphere.⁶⁵ Generally, women as a social category mostly experience violations of ESCRs, which are marginalised in both discourse and theory.⁶⁶

Moreover, legal proceedings are costly and time-consuming, without a guarantee of the desired legal outcome. In African countries, because the legal framework is weak, the violation of rights is the norm rather than the exception.⁶⁷ In many developing countries, rights are limited by claw-back clauses and weak implementation mechanisms. Occasionally, law is also instrumentally used as an instrument of oppression and control to legitimise selfish state interests.⁶⁸

In view of the above, but without trivialising the law as irrelevant to the struggle for human rights, the goal of law is to 'enlarge freedoms', in order to bring about positive social transformation.⁶⁹ The purpose of human rights is not only to '... create new opportunities for litigation, but also to act preventively by providing a set of basic standards and a positive approach that would instil a culture of respect of rights'.⁷⁰ For example, the women's movement has been at the forefront of utilising rights as a discourse of norm-setting in order to address the political and social injustices faced by both individuals and groups. Unless human rights enhance human dignity and address injustices by all actors, it runs the risk of becoming irrelevant to everyday struggles for justice and dignity.

Put differently, the struggle for human rights goes beyond the legal arena to embrace the greater democratisation of society. This resonates with the aspirations of the drafters of the Universal Declaration, as encapsulated in Eleanor Roosevelt's powerful prose:⁷¹

Where after all, do universal human rights begin? In small places, close to the home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of individual persons; the neighbourhood he lives in; the school or college he attends; the factory, farm or office he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights

65 Tamale (n 64 above) 63.

66 Oloka-Onyango (n 15 above) 853-854.

67 AA An-Na'im 'The legal protection of human rights in Africa: How to do more with less' in Sarat & Kearns (eds) *Human rights: Concepts, contests, contingencies* (2001) 105.

68 Discussed in Chap 4.

69 J Donnelly 'Human rights and western liberalism' in AA An-Naim & FM Deng (eds) *Human rights in Africa: Cross-cultural perspectives* (1990) 54.

70 F Butler *Human rights: Who needs them? Using human rights in the voluntary sector* (2004) 14; CJ Harvey 'Creating a culture of respect for human rights' in Harvey *Human rights in the community: Rights as agents for change* (2005) 2.

71 Eleanor Roosevelt 'In Our Hands' speech delivered on the tenth anniversary of the Universal Declaration of Human Rights in 1958 <http://www.un.org/en/globalissues/briefingpapers/humanrights/quotes.shtml> (accessed 14 May 2006).

have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

Given that human rights are 'entitlements enjoyed by everyone to be respected by everyone',⁷² observing rights by all actors would strengthen a culture of human rights. In the United Kingdom, in its report for the human rights commission, the Parliamentary Joint Committee on Human Rights identified three components of a culture of human rights.⁷³

First, a sense of entitlement. Citizens enjoy certain rights as an affirmation of their equal dignity and worth, and not as a contingent gift of the state. Secondly, a sense of personal responsibility. The rights of one person can easily impinge on the rights of another and each must therefore exercise his rights with care. Thirdly, a sense of social obligations. The rights of one person can require positive obligations on the part of another and in addition a fair balance will frequently have to be struck between individual rights and needs for a democratic society and the wider public interest.

In conclusion to the above, I argue that it is possible for NGOs to have both legal and moral duties to respect and promote human rights. The legal responsibility derives from both the ICCPR and CESCPR that bar any 'state, group or person' from violating rights and the Preamble to the ICCPR which recognises that individuals have the 'responsibility to strive for the promotion and observance of rights'. This obligation is reiterated in article 2 of CEDAW, articles 27 and 5 of the CRC and Chapter 2 of the African Charter.

The above notwithstanding, although it is possible to make a case for non-state actors as having legal duties, the moral argument is more persuasive and less contentious. The moral obligation of NGOs is grounded in the argument that seeking legal accountability of the state is only one of the strategies of human rights protection and promotion. Human rights can also be understood as a normative concept useful for bringing about positive social transformation by making all actors accountable for the human rights implications of their actions. In essence, the expansion of the human rights discourse to NGOs does not infer the abdication of state responsibilities, but rather, is complementary to the dominant state-centric human rights discourse. In other words, the state remains the main duty bearer of human rights. Nonetheless, applying human rights principles to NGOs' day-to-day policies and practices make rights part and parcel of everyday practices, ultimately catalysing a human

72 Clapham (n 6 above) 58.

73 Joint Committee on Human Rights 6th report, HL67-I, HC 489-I, vol 1 (2002) 11-12, quoted in F Butler 'Building a human rights culture' in C Harvey (n 70 above) 64; Spencer 'Partners rediscovered: Human rights and equality in the UK' in Harvey (n 70 above) 36.

rights culture. The following discussion draws on the rights-based approaches as a tool that advances the promotion of the moral human rights obligations of NGOs to respect and promote rights. It begins by tracing the genesis of the rights-based approach followed by an articulation of the implication of each principle to NGO's governance.

3 The rights-based approach as an instrument of good governance

Having highlighted the centrality of the rights-based approach to this book, I explore the potential of the rights-based approach to human rights and good governance principles, which can inform the policies and practices of NGOs. The rights-based approach is not a new phenomenon, only its popularity is. The application of human rights by all actors became popular following a directive of the then UN Secretary-General, Kofi Annan in 1997 that all UN agencies and programmes make human rights a core value of their activities.⁷⁴ The appointment of Mary Robinson as the Human Rights Commissioner in 1997 accelerated the process of mainstreaming rights in development processes by the development of policy guidelines.⁷⁵ This process is popularly referred to as the rights-based approach, as a framework that 'integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development'.⁷⁶

Traditionally, the role of NGOs is to serve as a watchdog to the state's rights obligations to the individual and to promote good governance. As the custodians of good governance, NGOs are obliged not only to monitor and ensure the application of good governance principles by the state and its agencies, but also observe the same principles of accountability, transparency, participation, equity, non-discrimination in their internal organisation.

The justification for the rights-based approach is traced from 1948, with the recognition by the Universal Declaration, that 'the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.⁷⁷ This statement is reiterated in the Preamble of the ICCPR and CESCPR. The African Charter demonstrates the concept of indivisibility and interdependence of rights by providing for CPRs and ESCRs in one

74 P Alston & M Robinson 'The challenges of ensuring mutuality of human rights and development endeavours' in Alston & Robinson (n 6 above) 2; M Robinson 'What rights can add to good development practice' in Alston & Robinson (n 6 above) 29.

75 Robinson (n 74 above) 11-12.

76 UNOHCHR <http://www.unhchr.ch/development/approaches-01.html> (accessed 3 June 2007).

77 Universal Declaration (n 60 above) Preamble.

document. The Declaration on the Right to Development of 1986 makes reference to the interdependence and mutually reinforcing relationship between rights and development. It defines development as a 'comprehensive economic, social, cultural and political process', whose objective is the 'constant improvement of the well-being of all people on the basis of their active, free and meaningful participation in development and in the fair distribution of the resulting benefits'.⁷⁸ The Vienna Declaration of 1993 reiterates that rights, democracy and development are mutually reinforcing and interdependent.⁷⁹ Similarly, the Copenhagen Declaration of 1995 reaffirms the link between human rights and development by establishing a new consensus that places people at the centre of sustainable development in order to achieve stable, safe and just societies for all.

The following section clarifies the relevance of human rights principles to the governance and organising of NGOs. My intention is not to belittle rights-based approaches, but rather to inspire a critical self-reflection by NGOs to instil human rights principles in their governance.

4 Implications of the rights-based approach to NGO governance

In discussing the principles of the rights-based approach they are neither mutually exclusive, nor is there a clear demarcation of the boundaries of each principle. Rather, the principles should be understood as complementary and overlapping, with the common aim of ensuring the cardinal human right principle of respect of the inherent equality and dignity of the human person. The key characteristics of human rights are that they are inalienable, universal, inter-dependent and indivisible.

4.1 Express linkage to human rights

The principle of express linkage to rights requires all NGOs to mainstream human rights in their work. The importance of human rights is that they establish an agreed objective and minimum-benchmark to protect rights with both governments and members of society made accountable.⁸⁰ Human rights provide the universally agreed standards to regulate human interaction.⁸¹ It also provides a framework that emphasises tolerance, privacy and autonomy on the one hand, and respect for the rights of others

78 Declaration on the Right to Development: A/RES/41/128, 4 December 1986, 97th plenary meeting, art 1 <http://www.un.org/documents/ga/res/41/a41r128.htm> (accessed 13 August 2006).

79 Vienna Declaration and Program of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, paras 8 & 74 <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> (accessed 13 August 2006).

80 Robinson (n 74 above) 32 & 39.

and the needs of the wider community, on the other.⁸² Hence, all actors including NGOs are obliged to comply with international standards in their actions and relations in a way that advances all rights.

4.2 Accountability and transparency

Accountability means 'responsibility ... explaining one's actions or presenting accounts to someone else'.⁸³ The notion of accountability is a common pillar in the rights-based approach, good governance and development. In broad terms, accountability involves individual's or groups' responsibilities for the performance of specified duties. Accountability entails being answerable for performance of one's obligations as well as providing a satisfactory explanation over the exercise of power, authority and resources entrusted to leaders.⁸⁴

When the notion of accountability is espoused, three important questions arise: accountable *to whom*; *for what*; and *how*? These issues amplify three main dimensions: the *agents of accountability* (accountable to whom); the *standards of accountability* (accountability for what); and the *means of accountability* (how accountability is ensured).⁸⁵ The means of accountability include: *external* mechanisms, including legislative instruments, political executive means, judicial or quasi judicial processes, as well as public hearings, debates and audits, and media scrutiny; *internal* mechanisms, including the Board, official rules, codes of conduct, official hierarchies, and performance reviews; and others like organisational culture and professional ethics.⁸⁶

Thus, the significance of accountability serves essentially three core purposes: to *control* the abuse and misuse of entrusted authority/power; to provide *assurance* in respect to the use of resources and adherence to the law and ethical values; and to promote learning in pursuit of *continuous improvement* in institutional management and governance.⁸⁷ This explains the existence of numerous accountability processes and mechanisms in all systems, which serve to provide assurance that NGOs are fulfilling their objectives.⁸⁸

81 P Van Tuijl 'Entering the global dealing room: Reflections on the rights-based framework for NGOs in international development' (2000) 21 *Third World Quarterly* 619 & 625.

82 Butler (n 73 above) 15.

83 ICHRP (n 59 above) 12.

84 U Kakumba & DJ Fourie 'Revitalising accountability in public management reform: Issues and challenges for developing countries' (2007) 43 *Journal of Public Administration* 653.

85 As above.

86 Darrow & Tomas (n 57 above) 488 & 514.

87 Kakumba & Fourie (n 84 above) 651.

88 As above.

The rights-based approach provides a vehicle for expanding accountability beyond the government to other actors whose actions have an impact on the rights of people, such as the donor community, the intergovernmental organisations, and trans-national corporations.⁸⁹ The rights-based approach treats development issues as matters of obligation and rights, rather than discretion or charity.

Often accountability is confined to financial issues entailing demonstrating the value for money. However, accountability requires the development of adequate laws, policies, administrative procedures, practices and mechanisms of redress to translate the universal standards into locally determined benchmarks for measuring progress and performance. Accountability also goes beyond compliance with the law and carries a moral imperative of civilising power for the preservation of freedom and justice, particularly the power one wields.⁹⁰ In effect, accountability involves an investigation of how one manages the unequal power distribution in instances where those that are meant to benefit from one's work have weaker social, economic and political voice.⁹¹ In other words, the rights-based approach addressed the power inequalities in relationships in order to ensure that the less privileged persons can hold the powerful accountable.⁹²

The essence of transparency is to promote the accountability of NGOs to the wider public. The principle of transparency is embedded in the right to freedom of expression which is enshrined in all major human rights documents.⁹³ The right to freedom of expression includes the 'right to seek, receive and impart information'. Further in exercising the right of freedom of information, everyone has the obligation to respect the rights and reputation of others.⁹⁴ Although the Declaration of Principles on Freedom of Expression in Africa primarily concerns itself with the media, it underlines the point that transparency is a cornerstone of democracy that

89 UNOHCHR (n 76 above).

90 I Anwar 'Accountability and the Future of Freedom' A Presidential Fellows Lecture (2006) <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/EXTPRESIDENT/EXTPASTPRESIDENTS/EXTOFFICEPRESIDENT/0,,contentMDK:20977460~menuPK:64343277~pagePK:51174171~piPK:64258873~theSitePK:1014541,00.html> (accessed 3 November 2008); M Edwards & G Sen 'NGOs, social change and the transformation of human relationships: A 21st century civic agenda' (2000) 21 *Third World Quarterly* 618.

91 Keystone Accountability Survey 'How well are donors and NGOs performing on accountability to their beneficiaries?' (2006) 4 <http://keystoneaccountability.wordpress.com/2006/06/01/how-well-are-donors-and-NGOs-performing-on-accountability-to-their-beneficiaries-survey-results-released/> (accessed 21 July 2015).

92 C Nyamu-Musembi & A Cornwall *What is the 'rights based approach' all about? Perspectives from international development agencies* (2004) 47; Banda (n 63 above) 294.

93 ICCPR (n 26 above) art 19; Universal Declaration (n 60 above) 19; African Charter (n 44 above) 9.

94 ICCPR (n 26 above) art 19(3).

enables the free flow of ideas to inform decisions.⁹⁵ It further observes that the oral tradition within the African culture promotes transparency.⁹⁶

In applying good governance to non-state actors, the International Law Association Committee on Accountability of International Organisations identifies the core principles of good governance to include accountability, transparency and participation.⁹⁷ In detail this entails:⁹⁸

Transparency in both decision making process and the implementation of the ensuing institutional and operational decisions: a large degree of democracy in the decision making processes; access to information open to all potentially concerned and or affected by the decisions at stake; the well-functioning of the international civil service; sound financial management and appropriate reporting and evaluation mechanisms.

The International Centre for Not-for-Profit Law recommends that in order for NGOs to promote integrity and transparency, NGO regulations should include purpose, governing documents, systems of internal accountability, non-distribution of profit and policy on reasonable compensations.⁹⁹ Further, being answerable and accountable obliges NGOs to give information about its decision making processes and financial stewardship. Thus, the principle of transparency complements accountability, participation and democratic governance.

4.3 Participation and inclusion

The orientation of people's participation or citizen/community participation as commonly known is retraceable in Plato's view of democracy, which had fundamentals such as assembly, voting, freedom of speech and equal representation.¹⁰⁰ The rights-based approach prioritises strategies that place the human person at the centre of the development processes.¹⁰¹

The right to participation is entrenched within the international treaty law.¹⁰² Both the Universal Declaration and ICCPR guarantee the right and opportunity of every citizen to take part in government or in the

95 Declaration of Principles on Freedom of Expression in Africa (2002) Preamble.

96 As above.

97 Reinisch (n 6 above) 49.

98 As above.

99 International Centre for Non-profit-Law (ICNL) 'Integrity, good governance and transparency: Rules for self regulation' www.icnl.org/gendocs/selfreg.htm (accessed 3 June 2007).

100 U Kakumba & S Nsingo 'Citizen Participation in Uganda and the process of rural development: The rhetoric and reality in Uganda' (2008) 43 *Journal of Public Administration* 109.

101 UNOHCHR (n 76 above).

102 Universal Declaration (n 60 above) art 21; ICCPR (n 26 above) art 25; CRC (n 31 above) art 12; CEDAW (n 30 above) arts 7, 13 & 14(2); African Charter (n 44 above) art 13.

conduct of public affairs and to have access to public services. The right to participation cannot be realised in isolation of other rights such as the right to freedom of speech and expression, the right to non-discrimination, the right to freedom of assembly and association and the right to freedom of expression.¹⁰³ Furthermore, under the Declaration on the right to development, development is understood as the 'constant improvement of the well-being of all people on the basis of their active, free and meaningful participation coupled with the fair distribution of the resulting benefits'.¹⁰⁴

The Charter on Popular Participation articulates that popular participation is both a means and an end.¹⁰⁵

[As a means] it provides the driving force for collective commitment, for the determination of people based development processes and willingness of the people to undertake sacrifices and expend their social energies for its execution. As an end in itself, popular participation is the fundamental rights of the people to fully and effectively participate in the determination of the decisions which affect their lives at all levels and at all times.

It also underlies the point that 'popular participation begins at the family level and must be practiced at the workplace and in all organisations and in all walks of life'.¹⁰⁶ Participation enables the stimulation of local knowledge and the promotion of local dialogue in order to generate a diversity of options for consideration. It also raises the efficiency of resource utilisation, maximises ownership and sustainability to processes and outcomes.¹⁰⁷ What is necessary is to expose ordinary people to processes that enable them to challenge inequities in an organised and sustainable manner, and addressing the barriers that keep citizens out of the arenas of participation.¹⁰⁸ In order to construct participation as a process of development learning, the processes of participation must be permanent, on-going, and embedded in an organisational culture.¹⁰⁹

The rights-based approach requires a high degree of 'active, free and meaningful participation' involving a broad spectrum of stakeholders, including, communities, civil society, minorities, indigenous peoples and women.¹¹⁰ Equally, the Vienna Declaration obliges states to promote participation of the poorest people in the communities in promoting human rights and combating poverty.¹¹¹ Participation guarantees that the

103 Alston (n 12 above) 812; Darrow & Tomas (n 57 above) 509.

104 UN Declaration on the Right to Development (n 134 above) art 1.

105 African Charter for popular participation in development and transformation (1990) para 10. <http://www.afrimap.org/english/images/treaty/file4239ac8e921ed.pdf> (accessed 17 March 2006).

106 African Charter on Popular Participation (n 105 above) paras 6 & 15.

107 Darrow & Tomas (n 57 above) 506.

108 C McCrudden 'Mainstreaming human rights' in Harvey (n 70 above) 24.

109 Keystone Accountability Survey (n 91 above) 13.

110 UN Declaration on the Right to Development (n 78 above).

111 Vienna Declaration (n 79 above) para 25.

human person as a central subject of human rights is the principal beneficiary of any interventions.¹¹²

Often participation is confined to organised groups such as NGOs because it is less costly and time consuming. However, NGOs have to shift from conceptualising people as passive receivers, choosers or users of already made solutions to recasting them as the makers and shapers of their destiny.¹¹³ Most importantly, the objective of participation is not only to improve the project performance but also to promote critical consciousness and decision-making as a basis of active citizenship in order to enable the people have a stake in their governance and conditions of life.¹¹⁴ Simply put, participation extends 'beyond having a right to participate in a given space to include the right to define and shape that space'.¹¹⁵ Having been socialised to act for the community, NGOs have to learn how to act with the community, and to be more open, accommodative and responsive to the voices of the grassroots.¹¹⁶

4.4 Equity, non-discrimination and empowerment

The human rights corpus rests on the value system of non-discrimination and equality in dignity and rights.¹¹⁷ Consequently, achieving equality requires paying attention to vulnerable groups, marginalised on account of sex, age, disability, displacement and sexual orientation, to mention but a few. In order to achieve equality, focus is placed on formal equality by treating people alike and on substantive equality by addressing the systemic and underlying causes of discrimination, through special measures such as affirmative action.¹¹⁸ Ensuring equity at times involves non-identical treatment in order to address the differences. For instance, for women to achieve substantive equality requires the re-distributing of resources and power.¹¹⁹ This necessitates the rectification of unintended results of neutral laws, policies and practices on the vulnerable groups.

112 Vienna Declaration (n 79 above) Preamble.

113 J Gaventa 'Strengthening participatory approaches to local governance' (2004) 16 *National Civic Review* 29.

114 Darrow & Tomas (n 57 above) 506; Butler (n 73 above) 77.

115 Gaventa (n 113 above) 29.

116 Gaventa (n 113 above) 2.

117 Universal Declaration (60) art 1; UN Charter (1945) art 1 <http://www.un.org/en/documents/charter/> (accessed 13 August 2006); CESCR (n 26 above) art 2(2); ICCPR (n 26 above) art 2(1); African Charter (n 44) arts 2 & 3.

118 CEDAW General Recommendation on Temporary Special Measures, No 25 (CEDAW No 25) para 8 <http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20%28English%29.pdf> (accessed 7 November 2006).

119 CEDAW Recommendation No 25 (n 118 above) para 4-10; CERD Committee on the Elimination of Racial Discrimination, General Recommendation 14, Definition of Racial Discrimination (Forty-second session, 1993), UN Doc A/48/18 (1994) 114, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2003) 203, (CERD General Comment 14) <http://www1.umn.edu/humanrts/gencomm/genrxiv.htm> (accessed 24 July 2006).

The principle of empowerment derives from the cardinal human rights principle of respect of the inherent equality and dignity of the human person.¹²⁰ It draws attention to discrimination and exclusion and enables policy makers to target the most vulnerable people.¹²¹ From the human rights perspective, empowerment is understood as the ability of people to claim and exercise their rights.¹²² While citizen participation was noted as a critical component of good governance, it does not necessarily lead to empowerment. Empowerment, as Narayan contends, requires a process through which peoples' freedom of choice and action is expanded to enable them to have more control over resources and decisions that affect them.¹²³ Similarly, the Charter of Popular Participation emphasises that 'popular participation' is the 'empowerment of people to effectively involve themselves in creating the structures and designing policies and programmes that serve the interests of all'.¹²⁴ For empowerment to happen, participation must therefore be *effective*, in a way that it enforces accountability and changes in the behaviour of the organisation's leaders, and to ensure changes that make participation more inclusive of the poor and the underprivileged.¹²⁵

Integral to the phenomenon of empowerment is the imperative to discard the concept of 'victim-hood', where NGOs substitute themselves as fighters for the vulnerable poor and helpless victims of human rights violations.¹²⁶ As correctly observed by Mutua:¹²⁷

A basic characteristic of the victim is powerlessness: an inability for self defence against a state or the culture in question, usually described as hordes of nameless, despairing, and dispirited masses ... Their very being is a state of divorce from civilisation and a large distance from modernity ... In many cases the victims themselves deeply believe in and openly declare their helplessness and plead for outside help ... The victim must also be construed as sympathetic and innocent otherwise it is difficult to mobilise public outrage against the victimiser.

Empowering people requires improving the way they think about themselves. They need to be able to recognise that 'violations are not inevitable, that poverty is not a fact of nature or some original state

120 Universal Declaration (n 60 above) art 1; ICCPR (n 26 above) art 3; CESR (n 26 above) arts 2(2) & 3; African Charter (n 44 above) arts 5 & 19.

121 Robinson (n 74 above) 36; Alston & Robinson (n 74 above) 12; Darrow & Tomas (n 57 above) 486.

122 UNOHCHR (n 76 above).

123 D Narayan *Empowerment and poverty reduction: A Sourcebook* (2002) 14.

124 African Charter on Popular Participation (n 105 above) para 11.

125 Kakumba & Nsingo (n 100 above) 109.

126 S Dicklitch 'Action for development in Uganda' in CE Welch (ed) *NGOs and human rights: Promise and performance* (2001) 197; P Uvin *Human rights and development* (2004); J Oloka-Onyango *Civil society, democratisation and foreign donors in contemporary Uganda: A conceptual and literature review* (2000) 154; De Feyter (n 5 above) 221; Darrow & Tomas (n 57 above) 494.

127 Mutua (n 4 above) 28-29.

everybody departs from' and therefore human rights violations are not merely 'unfortunate but are fundamentally unjust'.¹²⁸

It is instructive that the poor have defined poverty not merely as the absence of commodities but also as a question of disempowerment.¹²⁹ NGOs should not simply empathise with the victims and beg the violators to desist from human rights violations, but join the struggle of the people in exposing and resisting violations.¹³⁰ The people are not just brought into the political processes as technical actors to provide information, but are respected as 'citizens with opinions to express, rights to exercise and interests to defend'.¹³¹ In other words, partnership rather than stewardship should be the guiding philosophy in NGO relationships with other stakeholders.

The goal of empowerment is to enhance people's power, capacities, capabilities and agency to improve their lives.¹³² While NGOs have been enthusiastic advocates for empowerment, they rarely interrogate their own internal power dynamics. Yet, empowerment entails taking a conscious personal commitment to confront individual or organisational power particularly in the NGOs' praxis, programmes, fundraising, constituency building, structures, systems and management.¹³³ In order to guard against the reinforcement of power imbalances, the rights-based approach requires the interrogation of the social-structural root causes of inequities, exclusion and oppression.¹³⁴ Consequently, each organisation is required to have policies that implement the human rights principles in their governance.

5 Conclusion

I have evaluated the three schools of thought pertaining to the debate on whether or not NGOs have human rights obligations under international law in this chapter. The dominant legal liberalism school has been criticised for being legalistic and disregarding the impact of NGOs as part of non-state actors in the promotion of human rights. Whereas the second school of thought acknowledges that NGOs have some specific legal duties to respect and promote human rights, its orientation is rather inadequate and at most, it is complementary to the dominant state-centric human rights discourse. I support the third school of thought that is grounded in

128 Uvin (n 126 above) 130; De Feyter (n 5 above) 221.

129 See D Narayan et al *Voices of the Poor: Can anyone hear us* (2000).

130 Shivji (n 48 above) 71.

131 R McGee 'Unpacking policy: Actors, knowledge and spaces' in Brook et al (eds) *Unpacking policy: Knowledge, actors and spaces in poverty reduction in Uganda and Nigeria* (2004) 11.

132 Keystone Accountability Survey (n 91 above) 13.

133 Edwards & Sen (n 90 above) 611-612.

134 Uvin (n 126 above) 135 & 175.

the sociology of law, which conceptualises human rights as a normative concept and recognises that NGOs have a moral responsibility to promote and respect human rights. The issue is not a matter of abdication of state responsibility, but rather extending the state responsibility to the NGOs to complement the role of promoting and respecting rights.

The foregoing theoretical review has revealed that the principles of rights-based approach are similar to the imperatives of good governance. The discussion has demonstrated that NGOs must exhibit the rights-based principles of express linkage to rights, accountability, transparency, participation and inclusion, empowerment, equity and non-discrimination in their internal policies and practices if they are to measure up to the challenge of being the watchdogs for human rights and good governance. Although not a panacea for societal problems, the value of the rights-based approach lies in shedding light on how power inequalities affect the processes of development and governance. The application of the rights-based approach does not in any way suggest that law is unimportant to the realisation of rights. Rather in addition to law, the rights-based approach offers a more proactive approach in the quest of nurturing people centred development and human rights and good governance culture.

As advocates of human rights, NGOs are thus obliged to reflect on the way they mediate unequal power dynamics with other stakeholders, especially where such NGOs' stakeholders have weaker social, economic and political voice. This requires the re-conceptualisation of people as makers and shapers of their own destiny, with NGOs learning to 'work with' instead of 'work for' the community, in an open, accommodative and responsive manner. The participation of the ordinary persons in decisions about their lives ensures that they are the central beneficiaries of interventions, while simultaneously enhancing the ownership, sustainability and legitimacy of interventions made. The functional linkages between empowerment, participation and accountability should be understood as both a means to human development and as an end in nurturing a culture of human rights. Having mapped the status of NGOs as duty bearers and made the case for the rights-based approach, the following chapter analyses how NGOs have applied the principle of express linkage to rights to their governance.

CHAPTER 3

NGOs AND THE PRINCIPLE OF EXPRESS LINKAGE TO HUMAN RIGHTS

1 Introduction

The principle of express linkage to rights is grounded in the fact that human rights are universal, inter-dependent and indivisible. Cognisant that human rights is the ‘most globalised value of our time’,¹ I make the case for all NGOs to apply rights to their governance, in part two. Part three examines the extent to which NGOs have respected the fact that human rights are universal. The discussion focuses on how NGOs have related human rights to the knowledge and experiences of the communities that they work with, in order to promote the ownership of the human rights discourse and enhance their legitimacy. Using the example of how Development NGOs (DNGOs) have adopted the right-based principles and how Human Rights NGOs (HURINGOs) have respected the struggles of DNGOs as human rights struggles, I interrogate whether NGOs appreciate the point that human rights are inter-dependent and indivisible. The discussion illustrates the benefits of a rights-based approach in strengthening good governance. In short, the chapter answers the question: why human rights?

2 Why all NGOs should apply human right principles to their governance and management

Obviously, HURINGOs derive their legitimacy from human rights and are therefore obliged to respect them. The International Council on Human Rights Policy (ICHRP) defines HURINGOs as any organisation that acknowledges that human rights are universal.² The ICHRP underlies that

1 A Sarat & TR Kearns ‘The unsettled status of human rights: An introduction’ in A Sarat & TR Kearns (eds) *Human rights: Concepts, contests, contingencies* (2001) 4.

2 ICHRP Deserving trust (2003) www.ichrp.org/credo.md/archiva/documente/HumanRightsNGOAccountability.doc (accessed 2 August 2006) 38-39.

HURINGOs have to be exemplars of the human rights practices they demand of the state and market, in order to legitimately monitor the wider civil society, states and the market.³ Put differently, for NGOs to have the moral authority to demand human rights and democratic practices of others, the building of a human rights culture must begin with them.

The controversy remains as to whether all NGOs that do not define themselves as HURINGOs should also apply human rights principles to their governance. I argue that democracy and governance NGOs have to apply human rights because democracy and rights are mutually reinforcing. At the African and sub-regional levels, all treaties identify democracy and human rights as guiding principles, inferring that democracy and rights are inter-related.⁴

In a debate on democracy and rights,⁵ Aina has argued that asking the question, 'democracy for what?' underlines that 'democracy is for the promotion and advancement of individual and collective wellbeing of different people'.⁶ Therefore democracy cannot exist without respect of rights. Applying human rights principles to all NGOs' policies, processes and programming is in resonance with the indivisible, inter-dependent and mutually reinforcing conception of rights underscored by the Vienna Declaration of 1993.

The development of the rights-based approaches in the 1990s integrated human rights in all major global issues and by all actors in order to regulate the use of power.⁷ Scholarly opinion suggests that the Universal Declaration together with the two UN Covenants have attained the status of customary international law and thus provide a standard of achievement

3 ICHRP (n 2 above) 3.

4 Constitutive Act of the African Union, adopted in Lome, Togo in July 2000 and entered into force in May 2001, http://www.au.int/en/about/constitutive_act (accessed 11 November 2006); New Partnership for Africa's Development (NEPAD) Declaration (2001) para 49 <http://www.un.org/africa/osaa/reports/nepadEngversion.pdf> (accessed 11 November 2006); Southern African Development Community (SADC) Treaty (1992) arts 4 & 5 http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf (accessed 11 November 2006); East Africa Community (EAC) Treaty (1999) art 6.

5 'Electronic Round Table: "Democracy and Human Rights"' (February, 2000) 50 www.africaaction.org/rtable/rtb2.pdf (accessed 2 August 2006).

6 Aina, 'Electronic Round Table' (as above).

7 UNOHCHR <http://www.unhchr.ch/development/approaches-01.html> (accessed 3 June 2007); M Robinson 'What rights can add to good development practice' in P Alston & M Robinson (eds) *Human rights and development: Towards mutual reinforcement* (2005) 32 & 36; M Darrow & A Tomas 'Power, capture and conflict: A call for human rights accountability in development cooperation' (2005) 27 *Human Rights Quarterly* 487.

of all nations and peoples.⁸ Consequently, the application of rights-based principles to development and governance facilitates the establishment of agreed minimum standards of achievement for the protection of rights.

Although there is no consensus on the most appropriate way of integrating human rights in development and governance discourses, doing so would expand the human rights movement. The task of serving as a watchdog to both market and state fundamentalism cannot be achieved by human rights NGOs alone. It requires forging strategic alliances with all NGOs and with the broader civil society. Given that the human rights community has fewer monetary and personnel resources than the development community, a rights-based approach would attract more resources to human rights work. For example, globally by the mid-1990s the human rights sector attracted only 1 per cent of the US\$50 billion annual revenue of the development sector.⁹ Similarly, under the NGO sector, the human rights component is comparatively less financially resourced. For example, in 1996, the Organisation for Economic Co-operation and Development (OECD) found that 90 per cent of available resources belonged to only 20 per cent of DNGOs.¹⁰ In 2005, 50 per cent of the European Commission funding was to DNGOs working in humanitarian and relief services.¹¹ Both OXFAM and CARE generated ten-times more revenue than Amnesty International (USA) and more than twenty times that of Human Rights Watch, which are the most resourced HURINGOs.¹² Although in the 1990s both South Africa and Nigeria boasted of the most dynamic NGO sectors in Africa, the number of self-professed human rights NGOs in the two countries was less than 1 per cent.¹³ Therefore, an exclusionary approach of distinguishing between the works of NGOs could block a natural and important growth of human rights movements.

In real life, what is defined as the problem and how it is addressed often depends on who has voice, status and power.¹⁴ Consequently, mainstreaming human rights addresses power inequalities by tackling the

- 8 J Donnelly 'Human rights, globalising flows and state power' in A Brysk (ed) *Globalisation and human rights* (2002) 229; W Korey *NGOs and the universal declaration of human rights: A curious grapevine* (2001) 3; A Reinisch 'The changing international legal framework for dealing with non-state actors' in Alston & Robinson (n 7 above) 39; F Viljoen 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *African Human Rights Law Journal* 19.
- 9 P Uvin *Human rights and development* (2004) 13.
- 10 I De Senolissa 'A new age of social movements: A fifth generation of non-governmental development organisations in the making?' in M Kothari & D Eade (eds) *Development and social action* (1999) 95.
- 11 Association of Women in Development (AWID) *The Second Fundher Report: Financial sustainability for women's movements worldwide* (2007) 48.
- 12 TJ Scott 'Evaluating development-oriented NGOs' in CE Welch (ed) *NGOs and human rights: Promise and performance* (2001) 209.
- 13 L Seafeld 'South Africa: The interdependence of all human rights' in AA An-Na'im (ed) *Human rights under African constitutions: Realising the promise for ourselves* (2003) 233-234; CO Okafor *Legitimising human rights NGOs: Lessons from Nigeria* (2006) 4 & 6.
- 14 Darrow & Tomas (n 7 above) 475.

phenomenon of elite capture. The concept of elite capture is 'a process by which the elite skim development resources intended for the legitimate development ... and defines politics in a way that protects their own interests'.¹⁵ Human rights therefore provide an effective mechanism to overcome arbitrariness in decision-making and in the development processes.¹⁶ Human rights are a social science to solve social problems, including and not restricted to taming the state.¹⁷ Human rights is an ideology of mobilisation for any struggle against domination, oppression and exploitation, to expose and address any abuse of power and privilege that results in the violation of human rights.¹⁸

In a nutshell, mainstreaming human rights would promote a culture of human rights. According to Butler, realisation of a human rights culture would mean that:¹⁹

(i) the vulnerable would be better protected from violation; (ii) government would promote human rights standards and operate within a human rights framework; (iii) public authorities would institutionalise human rights thinking and treat people with fairness and respect thus safeguarding their dignity; (iv) wider civil society would popularly accept human rights standards as the principle by which we live and treat each other and by which conflicts are resolved; (v) people would recognise and value both their own rights and the rights of others and would genuinely be tolerant of difference.

Since the 'concept of human rights relates to all aspects of human interaction, it is best protected when all people voluntarily observe human rights norms as part of their culture of doing things'.²⁰ Therefore human rights observance must be practiced as discipline to ensure equitable human relations. Evans provides an apt definition of discipline:²¹

Discipline refers to a mode of social organisation that operates without need for coercion. It is a form of modernist power that imbues the individual with particular ways of thinking, knowing and behaving, thus instilling modes of social consciousness that makes social action predictable. Discipline is learned and practiced in the day to day complex of social life, through institutional training received, for example, in the school, the university, the military, the workplace, the church and the prison, where notions of correct and incorrect

15 As above.

16 Darrow & Tomas (n 7 above) 520.

17 De Feyter *Human rights, social justice in the age of the market* (2005) 25; Clapham *Human rights obligations and non-state actors* (2005) 56.

18 IG Shivji *The concept of human rights in Africa* (1989) 71; B Ibhawoh 'Restraining universalism: Africanist perspectives on cultural relativism in the human rights discourse' in PT Zeleza & PJ McConaughay (eds) *Human rights, the rule of law, and development in Africa* (2004) 30.

19 F Butler 'Building a human rights culture' in C Harvey (ed) *Human rights in the community: Rights as agents for change* (2005).

20 C Heyns & F Viljoen 'The regional protection of human rights in Africa: An overview and evaluation' in Zeleza & McConaughay (n 18 above) 130.

21 T Evans 'International human rights law as power/knowledge' (2005) 27 *Human Rights Quarterly* 1055.

behaviour and thoughts are clearly delimited. The epithet 'common sense' is achieved when a particular mode of thought and conduct is unquestioningly accepted as normal.

There is a growing appropriation of the human rights language in the mission statements of almost all institutions and organisations. Some organisations have a dual mandate of rights and development. Many traditional DNGOs are concurrently undertaking advocacy to influence policies. Donors and governments have also demanded accountability of NGOs through the legal framework and the funding processes. In an effort perhaps of self-preservation, there is a growing trend amongst NGOs of experimenting and innovating rights-based approaches. I document these efforts as a more accessible format of information sharing.

There are many attempts to clarify the human rights principles NGOs should observe. ICHRP identifies the following human rights principles that NGOs should observe: accountability, support to human dignity, universality, non-discrimination, safeguards against abuse of power, belief in the rule of law, commitment to accurate and objective information, effectiveness, and respect for the basic rules of the organisation.²²

The Charter for Popular Participation urges all NGOs and voluntary organisations to: be fully participatory, democratic and accountable; strengthen institutional structures that bring them together; disseminate successful African and grassroots experiences throughout the continent; establish forum for honest popular and open dialogue between governments, grassroots organisations and NGOs; give increased support and target their operations within the framework of national economic strategies; and give due considerations to initiatives at the grassroots, utilise African expertise, strengthen advocacy nationally and internationally, and influence donors in genuine partnership.²³

3 The principle of express linkage to rights and the universality of human rights

The following discussion analyses the extent to which NGOs have respected the universality of human rights. The discussion begins with an examination of how Northern NGOs (NNGOs) respect African NGOs in interpretation and prioritisation of the human rights discourse. It is followed by an analysis of the appreciation by African NGOs of ordinary people's conceptualisation of human rights.

²² ICHRP (n 2 above) 9-10.

²³ African Charter for popular participation in development and transformation (1990) para 10. <http://www.afrimap.org/english/images/treaty/file4239ac8e921ed.pdf> (accessed 17 March 2006) part 111(D).

3.1 The universality of rights: The conceptualisation of rights amongst NNGOs and South NGOs (SNGOs)

Human rights are universal and therefore must reflect the changing values, perceptions and different contextual realities of the world. Despite the recognition of the universality of human rights, they are still predominantly understood and expressed in western ideas and language.²⁴ The genesis of human rights is almost exclusively confined to western history which perpetuates the misconception of human rights as a western concept. For example, Rhoda Howard dismisses the presence of human rights in traditional Africa, arguing that it was merely a concept of human dignity.²⁵ On the other hand, Leary argues that while the development of the institutional framework of human rights was precipitated by the atrocities of the Nazi regime in Germany, the contribution of the West was not unique because human rights are universal.²⁶

Secondly, there is a difference in the prioritisation of rights. NNGOs prioritised CPRs while SNGOs sought to address ESCRs. The prioritisation of CPRs was influenced by the fact that human rights initiatives were predominantly spearheaded by lawyers, journalists and other professionals whose interests and activities are substantially affected by the infringement of CPRs.²⁷ Further, during the Cold War, ESCRs were considered communist in inspiration and content and also lacked a comprehensive institutional framework for enforcement.²⁸

Third, is the difference in strategies to advance human rights. Many African NGOs grew out of the overt support from the NNGOs.²⁹ Most SNGOs initially mirrored the strategies of NNGOs such as standard setting through legally binding treaties, the documentation of abuses, research, public advocacy and providing assistance to the victims of human rights abuses.³⁰ It is only in the 1990s that SNGOs in addition to employing the strategies of NNGOs began investigating the root causes of the violation of rights.³¹ Hence, the differences in strategies with NNGOs preferring the apolitical approach to rights and SNGOs preferring a more

24 M Mutua *Human rights: A political and cultural critique* (2002) 2-4.

25 R Howard 'Group versus individual identity in the African debate on human rights' in AA An-Naim & FM Deng (eds) *Human rights in Africa: Cross-cultural perspectives* (1990) 166.

26 V Leary 'The effects of western perspectives on international human rights' in An-Naim & Deng (n 25 above) 30; Mutua (n 24 above) 16.

27 International Human Rights Internship Program (IHRIP) & the Swedish NGOs Foundation for Human Rights *The status of human rights organisations in sub-Saharan Africa* (1994) 6.

28 J Oloka-Onyango 'NGOs struggles for ESCRs in UTAKA: A Ugandan Perspective' in M Mutua (ed) *Human rights NGOs in East Africa: Political and normative tensions* (2009) 75-76; Mutua (n 24 above) 52-53.

29 SN Ndegwa *The two faces of the civil society: NGOs and politics in Africa* (1996) 32.

30 Mutua (n 24 above) 37-38; Mutua (n 28 above) 19; W Mutunga 'So what really is non-partisanship?' in Kenya Human Rights Commission (KHRC) M Mutua and W Mutunga (eds) *Eyes on the prize* (2003) 37; Welch (n 12 above) 3.

political advocacy approach that addresses the roots causes of violations, such as bad governance and corruption.

Following the Vienna Conference, the Harvard Retreat while acknowledging the existence of a global human rights movement, observed some differences in priorities and style shaped by contextual realities.³² In criticising NNGOs at the Harvard Retreat, SNGOs did not advocate for the abandonment of addressing individual human rights violations, but also advocated for addressing the root causes of such violations.³³

Fourthly, NNGOs have set the international agenda. From its inception, ECOSOC only granted observer status to INGOs, who were defined as organisations having an international character, with members and branches in more than one country and with objectives that are not limited to one state.³⁴ Hence national NGOs had to align themselves to INGOs to access the international human rights arena. It is only after 1996 that the ECOSOC was obliged to ensure a just, balanced and effective participation of NGOs from all over the world that national NGOs began to acquire observer status.³⁵ In practice, most investigations of human rights violations are targeted at the South. In contrast, reports on the North are both episodic and insufficiently publicised.³⁶ Ironically, African NGOs have equally trivialised how ordinary people have applied human rights to their experiences, a point that I take up in the following section.

3.2 The universality of rights: African NGOs and cultural interpretation

African NGOs have largely and wrongly packaged human rights as a sophisticated discourse to be transmitted to 'ignorant masses'.³⁷ And yet, the legitimacy of NGOs is enhanced by mobilising public support, thus entrenching human rights as part and parcel of everyday life struggles. By

31 ME Keck & S Sikkink *Activists beyond borders: Advocacy network in international politics* (1998) 88 & 184; TW Dichter 'Appeasing the gods of sustainability: The future of international NGOs in Microfinance' in D Hulmes & M Edwards (eds) *NGOs, state and donors: Too close for comfort* (1997) 3.

32 HJ Steiner *Diverse Partners: NGOs in the human rights movement – A report of a retreat of human rights activists* (1999) 17 & 81.

33 Steiner (n 32 above) 22.

34 ECOSOC Resolution 1296 (XLIV) 23 May 1968 on Consultative relations between UN and NGOs <http://habitat.igc.org/ngo-rev/1296.html> (accessed 17 August 2007); INGO Accountability Charter (2005) 1, www.amnesty.org/resiurces/downloads/INGO_Accountability_charter.pdf (accessed 3 June 2007). 1.

35 ECOSOC Resolution 1996/31 of 25 July 1996 <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm> (accessed 17 August 2007).

36 DA Bell & JH Carens 'Ethical dilemmas of international human rights and humanitarian NGOs: Reflection on a dialogue between practitioners and theorists' (2004) 26 *Human Rights Quarterly* 314-315.

37 Steiner (n 32 above) 74; AA An-Nai'm 'Expanding legal protection of human rights in Africa contexts' in An-Naim (n 13 above) 3.

implication, NGOs have an obligation to learn how the local people have adapted their traditional culture to human rights principles. Moreover, erasing negative cultural norms requires the active participation of the communities in effecting change. As Odinkalu reminds us:³⁸

[P]eople are acutely aware of the injustices inflicted upon them ... [T]he real life struggles for social justice are waged despite human rights groups-not by or because of them-by people who feel that their realities and aspirations are not adequately captured by human rights organisations or their language ... People will struggle for their rights whether or not the language of human rights is accessible to them ... But they will not build the struggle around the notion of human rights unless the language ... speaks directly to their aspirations and survival.

I neither blindly romanticise African-ness or belabour the somewhat dated cultural relativism and universalism debate. I also acknowledge that culture is a double-edged sword capable of both enhancing and detracting from the enjoyment of rights. I therefore advocate for the activism of NGOs to deconstruct the concept of traditional culture in order to discard the negative social practices, while preserving the positive ones that contribute to the universality of human rights. Presently, respect of people's knowledge based on their experiences is an exception rather than the norm.

One of the unique contributions of the African Charter is that it promotes 'positive cultural values ... in a spirit of tolerance, dialogue and consultations to contribute to the promotion of the moral well-being of society'.³⁹ Likewise, the Protocol to the Africa Charter on Human and Peoples' Rights on the rights of women (Maputo Protocol on women) unequivocally calls for the preservation of African cultures that are positive and based on principles of equality, peace, freedom, dignity, justice, solidarity and democracy.⁴⁰

UNESCO's Declaration of the Principles of International Cultural Cooperation acknowledges that each culture has a dignity and value, which must be respected and preserved and all cultures form part of the common heritage belonging to all mankind.⁴¹ However, reference to

38 CA Odinkalu 'Why more Africans don't speak the human rights language' Carnegie Council on Ethics and International Affairs *Human rights Dialogue: Human Rights in Times of Conflict: Humanitarian Interventions* Series 2, Number 5, reproduced in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: A reader* (2006) 187-188.

39 African [Banjul] Charter on Human and Peoples' Rights (African Charter) adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), *entered into force* 21 October 1986, (1981) art 29(7).

40 Protocol on the African Charter on Human and Peoples' Rights on the rights of women in Africa (2003) art 3 & 4, http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf (accessed 13 July 2006).

41 UNESCO Declaration of principles of cultural cooperation (1966) arts 1(1) & 1(3) http://portal.unesco.org/en/ev.php-URL_ID=13147&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 1 April 2007).

culture is most routinely used to mean artistic expressions or its cultural products, such as literature, music, dance, arts, sculpture, theatre, film and sports.⁴² As tritely substantiated by the Blair Commission:⁴³

[C]ulture is also about shared patterns of identity, symbolic meaning, aspirations and about relationships between individuals and groups within a society. Culture is also about the relationship between ideas and perspectives about self-respect and a sense of security, about how individuals are socialised and values are formed and transmitted. It is also deeply intertwined with structures of power and wealth. What it is not – contrary to the views of some – is an expression of unchanging tradition ... Culture is both dynamic and reactive, it both influences economic and political conditions and is influenced by them.

Similarly, the Human Rights Council defines culture as:⁴⁴

[A] set of shared spiritual, material, intellectual and emotions features of human experience that is created and constructed within social praxis. As such culture is intimately connected with the diverse ways in which social groups produce their daily existence economically, socially, and politically. It therefore embraces both commonly held meaning that allow for the continuation of everyday practices as well as competing meanings that galvanise change over time.

Unfortunately, due to colonialism, African culture is almost exclusively perceived as a source of human rights violations, as regressive and inimical to development.⁴⁵ The CEDAW Committee depicts culture as a negative impediment to the enjoyment of women's rights with no possibility of facilitating women's empowerment.⁴⁶ Similarly, in considering state reports the African Commission tends to attribute the denial of women's human rights to the restrictive construction of culture.⁴⁷ The hostility against culture is influenced by the fact that the African Cultural Charter

42 Blair Commission for Africa *Our common interest: Report of the Commission for Africa* (2005) 114, para 3 http://www.commissionforafrica.org/english/report/thereport/english/11-03-05_cr_report.pdf (accessed 3 June 2006).

43 As above.

44 Human Rights Council, Reports of the Special Rapporteur on violence against Women, its causes and consequences *Intersection between culture and violence against women: Implementation of General Assembly Resolution 60/251 of 15 March 2006*, A/HRC/4/34 G (2007) 8.

45 Blair Commission (n 42 above) 116, para 14; Okafor (n 13 above) 215; R Murray 'A feminist perspective on reform of the African human rights system' (2001) 2 *African Human Rights Law Journal* 224; S Tamale 'The Right to culture and the culture of rights: A critical perspective on Women's sexual rights in Africa' *Urgent Action Fund-Africa, Sex Matters* (2008) 149-151.

46 C Nyamu 'How should human rights and development respond to cultural legitimisation of gender hierarchy in developing countries?' (2000) 41 *Harvard International Law Journal* 381; F Banda *Women, law and human rights: An African perspective* (2005) 249-250; United Nations Special Rapporteur on Violence against women its causes and consequences *15 years of the United Nations Special Rapporteur on Violence against women its causes and consequences* (2009) 39.

47 Nyamu (n 46 above) 381; Banda (n 46 above).

does not elucidate what African culture actually is, but speaks of it as a homogenous entity.⁴⁸

The misconception that culture and rights are antagonistic and distinct from each other distances human rights from the realities of African people and therefore frustrates the entrenching of rights as a lived concept. The assumption that local practices do not embrace human rights ignores the fluid and transformative potential of local cultural norms as well as the impact of human agency in bringing about change.⁴⁹ It is therefore incumbent on NGOs as advocates for human rights to demonstrate the relevance of international human rights to local context.

However, culture is rarely appreciated as a building block for popularising the human rights movement. At the 43rd session of the Commission in May 2008, the NGO Forum attributed the violation of women's and children's rights to culture.⁵⁰ Similarly, the NGO Task Force in Tanzania complained that obliging them to respect the culture of the communities within which they operated was retrogressive, imputing culture as exclusively negative.⁵¹

Culture is historically constructed through human action, incorporated into the power structures, and reinterpreted through local understanding and interests.⁵² In *Chiku Lidah v Adam Omari*,⁵³ it was reiterated that Customary Law is not immutable but is a 'living law capable of adaptation and development'.⁵⁴ Therefore, NGOs should build on the positive cultural values that resonate with human rights principles instead of dismissing culture as solely an impediment to the realisation of rights. The Human Rights Council calls for a 'cultural negotiation' that emphasises the positive elements to advance human rights and discarding the oppressive elements and hierarchies within.⁵⁵ Erturk Yankin rightly observes that the threat to women's human rights comes from the monopoly over the interpretation of culture by the privileged few, rather than culture on its own.⁵⁶ The adoption of a cross-cultural perspective that

48 Cultural Charter for Africa (1976) www.africa-union.org/root/au/Documents/Treaties/Text/Cultural_Charter_for_Africa.pdf (accessed 17 May 2006).

49 C Nyamu-Musembi 'Are local norms and practices fences or pathways? The example of women's property rights' in AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) 127; Tamale (n 45 above) 149-152; Report of the Special Rapporteur on violence against Women, its causes and consequences (n 46 above) 9 & 21.

50 NGO Forum Indaba *Swazi Observer* 6 May (2008) 14.

51 Interview with Sungusia, Programme officer, Legal and Human Rights Centre, 25 July 2007, critiquing sec 31(b) of the NGO Amendment law.

52 Sarat & Kearns (n 1 above) 14-15.

53 PC Civil Appeal No 34 of 1991, reported in CM Peter *Human rights in Tanzania: Selected cases and materials* (1997) 66-67.

54 As above.

55 A/HRC/4/34 G (n 44 above) 19-20.

56 15 years of the UN VAW (46 above) 29.

promotes the interplay between cultural norms and universal human rights is crucial in stimulating the mass support of human rights.

The concept of *ubuntu* amongst the Bantu people of sub-Saharan Africa, loosely defined as humanness, respect for the human person and community responsibility towards each other⁵⁷ provides a basis for linking human rights to culture. Critics of *ubuntu*, while agreed over its commonality amongst most African languages, trivialise it as inherently patriarchal and of limited relevance to contemporary youth.⁵⁸ Proponents of *ubuntu* acclaim it as a 'philosophy of ... personhood, humaneness and morality'.⁵⁹ To Fredrick Jjuuko, *ubuntu* is a more expansive concept than human rights because it obliges mutual responsibility while rights are demand driven, adversarial and confrontational and their enjoyment depends on an individual's willingness and capability to claim them.⁶⁰ Likewise, the social values inherent in *ubuntu* such as solidarity, conformity, compassion, respect, human dignity and collective unity

provide an indigenous impetus that aligns age-old African social innovations and historical cultural experiences to present day legal notions and techniques in order to create a legitimate system of law.⁶¹

The Centre for Human Rights at Pretoria has demonstrated the utility of engaging cultural institutions. Since 2003, recognising that land and inheritance are predominantly managed under chieftaincy, the Community Service Programme run under the Centre has targeted SADC cultural chiefs to make them the vehicle of human rights.⁶² It is currently a common practice for women's rights groups to work with cultural institutions to reclaim their rights as cultural beings. For example, in its original conceptualisation the estate of the deceased person was not taken as individual property of the heir for private appropriation but the heir served as the trustee of the estate for the collective good of all beneficiaries, akin to the concept of a legal administrator. The dispossession of women's property rights is a result of the introduction of individual property rights.

57 South African Human Rights Commission *Report on the seminar on affirming a culture of values in the South African human rights framework*, Johannesburg, 12 August 2006, 55 www.sahrc.org.za/sahrc-cms (accessed 18 May 2007)

58 D Cornell & K van Marle 'Exploring *ubuntu*: Tentative reflections' (2005) 5 *African Human Rights Law Journal* 196.

59 Y Mokgoro 'Ubuntu and the law in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 15.

60 Interview with Jjuuko, Chairperson, The Free Movement, Uganda, 29 August 2007, Makerere University.

61 Mokgoro (n 59 above) 17-18 & 21.

62 Interview with Hansungule, Centre for Human Rights, Pretoria, 14 May 2007, Pretoria.

As argued by Monica Aleman, women's rights and culture are not opposed to each other but can be complementary because culture is one of the key aspects of one's identity.⁶³ Likewise, Ifi Amadiume argues that it is colonial rule and the introduction of Christianity which destroyed the traditional power of African women derived from 'motherhood',⁶⁴ and preached 'self-sacrifice' as well as 'condemned women's headstrongness as unfeminine'.⁶⁵ Using the issue of sexuality, Tamale illustrates the potential of the social legitimacy of African culture as an empowering resource to challenge male domination.⁶⁶ Pitting culture against rights as adversarial to each other is a key constraint inhibiting the rights movement from galvanising itself into a thunderous social movement with strong linkages across diverse sectors of society. Consequently, women are left with a limited choice of either complying with the negative culture or joining the dominant human rights discourse that trivialises their cultural experiences.⁶⁷ Thus, the then UN Special Rapporteur on Violence against Women argued that reducing violence against women to a cultural problem isolates it from the political/economic environment, yet no culture justifies violence against women (VAW).⁶⁸ Evidently, feminists are deliberately cast as culturally alien which alienates them from the social base of their communities. Hence it is imperative to involve those who live their culture, in the process of identifying the positive cultural norms that can be used as a vehicle to support women's rights and the negative ones to be discarded.

It is redeeming that the Protocol on Women provides that women be consulted about the content of the cultural norms that are to operate within their societies.⁶⁹ Significantly, the Protocol on Women validates 'Africa women's agency in challenging culture as a concept of power, authority and reshaping of society'.⁷⁰ Similarly, the African Feminist Charter obliges the engagement with the cultural discourse to amplify the centrality of women's rights.⁷¹ Likewise, the Commonwealth Foundation NGO guidelines for good policy and practice recommend the respect for the rights, culture and dignity of men and women.⁷²

Cognisant of the fact that a majority of women make reference to their culture in solving their family disputes, FIDA-Uganda initiated a

63 Interview with Aleman, Programme Officer, Advancing Women's Leadership, 23 August 2013.

64 I Amadiume 'Gender, political systems and social movements: A West African experience' in M Mamdani et al (eds) *African studies in social movements and democracy* (1995) 38 & 54.

65 Amadiume (n 64 above) 56; Tamale (n 45 above) 159.

66 Tamale (n 45 above) 158-164.

67 A/HRC/4/34 G (n 44 above) 17.

68 A/HRC/4/34 G (n 44 above) 3 & 19.

69 Maputo Protocol on Women (n 40 above) Preamble & art 17.

70 Tamale (n 45 above) 159.

71 African Feminist Charter (2006) 11.

72 Commonwealth Foundation *Non-Governmental Organisations: Guidelines for good policy and practice* (1995) Guideline 5.

programme that engaged the cultural leaders to redefine the acceptable cultural norms that advance women's rights. The ground-breaking work with the *Ker-Kwaro*, a cultural institution in Northern Uganda, gained international recognition as an innovative strategy.⁷³ Similarly, its publication on the Ganda culture revealed that culture has been erroneously conflated with patriarchy by interpreting it in a manner that placed the interests of men above those of women.⁷⁴ Importantly, the research highlighted women's cultural power as the foundation of the home and society at large which has the potential for leveraging women's status if reclaimed. Indeed women's strategic positioning as the custodian of culture and their reproductive function makes them the child's first teacher, a unique opportunity for positively engendering the cultural discourse.⁷⁵ The harmonisation of human rights and culture upholds the universalism of human rights. Respect for the knowledge of ordinary people encourages the framing of everyday experiences in human rights language, ultimately entrenching human rights as part of social debate and practices.

The issue of how Development NGOs (DNGOs) and Human Rights NGOs (HURINGOs) have promoted the principle of the indivisibility of human rights is the focus of the next debate.

4 The principle of indivisibility of rights: A case study of DNGOS and HURINGOs

This discussion reviews the traditional relationship between DNGOs and HURINGOs and examines how the former have linked human rights to their work. It also interrogates how HURINGOs appreciate the struggles of DNGOs as human rights struggles.

4.1 The traditional relationship between DNGOs and HURINGOs

The Vienna Declaration recognises the indivisibility of human rights.⁷⁶ Integrating human rights in development is strategic because both share the common values of inclusion, non-discrimination, ownership,

73 UNDP *Rule of law and access to justice in Eastern and Southern Africa, showcasing innovations and good practice* (2013) 102-103 http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/rule-of-law-and-access-to-justice-in-eastern-and-southern-africa/ (accessed 11 October 2013)

74 See F Jjuuko & E Kibalama *Culture and women: The position of women in Buganda* (2011).

75 M Nassali 'Preface' in Jjuuko & Kibalama (n 74 above) vi.

76 Vienna Declaration and Program of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, paras 8 & 74 <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> (accessed 13 August 2006).

accountability, transparency, participation and empowerment and the goal of promoting the dignity and welfare of the human person.⁷⁷

Yet, prior to the 1990s, '... development enterprise lived in splendid isolation from human rights, both at the level of discourse and practice'.⁷⁸ As observed by UNDP:⁷⁹

Until the last decade, human development and human rights followed different paths in both concept and action—one largely dominated by economists, social scientists and policy makers, the other by political activists, lawyers and philosophers. They promoted divergent strategies of analysis and action—economic and social progress on the one hand, political pressure, law reform and ethical questioning on the other.

Alston has likened the relationship between the development and human rights community to '... ships passing in the night, each with little if any sustained engagement with one another'.⁸⁰ Similarly, Edwards observes that each year the World Economic Summit and the World Social Summit 'take place in splendid isolation'.⁸¹

The major challenge in merging rights discourse and development discourse is the divergent goals, with the latter essentially preoccupied with economic growth while the former focuses on the preservation of the dignity of the person and the exposure of abuses of power.⁸² HURINGOs preferred to stick to CPRs leaving the struggles for ESCRs and social change to the DNGOs.⁸³

On the one hand, HURINGOs prefer to apply the rights-based approach as a normative concept that imposes legal and moral obligations on all actors and all processes, arguing that rights are both a means and an end of development.⁸⁴ On the other hand, DNGOs use rights based approaches as an instrument to achieve more effective programming.⁸⁵

77 P Alston 'Ships passing in the Night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 825; P Alston & M Robinson 'The challenges of ensuring mutuality of human rights and development endeavours' in Alston & Robinson (n 7 above) 4.

78 Uvin (n 9 above) 1 & 47.

79 UNDP *Human rights and human development* (2000) 2; Robinson (n 7 above) 27; C Nyamu-Musembi & A Cornwall *What is the 'rights based approach' all about? Perspectives from international development agencies* (2004) 8.

80 Alston (n 77 above) 799.

81 M Edwards "'Philanthrocapitalism' and its limits" (2008) 10 *International Journal on Non-profit Law* 29.

82 Uvin (n 9 above) 2.

83 Uvin (n 9 above) 31; J Oloka-Onyango *On the barricades: Civil society and the role of human rights and women's organisations in the formulation of the bill of rights of Uganda's 1995 Constitution* (2000) 33.

84 Darrow & Tomas (n 7 above) 492.

85 Darrow & Thomas (n 7 above) 492-493.

Development was conceptualised as a technical and not a political process, rendering it blind to the dynamics of power and exclusion.⁸⁶

Hence, the scepticism that rights-based approaches can easily be manipulated to provide a smokescreen for hiding inequities and rights violations from scrutiny. There is also a tendency for DNGOs to simply repackage or add labels without necessarily re-conceptualising or changing their practice of treating rights as '... gifts, charity or policy blueprints'.⁸⁷ Furthermore, DNGOs perceive rights as state-centric, political, adversarial, judgmental, elitist and preoccupied with quick results but impractical in cases of scarce resources and competing demands.⁸⁸ For example, in the UK many voluntary organisations misperceived rights as a 'far-fetched luxury' of interest to expensive lawyers and celebrities or a camouflage to advance the interference of European judges in British affairs.⁸⁹

Notwithstanding the above, rights-based approaches are becoming commonplace. The Commonwealth Foundation 'NGO Guidelines for good policy and practice' obliges NGOs to advance and improve the human condition; respect rights, culture and dignity of men and women; devolve the maximum resources to the task at hand, remain true to its mission and objectives; and involve beneficiaries as partners, exercise willingness to collaborate and network and maintain high ethical standards at both organisational and personal level.⁹⁰

The International Non-Governmental Accountability Charter reiterates that the high standards that INGOs demand of others should be respected in INGO's own organisations.⁹¹ It articulates a number of principles such as political and financial independence; responsible advocacy that advances shared and defined public interests; effective programming working in genuine partnerships with local communities, NGOs and other stakeholders; non-discrimination that encourages diversity, impartiality and gender equity and balance; transparency, openness, honesty and active communication; compliance with relevant governance, financial accounting and reporting requirements; accuracy of information; and good governance by adhering to clear missions,

86 Uvin (n 9 above) 3, 31 & 37; F Manji 'The depoliticisation of poverty' in D Eade (ed) *Development and rights* (2004) 26.

87 Scott (n 12 above) 210; Uvin (n 9 above) 53.

88 P Alston & M Robinson 'The challenges of ensuring mutuality of human rights and development endeavours' in Alston & Robinson (n 7 above) 5; Robinson (n 7 above) 32-37; F Butler *Human rights: Who needs them? Using human rights in the voluntary sector* (2004) 49; Nyamu-Musembi & Cornwall (n 79 above) 17; Wolfensohn, J 'Some reflection on human rights and development' in Alston & Robinson (n 7 above).

89 F Butler 'Building a human rights culture' in C Harvey (ed) *Human rights in the community: Rights as agents for change* (2005) 23 & 67.

90 Commonwealth Foundation (n 72 above) guideline 5.

91 INGO Accountability Charter (2005) 1 www.amnesty.org/resiurces/downloads/INGO_Accountability_charter.pdf (accessed 3 June 2007).

organisation structure and decision-making, written values, policies and procedures and ethical fundraising amongst others.⁹²

The Charter of Feminist Principles for African Feminists⁹³ outlines individual ethics which include: the indivisibility, inalienability and universality of women's human rights; networking; solidarity and mutual respect; care of other African feminists; non-violence; freedom of choice and autonomy; critical engagement of culture, tradition and domesticity; respectful personal relationships and documentation of her-stories.⁹⁴ It also prescribed institutional ethics, which include: openness, transparency, equality and accountability; professionalism; egalitarian governance, fair and equal remunerations; creation of spaces to empower and uplift women; responsible leadership and management of organisation; promoting self-fulfilment and professional development of others; leadership of women organisations by women; financial prudence and ethics; and self-assessment and working in response to real needs expressed by women.⁹⁵

The policy prescriptions of the above charters underscore the usefulness of DNGO's to apply human rights principles. In a reciprocal relationship, the following discussion interrogates whether HURINGOS engage the development agenda.

4.2 The indivisibility of rights: HURINGOs and the development agenda

Likewise, HURINGOs have neither readily appreciated DNGOs' struggles as human rights struggles nor embraced the struggles of DNGOs such as the anti-globalisation crusade spearheaded by the World Social Forum. Yet, the struggle for ESCRs provides a common ground for HURINGOs and DNGOs to work together. HURINGOs contend that despite the rhetoric of the indivisibility of rights, in practice the state prioritises economic growth to the detriment of human rights.⁹⁶ Consequently, HURINGOs are reluctant to engage in the development struggles in general for fear of marginalising human rights.⁹⁷ Mutunga questions ICHRP's resistance to join the anti-globalisation movement for lack of a legal basis which is considered risky because it compromises legal rigour to 'imprecise rhetoric'.⁹⁸ Conversely, as tritely argued by Mutunga

92 INGO Charter (n 91 above) 4-6.

93 www.africafeministsforum.org (accessed 7 June 2008).

94 African Feminist Charter (n 93 above) 10-11.

95 African Feminist Charter (n 93 above) 15-16.

96 Evans (n 21 above) 1057.

97 Alston (n 77 above) 761.

98 W Mutunga 'The human rights movement and the struggle for human rights states in East Africa' The Ford Foundation (2004) 21-22, unpublished (on file with the author).

the anti-globalisation movements are struggles for economic, social, cultural and political justice,⁹⁹ that:

the supercilious dismissal of people struggles for justice in the global economy illuminates the limitation of the dominant human rights discourse ... The human rights movement has failed to acknowledge that the anti-globalisation movements are dealing with global forces that have minimal faith in or respect for precise descriptions of the legal obligations.¹⁰⁰

All regional blocs provide for the active participation of civil society in the development processes.¹⁰¹ Nevertheless, HURINGOs have not been active in the regional integration process. Yet, the existence of trade relations and diplomatic ties facilitates the successful enforcement of human rights in regional economic blocs.¹⁰²

At the continental level, the African Union (AU) has categorically made human rights a key principle of its operations. The Africa Union provides for the building of partnerships, solidarity and cohesion between governments and all sectors of CSOs.¹⁰³ It establishes the Economic, Social and Cultural Council (ECOSOCC).¹⁰⁴ The objectives of the ECOSOCC are to ensure continuous dialogue between the people of Africa; forge strong partnerships with civil society; promote civil society participation in the implementation of AU policies and programmes; support and defend peace and security, culture of good governance, democratic principles and institutions, popular participation, human rights, freedoms and social justice; and promote gender equality and strengthen the capacities of CSOs.¹⁰⁵ Some NGOs have attributed their lack of engagement with the AU to the fact that to qualify as an observer, an NGO must derive 50 per cent of its finances from the membership.¹⁰⁶ Moreover, women's organisations are likely to be excluded on the ground of discrimination on the basis of gender.¹⁰⁷

While there is no comprehensive SADC CSOs Policy, the SADC Treaty commits its members to engage the people and the civil society in regional development and integration.¹⁰⁸ Southern African NGOs are well organised under the Southern Africa Development Community Council of Non-Governmental Organizations (SADC-CNGO), which has established its Secretariat in Gaborone to facilitate sustainable and

99 As above.

100 As above.

101 AU Act (n 4 above) arts 3(g) & 22; SADC Treaty (n 4 above) art 23; EAC Treaty (n 4 above) arts 7, 127-129.

102 C Heyns & F Viljoen 'Current development: An overview of international human rights protection in Africa' (1999) 15 *South African Journal on Human Rights* 423 & 433.

103 African Union Act (n 4 above).

104 African Union Act (n 4 above) arts 3(g) & 22.

105 Statute of the ECOSOCC of the African Union (2004) art 2.

106 Statute of the ECOSOCC of the African Union (n 105 above) art 2, rule v & vi.

107 Statute of the ECOSOCC of the African Union (n 105 above) art 2 rule ix.

108 SADC Treaty (n 4 above) arts 16A & 23.

constructive engagement with SADC Secretariat.¹⁰⁹ To amplify its voice and presence, SADC-CNGO has collaborated with the Fellowship of Christian Councils in Southern Africa (FOCCISA) and the Southern Africa Trade Union Co-ordination Council (SATUCC). Collectively, they have made bold recommendations such as: revising the SADC Principles and Guidelines Governing Democratic Elections to ensure independent and impartial electoral bodies; Compulsory adoption of the African Charter on Democracy and Good Governance and submission to the APRM governance audit; respect of judicial independence and media freedoms; and establishment of a Regional Court of Justice and adherence to the SADC Gender Protocol, to mention but a few.¹¹⁰

In contrast with East Africa, civil society is still grappling with its internal organising. NGOs have not effectively capitalised on the people-centred and people-driven principles to demand their participation in the EAC. Progressively, the Consultative workshop of 2005¹¹¹ recommended the establishment of the Economic, Social and Cultural Committee (ECOSOCC) as one of the autonomous structures of the EAC.¹¹² Since then, CSOs have organised themselves into the East African Civil Society Organisations' Forum (EACSOF) whose leadership is drawn from the five East African Countries.¹¹³ However, the ECOSOCC is plagued with suspicions that it largely functions as a project of EALS rather than the credible vehicle for civil society participation.¹¹⁴ Consequently, the EACSOF is not one of the recognised achievements of EAC.¹¹⁵ Neither is there an updated list of organisations with Observer Status.

With the possible exception of Kituo Cha Katiba (KCK)¹¹⁶ which initiated the East African Human Rights Bill passed by the East Africa Legislative Assembly in April 2012,¹¹⁷ NGOs have hardly collectively articulated alternative agendas to integrate rights into the development. However, there are many ESCRs that need to be safeguarded while promoting economic development. Significantly, the main objective of

109 <http://www.sadcngo.org/index.php/missions-visions> (accessed 17 September 2013).

110 SADC: 9th Civil Society Forum statement: <http://www.safpi.org/news/article/2013/sadc-9th-civil-society-forum-statement> (accessed 4 October 2013).

111 EAC *Report of the Civil Society Workshop Organised by the East African Community Secretariat* 28-29 July (2005) Arusha Tanzania.

112 EAC Summit Joint Communiqué (2005) para 9, 29-30 May 2005.

113 B Kabumba 'A Union of States or of Citizens: Reviewing mechanism for civil Society (Non) Participation in EAC integrative process' in M Odhiambo (ed) *Towards greater civil society participation in the East African Community: Challenges and prospects* (2010) xvi.

114 M Odhiambo 'Towards greater civil society participation in East African Community: Challenges and prospects' in Odhiambo (n 113 above) 57 & 84.

115 http://www.eac.int/index.php?option=com_content&view=article&id=46&Itemid=56 (accessed 12 August 2013).

116 EAC Receives Proposed Regional Bill of Rights, 23 October 2007 <http://all.africa.com/stories/200710230715.html> (accessed 12 August 2013).

117 http://www.eac.int/index.php?option=com_content&view=article&id=988:eala-pas-ses-bill-on-human-rights&catid=146:press-releases&Itemid=194 (13 August 2013).

legal reform in East Africa is to facilitate economic globalisation rather than the enhanced promotion and protection of human rights.¹¹⁸

Human rights NGOs can no longer remain aloof to the globalisation and development agendas because existing voluntary codes adopted by businesses are so vague, hardly raise human rights issues and are often applied in a discretionary fashion.¹¹⁹ NGOs have to support the state to regulate businesses to guarantee human rights for all. NGOs can use the tool of litigation to stimulate public debate and prompt consumer boycotts with non-compliant businesses. NGOs can also ensure that community consultations take on local concerns and address the barriers to the participation of communities in local processes. For example, the Kenya Human Rights Commission (KHRC) successfully organised a consumer boycott of the sale of Kenyan flowers in Italy, resulting in an improvement of the working conditions of export fruit and flower industries.¹²⁰ Similarly, promoting corporate social responsibility is an ideal strategy of linking business and rights.

At the national level, many NGOs in East and Southern Africa have criticised the consultations process of donor-government poverty reduction strategies. NGOs contended that the consultations were manipulative and mainly aimed at making NGOs endorse predetermined positions or only address non-contentious issues.¹²¹ For example the participation of East African NGOs in the poverty alleviation consultations was irregular, did not have thorough critiques and thus failed to hold government accountable. For example, in Uganda, NGOs did not have facts and figures to support their positions.¹²² Similarly, in Tanzania, NGOs' participation was mediocre because they were not united and lacked technical expertise in economic and development issues.¹²³ In Kenya, an Institute of Economic Affairs (IEA) found that 81 per cent of the respondents deemed CSO participation in the budgetary processes poor,

118 M Nassali 'Introduction' in M Nassali (ed) *Reforming justice in East Africa: A comparative review of the legal sector processes* (2008) 3.

119 P Baehr 'Human rights NGOs and globalization' in K Arts & P Mihyo (eds) *Responding to the human rights deficit: Essays in honour of Bas De Gaay Fortman* (2003) 36.

120 B Maina 'Civil society and the private sector' in D Okello (eds) *Civil Society in the Third Republic* (2004) 60.

121 Research on Poverty Alleviation (REPOA) *Tanzania Non-Governmental Organisations – Their perceptions of the relationship with government of Tanzania and donors, and their role in poverty reduction and development* (2007) 18-19; H Kotze 'Responding to the growing socio-economic crisis? A review of civil society in South Africa' in *Development Update, The deepening divide: Civil society and development in South Africa Annual Review 2001/2002* (2003) 26-27.

122 Interview with Asiimwe, then Programme Officer, European Union Civil Society Capacity Building, and former Programme Officer, Basket Fund, Ministry of Justice, 28 August 2007, Kampala; interview with Rukare, then Head of Party, European Union Civil Society Capacity Building, 14 August 2007, Kampala.

123 REPOA (n 121 above) 15 & 27.

while simultaneously 78 per cent of CSOs found the budgetary processes non-participative.¹²⁴ In South Africa, while the Mid Term Expenditure Framework was intended to be a participatory process by enabling stakeholders to scrutinise the budget, civil society was ‘... guilty of last minute, ad hoc responses to the budget rather than a more focused approach’.¹²⁵ Ostensibly, NGOs contribute to their marginalisation in development policy formulation by such casual participation.

5 Conclusion

The chapter has shown why all NGOs should embrace human rights principles in their governance arrangements, irrespective of whether or not they define themselves as HURINGOs. This is mainly because human rights mutually reinforce democratic and development arenas, to which all NGOs, directly or indirectly subscribe. In essence, the merit of human rights is that it draws attention to discrimination, it tames the exercise of power and provides mechanisms to overcome arbitrariness in decision-making and in the development processes, all of which are critical aspirations of the NGO tradition, irrespective of their priorities, style and belief.

The controversy surrounding the misconception that African culture does not embrace human rights is demystified, but with a caution to desist from either the blanket rejection or the glorification of African culture. African culture is a double-edged sword capable of both enhancing and detracting from human rights. NGOs must build on the positive cultural values that resonate with human rights, rather than dismiss culture entirely as an impediment to the realisation of human rights. This amongst others requires NGOs to learn from how ordinary citizens have interpreted human rights in their day to day experiences.

The relationship between DNGOs and HURINGOs is examined making a case for promoting the indivisibility of human rights, which reinforces the relevance of rights in all the policies and practices of NGOs. Just like the DNGOs cannot afford to ignore the centrality of human rights in their advocacy struggles, HURINGOs can no longer remain aloof to the globalisation and development agendas of DNGOs. Thus, even HURINGOs can stimulate human rights through advocacy on business-related issues such as corporate social responsibility and fair business regulation.

124 B Sihanya ‘The contribution of academia and civil society in development policy making and budgetary process’ in P Wanyande & MA Okede (eds) *Discourses on civil society in Kenya* African Research and Resource Forum (ARF) (2009) 56.

125 L Verwey et al *Medium Term Budget Policy Statement (MTBPS) 2007: Selected Issues* (2007) 4.

1 Introduction

Calls for an institutional framework that allows for the monitoring of civil society at the international, regional and national levels are growing. NGOs are questioned about their operations: ‘From where do NGOs derive their legitimacy?’; ‘To whom are NGOs accountable?’; and ‘Who or what do they represent?’.¹ NGO accountability is defined as the process where an NGO ably holds itself responsible for ‘what it believes, what it does, and what it does not do in a way which shows it involving all concerned parties and actively responding to what it learns’.² Accountability is not confined to the law but extends to ‘secure integrity in relationships within society’.³ Similarly, the Kingston Survey relates accountability to how ‘one manages unequal distribution of power in places when those that are meant to benefit from one’s work have weak political and economic voice’.⁴ This chapter examines the multiple accountabilities of NGOs to the various stakeholders, namely the law and NGO sector-wide self-regulatory Councils, the NGO Executive Board, the membership, communities, the public, and donors.

- 1 Commonwealth Foundation *Non-Governmental Organisations: Guidelines for good policy and practice* (1995) Guideline 32.
- 2 International Council on Human Rights Policy (ICHRP) ‘By what authority? The legitimacy and accountability of Non-governmental Organisations’ A paper presented by Hugo Slim at the meeting on *Global trends and human rights – Before and after 11* (2002) 12 www.jha.ac/articles/a082.htm; (accessed 2 August 2006).
- 3 I Anwar ‘Accountability and the Future of Freedom’ A Presidential Fellows Lecture (2006) <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/EXTPRESIDENT/EXTPASTPRESIDENTS/EXTOFFICEPRESIDENT/0,,contentMDK:20977460~menuPK:64343277~pagePK:51174171~piPK:64258873~theSitePK:1014541,00.html> (accessed 3 November 2008).
- 4 Keystone Accountability Survey ‘How well are donors and NGOs performing on accountability to their beneficiaries?’ (2006) 4 <http://keystoneaccountability.wordpress.com/2006/06/01/how-well-are-donors-and-NGOs-performing-on-accountability-to-their-beneficiaries-survey-results-released/> (accessed 21 July 2015).

The chapter begins with a focus on accountability to the law within the national legal framework in part two. It questions whether NGOs should have legal obligations to register under a specific law and examines the effectiveness of the law in strengthening NGO governance. In part three, I explore the potential of the NGO sector-wide self-regulatory body to enforce good governance within the NGO sector. Under non-profit law, the governing Board is a key organ that ensures that the NGO is accountable and achieves its core purpose. Therefore, I investigate the extent to which the Board is a source of accountability in part four, by examining the various accountability mechanisms such as the duty of loyalty of the Board and the conflict of interest policy, setting a clear mission, strategic planning, monitoring and evaluation processes. Part five highlights the dilemmas of accountability to the membership, profiling the tensions of having elections of the leadership *vis-à-vis* having a recruited Board. Part six addresses the question of accountability to the communities a particular NGO works with. In part seven, the chapter address the principle of transparency as an accountability mechanism to the broader public. The final section addresses the question of accountability to the donors as well as donors' potential to influence the governance of NGOs.

2 Accountability through the law

Using the framework of international principles for the protection of civil society,⁵ I investigate the extent to which the law has constrained or fostered the governance of NGOs. I focus on the right to entry and examine three related issues, namely: First, I address the right to form, join and participate in an organisation in pursuit of lawful purposes and the right to exist informally, inferring that an individual does not have to form a legal entity to enjoy the freedom of association and by implication NGOs are not obliged to register an organisation. Second, I argue that should an association choose to register, then it has a right to legal existence in that the state cannot refuse to register it or make its registration process cumbersome. Inherent in this right is the obligation to satisfy the law in so far as it does not erode the right to freedom of association. Third, an organisation whether registered or not has to be protected from unwarranted state interference. Simultaneously, this right creates the obligation of self-governance either through the sector self-regulatory mechanism or through the Executive Board. These issues are discussed in detail in the proceeding sections.

5 ICNL & WMD International Principles Protecting Civil Society <http://www.defendingcivilsociety.org/en/index.php/principles> (accessed 12 July 2013) Principle 1.

2.1 The right to exist informally as an organisation

The formation of associations provides an important beginning to organise in pursuit of common interests.⁶ All the constitutions of the East African countries⁷ and South Africa provide for the right to freedom of association.⁸ It is only organised people who can effectively struggle against oppression and repression by governments.⁹

Significantly, in Africa, the right of association was an inherent and natural right with the notion of dissent and expression of one's opinion being an essential component of forging societal consensus.¹⁰ Put differently, the most elementary human rights of self-expression, freedom of speech, the right to form social organisations to improve their conditions and to move freely within their communities were rights enjoyed from time immemorial.¹¹ The right of association was epitomised in the spirit of collectivism that even eating, drinking, working and sleeping were done collectively.¹² Hence, the human rights movements in Africa arose out of necessity and survival, rooted in African communal tradition with a rich tradition of solving social problems through cooperative efforts at the grassroots. These social obligations were not benevolent acts but were grounded in community social obligation for each individual's well-being.¹³ The very growth of the NGO movement as part of civil society is a reflection of people's efforts to 'create their own spaces and solutions to the crisis of the decay of the nation-state in satisfying their own needs'.¹⁴

Nonetheless, there is controversy as to whether or not the state should provide specific legal regulations of NGOs. Under international law, an NGO can exist informally because there is neither a requirement for a law to regulate freedom of association nor is there the existence of a legal

6 The African Commission Report of the African Commission's Working Group of Experts on Indigenous populations/communities (2005) 57.

7 Previously, the East African region referred to the countries of Uganda, Tanzania and Kenya, which were the original members of the East African Community. In 2006, Rwanda and Burundi joined the East African Community, which changes the original meaning of the term East Africa.

8 The Constitution of Tanzania (1977) art 20; The Constitution of Uganda (1995) art 29; The Constitution of Kenya (2010) art 36; The South African Constitution (1996) art 18.

9 PC Civil Appeal No 34 of 1991, reported in CM Peter *Human rights in Tanzania: Selected cases and materials* 650.

10 N Mandela *Long walk to freedom: The autobiography of Nelson Mandela* (1994) 20-21.

11 J Kenyatta (1938) *Facing Mount Kenya: The tribal life of the Gikuyu* (1938) 197.

12 Kenyatta (n 11 above) 195.

13 Kenyatta (n 11 above) 2 & 117; see M Mamdani & P Otim *Non-Governmental organisations (NGOs) in East Africa: Report of a Survey of Training Needs* (1994) 3; LM Salamon et al 'Global civil society: An overview' in LM Salamon et al (eds) *'Global civil society: Dimensions of the non-profit sector' Vol 2* (2004) 2.

14 FW Jjuuko 'Political parties, NGOs and civil society in Uganda' in Oloka-Onyango et al (ed) *Law and the struggle for democracy in East Africa* (1996) 193.

model of registration.¹⁵ In other words, registration is not a pre-requisite for the enjoyment of the right to freedom of assembly. The Lawyers Committee for Human Rights (LCHR) contends that NGOs should not be subjected to any special oversight mechanism nor suffer discrimination only because of their not-for profit character, but argue that ordinary criminal and civil laws designed to protect against fraud and abuse are sufficient.¹⁶ LCHR fears that governments can manipulate such regulations in order to interfere with legitimate associational life.¹⁷

In Kenya and South Africa, registration is voluntary and organisations can exist informally. In both countries, the law provides incentives to register, such as government funding through contracts, subsidies and tax benefits and government sponsored training as well as access to information.¹⁸ In contrast, in Tanzania and Uganda registration is compulsory and non-registration is a criminal offense.¹⁹ While in Uganda the NGO Board argues that the requirement for CBOs to register is a positive trend because the law takes the services closer to the CBOs for requiring them to register with their Districts,²⁰ it has exposed the CBOs to unrestrained discretion.

Such compulsory registration reduces the right to freedom of association of NGOs from an inherent right to a mere positive right acquired only upon registration by the state. Yet, an NGO or a coalition of NGOs may decide not to register in order to enable it to function in a free and flexible manner. At times an NGO may operate as a project of a registered NGO, pending its own registration. The informality of loose coalitions, as was the case with Coalition of Political Accountability to Women (COPAW) in Uganda, Mandela Park Anti Eviction Campaign (MPAEC), Landless People's Movement (LPM) and the Homeless People's Association (HPA) in South Africa and the Kenya Women's Political Caucus in its formative years,²¹ allows flexibility and political

15 Lawyers Committee on Human Rights (LCHR) *The neglected right: Freedom of association in international human rights law* (1997) 20.

16 LCHR (n 15 above) 45.

17 J Clark 'The state and the voluntary sector' Human Resource Development and Operations Policy, World Bank Report, October, HROWP 12 (1993) 15 http://www-wds.worldbank.org/servlet/WDSCContentServer/WDSP/IB/1993/10/01/000009265_3961005082045/Rendered/PDF/multi_page.pdf (accessed 19 August 2013).

18 South African Department of Social Development *An impact assessment of the Non-Profit Organisation (NPO) Act No 71 of 1997* (2005) 8-9 & 71; Kenya, Public Benefit Organisations Act (PBO Act) (2013) sec 6 & the Second Schedule: Benefits of Registration.

19 Tanzania NGO Act (2002) 5(b) Uganda NGO Amendment Act (2006) secs 2(5), 2(6) & sec 7(2).

20 Interview with Kangwagye, Chairperson NGO Board, 29 Nov 2012; Uganda NGO Amendment Act (n 19 above) sec 7(2).

21 S Greenberg 'The landless people's movement and the failure of post-apartheid land reform' (2004) 20 www.ukzn.ac.za/ccs (accessed 7 July 2006); S Oldfield & K Stokke 'Building unity in diversity: Social movements activism in the Western Cape anti-eviction campaign' (2004) 21 www.ukzn.ac.za/ccs (accessed 7 July 2006); E Kibalama & M Nassali (2004) 'Women's voices in the political transition' a paper presented at

autonomy from government.²² At times NGOs worry that registration might widen the gap between formal leadership and membership.²³ For example, Soweto Electricity Crisis Committee (SECC) and Mandela Park Anti-Eviction Campaign (MPAEC) were concerned that registration would result in 'internal oligarchies' and blunt its 'militancy'.²⁴ Free Movement in Uganda refused to register because the reference point for its existence was asserted to be the right to freedom of association enshrined in the Constitution.²⁵

2.2 The right to legal existence and the obligation to register

The International Council of Human Rights Policy (ICHRP) contends that 'NGOs have a right to register their existence, as well as an obligation'.²⁶ In case of compulsory registration, the procedures for registration must be clear, quick, straightforward, cheap, apolitical and not subjected to arbitrary decision making with the denial of registration subjected to judicial review.²⁷ The World Bank argues that registered NGOs should accept reporting requirements and enforcement mechanisms that are appropriate and proportional to the legitimate public interests or public order.²⁸

According to the ICHRP, rather than refusing to register, an NGO should advocate for the amendment of the law because being law abiding enhances an NGO's legitimacy.²⁹ For example, under the Landless People's Movement (LPM) some NGOs believed that it was programmatically difficult to carry out plans without a formal structure, arguing that 'too little structure can cause disintegration of the movement and localise the struggle'.³⁰ Having a non-registered status is prone to difficulties such as inability to own a bank account, rent premises and fundraise as well as tensions in determining the roles and responsibilities between the hosting organisation and the informal entity.

ISSIC-WICCE meeting, May July 2004 on Women and political transition (on file with author); F Khan & E Pietersen 'The homeless people's alliance: Purposive creation and ambiguated realities' (2004) 16 *www.ukzn.ac.za/ccs* (accessed 7 July 2006); J Adhiambo-Oduol 'Gender, civil society and leadership: A case study of the Kenya Women's Political Caucus (KWPC)' in A Bujra & S Adejumbi (eds) *Leadership, civil society and democratisation in Africa: Case studies from Eastern Africa* (2002) 105.

22 Khan & Pietersen (n 21 above) 16.

23 Greenberg (n 21 above) 22.

24 A Desai & R Pithouse 'But we are in thousands: Dispossession, resistance, repossession and repression in Mandela Park' (2004) 23-24 *www.antieviction.org.za/*; *www.southafrica.indimedia.org*; and *www.nu.ac.za/ccs*; *www.ukzn.ac.za/ccs* (all accessed 7 July 2006).

25 Interview with Jjuuko, Chairperson, The Free Movement, Uganda, 29 August 2007, Makerere University.

26 ICHRP (n 2 above) 73.

27 LCHR (n 15 above) 22; ICNL & WMD (n 5 above) Principle 1(3).

28 Clark (n 17 above).

29 ICHRP (n 2 above) 73.

30 Greenberg (n 21 above) 22.

All countries under review provide for specific NGO laws.³¹ However, given that NGO registration processes are cumbersome, many organisations register as societies, trusts and companies limited by guarantee. In Tanzania, a majority of organisations were registered as societies.³² In Kenya and Uganda, most established organisations register as Companies limited by guarantee. Even in South Africa, where the law provides for expeditious registration to be completed within two months, it can be delayed for up to six months.³³ In Zanzibar, the registration of Zanzibar Women's Lawyers (ZAFELA) and Zanzibar Law Society was delayed for more than a year.³⁴ In Kenya, Kenya Human Rights Commission (KHRC) was denied registration for two years, forcing it to register itself in the USA.³⁵

Moreover, there is ambivalence as to whether the law in South Africa facilitates the governance and registration of NGOs. The Telesurvey on the Cooperative/Non-Profit Organisation case study found that some NGOs found the multi-registration procedures complicated and frustrating, while others found that the triple registration contributes to an enabling environment because some NGOs use different legal registrations interchangeably to access different benefits.³⁶ Likewise, in Uganda the optional registration³⁷ has been advantageous. For example, in 2012, the Ministry of Internal Affairs failed to deregister organisations opposed to the Anti-Gay Bill because they were registered under the Ministry of Justice as companies limited by guarantee and not as NGOs under the NGO Board.

In all the countries examined in this study, the law establishes a government regulatory body for the registration and monitoring of NGOs.³⁸ However, in South Africa and Kenya the regulatory body is also mandated to promote good governance of NGOs. The South African law which is rated as the most progressive in Africa³⁹ aims at providing an environment in which NGOs can flourish, improve the standards of

31 The Tanzania NGO Amendment Act (n 19 above); The Uganda NGO Amendment Act (n 19 above); The Kenya Public Benefit Organisations Act (n 18 above); The South African Non Profit Organisations Act 1997.

32 IG Shivji & WB Kapinga *Maasai rights in Ngorongoro conservation authority area* (1998) 46-47.

33 Impact Assessment of the NPO Act (n 18 above) 101.

34 Interview with Aboubakar, then Executive Director, Association of NGOs Zanzibar (ANGOZA) 27 July 2007.

35 BK Murungi 'For whom, for what and about what: The legitimacy of human rights NGOs in Kenya' in M Mutua (ed) *Human rights NGOs in East Africa: Political and normative tensions* (2009) 40.

36 Impact Assessment of NPO Act (n 18 above) 66.

37 An organisation can register as a society, Trust or Company limited by guarantee.

38 Tanzania NGO Act (n 19 above) secs 6 & 7; South African Non-profit Act (n 31 above) sec 4; Uganda NGO Amendment Act (n 19 above) secs 3 & 7; Kenya PBO Act (n 18 above) sec 42.

39 USAID et al *The 2009 NGO sustainability index for Sub-Saharan Africa* (2009) 6.

governance and transparency, as well as promote cooperation with government, donors and interested persons.⁴⁰ Contrary to the law, the Directorate is more preoccupied with registration and deregistration of NGOs.⁴¹ For example, in January 2013, the Directorate de-registered about 55 000 organisations for non-compliance with the law, but their registration status was reinstated due to public outcry.⁴² The Directorate has been criticised for being non-compliant with the law by failing to put in place the Arbitration Panel before deregistration.⁴³ Generally in South Africa, NGOs are poorly governed, with poor financial reporting.⁴⁴ The capacity building function of the Directorate has mostly targeted government cadres. To fill this void, in 2004, the Charity Aids Foundation Southern Africa (CAFSA) established the NGO Governance Initiative.

Unfortunately, in 2012, the Department of Social Development at the South African Non-profit Organisation introduced the Policy Framework on Non-profit Organisations Law (the Policy). The proposed reform is considered more retrogressive compared to the NPO Act.⁴⁵ The proposed South African Non-profit Organisations Regulatory Authority (SANPORA) which would replace the Directorate would have powers to examine books, records and activities of non-profit organisations, conduct random and selective audits, issue sanctions for non-compliance and enforce punitive measures. It also seeks to make INGOs registration compulsory under the pretext of curbing money laundering and financing of terrorist activities.⁴⁶

Similarly, none of the Government Boards in East Africa has enhanced the governance of NGOs, primarily due to weak capacity. Initially in all the countries of study, comparably more INGOs than local NGOs comply with the legal requirement of submitting their annual programme reports and audited accounts.⁴⁷ Progressively in Kenya the NGO Board report of 2012 showed that 80 per cent of the NGOs were compliant with their obligations.⁴⁸ Under the new law, the government has the responsibility to respect the freedoms of association and assembly,

40 South African Non-profit Act (n 31 above) sec 2.

41 NPO Impact Assessment (n 18 above) 8-10, 73, 91, 93 & 101.

42 International Centre for Not-for-Profit Law (ICNL) 'NGO Law Monitor: South Africa' <http://www.icnl.org/research/monitor/southafrica.html> (accessed 13 August 2013).

43 RG Wyngaard 'The South African NPO Crisis: Time to Join Hands' (2013) 15 *International Journal of Not-for-Profit Law* 8-9.

44 Impact Assessment of the NPO Act (n 18 above) 73, 89, 93 & 101; Wyngaard (n 43 above) 8.

45 Wyngaard (n 43 above) 9.

46 Wyngaard (n 43 above) 10-11; ICNL (n 42 above) 5.

47 Research on Poverty Alleviation (REPOA) *Tanzania Non-Governmental Organisations – Their perceptions of the relationship with government of Tanzania and donors, and their role in poverty reduction and development* (2007) 7; Barr et al *Non-Governmental Organisations in Uganda: A report to the Government of Uganda* (2003) 10-11; NPO Impact Assessment (n 18 above) 91.

48 CSO Reference Group Commissioned Report *The fight for democratic space of CSOs in Kenya: The case of the Public Benefit Organisations Act 2013 Amendment* (2014) 12.

as well as provide an enabling environment for growth.⁴⁹ The law acknowledges the contribution of organisations to development, social cohesion, democracy, the rule of law, governance as well as public service delivery.⁵⁰ Furthermore, the law is premised on constructive and principled collaboration between PBOs and government.⁵¹ Significantly, to demonstrate government's good will towards NGOs, the PBO docket was moved from the Ministry of Home Affairs to the Ministry of Planning and Devolution.⁵² Initially there was excitement that the new law would facilitate NGOs' growth because it is the letter of the law.⁵³ Unfortunately, the attempts to amend the law to make it more 'punitive and vengeful' are on-going.⁵⁴

In Uganda, the Board has discretionary powers to revoke a licence in the public interest.⁵⁵ The law introduces a permit,⁵⁶ renewable at the discretion of the Minister.⁵⁷ Worse still, the 2009 NGO Registration Regulations made the registration process more cumbersome, by requiring a prospective NGO to provide a one year work-plan and budget and two recommendations from the political leadership of the proposed area of operations for purposes of registration.⁵⁸ Moreover, an NGO is supposed to give a seven days' notice to the Local Council and Resident District Commissioner before contacting the local communities.⁵⁹ The law mandates the local government to coordinate, monitor and supervise the activities of NGOs,⁶⁰ which powers are reiterated under the NGO Policy.⁶¹ This has exposed NGOs to government arbitrariness, such as the threat to revoke the licences of NGOs accused of interfering in local politics and negatively criticising the government.⁶² Unsurprisingly, the National Development Plan (NDP) acknowledges that the current law constrains the productive engagement between NGOs and the government.⁶³

49 Kenya PBO Act (n 18 above) sec 4.

50 Kenya PBO Act (n 18 above) Preamble.

51 Kenya PBO Act (n 18 above) sec 3.

52 Suba Churchill 'Kenya: Why NGOs are jittery over Public Benefits Organizations Act' Opinion, 12 June 2013 <http://allafrica.com/stories/201306141120.html> (accessed 16 July 2013).

53 Kenya-The New NGO's law good for the sector <http://nguzoafrica.blogspot.com/2013/04/kenya-new-law-good-for-sector-proposed.html> (accessed 16 July 2013).

54 <https://www.facebook.com/PBOAct2013/photos/pcb.618273158283677/618272674950392/?type=1&theater>

55 Uganda NGO Amendment Act (n 19 above) sec 10(c).

56 Uganda NGO Amendment Act (n 19 above) sec 2.

57 Uganda NGO Amendment Act (n 19 above) sec 13.

58 Uganda NGO Registration Regulations (2009) 156-157.

59 Uganda NGO Registration Regulations (n 58 above) r.13.

60 Uganda Local Government Act (n 33 above) secs 18(b), 27 & 50(f); Uganda NGO Policy (2010) 43-45.

61 Uganda NGO Policy (As above) 43-45.

62 'NGOs in Budaka face expulsion' *Sunday Monitor* 6 January 2013 7.

63 Government of Uganda *National Development Plan* (2010) 28.

In Tanzania, the law makes the office bearer criminally responsible for violations of the law and shifts the burden of proof to him/her instead of the prosecution, contrary to the principles of criminal justice.⁶⁴

2.3 Protection from unwarranted state interference

In a democratic society, the state is obliged to provide the legal and regulatory framework for civil society to function independently.⁶⁵ All Constitutions provide that any limitation to the enjoyment of rights should not be beyond what is justifiable and acceptable in a free and democratic society.⁶⁶ The Human Rights Committee has emphasised that no restriction may be applied in a manner that would impair the essence of a right.⁶⁷ The right of NGOs to enjoy autonomous existence has been reinforced by judicial review. The African Commission on Human and Peoples' Rights in *Civil Liberties Organisation (CLO) v Nigeria*⁶⁸ underscored the state's duty to refrain from interfering in the internal affairs of NGOs.⁶⁹ In *Christopher Mtikila v AG*, the High Court in Tanzania held that a law which seeks to limit or derogate from the basic rights of the individual has to satisfy two conditions: First, such a law must be lawful and should make adequate safeguards against arbitrary abuse by those in authority when using the law. Secondly, the limitation imposed by law must not be more than is reasonably necessary to achieve the legitimate object.⁷⁰

Likewise, organisations have a right to peaceful assembly. An NGO does not have to obtain permission to hold an assembly. Where notification is required, it should not be burdensome as to become a denial of the right.⁷¹ In fact where the notification is impractical, international law permits spontaneous assemblies, with a duty incumbent on the state to protect peaceful assemblies.⁷² In *All People's Party and Others v Inspector*

64 ICNL & WMD 'Defending Civil Society' (2008) 14 *The International Journal of Not-for-Profit Law* 10, 2 & 42 <http://www.icnl.org/research/journal/vol10iss2/vol10iss2.pdf> (accessed 13 July 2013).

65 M Edwards *Civil Society* (2004) 24; CE Welch *Protecting Human Rights in Africa: Roles and strategies of non-governmental organizations* (1995) 44.

66 The Constitution of Uganda (n 8 above) art 43(2); South African Constitution (n 8 above) art 36; the Constitution of Kenya (n 8 above) art 36.

67 Human Rights Committee, General Comment No 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) <http://www1.umn.edu/humanrts/gencomm/hrcomm31.html> (accessed 5 March 2006).

68 Institute of Human Rights and Development 'Communication No 101/93' in *Compilation of decisions on communications of the African Commission on Human and Peoples' Rights* (1999) 43-46.

69 As above, para 15.

70 *Christopher Mtikila v AG* High Court of Dodoma, Civil Case No 5 of 1993, discussing the constitutionality of sec 40 of the Police Force ordinance 1953, reproduced in Peter (n 9 above) 690-691.

71 International Principles Protecting Civil Society (n 5 above) principle 5.

72 ICNL & WMD (n 64 above) 47.

General of Police,⁷³ a case from Nigeria, the Africa Commission relied on the Ghanaian case of *New Patriotic Party v Inspector of Police of Accra*⁷⁴ to declare the requirement of obtaining a police permit before holding a meeting or procession in a public place as unconstitutional. In *Malawi & Others, Ex parte the Malawi Law Society*, the High Court emphasised that national security should not be used as an excuse for frustrating the will of the people as expressed in the Constitution.⁷⁵ In Uganda in *Muwanga Kivumbi v AG*,⁷⁶ the Constitutional Court found that the police discretionary powers over convening of an assembly were prohibitive rather than regulatory and therefore constituted an unjustified limitation on the enjoyment of a fundamental right.

In reality, the space allotted to NGOs to operate is principally determined by the political interests of the state.⁷⁷ Since the twin tower bombings in the US on 11 September 2001, there is a global trend towards limiting spaces for civil society under the guise of combating terrorism or defending sovereignty.⁷⁸ Likewise, the African Commission has raised concern over the continued criminalisation of disapproved but legitimate critical expression under defamation, insults, publication of false news to mention but a few.⁷⁹ Compounded by the Arab spring of 2011, East African governments have become intolerant to social protests.⁸⁰

In Uganda, the Ministry of Internal Affairs enacted the Police Declaration of Gazetted Areas Instrument which amongst others compels 25 or more people to assemble in only specifically gazetted areas and to secure a permit for holding an assembly, demonstrations or processions, from the Inspector General of Police (IGP).⁸¹ However, although the *Black*

*Monday Campaign*⁸² was held within the law and the Inspector General of Police notified, the organisers found the police deployed at the premises of

73 (2007) AHRLR 179 (NgCA 2007) <http://www1.chr.up.ac.za/index.php/browse-by-subject/415-nigeria-inspector-general-of-police-v-all-nigeria-peoples-party-and-others-2007-ahrlr-179-ngca-2007.html> (accessed 22 March 2013).

74 (2001) AHRLR 138 (GhSC 1993) <http://www1.chr.up.ac.za/index.php/browse-by-subject/316-ghana-new-patriotic-party-v-inspector-general-of-police-2001-ahrlr-138-gh-sc-1993.html> (accessed 22 March 2013).

75 [2010] MWHC 6 <http://www.malawilii.org/mw/judgment/high-court-general-division/2010/6> (accessed 22 March 2013).

76 *Muwanga Kivumbi v AG*, Constitutional Petition No 9/2005.

77 Welch (n 65 above) 74; S Dicklitch *The elusive promise of NGOs in Africa* (1998) 169; MK Juma 'The compromised brokers: NGOs and displaced populations in East Africa' in PT Zelaza & PJ McConnaughay (eds) *Human rights, the rule of law, and development in Africa* (2004) 236.

78 ICNL & WMD (n 64 above) 5 & 9-11; ACHPR *34th Activity report of the African Commission on Human and Peoples' Rights* (2013) para 21 <http://www.achpr.org/activity-reports/34/> (accessed 15 October 2013).

79 ACHPR (n 78 above).

80 The EAC Deputy Secretary General in charge of Political Federation <http://www.eac.int/about-eac/eacnews/981-2nd-political-dialogue.html> (accessed 15 March 2011).

81 Uganda Police (Declaration of Gazetted Areas) Statutory Instrument No 53 of 2007, r 2, 3, 4 & 5.

Uganda Manufacturer's Association (UMA), where the meeting was to be held, on the pretext that UMA had sought police intervention fearing disruption of their businesses. Unfortunately, the police believe that the duty to 'prevent and detect crime'⁸³ entitles them to disperse gatherings suspected of disrupting law and order,⁸⁴ particularly those seen as antithetical to government irrespective of written notices.⁸⁵ Consequently, the Black Monday was interrupted without any indication of chaos, underlining government's resistance to any organised dissent. NGO activists continue to be apprehended by Police albeit without any charges preferred and their materials confiscated.⁸⁶ As part of his virgin acceptance speech on 24 July 2013, the Minister of Internal Affairs announced that amongst his priorities is restraining NGOs engaging in activities different from those they registered for and enforcing stricter media regulations.⁸⁷ It is noteworthy that it is only Uganda that has the docket of NGOs under a Ministry responsible for national security.⁸⁸ Worse still, since 2011, purported burglars have broken into the premises of several NGOs, targeting the offices of the Executive Directors, finance and Communications. However, while those who broke into the offices of Anti-Corruption Coalition in Uganda were caught on the CCTV camera, the police have not taken appropriate action.⁸⁹

Likewise, in South Africa, the government has used the law to harass activists through summons and arrests.⁹⁰ For example, between 2000 and 2004, 400 residents of Mandela Park had spent some time in jail.⁹¹ The Kensington 87 (K87) pensioners who attempted to disconnect electricity

82 This anti-corruption campaign was organised by major Coalitions and Networks: NGO Forum, DENIVA, HURINET and UWONET, to challenge government over its political impunity for corruption. In the wake of the Office of the Prime Minister (OPM) scandal where over USD 160 Million was stolen, 11 November 2011 was declared Black Monday with the closure of the NGO offices and wearing of black. The campaign was well planned and multifaceted including, a media campaign, closure of offices by NGOs for one day and the distribution of flyers at various strategic points. The flyers detailed the impact of corruption on the economy and included a pictorial account of the deplorable social service sector. It also made concrete demands, including the resignation and trial of the implicated officers, return of the stolen money and not to use tax payers' money to refund donors, but rather to confiscate the dubious properties of individuals involved in corruption.

83 Constitution of Uganda (n 8 above) art 212(c).

84 Presentation by Andrew Kaweesi, Assistant Inspector General of Police, Makerere University Public Dialogue on *The human rights situation in the country, in the context of the rule of law and keeping law and order by security agencies*, 16 November 2012.

85 Presentation by Prof Jean Barya at Makerere University Public Dialogue (n 84 above).

86 'Activists held over graft flyers' *Daily Monitor* 8 January 2013 7; *NTV Tonight News Bulletin* of 7 January 2013 aired the arrests of Arthur Larok, Country Director of Action Aid, Leonard Okello, Executive Chairman of Uhuru Institute and Rtd Bishop of Kampala, Zac Niringiye.

87 'Aronda vows to deal with activists, NGOs' *Daily Monitor* 25 July 2013 6. The major concern of the Minister was that NGOs were involving themselves in politics.

88 In South Africa, it is the Department of Social Development; in Kenya, the Ministry of planning and National Development; in Tanzania, the Ministry of Community Development, Gender and Children.

89 'Government stealing out documents-NGO' *Daily Monitor* 5 Nov 2013.

90 Oldfield & Stokke (n 21 above) 22.

91 Desai & Pithouse (n 24 above) 21.

from the Mayor's house were charged and the case dragged on for a year, only to be dismissed.⁹² The criminalisation of the Mandela Park Anti-Eviction Campaign (MPAEC) and the charging of its leadership exhausted activists in fundraising for bail and legal fees.⁹³ Unsurprisingly, in 2011, the Supreme Court interpreted the 1993 Regulations of Gatherings Act in a manner that imposes liability for the harm caused on the organisers or conveners of gatherings. Specifically the Court held:⁹⁴

Organisers are obliged at all times to take reasonable steps to prevent all reasonably foreseeable conduct that causes damage and the reasonable steps must be of the kind that render the conduct causing damage unforeseeable.

Generally, the relationship between local NGOs and the government is characterised by mutual suspicion.⁹⁵ Human rights and governance NGOs suffer state harassment and receive less domestic resources and recognition compared to their counterparts involved in service delivery.⁹⁶ Where the NGO's mission is to enhance rights and democracy, the law is at times used to frustrate that mission. For example, in 1990 the Tanzania Legal Education Trust (TANLET) received notice of deregistration for having sponsored a national seminar on multi-party democracy.⁹⁷ In 1997/98 the Minister of Home Affairs in Tanzania warned that NGOs engaged in 'hostile exchanges of words with government, proving stubborn or likely to create confusion and insecurity in the country would be struck off [the register]'.⁹⁸ Baraza la Wanawake wa Tanzania (BAWATA) which had been registered in 1995 was banned in 1997 for outlining each political party's position on women.⁹⁹

In Uganda, in the recent past, threats of deregistration have been targeted at NGOs that engage in issues considered political or unfavourable to the government's positions. In 2011, Uganda Land Alliance publication titled '*Impact of Land-Grabbing on Food Security and Wellbeing*' was perceived to be defamatory of the person of the President and an incitement to economic sabotage.¹⁰⁰ In 2012, the Ministry of Ethics threatened to deregister NGOs contesting the Anti-homosexuality Bill.¹⁰¹

92 A Egan & A Wafer 'The Soweto electricity crisis committee' (2004) 10-11 www.ukzn.ac.za/ccs (accessed 7 July 2006).

93 Oldfield & Stokke (n 21 above) 17 & 23.

94 *South African Transport and Allied Workers Union and Another v Garvas and Others* 2013 (1) SA 83 (CC) <http://www.saflii.org/za/cases/ZACC/2012/13.html> (accessed 13 November 2013).

95 NDP (n 63 above) 28.

96 Salamon et al (n 13 above); USAID et al (n 39 above) 3, 5 & 7.

97 H Kijo-Bisimba & SEA Mvungi *Through a crucible of human rights struggles in Tanzania: A decade of legal and human rights* (2006) 19-21.

98 Shivji & Kapinga (n 32 above) 50.

99 CM Peter 'The state and independent civil society organisations: The case of Tanzania Women Council BAWATA' in AS Kiondo & JE Nyang'oro (eds) *Civil society and democratic development in Tanzania* (2006) 110-111.

100 Interview with ObaiKol, Executive Director, Uganda Land Alliance, 10 November 2012.

101 Interview with Kangwagye (n 20 above).

Likewise, in 2012, Advocates Coalition for Development and Environment (ACODE) was summoned by the NGO Board to explain its funding status on suspicions of serving as a conduit of resources to the opposition and foreign interests.¹⁰²

Even under the National Alliance Rainbow Coalition (NARC) reform government, Christian Partners Development Agencies (CPDA), Centre for Law and Research (CLARION), Northern Aid, Womankind, and Corruption Watch International were threatened with deregistration for challenging government policy and actions.¹⁰³ In 2014, the Kenya NGO Coordinating Board deregistered 525 organisations, of which 15 were linked to terrorism and 510 had failed to submit their audited and annual reports.¹⁰⁴ Worse still an additional 10 000 were threatened with deregistration on failure to submit their reports in two weeks.¹⁰⁵

The sum effect of the above demonstrates that governments at times use the law to interfere with the freedom of association rather than promote the good governance of NGOs to pursue its mission. In Uganda, in 2009 the Human Rights Network (HURINET) and NGO Forum petitioned the Constitutional Court challenging the mandatory registration, annual permit and broad discretionary powers to deregister an organisation.¹⁰⁶ However, at the time of writing this book, the petition was still pending. On the positive side, in order to mitigate abuse of authority, NGO Forum and Development Network of Indigenous Voluntary Associations (DENIVA) have worked with the NGO Board to develop the NGO regulations and Policy as well as strengthening the capacity of the NGO Board and its field offices to understand their roles and responsibilities.¹⁰⁷

In view of the above NGOs flourish when demand for services is not met, irrespective of whether the government is democratic or not, particularly in light of government incapacity to enforce repressive registration.¹⁰⁸ Even in Kenya, the NGO regulatory agencies are so under-resourced that they are incapacitated to manage their basic functions effectively.¹⁰⁹ Cognisant of government's incapacity to strengthen NGO's internal governance, the following discussion makes a case for NGO's self-regulations.

102 Interview with Bainomugisha, then Director Research, ACODE, and currently the Executive Director, 12 November 2012.

103 'Groups protest at plan to deregister five NGOs' *Nation* 6 March 2006.

104 Kenya freezes shuttered NGOs' assets; <http://allafrica.com/stories/201412190027.html> (accessed 4 March 2015).

105 As above.

106 Uganda Constitutional Petition No 5 of 2009.

107 Richard Sewakiryanga *Statement by Civil Society Representative at the Launch of the National NGO Policy*, 27 July 2012 at the Golf Course Hotel, Kampala, Uganda.

108 J Fisher *Non governments and the political development of the Third world* (1998) 68.

109 NGO Monitor Kenya <http://www.icnl.org/research/monitor/kenya.html> (accessed 28 July 2015).

3 Accountability to sector wide mechanism for self-regulation

In authoritarian regimes, the government sees no need for autonomous NGOs.¹¹⁰ Consequently, the law is more concerned with controlling NGOs than promoting their governance. From the foregone discussion, it is evident that government regulatory boards have been more preoccupied with controlling NGOs than in strengthening their accountability. Consequently, the future of independent organisations does not only lie with government's respect of rights, but also civil society's coherence in defending its rights.¹¹¹ Importantly, in consolidation of NGOs' voice, it is imperative that they strengthen their internal governance through self-regulation. Similarly, the Commonwealth Secretariat advocates for NGO networking to develop common practices, standards, codes of conduct, monitoring and evaluation as well as information directories among others.¹¹²

The above notwithstanding, globally, there are no agreed standards or procedures for an NGO to criticise another NGO. Shortcomings of NGOs are merely 'gossiped about' within the sector but not comprehensively addressed.¹¹³ There are no tribunals because NGOs are quite diverse and at different stages of development.¹¹⁴ Of the countries under study, it is only Kenya and Tanzania that have legally constituted self-regulatory bodies. In Tanzania, the law provides for the NGO Council with the mandate to draft the Code of Conduct for NGOs.¹¹⁵ The Code of Ethics must be consistent with the National NGO Policy and be published in the gazette.¹¹⁶ The NGO Council was initially resisted as a duplication of the work of Tanzania Association of NGOs (TANGO) and the Tanzania Council for Social Development (TACOSODE).¹¹⁷ Furthermore, the process of initiating the NGO Council was considered illegitimate by the INGOs that it is poorly funded, rendering its operations ad-hoc,¹¹⁸ a situation that has persisted to date. As a result of insufficient resources, the NGO Council is housed under the Ministry of Community Development, Gender and Children, which compromises its autonomy.¹¹⁹

110 Shivji & Kapinga (n 32 above) 48.

111 Peter (n 99 above) 117.

112 Commonwealth Foundation (n 1 above) 71.

113 ICHRP (n 2 above) 54.

114 ICHRP (n 2 above) 55.

115 Tanzania NGO Act (n 19 above) sec 27.

116 Tanzania NGO Act (n 19 above) sec 28.

117 Interview with Sangusia, then Programme Officer, Legal and Human Rights Centre (LHRC), Tanzania, 25 July 2007, Dar-es-Salaam.

118 Interview with Tweve, then Programme Officer, PACT-Tanzania and INGO Representative to the Tanzania NGO Council, 10 August 2007, Dar-es-Salaam.

119 Interview with Mallya, then Executive Director, Tanzania Gender Networking Programme, Member Tanzania NGO Council, 15 October 2013.

In Kenya, the 1990 law established a National NGO Council as a self-regulatory body of NGOs.¹²⁰ The new law replaces the NGO Council with the National Federation of Public Benefits Organizations as a forum of self-regulatory bodies.¹²¹ Each self-regulatory body is held responsible for developing codes of conduct and standards for its membership.¹²² The case study of the defunct Kenya NGO Council highlights that if well governed, a self-regulatory body can effectively hold the NGO sector accountable. Up until the disputed election of the Orio Orogu of 2004, the NGO Council received an average of between twenty and thirty cases per month, demonstrating the ability of the NGO Council to hold the NGO sector somewhat accountable.¹²³ The majority of cases involved the non-payment of salaries or unlawful termination primarily due to a lack of written contracts.¹²⁴ There were incidents where the NGO Council recommended deregistration on account of poor governance. For example, the Public Law Institute had ceased to function and owed employees salary arrears for two years.¹²⁵ Faidi Kenya could no longer carry out its objectives as an NGO.¹²⁶ Empowering People's Perceptions Organisation (EPCO) was established for personal gain without any governance structures.¹²⁷

The disputed elections of Orio-Rogo severely undermined the utility of the self-regulatory body to provide alternative leadership. Not only did senior management and the Board resign, but also a section of the NGOs petitioned government to resolve the internal conflicts within the NGO Council: a self-regulatory body.¹²⁸ Since then the NGO Council became non-functional and splintered into three factions.¹²⁹ Entrenching the mechanism within the law cushions it from government's arbitrariness. The previous NGO Council could not be dissolved except by repealing the entire Act.¹³⁰ Consequently, attempts by the then Minister of State for National Heritage, Najib Balala in April 2005 to dissolve the NGO Council were stopped by the court petition of Orio Rogo. Unfortunately, the current Federation does not have the same legal safeguard.

120 The Kenya NGO Act (1990) sec 23.

121 Kenya PBO Act (n 18 above) sec 21.

122 Kenya PBO Act (n 18 above) sec 24 & 28.

123 Interview with Adhanja, Chief Executive Officer, Kenya NGO Council, 24 August 2007, Nairobi.

124 As above.

125 Interview with Angila, former CEO, Kenya NGO Council, currently programme officer PACT-Kenya, 6 September 2007.

126 *David Muganda et al v Faidi Kenya* Reg/03/04.

127 *Evans C Jumah, Adiedo Empowering Community Perceptions Orga v J Magut (Chairman) Empowering People's Perceptions Organisation (ECPO)* Complaint Reg/No 2 of 2003.

128 Report of the breakfast meeting hosted by the Coalition of Young Kenyan voters, Hilton, 11 October 2007 on Session paper on the role of NGOs (2006) 18 (on file with author).

129 CSO Reference Group (n 48 above) 6 & 9.

130 Kenya NGO Council Regulations (1993) sec 28.

In South Africa, in 2010, a Civil Society Working Group embarked on a two year extensive internal consultation process that culminated in an Independent Code of Governance for Non-Profit Organisation, which was adopted in July 2012.¹³¹ The Code lists the core policies necessary for good governance, such as Conflict of interest policies; induction programmes; formal succession plans; annual evaluations; remuneration policies; risk policies and plans; disaster recovery plans; information security management systems; and integrated reports.¹³² The above notwithstanding, there is no consensus on the proposal to establish a self-regulatory NPO Council.¹³³

In Uganda, efforts at self-regulation are nascent. The 2006, NGO Quality Assurance Mechanism (QUaM), popularly known as the Code of Honour developed by DENIVA and NGO Forum is voluntary.¹³⁴ There was initial resistance to the Code due to suspicion that the movers would dominate the sector.¹³⁵ In contrast, to become a member of the Nigerian Network, one must first subscribe to the Code of Conduct.¹³⁶

The lack of a single formidable network that could constitute the self-regulatory mechanism weakens the sector. Yet, the NGO Policy envisages a multiplicity of self-regulating mechanisms under the guise of fostering pluralism,¹³⁷ which inadvertently may undermine NGOs' collective voice thereby leaving the state as the neutral arbiter to interfere in NGOs' internal functioning. A debate of whether or not NGO Forum and DENIVA should merge to form the NGO Council has been initiated at the management leadership. It is desirable that the two could evolve into a unified and stronger mechanism, instead of the perceived competition over being the umbrella organisation. This conversation needs to be honestly interrogated otherwise the NGO sector is likely to be besieged by government on a legitimate excuse that it is filling an eminent void of the inability of the sector to self-regulate itself.

Indeed, in defending the Kenyan government's action to reform the PBO Act, before it is even operationalised, President Kenyatta alluded to the lack of an effective self-regulation mechanism. He contended that:¹³⁸

131 Wyngaard (n 43 above) 10-11;

132 Wyngaard (n 43 above) 10-11.

133 ICNL (n 42 above) 4.

134 DENIVA & NGO Forum *Uganda NGO Code of Honour: The quality assurance certification mechanism* (2006).

135 Interview with Kwesiga, then Executive Director, Development Network of Indigenous Voluntary Associations (DENIVA), Uganda, 6 December 2006, Kampala.

136 USAID et al (n 39 above) 23.

137 Uganda NGO Policy (n 60 above) 31.

138 The Presidency 'President Kenyatta's speech at the 25th Anniversary of the NGO Coordination Act' <http://www.president.go.ke/president-kenyattas-speech-at-the-25-anniversary-of-the-ngo-co-ordination-act/> (accessed 18 January 2015).

Self-regulation requires a high level of accountability. Everyone in Kenya has a stake in a credible NGO movement with integrity. Just as you demand integrity of Government and other public institutions, Kenyans have a right to demand the same of you. Transparency and accountability are, therefore, unavoidable going forward.

In conclusion, the effectiveness of a self-regulatory mechanism is highly reliant on the respect of its membership by exhibiting independence and impartiality in decision-making as the independent ombudsman and repository of NGO information.¹³⁹ Secondly, the ability of the self-regulatory body to police the sector is determined by its internal governance and resultant legitimacy. Functional self-regulatory bodies exist in the UK, New Zealand, the Philippines and Pakistan.¹⁴⁰ Moreover, the fact that in East Africa most complaints against NGOs to the Government NGO Board are submitted by NGOs themselves and are finance related, infers the willingness of the sector to police itself and hold itself accountable. Conversely, enforcing internal structures of NGOs by governments may degenerate into totalitarianism.¹⁴¹ In view of the weak self-regulatory bodies, the following debate interrogates the effectiveness of the governing Executive Boards of NGOs in ensuring the internal governance of NGOs.

4 Accountability to the NGO Board

4.1 The Board as a source of accountability

Within the non-profit literature, governance is primarily understood as the Board's compliance with their legal duties of care, obedience and loyalty.¹⁴² The Board of an NGO reassures the public that the NGO shall achieve its mission in an accountable manner.¹⁴³ According to ICHRP, the Board is the 'heart of the accountability and is absolutely vital where other forms of accountability are weak or absent'.¹⁴⁴ Being accountable for an NGO means demonstrating that the NGO uses its resources wisely, its

139 Y Morgan 'The potential for an independent regulatory authority in South Africa' (2006) 5-6 www.icnl.org/knowledge/ijnl/vol7iss3/art_1.htm (accessed 15 September 2007).

140 Morgan (n 139 above) 4.

141 Edwards (n 65 above) 84.

142 MM Stone & F Ostrower 'Acting in the public interest? Another look at research on non-profit governance' (2007) 36 *Nonprofit and Voluntary Sector Quarterly* 416-417 <http://nvs.sagepub.com/cgi/content/abstract/36/3/416> (accessed 11 May 2008); South African Department of Social Development *Codes of good practice for South African non-profit organisations* (2001) 10 http://www.dsd.gov.za/npo/index2.php?option=com_docman&task=doc_view&gid=46&Itemid=39 (accessed 1 August 2008).

143 R Lehr-Lehnardt (2005) 'NGO legitimacy: Reassessing democracy, accountability and transparency' (2005) 2, Paper presented at Cornell Law School Inter-University Graduate Student Conference <http://lsr.nellco.org/cornell/lps/clacp/6> (accessed 7 January 2008); BM Lakey *Non-profit governance: Steering your organisations with authority and accountability* (2000) 6.

144 ICHRP (n 2 above) 112.

activities are mission driven and its internal systems safeguard the public trust.¹⁴⁵ The duty of care which is also known as the 'business judgement rule', obliges the Board to exercise the 'care of an ordinary prudent person would exercise in a like position and under similar circumstances'.¹⁴⁶ Therefore, the Board must be creative and take risks so long as they are made in the best interest of the NGO and having exercised due diligence.¹⁴⁷ Consequently, each Board member is expected to be informed, ask questions and participate in the Board's deliberations.¹⁴⁸ The duty of obedience or respect obliges the Board to obey the law and be faithful to the NGO's mission. Therefore all actions undertaken by the NGO should be consistent with the mission, as the NGO's central purpose.¹⁴⁹ The duty of loyalty obliges the Board to be faithful to the NGO's mission and not have divided allegiance to the NGO or to compromise the NGO to individual interests.¹⁵⁰

Board Source in the USA has expounded on the three legal obligations of obedience, loyalty, and care into the following 'ten responsibilities' of the Board to include: The board should set a clear and common mission and strategies to achieve the mission; select the Executive Director; provide financial oversight; ensure sufficient resources in terms of personnel, finances, equipment, technology and information; ensure legal and ethical integrity and maintain accountability; ensure effective organisational planning; recruit and orient new Board members; undertake self assessment; enhance public standing and determine, monitor and strengthen programmes; and support the Executive Director.¹⁵¹

Globally, there are many scandals that point to the lack of Board oversight in executive compensation and fiscal management, with NGOs falling victim to fraud, embezzlement or breach of public trust.¹⁵² A study of NGO Boards in South Africa by CORE in 2002 found that NGOs are

145 M Wyatt *A handbook of NGO governance, the central and Eastern European Working Group on non-profit governance* (2004) 1.

146 Lakey (n 143 above) 25; DL Kurtz *Managing conflict of interest: Practical guidelines for the Non-profit boards* (2001) 13.

147 Kituo Cha Katiba (KCK) & Board Source *NGO Governance Workshop report* (2002) 17 unpublished (on file with the author).

148 Lakey (n 143 above) 25.

149 Lakey (n 143 above) 26; DL Kurtz, *Managing conflict of interest: Practical guidelines for the Non-profit boards*, Kurtz (2001) 7 & 15.

150 Lakey (n 143 above) 25.

151 Ingram *Ten basic responsibilities of Non Profit Boards* (2003) 8; KCK & Board Source (n 147 above) 22; Stone & Ostrower (n 142 above) 417.

152 Stone & Ostrower (n 142 above) 426; Ingram (n 151 above) 8.

poor at governance, accountability, participation, inclusiveness and representation.¹⁵³ The above state of affairs is attributed to the poor induction in governance. Less than 50 per cent provide induction for new Board members and there are hardly efforts to build Board capacity.¹⁵⁴ The CORE study showed that the level of Board renewal is also poor with only 58 per cent of NGOs having term limits for Board members.¹⁵⁵ In East Africa, the challenges of having effective Boards include poor executive transitions, multiple engagements in different and at times competing NGO boards, weak gender representation, weak volunteerism, insufficient information to make informed decisions, poor fundraising and unclear separation of the governance and management roles.¹⁵⁶

A common dilemma amongst Boards is the issue of representativeness. The right to freedom of association is a voluntary right, and each NGO has the discretion to decide whom to associate with. Therefore, in East Africa, there is a preference for small boards because there is better synergy amongst the Board members.¹⁵⁷ Moreover, the wider representation of all interest groups on the Board does not automatically translate into having a more effective or efficient Board.

Generally, Executive Directors identify managing the Board as their biggest challenge. Executive Directors expect Board members to be committed, have financial integrity and respond to issues in a timely manner and from an informed point of view. The Board/Executive Director relationship is aggravated when the Executive Director questions the basis upon which she or he is supervised by the Board which does not understand its roles.¹⁵⁸

Issues pertaining to the performance of a director are considered internal to an NGO, and yet rarely are there clear systems of redress.¹⁵⁹ Usually, cases of improper conduct are covered up for fear that it would dent the NGO's public image. In cases of illegal or inappropriate behaviour within organisations, many Board members try to absolve themselves of responsibility contending that they had no idea about what was happening.¹⁶⁰ Incidents of the leadership of an NGO reporting the NGO or beseeching the intervention of a donor to settle internal grievances are commonplace. Yet, a donor's nightmare is learning that the funding given to alleviate oppression and suffering has triggered avoidable

153 P Camay & AJ Gordon *CSOs practicing what they preach: A composite report on the civil society governing boards in South Africa* (2002) 49.66

154 Camay & Gordon (n 153 above) 39.

155 Camay & Gordon (n 153 above) 22.

156 KCK & Board Source (n 147 above) 14.

157 KCK & Board Source (n 147 above) 10.

158 Interview with Kisare, Executive Director, EASUN, Centre for Organisational Learning, 8 August 2007, Arusha.

159 Impact Assessment of the NPO Act (n 18 above) 88.

160 Camay & Gordon (n 153 above) 38.

conflicts.¹⁶¹ The management of serious cases of bad governance and fiduciary responsibility of NGOs has been abdicated to courts.¹⁶²

An outstanding global example of Board accountability happened in 1967, when Peter Benenson of Amnesty International (AI) and Sean MacBride, the chair of Amnesty International's International Executive Committee (IEC) and head of the International Commission of Justice were subjected to an inquiry on suspicion of having received British government funding, albeit the charges were subsequently found to be unsubstantiated.¹⁶³ The inquiry sent a strong message of the imperative for leaders to implement policies in a transparent manner.¹⁶⁴ However, such accountability of the Board and particularly founders is the exception rather than the norm.

Board Source recommends that each NGO establishes a Governance Committee or Board Development Committee to assess the skills gaps within the Board, undertake voters' education for the membership and generally provide rules and regulations for the electoral process of the NGO, address the membership needs, identify prospective nominees and oversee the Board orientation and self-assessment.¹⁶⁵

4.2 The mechanisms of accountability by the Board

There are numerous mechanisms of enabling the Board to guide an NGO's governance. These mechanisms include: First accountability to the mission requiring the Board to set a clear mission to guide all its work. Secondly the duty of loyalty and the conflict of interest policy requires the Board to put the mission of the organisation first in the event of competing interest between the mission of the organisation and other vested interest. Put differently the Board must be loyal to the mission and put in place a conflict of interest policy to manage the competing interest in a transparent and professional manner. Lastly the board is obliged to continuously monitor and periodically evaluate the progress made in achieving the mission. These mechanisms are discussed in detail to assess the extent to which they are effective.

161 Interview with Gitari, Programme Officer, Human Rights and Social Justice, Ford Foundation Lagos, 5 June 2006, Senegal.

162 Impact Assessment of the NPO Act (n 18 above) 88.

163 CE Welch 'Amnesty International and Human Rights Watch: A comparison' in CE Welch (ed) *NGOs and human rights: Promise and performance* (2001) 88; W Korey *NGOs and the universal declaration of human rights: A curious grapevine* (2001) 167.

164 Welch (n 163 above) 88.

165 KCK & Board Source (n 147 above) 43; Ingram (n 151 above) 13.

4.2.1 Accountability to the NGOs' mission

The Board has the primary responsibility to set a clear mission. The mission is the main reason for the existence of an NGO. The rationale for forming an NGO is to collectively address common problems. Therefore, having a clear and concise mission strengthens collective efforts and the effectiveness of an organisation. Conversely, having an expansive mission makes an NGO ineffective because it is difficult to be passionate about everything and to have expertise in everything. The success of an NGO is measured by the extent to which it achieves its self-identified mission or programme mandate.¹⁶⁶ Drucker rightly argues that:

[T]he role of the non-profit sector is not merely to deliver a service ... but to use its service to bring about change in a human being ... Until this has happens, the non-profit sector has had no results: it has only had good intentions.¹⁶⁷

However, the process of arriving at the mission is deficient in many NGOs. In most cases, both the Constitution in which the mission is enshrined and the strategic plan are written by external lawyers or consultants. Rather, a mission should be derived internally from an NGO's own reflection of what it wants to be and achieve. Morgan recalls a situation illuminating the practice of cutting and pasting from one document to another, where an NGO working on a bakery as its principle activity requested for sewing machines as its key equipment.¹⁶⁸ The example also illustrates the lack of appreciation of a mission as the core purpose, resulting in a disconnection between the NGO's mission and core activities.

Ironically, the more successful a NGO is the more demands are placed on it and there are greater expectations of it to act on every issue, which inadvertently may derail it from its mission. However, according to Welch, as a general rule the more successful an organisation is the more difficult it becomes to change its mission.¹⁶⁹ Consequently, activists who are frustrated by the limited mandate of the organisation in which they belong tend to form other NGOs.¹⁷⁰ For example, Amnesty International's rigid mission restricted opportunities for collaboration with other NGOs.¹⁷¹ Likewise, FIDA-Uganda's past rigid mission that solely focussed on legal aid accounts for the loss of skilled personnel and

166 D Thaw 'Stepping into the river of change' in M Edwards & A Fowler (eds) *The Earthscan reader on NGO Management* (2002) 158; ICHRP (n 2 above) 10; ST Orlin 'The local non-governmental organization: The human rights gatekeeper' in S Akemark et al (eds) *Human rights education: Achievements and challenges* (1998) 130.

167 PF Drucker, *Managing the non-profit organisation: Practices and principles* (1990) 39.

168 Interview with Morgan, Advisory Service Manager, Charity Aids Foundation, South Africa, 26 February 2008.

169 Welch (n 163 above) 267.

170 As above; ME Winston 'Assessing the effectiveness of international human rights NGOs: Amnesty International' in Welch (n 163 above) 35 & 5.

171 Korey (n 163 above) 303.

membership who desired a more transformational role of law by addressing the root causes of rights violation.¹⁷² In South Africa, the dramatic overthrow of apartheid compelled NGOs to redefine their missions to work as critical allies of the new government and champions of marginalised groups.¹⁷³ Following the post-apartheid era, some NGOs applied for deregistration because they had completed their missions.¹⁷⁴

In order for an NGO's mission to remain relevant to the changing world framework it is reviewed through the strategic planning process. Strategic planning is the projection of long-term choices outlining concrete goals and resource allocation.¹⁷⁵ A good strategic plan should be precise and short by outlining the organisation expected results, strategic actions and the necessary resources to achieve its mission. In reality, strategic planning may:¹⁷⁶

conjure up fear, ambivalence or resistance in the hearts and minds of [NGOs] because leaders assume that they know what they want to do and therefore resist scrutinising the mission.¹⁷⁷

Ideally, an organisational development consultant has to facilitate the NGO to manage change in a sustainable way. Participation in strategic planning encourages ownership of the strategic direction of the NGO. In practice, strategic planning is usually a technical exercise directed by consultants with a limited engagement of the NGOs in negotiating the contested and varied strategies of achieving the mission. The terms of reference to the consultants can be quite vague, depicting the lack of seriousness on the part of an NGO in directing its mission and growth. A hilarious example includes 'give it an oomph', as a term of reference for one such exercise.¹⁷⁸ The primary intention of the strategic plans often authored by consultants is to attract funding rather than to facilitate a serious process of reflection on governance, structures, systems or organisational culture. Consequently, the strategic plan is ignored and the NGO continues pursuing the resource-driven agenda, often oblivious of the strategic plan.

172 FIDA-Uganda Membership Survey (2008) unpublished (on file with the author).

173 V Saldanha 'NGOs and the promotion of human rights in South Africa' in Zeleza & McConaughay (n 77 above) 211-212.

174 Impact Assessment of the NPO Act (n 18 above) 90.

175 A Fowler 'Organising Non-profits for development' in Edwards & Fowler (n 166 above) 78.

176 JA Yankey & A McClellan *The non-profit board's role in planning and evaluation* (2003) vii & I.

177 As above.

178 Interview with Kiragu, Managing Director, Satima Consultant, and former Executive Director, FIDA-Kenya and Care taker members for the NGO Council Kenya, 7 September 2007.

4.2.2 *The duty of loyalty and the conflict of interest policy*

It is possible for individuals to have an interest in many different organisations. At times the personal interest of an individual may conflict with those of the organisation. Therefore the duty of loyalty ensures that personal interests do not override those of the NGO. Individuals are motivated to participate in NGOs in order to contribute to social change, be self-employed, secure a platform to own ideas and enhance advocacy to influence society.¹⁷⁹ At times members support an NGO because they expect a reciprocal relationship in which the NGO build their life skills and public standing. Complaints about individuals hijacking an NGO's agenda in order to promote their self-image also occur. In order to ensure that neither the Board nor staff put personal interests above that of an NGO, the Board is obliged to put in place a conflict of interest policy.

The conflict of interest policy assures the public that the NGO will operate with high standards of honesty and integrity.¹⁸⁰ However, not all Boards have written conflict of interest policies. For example, in South Africa in 2002, two-thirds of NGOs did not have a written conflict of interest policy.¹⁸¹

Conflict of interest is mainly understood to include benefiting from the NGOs such as paid consultancies, company business deals, benefiting from NGO programmes, doing consultancy work for an NGO and hiring relatives. In Uganda, 12 per cent of NGOs had the Executive Director's spouse as a staff member.¹⁸² Usually NGOs do not perceive serving on a similar Board as a conflict of interest but rather as a demonstration of the worthiness of an individual.¹⁸³ Yet, serving on a similar Board constitutes a conflict of interest because of divided loyalty. Worse still, often, Executive Directors serve on each others' Board, a situation Ssewakiryanga refers to as 'incestuous Boards'.¹⁸⁴ Evidently, such an incestuous Board is disempowered from exercising its oversight.

Another conflict of interest arises where a staff member is also a Board member of the same NGO because it confuses the management function with the governance oversight roles. Generally, the Board sets the policy and identifies the vision and mission of the NGO, while management implements the mission. The separation of the roles ensures adequate checks and balances necessary to safeguard the public interest.¹⁸⁵

179 Interview with Fall, then Founder and Executive Director, Institute for Human Rights and Development in Africa, 24 April 2006, Pretoria.

180 Commonwealth Foundation (n 1 above) 32; Kurtz (n 149 above) 7.

181 Camay & Gordon (n 153 above) 37.

182 Barr et al (n 47 above) 20.

183 KCK & Board Source (n 147 above) 49.

184 Interview with Ssewakiryanga, Executive Director NGO Forum, 31 October 2012.

185 Wyatt (n 145 above) 14.

Conversely, the executive oversight and management function are blurred.¹⁸⁶ In such situations the Board tends to concentrate on programmatic accountability and staff welfare at the expense of larger institutional issues such as the mission.¹⁸⁷ Put differently, the failure to separate the roles and responsibilities between the management and Executive board, compromises the necessary checks and balances. Although the Executive Director may serve as a member of the Board for the purposes of having a link between the governance and management structures, as a best practice the Executive Director should not have voting powers. In Kenya, the PBO explicitly provides that the day-to-day management and the governing body should be separate.¹⁸⁸

In East Africa, common abuses of the Board include interfering in the management function. Such bad practices include taking over a desk of a member of staff to read emails, giving the secretariat personal work to type or asking the staff to carry personal luggage for the Board member or to do personal shopping. A previous Director of NGO Forum in Uganda observed that some Board members do not mind being manipulated by the Secretariat, in that a 'Board member can jokingly ask: I am broke can you buy me a soda?'¹⁸⁹

Commonly the principle of conflict of interest assures the public that the Board has no vested personal financial interests in the NGO. Therefore, it is a good practice that the Board does not execute consultancies on behalf of an organisation. Nonetheless in exceptional situations particularly where the board has specialised skills that are not readily available on the market, it may be in the best interest of the organisation for a Board member to do so. Likewise, in nascent organisations it is common for the Board to be a working Board that fills the gap of a fully functioning management. Therefore what is required is to be transparent about the potential conflict of interest and discuss it with the donor as well as honestly address it under the Conflict of Interest Policy. Put differently, conflicts are part of life. Even within an individual there will be competing interests over time and resources. Therefore, an NGO has an obligation to resolve each situation of conflict of interest in a manner that places the organisation's interest first; hence, the imperative of a written conflict of interest.

In addressing the issue of conflict of interest, each Board member is obliged to disclose the potential conflict of interests; the interested party must be absent from the decision making process that discusses that conflict of interest; the reasons as well as decisions taken to address a

186 Wyatt (n 145 above) 4.

187 R Tandon 'Board games: Governance and accountability in NGOs' in Edwards & Fowler (n 166 above) 217.

188 Kenya PBO Act (n 18 above) sec 25(1).

189 Interview with Nyamugasira, then Executive Director, NGO Forum, Uganda, 3 August 2007, Kampala.

conflict of interest must be documented.¹⁹⁰ Kurtz suggests that in order to allow free discussion about a conflict of interest the affected Board member should not speak actively about the issue nor be present in the room but would be requested to offer factual information to reach an informed decision.¹⁹¹

4.2.3 *Monitoring and evaluations*

In order to remain accountable to its mission, an NGO has to undertake continuous monitoring and evaluation of its work. Whereas success simply means achieving the maximum results from the resources invested in an NGO, measuring the impact of human rights NGOs is problematic because of the difficulty in determining causation. In distinguishing between monitoring and evaluation, Smillie observes as follows:¹⁹²

Monitoring is a continuous process of collecting and processing data. It is essentially done by the partners involved in the action. ... Monitoring makes it possible to detect implementation anomalies, to correct management and effect technical reorientation. Whereas monitoring is designed to adjust the action to circumstances, evaluation is rather to appreciate the objectives set and the strategy chosen ... with others eyes.

Lahey distinguishes between monitoring and evaluation as follows:¹⁹³

[M]onitoring means checking to see whether plans are being implemented and goals achieved ... [E]valuation focuses on the quality of the programmes and services and whether the results are worth the expenditure of funds and efforts. Monitoring asks, Are we doing what we said we would do? Evaluation asks, Are we doing the right thing? Is this the best way to accomplish our mission? Monitoring involves the collection of data, while evaluation involves the analysis of data.

In precise terms, an evaluation assesses whether the NGO has accomplished its mission. Evaluation is also useful in order to enable an NGO track its achievements, protect its gains, as well as be energised by the differences it is making.¹⁹⁴ Measuring impact enables an NGO to correct mistakes, learn from failures, reward successes, demonstrate results and cultivate public support.¹⁹⁵ Self-evaluation is critical because each organisation has its unique experiences. However, monitoring and

190 Lahey (n 143) 25; Kurtz (n 149) 16-17.

191 Kurtz (n 149) 16-17.

192 I Smillie 'At sea in a sieve? Trends and issues in the relationship between Northern NGOs and Northern governments' in I Smillie & H Hendricks (eds) *Stakeholders government-NGO partnership for the international development* (1999) 23.

193 Lahey (n 143 above) 21.

194 Interview with Mutuma, then Acting Dean, Kenya Human Rights Institute, 24 August 2007, Nairobi.

195 Interview with Muraari-Mwololo, Lead Consultant, Koobi Consult, Kenya, 4 December 2007, Nairobi.

evaluation are mainly enforced by donors, and done by external evaluators but not by NGOs themselves.

Amongst the guidelines for good policy and practices of the Commonwealth Foundation is proper management entailing maximum utilisation and development of human resources, accountability and transparency and continuous monitoring and evaluation.¹⁹⁶ Given that the context in which NGOs operate is constantly changing, monitoring and evaluation is essential in order to guide growth. Monitoring and evaluation also enables an NGO to capitalise on its accumulated experiences and expertise rather than engage in 'serendipities or opportunistic' work.¹⁹⁷ Developing monitoring indicators enables an NGO to be accountable to the mission right from the planning processes through to the stage of implementation. An NGO cannot have significant impact unless it purposefully pays attention to its desired results consistently reviews its strategies. Having clear monitoring indicators improves data collection, knowledge building, facilitates the writing of comprehensive reports and ultimately energises the NGO as it celebrates the achievement of its mission.

Globally, NGOs usually ignore monitoring of performance on the pretext that they serve a good cause.¹⁹⁸ In Tanzania, less than 20 per cent of NGOs undertake formal monitoring to measure their effectiveness.¹⁹⁹ NGOs refrain from undertaking self-evaluations due to several reasons, including a lack of time, the complexity of measuring intangible impact and a fear of demoralising themselves.²⁰⁰ Assessing impact is further complicated by the lack of objective measure and data of what NGOs produce. For example, Barr, Fafchamps and Owen while acknowledging the role of advocacy in strengthening of communities as agents of social transformation, observed that 'talk and advocacy' are non-material services, which are difficult to compute in monetary terms.²⁰¹

While acknowledging that precise answers are not elusive in advocacy, it is useful for NGOs as human rights defenders to set targets, put in place systems and reflect on their impact.²⁰² Although mere numbers may be unsuited in all situations of monitoring and evaluations, it is important to clarify the shifts an NGO is making in the communities it is working with.²⁰³ Examples of successes could include, shifts in defining issues differently, shifts in engagement by promoting communities to identify

196 Commonwealth Foundation (n 1 above) guideline 9.

197 Commonwealth Foundation (n 1 above) 35.

198 Drucker (n 167 above) 107.

199 REPOA (n 47 above) xiii, 4 & 96.

200 TJ Scott 'Evaluating development-oriented NGOs' in Welch (n 163 above) 213.

201 Barr et al (n 47 above) 6 & 17.

202 ICHRP Deserving trust (2003) www.ichrp.org/credo.md/archiva/documente/HumanRightsNGOAccountability.doc (accessed 2 August 2006) 93 & 101.

203 See The Women's Funding Network *Smart Growth Module* (2004).

issues of concern to them and shifts in policies changed as a result of an NGO's advocacy work. It is also useful to have continuous reflections after major activities on key broad questions including: 'What went wrong? What did we learn? What could be done better and what should be consolidated as a practice?'²⁰⁴

Generally, the evaluations of the Executive Director are erroneously used as a basis of contract renewal or the determination of remuneration. However, the primary motivation of evaluations should be to help the Executive Director improve performance.²⁰⁵ The Executive Director's performance is virtually equated to overall organisational performance without taking into account the whole range of other internal and external factors which influence outcomes.²⁰⁶ A common observation by organisational development consultants interviewed is that Executive Directors often complain about insufficient recognition, a lack of space, micro-management and being mistrusted by the Board. A former CEO recollected an unfortunate incident of being found shopping at a luxurious supermarket and her Chairperson ordered a system's audit.

5 Accountability to members

Individuals come together to achieve a common mission. NGOs can either have broad membership or not. However, there is an assumption that membership organisations ensure accountability of the leadership to its social base through the general membership meeting (such as the General Assembly) as the highest decision-making organ.²⁰⁷ In reality, being a membership NGO does not necessarily result in being more accountable. This discussion examines whether or not NGOs are accountable to their members and the mechanisms of accountability.

It is doubtful that an organisation's membership has influence over the establishment of an NGO's agenda other than approving the proposals suggested by the Board and management. Mamdani observes as follows:²⁰⁸

The new NGO culture operates on an opposed principle: they operate on a principle of noblesse oblige, as charitable institutions and not democratic institutions ... In fact most NGOs do not have members; they have recipients. NGOs think of the population on the ground as welfare recipients with needs, not members with rights. They see themselves more as on-the scene 'reps' of

204 Interview with Peter, Chairperson, International Governance Alliance, 3 October 2013, Kampala.

205 Ingram (n 151 above) 19.

206 Camay & Gordon (n 153 above) 43.

207 Edwards (n 65 above) 79; JJ Barya *The state of civil society in Uganda: An analysis of the legal and politico-economic aspects* (2000) 33; Mamdani & Otim (n 13 above) 5.

208 Mamdani in Electronic Round Table: "Democracy and human rights" (February, 2000) 50 www.africaaction.org/rtable/rtb2.pdf (accessed 2 August 2006).

donors, less as expressions of local initiatives ... democracy has to be thought of as internal mobilisation and struggle.

Under ECOSOC, NGOs are required to have a membership which controls its actions and policies.²⁰⁹ Under the European Union, it is recognised that although NGOs usually have a membership, it is not mandatory.²¹⁰ Similarly, the UN Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Defenders' Declaration)²¹¹ recognises non-membership organisations such as foundations and companies limited by guarantee.²¹² Although NGOs do not have to be membership controlled in order to be legitimate, they do have to be accountable for what they do. A comparative study of Uganda, Ghana and South Africa conducted by the Institute of Development Studies, Sussex, found that a large membership on its own does not guarantee that the NGO is inherently more democratically governed.²¹³

Payment of membership fees or other financial contributions and elections of leaders are some of the mechanisms of accountability of an NGO's leadership to its membership. In reality, NGOs rarely canvass for membership fees, probably because they are so so minimal and the collection processes tedious resulting in high levels of default in payment. Moreover, in many instances, a membership organisation can function without the collection of membership dues. Even Treatment Action Campaign (TAC) which had between 8 000 and 9 500 members derived 98 per cent of its income from donors.²¹⁴

Kenya Human Rights Commission, Kituo Cha Katiba, International Governance Alliance (iGA), Urgent Action Fund-Africa do not have membership, but contend that their legitimacy lie in their missions. In the late 1990s, Lawyers for Human Rights in South Africa amended its constitution to remove the membership as a decision-making body, because managing people is expensive and requires specialised skills.²¹⁵ Although the Landless People's Movement in South Africa has national

209 ECOSOC Resolution 1996/31 of 25 July 1996 <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm> (accessed 17 August 2007) para 12.

210 European Fundamental principles on the Status of NGOs in Europe and Explanatory note, EU (2002) para 2.

211 General Assembly Resolution 53/144 of 9 December 1998 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx> (accessed 4 July 2013).

212 International Centre for Not-for-Profit-Law (ICNL) & World Movement for Democracy (WMD) *Defending civil society report* Second Edition, June (2012) 3 & 9.

213 B Nyangabyaki et al *Civil Society, democracy assistance and public policy in Africa* Sussex: Institute of Development Studies (2001) 10 (unpublished) (on file with the author).

214 S Friedman & S Mottair 'The rewarding engagement? The treatment action campaign and the politics of HIV/AIDS' (2004) 1 www.ukzn.ac.za/ccs (accessed 7 July 2006) 4-5.

215 Interview with Jansen, Executive Director, Lawyers for Human Rights, 19 November 2007, Pretoria; Interview with Morgan (n 483 above).

structures and elects its leaders every two years, not all branches are functional, making accountability a challenge.²¹⁶ Furthermore, most membership NGOs lack clearly demarcated lines between the Secretariat staff and membership, breeding avoidable conflict between the two organs.

There are two major processes of becoming a leader within NGOs. One is through direct elections and the other through recruitment or nomination. With a recruited/nominated Board, the selection of leaders is normally through a nomination process where the nominated individual provides specific and relevant expertise. In South Africa, Lawyers for Human Rights, Gender Links, HURISA and IDASA have nominated or recruited Board, while in East Africa KCK, UAF-A, KHRC, TGNP and iGA have nominated or recruited Boards. In Uganda, half the NGOs hold elections and a third nominate or recruit their Board.²¹⁷ In practice, while many membership NGOs elect their Board, they fall far short of being democratically governed and there are incidents of disputed elections. One view holds that the fact that very few NGOs vote for their leaders or on key decisions 'contradicts the basic rule of democracy which is mainly to govern with the consent of the governed'.²¹⁸ The initial impression is that NGO Boards which are not publicly elected are unlikely to attend to broader societal interests.

On the other hand I argue that democratic governance should not be reduced to elections and having a broad membership. Having elections does not automatically translate into democracy because at times elections are a mere endorsement of preconceived agreements. Within many African contexts, elections are 'dicey' because hardly is there voter's education or analysis of the competencies of the candidates.²¹⁹ In East Africa, it is common for leaders to be elected on a populist vote such as being most vocal at a meeting but without due regard to one's skills competencies of a given individual or availability to commit time to the Board. There are also incidents of 'trouble makers' who can abuse the Board to create a 'political platform or just to hear themselves talk'.²²⁰ Elections can easily be manipulated by members who register solely for the purpose of participating in the voting, particularly where the interested candidate pays the registration fees. In order to allow maximum participation in elections, some NGOs – particularly professional associations – allow voting by proxy.

The poorly organised electoral process of the Kenya NGO Council elections in 2004 illustrates the shortcomings of accountability through elections. A report of the Institute of Education in Democracy (IED)

216 Greenberg (n 21 above) 21.

217 Barr et al (n 47 above).

218 Lehr-Lehnardt (n 143 above) 16.

219 E Mbogori 'Electronic Round Table' (n 208 above).

220 Drucker (n 167 above) 124.

which served as the main observer of the elections, revealed a number of anomalies in the process.²²¹ Only 131 members out of the paid-up membership of 3500 turned up for the election of the Chairperson; the entrance to the American Medical and Research Foundation (AMREF) offices, which served as the polling station, was so heavily guarded that it could intimidate the membership; all election officials were either employees or officials of the NGO Council; candidates were allowed to campaign inside the polling station, a process that degenerated into a 'war of words' and almost a fist fight; no arrangements for secret ballot were made; the criteria for electing the returning officer, one Charles Githuri, was not transparent; the rules and regulations were not available at the polling station; members were disqualified from voting on account of having subscription arrears which many of them refuted and yet the accountant was not available to collect dues as had traditionally been the practice; and there was no proper scrutiny of voters and no accurate register of voters at the polling station.²²² Orie Rogo won the election with 34 out of 131 votes. The IED recommended amongst others that the NGO Council enlist the services of the Electoral Commission of Kenya in order to institutionalise democratic electoral processes.²²³ Expectedly the law provides that the Election of the National Federation which replaced the NGO Council shall be conducted by the Independent Electoral and Boundaries Commission.²²⁴

Cognisant of the challenges of holding elections, Mutua cautions that while HURINGOs must be transparent and accountable, they need not fully democratise themselves because it can result in gridlock situations and that participation and consensus building render democracy slow.²²⁵ Similarly, Lehr-Lehnardt argues that NGOs can derive their legitimacy from the theory of rights, without having complete democracy in their internal processes.²²⁶ In fact it is popularly contended that NGOs are accountable only to their moral conscience to fight injustices.²²⁷ Rightly, the reduction of democracy to the elective vote may compromise the protection of minority voices. Yet HURINGOs exist in part to amplify the voices of silenced minorities whose rights are prone to be trampled on, particularly where the majority rule frustrate the changing of popular but negative social practices.

The above challenges notwithstanding, applying democracy and human rights principles to NGO governance would strengthen NGO's

221 As above.

222 As above.

223 Institute of Education and Democracy (IED) *Observer Report* (2004).

224 Kenya PBO Act (n 18 above) sec 21(5).

225 M Mutua 'Human rights NGOs in East Africa: Defining the challenges' in Mutua (n 35 above) 34.

226 Lehr-Lehnardt (n 143 above) 47-48.

227 Interview with Ramgobin, Executive Director, Human Rights Development Institute (HRDI) 19 August 2008.

legitimacy in many respects. In fact ICHRP urges NGOs not to conduct their affairs in an undemocratic or unjust way.²²⁸ Therefore, where an organisation establishes itself as a membership organisation, it needs to be accountable to its membership or else be honest and not provide for a membership in its structure.

6 Accountability to the communities

A rights-based approach requires that those directly affected by social exclusion should be made the principal agents of action in the struggle for rights in order to ensure that they are the principal beneficiaries.²²⁹ A Keystone Survey of 404 respondents in 28 countries around the world revealed that practising accountability to the beneficiaries is complex, requiring both time and resources.²³⁰ The most common form of accountability to communities is through needs assessments (84 per cent), followed by the review of strategic plans (68 per cent), programme evaluation (65 per cent), defining and measuring impact (54 per cent), governance practices (34 per cent), and financial accountability (20 per cent).²³¹ Nonetheless, 71 per cent think more structured ways of accountability would enhance performance and planning.²³²

Many NGOs involve rural communities in identifying, planning and implementing their projects in order to enhance the levels of success. NGOs are equally keen to involve host communities in the actual delivery of services or in the execution of projects. In Uganda, 55 per cent of NGOs reportedly involve communities in decisions about their activities and elicit feedback.²³³ However, the NGO law in Uganda contributes to the rift between NGOs and communities by requiring NGOs to give seven days notice to the Resident District Commissioner before making contact with the local communities.²³⁴ In contrast in Tanzania, in interpreting a similar provision that required a permit by the District Commissioner (DC) before organising an assembly or procession in a public place, the High Court held that the provision hijacks the right to peaceful assembly guaranteed under the constitution, by placing it under the personal disposition of the DC.²³⁵

The quality of NGO accountability to communities varies. Prior to the advent of the rights-based approaches, communities were regarded as

228 ICHRP (n 202 above) 11.

229 J Gaventa 'Assessing the social justice outcome of participatory local governance concept note of a project of the Ford Foundation Local Governance Learning Group (LOGO)' (2005) 29.

230 Keystone Accountability Survey (n 4 above) 3.

231 Keystone Accountability Survey (n 4 above) 6.

232 As above.

233 Barr et al (n 47 above) 41.

234 Uganda NGO Registration Regulations (n 58 above) r 13.

235 *Christopher Mtikila v AG* (n 70 above) 674.

the objects of NGO work rather than autonomous individuals to hold NGOs accountable.²³⁶ There is a tendency to have haphazard and top-down methods of the solicitation of beneficiaries' views after major decisions are taken, that the people fail to realise that the organisation is actually representing its interest.²³⁷ A then similar strategy for most NGOs, reduced communities to mere providers of information sought by NGOs or to the servants of NGOs to facilitate the execution of their projects. Community volunteers or paralegals were recruited through a criteria essentially determined by NGOs. Likewise, generally participatory evaluations were wrongly equated to being accountable. Consequently, most NGO work was not sustainable beyond the departure of the NGO from a given community because such work competes with already existing community interests. Insensitivity to local knowledge, interest and priorities erodes the sustainability of a programme. It has become a best practice to undertake stakeholders' consultations to inform programme designs and to clarify the appropriate mechanism of accountability to each stakeholder.

Similarly, there is an increasing practice of NGOs undertaking joint programmes with different stakeholders, based on each other's comparative advantage. Often the publications of NGOs recognise the various partners and funders. Increasingly, NGOs are holding annual forums as an accountability mechanism in order to showcase the work carried out during the year and solicit feedback from the communities at large. When a given community feels that an organisation is accountable to it and it directly benefits from its services, it is most likely to defend the sector against the state's arbitrariness. In South Africa, the fact that government relies on NGOs to deliver social services, prompted public outrage to have the deregistered NGOs re-registered in February 2013 as well as offer a public explanation about the process.²³⁸ In contrast in Uganda, the 2006 reform of the NGO law to make it more stringent received public support. The NGOs were oblivious of the growing public cynicism over the NGO sector, particularly in the aftermath of the Global Alliance for Vaccine and Immunisation (GAVI) Fund Scandal, where Government NGOs (GONGOs) had squandered and misappropriated funds under the Ministry of Health, tainting the image of the sector. The public cynicism was illustrated by the fact that during the call-in radio programmes most callers attacked NGOs for being thieves and commended government for streamlining the sector.²³⁹ Likewise in Kenya the ongoing attempts to amend the PBO Act has not received ample grassroots or rural community response probably because either they are unaware of the situations or they do not appreciate it as directly relevant to

236 D Hulmes & M Edwards 'NGOs, state and donors: An overview' in D Hulmes & M Edwards (eds) *NGOs, state and donors: Too close for comfort* (1997) 280.

237 Dicklitch (n 77 above) 131 & 160, Kenya CSO Reference Group (n 48 above) 19.

238 Wyngaard (n 43 above) 5 & 8.

239 Interview with Kwesiga (n 135 above) Executive Director DENIVA, 6 Dec 2006.

their lived situations.²⁴⁰ In contrast the Parliamentarians have resisted the reforms because they see it as negatively impacting on the welfare of their constituencies and by implication reducing their votes.

7 Transparency and public accountability

The principle of transparency imposes an obligation on NGOs to respect the rights of others and to provide accurate and objective information.²⁴¹ Since the 1990s, the demand for 'voice accountability' obliges an NGO to clarify whether it 'speaks as the poor, with the poor, for the poor or about the poor'.²⁴²

The principle of transparency enables the public to hold NGOs accountable as well as to expose the fraudulent ones amongst them. Transparency enables the public to monitor an NGO's performance. NGOs are expected to publicise their mission, objectives, policies, methods, activities, achievements, evaluations, geographical scope, organisational structures, sources of funds, profiles of staff and governance leadership amongst others.²⁴³ In South Africa, Kenya and Tanzania, information with the registration offices such as contact details of their employees and Board members, annual narrative reports and audited accounts is public.²⁴⁴ In South Africa, an NGO's registration lapses after thirty days on a reminder to submit reports, although it may reapply for re-registration.²⁴⁵

In Uganda, although NGOs are obliged to provide annual narrative and financial reports to the NGO Board, in 2003 only 1/3 of the NGOs provided information on money and many who did so provided inaccurate figures.²⁴⁶ Globally, while 57 per cent of NGOs consider it essential to be transparent about financial and governance information, only 20 per cent do so for financial accountability.²⁴⁷ Most donors are attracted to transparency because detailed information facilitates the accurate assessment of how both the NGO and the donor can achieve their mutual objectives.²⁴⁸ Transparency requires that the NGO reveals its failures and challenges. However, the competitive nature of the NGO sector makes NGOs to only publicise the positive aspects of their work but conceal the

240 CSO Reference Group (n 48 above).

241 ICHRP (n 202 above) 41.

242 ICHRP (n 202 above) 5-6.

243 Commonwealth Foundation (n 1 above) Guideline 6; Orlin (n 166 above) 137.

244 South African Non-profit Act (n 31 above) sec 25; Kenya PBO Act (n 18 above) sec 15(2); Tanzania NGO Amendment Act (n 19 above) sec 34.

245 Impact Assessment of NPO Act (n 18 above) 99.

246 Barr et al (n 47 above) 21.

247 Keystone Accountability Survey (n 4 above) 6.

248 Interviews with Donor round table: Ayanda Mvimbi of OXFAM-UK, John Campbell of HIVOS, Barbra Phillips of AWDF-US, Alice Brown of Ford Foundation, 9 November, 2007, Johannesburg.

challenges and weaknesses which compromises transparency.²⁴⁹ When an NGO acknowledges its mistakes and learns from them it is seen as a demonstration of growth. FIDA-Uganda is outstanding for having widely shared its organisational development evaluation report of 2007 to enable sister organisations in the women's movement learn from its mistakes. Clearly, NGOs are more inclined to share programme reports than share the intimate details of evaluations or organisational development reports.

NGO transparency is often frustrated by the almost non-existent organisational documentation. Boards often complain of receiving insufficient information from the Secretariat to make informed decisions. In contrast as a good practice, most international organisations have institutional biographies as tools of self-learning on the direction of the organisations and the choices made to shape their direction.²⁵⁰ Likewise, websites are rarely updated and some require passwords to access. Some NGOs are accused of being 'academically dishonest or irresponsible in their position paper[s]' with a tendency to exaggerate claims.²⁵¹

NGOs should not be modest about their achievements but publicise their work. In reality, activists write so little about themselves because of the unease about self-marketing.²⁵² Globally, NGOs are often accused of being 'secretive'.²⁵³ In both East and South Africa, very few NGOs have institutional biographies. A few exceptions exist such as KHRC's Constitution making from the middle, which explains the organisation's efforts in the process of the struggle for a people's constitution in Kenya, and Eyes on the Prize which clarifies its rationale for political engagement. The bulk of information from NGOs is focused on programme reports or research undertaken by NGOs. Moreover, vital information is mainly left in spiral-bound copies, which creates the impression of unfinished work and often remains inaccessible. Activists partially attribute their lack of writing to the almost non-existent opportunities for sabbaticals to reflect and write.

Due to the poor record-keeping culture that afflicts most NGOs, important documents disappear on final accountability to donors and especially in situations of executive succession. Furthermore, because information is beholden to individuals, individuals in office get 'burnt-out' from giving interview after interview instead of disseminating already processed information. The persistent practice of 'oral history' makes individuals vital repositories of the NGO's history. The sum effect of poor

249 D Hulmes & M Edwards 'NGOs, state and donors: An overview' in Hulmes & Edwards (n 236 above) 190 & 197.

250 Welch (n 163 above) 6.

251 UN Press release NGO/296, PI/1029 (10 September 1997) PI 1272; Stanley Foundation, quoted in Lehr-Lehnardt (n 143 above) 28.

252 J Barry & J Dordevic *What is the point of revolution if we can't dance?* (2007) 22.

253 Commonwealth Foundation (n 1 above) 35.

documentation is NGOs' compromised transparency with the adverse effect of limiting the potential to learn from their experiences.

In order to strengthen transparency, there is a growing trend of working with academia to document NGOs' work. All INGOs have increased their research capacity and involve academia and think tanks to ensure high quality research.²⁵⁴ In South Africa, think tanks and academic based centres at universities have linked with NGOs to document the NGOs/social movement experiences. The Centre for Civil Society at the University of Natal documented the campaigns of the social movements in South Africa.²⁵⁵ Since 2007, the Centre for Human Rights (CHR) at the University of Pretoria re-established the activism component under the Advocacy and Rapid Response Programme to address gross violations and engage the African Commission by offering legal opinions.²⁵⁶ Community testimonies are increasingly used to enhance the authenticity of NGOs, validate their experiences and promote mutual learning between activists and communities to sharpen policy debates.

Timely and widely disseminated information is also vital to effective advocacy. Advocacy embraces a broad range of communication activities such as public education, consciousness-raising, enlisting stakeholders' support and constituency building, and media dissemination to mention but a few. Advocacy entails drawing public attention to a given issue in order to stimulate the desired corrective action. Accordingly, the narrow dissemination of information has constrained NGO advocacy work. Most NGOs interpret transparency by engaging the media and measure their success by the amount of media coverage secured. Ironically, NGOs have become media fanatics appearing casually on television and radio for the sake of it, but without making substantive contributions. However, not many CSOs have invested enough in creating professional communications desks or departments that can streamline their communication with other organisations, the media and the general public. Few NGOs have a media campaign or efficiently publicise their work, which detracts from taking credit for the excellent work they do.²⁵⁷

With the exception of NGOs with a media or academic background, very few have proper information and documentation strategies. Paradoxically, when information sharing is not structured, it can 'degenerate into information overload that is trashed like spam'.²⁵⁸ As a caution, rather than relying on the media to make the case for NGOs, if an

254 ICHRP (n 2 above) 6.

255 www.ukzn.ac.za/ccs/default.asp (accessed 7 July 2006).

256 Interview with Taku, Deputy Director, Centre for Human Rights, Pretoria, 13 May 2008, Pretoria.

257 TrustAfrica, Programme Review October (2005) 6; Phillips Donor round table, 9 November 2007 Johannesburg.

258 Interview with Aktasi-Bukachi, Executive Director, EASSI, Kampala, 13 August 2007; REPOA (n 29 above) ix.

NGO has money it is advisable to buy media space in order to mitigate the distortion of the message.²⁵⁹

8 Accountability to donors

Money is a source of power. Donors wield power in Africa and have influenced development and political policies, strategies and agendas.²⁶⁰ It is therefore expected that donors would influence the governance of NGOs in seeking accountability for their resources. The key question addressed in the following discussion is how NGOs have been held accountable by donors in promoting the application of human rights obligations.

Until the 1990s, donors mostly concerned themselves with financial accountability but not with the overall governance of NGOs. In South Africa, there is some limited application of good governance practices and proper financial reporting by NGOs.²⁶¹ Most NGOs consider writing quality reports and submitting unqualified audited accounts as more important obligation than the application of human rights principles and processes in the execution of their work. Rarely do donors prosecute NGOs that misappropriate funding. Instead, they withdraw funding as a punitive measure. Previously, donors have rarely verified whether NGOs are accountable to their target groups.²⁶² It is becoming best practice for donors to visit grantees in their offices as pre-qualification grant mechanism as well as the communities that they work with to ascertain the impact of their work and the sustainability of the interventions beyond the project investment.

In South Africa, the law does not provide for instances of misappropriation or mismanagement of funds.²⁶³ The case of Rev Allan Boesak, who was a prominent former Minister of Economic Affairs in the Western Cape Government, is therefore significant.²⁶⁴ In *S v Boesak*,²⁶⁵ Rev Boesak, a former minister of the Dutch Reformed Mission Church and prominent anti-apartheid activist, was convicted for fraud relating to his position as President of the World Alliance of Reformed Churches

259 W Mutunga 'The human rights movement and the struggle for human rights states in East Africa' The Ford Foundation (2004) 21-22, unpublished (on file with the author).

260 REPOA (n 47 above) xii & 12; De Coninck 'The state, civil society and development policy in Uganda: Where are we coming from?' in Brook et al (eds) *Unpacking policy: Knowledge, actors and spaces in poverty reduction in Uganda and Nigeria* (2004) 64; R McGee 'Unpacking policy: Actors, knowledge and spaces' in Brook et al (eds) (as above) 5; R Ssewakiryanga 'The corporalist state, the parallel state and prospects for representative and accountable policy in Uganda' in Brock et al (as above) 80-83.

261 Impact assessment of the NPO Act (n 18 above) 73, 93 & 101.

262 Keystone accountability survey (n 4 above) 4.

263 Impact Assessment of the NPO Act (n 18 above) 73.

264 *S v Boesak* 2000 (3) SA 381 (SCA).

265 As above.

(WARC).²⁶⁶ In 1984, the Council established a Trust, the Foundation for Peace and Justice (FPJ), with the appellant (Rev Boesak) serving as trustee and a director. In 1988, FPJ established the Children's Trust with funding from an American musician, Mr Paul Simon, who donated US \$350 000 (equivalent to R682 161). However, only R423 000 was transferred to the Children's Trust, while Boesak claimed R259 000 as his incidental expenses. The failure to inform the donor of his reimbursement was confirmed by the appeal court to constitute fraud.²⁶⁷ The trial court found that the accused used money donated by SIDA for a purpose for which it was not intended. The court held that this was a breach of a trust relationship and amounted to theft. In respect of SIDA's money, the appeal court overturned the conviction of theft, but found that

where purpose A and purpose B were related, the matter became one of degree. If the relationship was sufficiently close that it might reasonably be concluded that the donor would have had no objection to the money being used,

then fraud was not established. The Supreme Court of Appeal relied on the fact that Boesak had acted openly and kept SIDA aware of the developments, although he had not done so at the time FPJ had extended the project. Therefore, although the appellant acted erroneously he acted *bona fide*. The appeal succeeded and the sentence was reduced from three to one year. It is instructive that the trial court observed that although the financial accounts were annually audited, annual audits are 'hopelessly ineffective' because auditors often overlook ordinary checks and balances resulting in large amounts of funds being siphoned off by corrupt NGO employees.

Globally, NGOs' financial reporting is confusing because of misrepresenting the overhead costs.²⁶⁸ Likewise, in Uganda, the government-commissioned study in 2003 found that only two-thirds of surveyed NGOs could provide figures on revenues and expenditure and that most figures did not add up.²⁶⁹

The relationship between NGOs and donors is quite unstructured, confined to visits, ad-hoc discussions and the launch of strategic plans. By 2003, 80 per cent of NGOs in Uganda had been visited by a donor agency.²⁷⁰ In Tanzania, 65 per cent of NGOs communicate with donors and an additional 15 per cent regularly meet with them.²⁷¹

266 As above.

267 As above.

268 Smillie (n 192 above) 11; D Shulman 'More lies than meet the eyes: Organizational realities and deceptions in nonprofit organizations' (2008) 10 *International Journal on Not-for-Profit Law* 5

269 Barr et al (n 47 above) 21.

270 Barr et al (n 47 above) 26.

271 REPOA (n 47 above) 10.

In many instances, donors undertake evaluations and monitoring as a form of accountability for monies given. However, most evaluations by donors primarily highlight inconsistencies and bad practices, as a basis of discontinuing support rather than as a mechanism to help organisational learning. As a good practice, the Ford Foundation utilised the 360-degree evaluation covering all key aspects of an organisation such as governance, policies, systems, programmes, funding and relationship with the aim of strengthening the organisation's weakest links. It has also provided training on sustainability of organisations and the monitoring and evaluation which it attends together with its grantees.

Since the 1990s, 'log-frames' were introduced as results oriented management (ROM) tools to help development work identify indicators of success and measurable outputs of their funding. However, with the traditional narrow focus on finance accountability, most NGOs tend to prioritise cost effectiveness and numbers rather than participatory processes. In addition, many NGOs promise impossible outputs, exaggerate successes and conceal problems, which curtail learning from failure. Collecting information on the number of people reached is imperfect because it does not evaluate the quality of information conveyed in terms of relevance and clarity.²⁷² Moreover, organisations that invest in participatory processes and consensus building might be misconceived as time wasting and indecisiveness.²⁷³ In addition, the demand for results compels NGOs to focus on numbers, which are easier to count, such as the number of people reached than change in behaviour. Inadvertently, innovativeness is stifled due to log-frames 'tendency to accountability rather than accountability; audit rather than learning and sharing'.²⁷⁴ Ostensibly, log-frames are ill suited for long-term intangible pursuits such as human rights or social justice.²⁷⁵ Promoting social justice requires a degree of flexibility to timely address unanticipated challenges and learn from errors.

9 Conclusion

The chapter has reviewed the multiple accountability obligations that NGOs have to various stakeholders including state laws, governmental regulatory Boards, NGO sector-wide self-regulatory Councils, NGO governing Boards, NGO membership, communities, and donors. It is noted that NGOs' accountability to state laws is constrained by the legal framework that are often invoked to clamp down on NGO activism, especially where the NGO activities challenge governments' excesses. In

272 Barr et al (n 47 above).

273 D Hulmes & M Edwards 'NGOs, state and donors: An overview' in Hulmes & Edwards (n 236) 197.

274 As above.

275 ICHRP (n 202 above) 98; R David & A Machini *Going against the flow: The struggle to make organisational systems part of the solution rather than part of the problem, lessons for change in policy and organisations* (2004) 17.

other words, the law has not strengthened the governance of NGOs but rather frustrates the accountability of NGOs to their missions. Similarly, government-established NGO Boards are largely preoccupied with NGOs' registration and control of the operations as opposed to strengthening the NGOs' internal governance capacity to enhance accountability to the beneficiaries. Likewise, NGO accountability through the sector-wide self-regulatory mechanisms is largely inadequate, owing to mistrust, voluntarism in participation, inconsistencies in treatment and lack of resources. NGOs' internal governing Boards equally suffer from challenges emanating from poor induction and conflict of interest exacerbated by multiple engagements. Accountability to membership is almost non-existent given that members rarely influence strategic decisions.

The chapter has examined the quality of NGOs' accountability to the communities, which is often derailed by the top-down methods where the views of NGO beneficiaries are merely solicited after major decisions have been taken. Although accountability to the donors is largely respected by NGOs, the former rarely verify whether the latter are accountable to their target groups or missions, as their concern is often the latter's compliance to specific funding conditions.

These challenges notwithstanding, applying democratic and human rights principles to the NGO governance can strengthen NGOs' legitimacy in the eyes of the public that the NGOs do exist for the public good. To ensure that neither the Board nor staff put personal interests above those of an NGO there is need to put in place a conflict of interest policy and respect it. Further, in order to remain accountable to the NGOs' missions, NGOs must undertake continuous monitoring and evaluation of their work to enable them to capitalise on their strengths and expertise, rather than shielding their internal weaknesses to win donor favours. Working with the communities on human rights issues of interest to them, affirming and validating their experiences and promoting mutual learning between NGOs and communities, are positive steps of strengthening accountability to them.

1 Introduction

It is widely believed that NGOs directly and indirectly promote broader participation, strengthen pluralism and enhance democratic values and improve political participation. This chapter examines the following key questions: How have NGOs applied the principles of participation and inclusion in their internal governance? How have NGOs broadened participation amongst the different stakeholders that they work with?

I begin with an analysis of the ‘founder syndrome’, highlighting the contradictions and tensions of the extraordinary courage, and innovativeness of founders (especially Executive Directors) juxtaposed to their potential to undermine participation and dominate decision-making, in part two. The discussion is followed by an analysis of how change and succession processes are managed in a bid to expand participation within an NGO in part three. In part four, I interrogate how NGOs address conflicts as an integral part of pluralism accruing from participation. Given that participation is not an end in and of itself but rather a means of ensuring that the interests and voice of the participants are taken into account in taking decisions, the chapter also addresses the nature of participation with communities focussing on the tensions between ‘NGOisation’,¹ professionalism and volunteerism in part five. Part six examines the utility of networks in fostering collective participation and action, which is followed by an interrogation of the question of the apolitical role of NGOs *vis-à-vis* NGOs’ participation in political society. The final part of the chapter addresses NGOs participation at the Africa Commission on Human and Peoples’ Rights, focussing on NGOs’ adherence to the rules of observer status, and also looks at the case of the national Human Rights Commissions in relation to the effectiveness of NGO participation in their work.

1 NGOisation refers to the organising of activism into formal organisations.

2 Founders and inclusive and participatory management

Globally, it is conceded that the Executive Director is the most influential person for setting and implementing the NGO agenda.² Most established NGOs are run by the core management team which is initially led by the founder/Executive Director who is widely regarded as the 'owner' of the NGO.³ The term 'founder syndrome' is primarily used in reference to its negative connotation, with limited focus on their positive contributions by suggesting an overbearing personality and private proprietary ownership of the NGO. It is necessary to explore the challenges NGOs face in promoting participatory and inclusive management, particularly where the founder is also the Executive Director.

Generally founders have unusual dedication to the task at hand, and are risk takers, versatile, courageous, centres of acknowledged power, dedicated, competent and proficient. Building an NGO is a very intimate process driven by total commitment and sacrifice. The seed funding is the most difficult to raise because the NGO has no track record and is merely promising a dream of a better world. Many times, NGOs are founded in the sitting rooms of a core group of individuals, hence perpetuating the illusion that NGOs' work can be cheaply accomplished.⁴ Although Asha Ramgobin founded the Human Rights Development Initiative (HRDI) in 2004, it only received the seed grant in 2006.⁵ FIDA-Uganda's first office was a one-room affair with one chair.⁶ Kaari-Murungi ran Urgent Action Fund (UAF-A) for six months from her private chambers until she found a sponsor.⁷ Hope Chigudu remembers literally carrying bricks to build the Zimbabwe Women's Resource Centre.⁸ Maurice Makoloo's first office for Institute for Law and Environmental Governance (ILEG) was so small that at their first donor meeting, some of the members had to remain standing.⁹ In extremely rare cases an organisation will receive seed funding based on the founder's stellar track record buttressed with an innovative idea of how to contribute to the bigger goal of human dignity and welfare.

2 MM Stone & F Ostrower 'Acting in the public interest? Another look at research on non-profit governance' (2007) 36 *Nonprofit and Voluntary Sector Quarterly* 416-417 <http://nvs.sagepub.com/cgi/content/abstract/36/3/416> (accessed 11 May 2008) 420.

3 CO Okafor *Legitimising human rights NGOs: Lessons from Nigeria* (2006) 220-221.

4 J Barry & J Dordevic *What is the point of revolution if we can't dance?* (2007) 11-12.

5 Interview with Ramgobin, Executive Director, Human Rights Development Institute (HRDI) 19 August 2008.

6 Interview with Bagalaaliwo, former Chairperson of FIDA-Uganda, 18 June 2007, Kampala.

7 Interview with Murungi, founder UAF-Africa, 14 April 2007, Nairobi.

8 Interview with Chigudu, Organisational Consultant, co-founder Zimbabwe Women Resource Centre, currently Director, Hope Africa, 16 March 2007, Kampala.

9 Interview with Makoloo, Ford Foundation Resident Representative in Kenya, 20 August 2013.

Almost all founders interviewed referred to the experience of founding an NGO as the same as 'raising a child'.¹⁰ Many founders take the organisation as a matter of life and death. One time, during a trip she was taking and air turbulence affected the journey, Jamina Toko cried: 'What about the Womens' Resource Centre?'¹¹ On her death bed, Grace Githu was talking about the Institute for Education and Democracy (IED).¹² Welch observes that Peter Benenson and Sean MacBride of Amnesty International and Aryeh Neier and Robert Bernestein of Human Rights Watch left indelible marks on the organisations they founded.¹³ Zackie Achmat is treated with reverence by the communities in which he operates.¹⁴ The same is true for Trevor Ngwane of the Soweto Electricity Crisis Committee (SECC).¹⁵

Founders invest their body, heart and soul in an organisation. In the initial years the founder is the sole employee of the NGO who envisions the roadmap, and sets the agenda, systems and organisational culture without any set standards.¹⁶ Even amongst INGOs, personalities have the power to set mandates. For example, Aryeh Neier was able to oppose Human Rights Watch's focus on economic, social and cultural rights (ESCR), but on succession by Ken Roth, HRW's mandate was expanded to include ESCRs.¹⁷

The above positive attributes of founders notwithstanding, most organisations are vulnerable because the founder Executive Director is more informed about the NGO than the others who interact with it. Rarely is the Executive Director's communication interrogated. Such uninhibited power makes it akin to personal rule, a situation Ndegwa defines as:

[A] system of governance under which the ruler determines the issues, the rules, and often the outcomes of political relation; this role is neither institutionalised nor purposively constrained by impersonal institutions.¹⁸

10 Interpretation by the author in understanding the passion and care dedicated to founding the NGOs. Expression ranged from being equated to a teenager: troublesome and unpredictable; a baby, requiring undivided attention, a child: conceived and owned, intricate and time consuming. At the same time, many look back with delight on having outlived the organisation. 'It feels real good', was one such response about looking back on an organisation founded.

11 Interview with Chigudu (n 8 above).

12 Interview with Koki-Muli, then Executive Director, Institute for Education and Democracy (IED), Kenya, 7 September 2007, Nairobi.

13 CE Welch 'Amnesty International and Human Rights Watch: A comparison' in CE Welch (ed) *NGOs and human rights: Promise and performance* (2001) 262.

14 S Friedman & S Mottair 'The rewarding engagement? The treatment action campaign and the politics of HIV/AIDS' (2004) 1 www.ukzn.ac.za/ccs (accessed 7 July 2006).

15 A Egan & A Wafer 'The Soweto electricity crisis committee' (2004) 12 www.ukzn.ac.za/ccs (accessed 7 July 2006).

16 Interview with Nowrejee, then Resident Representative of OSEIA, 2 July 2013.

17 DA Bell & JH Carens 'Ethical dilemmas of international human rights and humanitarian NGOs: Reflection on a dialogue between practitioners and theorists' (2004) 26 *Human Rights Quarterly* 312.

18 SN Ndegwa *The two faces of the civil society: NGOs and politics in Africa* (1996) 12.

Related to the founder syndrome, NGOs also suffer from the 'star syndrome' of a human rights hero, making the NGO's institutional profile closely associated with a particular person.¹⁹ Rarely do personnel in second level management get invited to conferences and workshops as ideal places for networking and learning new ideas.²⁰ Donors have also contributed to the narrowing of accountability and participation by working with only one individual who is often the Executive Director, further accentuating the power imbalances within NGOs. As a good practice, the Ford Foundation requires that at least two other persons in leadership positions write an endorsement letter confirming that they are aware of the project activities and the funding requested for.²¹

In East Africa, the vast majority of NGOs are 'badly managed, poorly resourced, ill-staffed, subjected to a powerful CEO and dysfunctional Board of directors'.²² In South Africa, NGOs are plagued with the same governance problems that affect the state, in that they tend to be dominated by a single leader who is rarely accountable to a professional Board, and manages the organisation with limited participation of other stakeholders.²³

In some cases, the founder ridiculously assumes private ownership of the NGO. For example, in one case a founder locked the NGO's registration certificate in his bedroom and claimed that he could not have access to it, because the wife had gone to the market.²⁴ In another case, the founder locked up all the NGO's equipment in her office and went away on vacation. The saga of the Education Centre for Women in Democracies (ECWD) in Kenya demonstrates the ultimate abuse of founder power.²⁵ ECWD rented the premises of the founder CEO Tabitha Seii. When a disagreement ensued between her and the successor, Margaret Hutchinson, in October 2006, the founder locked up the office premises, installed new watchmen and used the police to disperse the employees. The founder alleged that she was 'rescuing her organisation' from mismanagement.²⁶ Subsequently Seii was reinstated as CEO.

19 G Hamilton *Philanthropy in Africa in the 21st century: Challenges and opportunities* (2005) 16.

20 Hamilton (n 19 above) 17.

21 Ford Foundation grant application proposal requirement outline (2008) 1.

22 M Mutua 'Human rights NGOs in East Africa: Defining the challenges' in M Mutua (ed) *Human rights NGOs in East Africa: Political and normative tensions* (2009) 13 & 17.

23 N Van de Walle 'Introduction, the state and African development' in *Beyond structural adjustment: The institutional context of African development* (2003) 25.

24 Interview with Jairo, Commissioner, Tanzania Human Rights and Good Governance Commission, 25 July 2007, Dar-es-Salaam.

25 The case was covered by the media and discussed by all respondents in Kenya due the political prominence of Seii, who at the time was serving as an Ambassador of Kenya to South Africa.

26 Interview with Wangari, then Coordinator, Women Direct, 6 September 2007, Nairobi.

Although Welch observes that in the South of the Sahara it is individuals who make human rights a reality, he concedes that the long term success depends on the institutionalisation of NGOs.²⁷ The founder's power is checked as the organisation institutionalises itself. It is in the founder's interest to build participatory and inclusive management in order to sustain the mission of the NGO. Conversely, the organisation's sustainability is compromised. Put differently, NGOs are formed to serve a social interest or cause. Unless the NGO becomes institutionalised, it is difficult to separate the identity of the person within an NGO from that of the NGO at large. While the originality and personal commitment of individual leaders nurtures innovations, truly significant change is achieved when like-minded people are mobilised to contribute to a common agenda.²⁸

3 Broadening participation through transitions and succession

Sustainability goes beyond the question of having the money to carry out the activities of the organisation and includes organisational regeneration.²⁹ Change is inevitable because like all living things, NGO missions become irrelevant, activists suffer burn-out and strategies become ineffective. Transitions and succession are positive strategies that enable an NGO to renew itself to harness new opportunities and set new goals, priorities, and strategies. Therefore it is imperative for any NGO to renew its human resources and properly manage its transitions and change processes.

Although change is natural, it is equally painful to let go of the comfort zones and established routines. A respondent who had been away from Uganda for five years found all NGOs in a 'state of stagnation, no growth, same table, same library, same paint and doing same old things: nothing much has changed'.³⁰ Globally, many NGOs fail to have a smooth handover of authority.³¹ Usually change in the leadership is due to an end of contract or in response to a crisis.

Seniority within NGOs impacts on individuals' power over it, making succession issues very relevant.³² In many cases of a founder Executive Director, the Board hardly plays an oversight role. In Human Rights

27 CE Welch *Protecting human rights in Africa: Roles and strategies of non-governmental organizations* (1995) 295 & 314.

28 S Berresford *Ford Foundation Annual Report* (2006) 5.

29 A Fowler 'Organising Non-profits for development' in M Edwards & A Fowler (eds) *The Earthscan reader on NGO Management* (2002) 367.

30 Interview with Kaduru, then CEO, Club.de.Madrid, 30 August 2007, Kampala.

31 ICHRP *Deserving trust* (2003) www.ichrp.org/credo.md/archiva/documente/HumanRightsNGOAccountability.doc (accessed 2 August 2006).

32 Stone & Ostrower (n 2 above) 420.

Watch (HRW), the succession of its founder Executive Director, Aryer Neier by Ken Roth, allowed for operational procedure and structures to be streamlined and decentralised power from the office of the Executive Director as the main fundraiser and spokesperson of the organisation.³³ Executive Directors need to have term limits otherwise it becomes difficult to challenge their decisions, resulting in organisational inertia, because after ten years of leadership most options are exhausted. Having term limits harnesses new energy and is indicative of the institutionalisation of an NGO whose survival becomes less contingent on an individual.³⁴

Many NGOs often fail to sustain themselves after the transition from powerful leadership of either chairpersons or directors.³⁵ In East Africa, some of the most successful NGOs have an Executive transition after fifteen years of existence or when it becomes apparent that the Executive Director is not in position to sustain the growth of an organisation. Even when the transition happens at the most successful time of the NGO, the assumption is that the NGO has problems. The uncertainty makes transitions conflict-prone. The reluctance of donors to fund NGOs in transition further aggravates the turbulence of change. Therefore, succession requires strong leadership to mitigate anxieties and mobilise support in order to build on past successes.

The most complex transition is one from the founder Executive Director. According to Kisare, the founder's succession is often characterised by turmoil.³⁶

As the founder envisions his or her departure, he or she starts to strengthen the organisational system and delegates authority by creating mid-level management positions with administrative and decision-making powers. Contradictorily, the anointed successor often emulates the founder's authoritarian style but not necessarily with the same unquestioned leadership and charisma. Ultimately, this leads to turmoil. As a result, the NGO's system is clogged as the prospective successor sub-consciously re-establishes what the founder seeks to change, breeding conflict between the founder, the successor and the NGO in general.

In order to retain competencies, skills and experience, there is a growing consensus that retaining founders as trustees or ambassadors helps to safeguard the vision and passion of the NGO. But this does not always work out. In Central and Eastern Europe, many new Executive Directors found the transition of the former Executive director to the Board

33 W Korey *NGOs and the universal declaration of human rights: A curious grapevine* (2001) 349.

34 Interview with Kiai, then Chairperson, Kenya National Human Rights Commission, Kenya 23 August 2007, Nairobi.

35 Welch (n 27 above) 293; Welch (n 13 above) 272, RN Axelrod *Chief executive succession planning: The Board's role in securing your organisation's future* (2002) 7.

36 Interview with Kisare, Executive Director, EASUN, Centre for Organisational Learning, 8 August 2007, Arusha.

'inhibiting or frustrating'.³⁷ It is also not prudent to immediately make the immediate previous Executive Director the Chair of the Board because it compromises the renewal of an NGO, as the key reason for the succession. Rarely within East and South Africa is a former Executive Director recruited to the Board.³⁸

While undertaking successions, NGOs need to create sufficient space for founders or predecessors to continue to contribute to the NGO and use the benefit of hindsight to guide the organisation. However, it is better that founders interact with the Board and not with the Executive Director.³⁹ In reality, founders feel discarded by the NGOs they started. Barry and Dordevic document a founder's frustration.⁴⁰

The organisations we started are spaces we also build for ourselves ... where we feel good, where we ARE. Where we are accepted when the rest of society rejects us ... and after so many years of giving everything to women's rights ... we are asked to leave ... where do we expect a leader to go when she hands over the leadership of her organisation?

Nkutu compares succession in an NGO to a divorce:⁴¹

Succession is like a divorce. One invests all her being, passion and commitment into an NGO so that it becomes a part of her and a way of life. Therefore, succession constitutes a loss of identity, power and even a contact address. At times one clings on, not necessarily for power but it is the only life one knows ... It requires time and a deliberate effort to lose that part of you.

In one NGO, the outgoing Executive Director was visibly angry highlighting the messy manner in which succession is handled:

I am on my way out. I will not be useful in this discussion ... I am leaving in a few days, so I will introduce you to my colleague who is here then I will leave you to continue the discussion ... Maybe she can brief the new incoming person.⁴²

Hence the imperative for sensitivity to ensure smooth succession that retains the investment of passion, social networks and psychological attachment of individuals to mitigate the feeling of loss. To institutionalise ownership, African Women Development Fund (AWDF) retained the founders on the Board. Founders guarantee ownership and have

37 M Wyatt *A handbook of NGO governance, the central and Eastern European Working Group on non-profit governance* (2004) 16.

38 Researchers observation in East Africa and interview with Van Garderen, Executive Director, Lawyers for Human Rights, 11 March 2008, Pretoria.

39 Telephone Interview with Gregoire, former Training Programme Officer, Africa, 10 August 2008.

40 Barry & Dordevic (n 4 above) 67.

41 Interview with Nkutu, then Programme Officer, World Vision, Kampala, 12 March 2008, Kampala.

42 Person requested anonymity.

undivided dedication to an organisation. In 2007, when FIDA-Uganda was threatened by total collapse, it was the founders who recouped to rebuild it.⁴³

Some of the issues that aggravate the relationship between the predecessor and his or her successor are so trivial that they could not be attributed to ill-intentions. For instance, a successor can wonder why the mail is still being addressed to a predecessor, months after he or she left office. In one incident, the successor could not find the keys which were in her desk, because she had not been told of the code name. This situation highlights the lack of comprehensive information during handover processes, which is supposed to be provided by the outgoing leader. In another case, the successor was given a wrong budget for the programme. In one NGO, there were two, ten minute meetings held to hear what the predecessor felt about the NGO, hardly interrogating the dynamics of change. In another NGO, an individual moved with all the staff and contacts, leaving almost a shell of an NGO. In yet another NGO, although a transition period had been established, it was abruptly halted at a donor meeting where the predecessor was requested to excuse herself from the meeting because her term was due to end in a month. The transition of Godber Tumushabe, one of the founders of ACODE, was announced at an unceremonious press conference by the Board Chairperson that it sounded punitive.⁴⁴ Such untidy transition processes fuel the suspicion that the change was initiated due to wrong doing on the part of the departing personnel or a lack of the necessary cohesion to nurture organisational growth. It is only after the truth is established that external stakeholders are willing to re-engage the organisation, which process usually takes between six months to a year.

As a good practice, Tanzania Gender Networking Programme (TGNP) organises a ceremonial handover to introduce the successor to the stakeholders. It is common for established organisations to have a six months overlap particularly where the recruitment is external in order to transfer the oral institutional memory to the incoming personnel. Another good practice is for the outgoing and incoming CEOs to interact on a need-to-know basis for a bridging three months.

The predecessor is expected to allow the successor space and to trust that the latter would work in the interest of the common NGO's mission. Due to apprehension of being accused of unsolicited intermeddling, most predecessors keep away from the NGO. One respondent complained that the NGO she painstakingly found and built suddenly did not trust her to work in its best interest, simply because she was no longer in leadership.

43 FIDA-Uganda, Butterfly report (2008) (on file with the author).

44 'ACODE boss not forced out, says Board Chairperson' *Daily Monitor* 27 September 2013 6.

In situations where the successors are comfortable with consulting their predecessors on a need-to-know basis, there has been continuity and growth. Such consultations are critical given the generally poor institutional documentation within NGOs. Moreover, most NGOs do not have a Deputy largely because of the fear that it could trigger opposition and conflict between the two officers. The establishment of the deputy position is more commonly initiated in preparation for succession but not in the ordinary course of work. For instance, in 2007, Foundation for Human Rights Initiative in Uganda (FHRI), after twenty years of existence established two deputy positions, one for programmes and the other for administration as part of succession planning.⁴⁵

Where the departure is voluntary, amicable or planned, the following rules of engagement apply: the predecessor should be available at the Board's request to share insights; be willing to dialogue and respond to the questions raised by the successor or the Board; discourage discussions that seek to vent frustrations about the NGO's transition; and be generally guided by the best interests of the NGO.⁴⁶

Unfortunately, there are very few spaces where Executive Directors can transition to, the most prominent ones being INGOs, donor community, the UN and perhaps the academia. Otherwise, the Executive Director is left with the hard option of starting again at the beginning to found another organisation but often without the necessary energy. Where a former Executive Director retires to is also critical. When the Executive Director retires to a perceived better space, the organisation is pressured to keep the legacy and not embarrass their own.⁴⁷ Indeed, Makoloo's transition as a Resident Representative of the Ford Foundation in Kenya was publicly celebrated as an opportunity to advance the bigger goals of the organisation.⁴⁸ However, where the Executive Director founds another competitive organisation, the intentions are trivialised as personal greed. A study of Nigeria reveals that the quest for personal power, the 'phenomena of *ogaship*' (chieftaincy), accounts for the fragmentation of NGOs because too often the emergent ones tend to do the same things that the parent NGO does, which results in competition for the very same resources between the former and the latter.⁴⁹ Okafor observes as follows:

45 Interview with Sewanyana, Executive Director, FHRI, 14 August 2007, Kampala.

46 Axelrod (n 35 above) 42.

47 Interview with Makoloo (n 9 above).

48 'ILEG bids farewell to Makoloo' <http://www.ilegkenya.org/index.php/ileg-bids-farewell-makoloo> (accessed 25 August 2013).

49 CO Okafor *Legitimising human rights NGOs: Lessons from Nigeria* (2006) 217-218; N Byamukama 'Underdeveloped leadership potential in civil society advocacy in Africa: A case study of human rights NGOs in Uganda, 1986-2000' in A Bujra & S Adejumo (eds) *Leadership, civil society and democratisation in Africa: Case studies from Eastern Africa* (2002) 38; J Adhiambo-Oduol 'Gender, civil society and leadership: A case study of the Kenya Women's Political Caucus (KWPC)' in Bujra & Adejumo (as above) 105.

The new NGO becomes less institutionalised and much more driven by 'personal rule' of one powerful boss or Oga, than is the case with the parent NGO ... The real reason for the formation of the new NGO is oga-ship ambitions and desires of many of the leaders of the new organisation who have cut their teeth dutifully serving the older 'Ogas' now want control directly of their own portions of the pot of funds.⁵⁰

A related challenge emanates from recruiting a Board member to serve as Executive Director. In most situations, this has proven futile for Human Rights Network (HURINET), Kituo Cha Katiba (KCK), Uganda Women's Network (UWONET), FIDA-Uganda (FIDA-U) and Action for Development (ACFODE), largely due to the inability of the previous Board member to relate to the Secretariat as peers. During the field research, a number of respondents in Kenya were critical of KHRC for having consecutively recruited internally from the Board. KHRC counter argued that it had to ensure its institutional memory and safeguard against its co-optation during the very dictatorial Moi regime.⁵¹

Although the outgoing Executive Directors are expected to fundraise for the transition period so that they handover a financially viable organisation, it has inadvertently created the wrong impression that money 'pours' in. In one NGO, the successor Executive Director was reluctant to move into the institutional house because it was too far from the city centre, yet it was strategically located within reach of the target communities.⁵²

Planning succession from the onset is very empowering because it sets a time-frame for achieving specific goals. As a good practice, the Executive Director should be able to delegate the office when on leave or during travel, to the acting Executive Director and refrain from calling office or responding to office queries in order to build a culture of independence.⁵³ Another way of promoting participation in an NGO is by ensuring that everyone has authority to incur expenditure, because money is power. Nonetheless, the power derived from money needs to be balanced by sufficient controls and oversight mechanisms.

Succession planning is not restricted to the practice of grooming one individual to become the Executive Director.⁵⁴ A good succession must begin with an institutional assessment to identify the salient issues that the new successor is expected to address and its strategic direction.⁵⁵ Put differently, while the first step in succession planning is not to search for

50 Okafor (n 49 above) 218.

51 Interview with Kiai (n 34 above).

52 Interview with Tumaini, former Executive Director, Tanzania Women Lawyers' Association, 24 July 2007, Dar-es-Salaam.

53 Interview with Mutunga, then Programme Officer, The Ford Foundation, Kenya, 17 July 2007, Nairobi.

54 Axelrod (n 35 above) 2.

55 Axelrod (n 35 above) 19.

the new Executive Director most Boards tend to focus on identifying the personal qualities the ideal candidate should possess before defining the organisational issues.⁵⁶ While the new leadership is expected to infuse new ideas, rarely are the key issues and strategies that would be brought to suit the NGO's strategic direction deliberated upon.⁵⁷ Where the NGO is successful, there is an inclination to recruit a succession candidate with similar attributes to the predecessor yet, 'carbon copies are weak'.⁵⁸ Succession planning is more successful when the NGO builds on a model of shared leadership without anointing or simply grooming one successor.⁵⁹ It is also prudent that an independent group makes the judgment to choose the successor.⁶⁰

4 Participation and the management of conflicts

Civil society is a place for public participation, argument and dissent in order to forge new, alternative or creative strategies to common problems.⁶¹ While an NGO is an expression of common goals, people think differently and the strength of the NGO lies in harnessing diversity.⁶² Consequently, conflict is inherent in the principle of participation because participation encourages pluralism of opinions on how to achieve common goals. Conflict on its own is not the problem, but the manner in which it is addressed.

As articulated by Darrow and Thomas:⁶³

Conflict is an innate and natural aspect of human interaction, experienced on a daily basis by almost everyone. While not all conflicts lead to violence (and indeed some conflicts lead to positive change), conflicts do generally produce social change of some kind. The type of change generated by conflict ... in a given instance, involves the settling of a dispute through violence. In different instances the result might well be an altered configuration of social arrangements that effectively reduces poverty and the risk of violence.

Likewise, Drucker rightly argues that 'dissent and disagreement can resolve conflict',⁶⁴ explaining that:

If one asks for disagreement openly, it gives people the feeling that they have been heard but they also know where the objectors are and what the

56 Axelrod (n 35 above) 18.

57 Telephone interview with Gregoire (n 39 above).

58 PF Drucker *Managing the non-profit organisation: Practices and principles* (1990) 19 & 120.

59 Interview with Aina, then Resident Representative, the Ford Foundation, 5 December 2007, Nairobi.

60 ICHRP (n 31 above) 110.

61 M Edwards *Civil society* (2004) 55.

62 Drucker (n 58 above) 118.

63 M Darrow & A Tomas 'Power, capture and conflict: A call for human rights accountability in development cooperation' (2005) 27 *Human Rights Quarterly* 490.

64 Drucker (n 58 above) 125.

objections are. In many cases you can accommodate them, so that they can accept the decision gracefully. That also enables them very often to understand the argument on the winning side. Maybe not to accept them: but to see that these people are neither stupid nor malicious. They only differ. In this way you resolve conflict, you do not prevent disagreement, but you resolve conflict.⁶⁵

However, NGOs inadequately address conflicts despite having conflict resolution mechanisms in place. In situations of conflict between the Board and the Executive Director, the latter often resigns. Nonetheless, dynamic tension between the Board and the Executive Director is natural and healthy if managed through respectful dialogue and the willingness to accommodate different views.⁶⁶ Winston has drawn a comparison between an NGO and a marriage which ends up in divorce because the partners fail to work out the differences in order to preserve the relationship.⁶⁷

Due to the lack of an NGO sector-wide framework for conflict resolution, in extreme cases NGOs resort to court to settle their differences. For example, in Kenya the dispute within the Kenya Women's Political Caucus over the selection of women representatives to participate in the Constitution of Kenya Review Process culminated in a court process.⁶⁸ The leadership wrangles over the Kenya NGO Council were taken to court.⁶⁹ FIDA-Kenya's electoral processes of 2007 were challenged in court by a prospective candidate.

Management of conflict is aggravated by the refusal to discuss power imbalances within the NGO sector or the tendency to define power in more idealised ways.⁷⁰ For example, although feminists' principles espouse the values of equality, participation, fairness and respect, amongst others, in reality the concept of power as dominance and manipulation of others reigns even amongst feminists. Inadvertently, the flat structures in which official power has no place, result in the 'tyranny of structurelessness'⁷¹ characterised by the muddling of roles and responsibilities between the governance and management structures as well as among the various levels of the management team. The very refusal to discuss 'power over' often results in the exercise of unofficial and virtually uninhibited power within the NGO which aggravates the conflict.⁷² In one NGO in South

65 Drucker (n 58 above) 125.

66 Axelrod (n 35 above) 9.

67 ME Winston 'Assessing the effectiveness of international human rights NGOs: Amnesty International' in Welch (n 25 above) 51.

68 J Michuki 'Kenyan women's struggles for inclusion in constitution making and political decisions making' in J Oloka-Onyango & CM Peter (eds) *Constitutionalism and transition: Africa and Eastern European perspectives* (2004) 107.

69 Chap 4.

70 HM Lips *Women, men and power* (1991) 3.

71 S Sheelag & J Taylor 'Women organising women: Doing it backwards and in high heels' in AM Goetz (ed) *Getting institutions right for women and development* (1997) 215.

72 Lips (n 70 above) 7.

Africa, the chairperson tendered in her resignation at a meeting she was chairing because one of the participants called her racist.⁷³

Paradoxically, while activism is about shared goals, competition for money and power is a source of conflict in the relationships amongst NGO activists. Instead of open confrontations, conflicts are played out in the form of 'low murmur of gossip, backstabbing, withholding information, outright violence and false accusations such as misappropriation of funds, harassment and nepotism'.⁷⁴ When the root causes of conflict are not addressed, conflicts manifest themselves in what may appear to be petty issues such as use of cars or the allocation of overseas trips, and other office perks.

Often employees in NGOs work at the sufferance of the leadership. In comparing NGOs to government, Kaguongo observed that NGOs conflict resolution procedures can easily be manipulated: Government tends to be more impartial with clearer disciplinary mechanisms which enable the employee ample time to prepare for the eventualities.⁷⁵ In contrast, in NGOs, the person complained of is likely to be part of the disciplinary process, and the abrupt nature of conflict resolution procedures has a dramatic impact on the employee without ample time to reflect or reorganise him or herself; yet seeking court redress is so laborious, that one resigns to fate.⁷⁶

The majority of cases at the Kenya NGO Council involve the non-payment of salaries due to the lack of written contracts.⁷⁷ The same is true in other countries, particularly in light of the difficulty in securing core costs for most NGOs. The predicament of employees is further aggravated by the fact that the NGO sector has no workers' trade union, despite the fact that some NGOs work on labour rights.⁷⁸

NGOs have to accept conflicts as an integral part of broadening participation and harnessing divergent views by putting in place mechanisms that promote diversity and inclusiveness. Despite the challenges of nurturing consensus, it is important that all affected parties participate in resolving the controversy thus owning the resultant solutions.⁷⁹ Curtailing arguments produces an illusion of agreement that disguises the differences to the advantage of those in power.⁸⁰

73 Interview with Chigudu (n 8 above).

74 Barry & Dordevic (n 4 above) 58.

75 Interview with Kaguongo, then LLD candidate, University of Pretoria, South Africa, 19 March 2007, Pretoria.

76 As above.

77 Interview with Adhanja, the Chief Executive Officer, Kenya NGO Council, 24 August 2007, Nairobi.

78 Interview with Angila, former CEO, Kenya NGO Council, currently programme officer PACT-Kenya, 6 September 2007.

79 Edwards (n 61 above) 69.

80 Edwards (n 61 above) 68.

Participation and consultation does not necessarily mean that every decision has to be questioned or undone because of a lack of participation, but rather that stakeholders are involved in the deliberation of strategic decisions that affect them. Allowing a questioning atmosphere in an NGO encourages debate and creativity for new answers while simultaneously strengthening ownership of the agreed solution.⁸¹ Conversely, forcing submission or silence, frustrates energy for social engagement.⁸² In the next section, I analyse the practical manifestation of accountability and participation between the NGOs and the communities.

5 NGOs and community participation

This discussion examines the extent to which NGOs have promoted community participation. According to Edwards and Fowler:⁸³

[T]he 'power and influence of NGOs is based on civic engagement, social mobilisation and reliance on social capital, not the political mandate and 'strong arm of government, or the financial capital and influence of businesses. The quality of [NGO] engagements with citizens is therefore a key determinant of the NGO's legitimacy and effectiveness'.⁸⁴

I draw from the experiences of NGOs working with or within social movements to highlight the lessons in NGO/community relationships in broadening participation. Globally NGOs tend to be characterised as elite institutions separate from the communities that they work with.⁸⁵ Even Amnesty International, the pioneer human rights NGO, is described as elitist because its wide membership is primarily drawn from the global middle class.⁸⁶ Therefore the fact that the NGO sector is predominantly elite and urban based obliges NGOs to ensure a more egalitarian participation of the communities. Because the poor tend to have fewer skills valued by the market, they are systematically disadvantaged as a class.⁸⁷ Consequently, where campaigns for social equity are restricted to weak sections of society, they get isolated and ignored, warranting coalition building with influential social groups such as NGOs.⁸⁸ Nonetheless, in resonance with Mamdani, there is no 'Chinese wall

81 A Kaplan 'Leadership and management' in Edwards & Fowler (n 29 above) 427-428; Edwards (n 61 above) 68.

82 M Edwards & G Sen 'NGOs, social change and the transformation of human relations: A 21st-century civic agenda' in Edwards & Fowler (n 29 above) 43.

83 M Edwards & A Fowler 'Introduction: Changing challenges for NGDO management' in Edwards & Fowler (n 29 above) 4.

84 Edwards & Fowler (n 83 above) 4.

85 R Lehr-Lehnardt (2005) 'NGO legitimacy: Reassessing democracy, accountability and transparency' (2005) 2, Paper presented at Cornell Law School Inter-University Graduate Student Conference <http://lsr.nellco.org/cornell/lps/clacp/6> (accessed 7 January 2008); 74.

86 Korey (n 34 above) 169.

87 J Donnelly 'Human rights, democracy and development' (1999) 21 *Human Rights Quarterly* 629.

88 Friedman & Mottair (n 14 above) 32.

between the elite and popular movements'.⁸⁹ To be effective, NGOs need mass support to augment their influence on the state and other powerful actors. Simultaneously, it is difficult for the communities to achieve political change without allies among the NGOs.⁹⁰ In discussing inclusiveness and participation, the chapter analyses the strategies of NGOs in mobilising communities for the human rights movements.

The importance of human rights awareness-raising by NGOs is fundamental because a majority of the communities are unaware of their constitutional rights. For example, in South Africa, a South African Human Rights Commission Study found that only 24,9 per cent of South Africans were aware of the human rights in the Constitution.⁹¹ Yet, access to information makes it more likely for the people to influence public policies to their benefit as well as take advantage of existing opportunities and services.

Nonetheless, the implicit belief that ignorance is a major source of poverty and unhappiness has made 'talking to the poor and needy' a key activity.⁹² Making people aware of their subordinate status is only one step towards addressing marginalisation. Otherwise, mere awareness-raising without giving people the tools to alter their marginalisation accentuates their frustration. Human rights awareness is not an end in itself but a tool to influence decision making and to enable individuals claim their rights, as well as access services and opportunities. According to Chigudu, this requires adopting:⁹³

a participatory process that engages people in reflection, inquiry and action. By sharing life stories and doing a basic analysis of common problems such as domestic violence ... [t]hey begin to question their world and their place in it, affirming their own sources of power and ... sense of personal worth ... and ... willingness to act both individually and collectively to improve their world by challenging power relations.

Promoting human rights requires listening and learning from the rich experiences of how ordinary people have applied human rights to their lives. Kenyatta argues that because the aim of education is to build the character and not the mere acquisition of knowledge, education was applied to concrete situations with behaviour taught in relation to some particular person and from doing things together as a social activity.⁹⁴ The vivid narrative of information often supported by imagery, and animal

89 M Mamdani 'Introduction' in M Mamdani et al (eds) (1995) *African studies in social movements and democracy* 7.

90 J Fisher *Non governments and the political development of the Third World* (1998) 85.

91 JC Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (2004) 124.

92 Barr et al *Non-governmental organisations in Uganda: A report to the Government of Uganda* (2003) 17.

93 FIDA-Uganda Butterfly Report (n 43) x.

94 J Kenyatta (1938) *Facing Mount Kenya: The tribal life of the Gikuyu* (1938) 120-121.

pictorial references resulted in an indelible mental picture.⁹⁵ Songs, games, sports, riddles and puzzles constituted a form of education that helped in memorising the educational phrases.⁹⁶ Mandela equally affirms this approach. He states that amongst the Xhosa, knowledge was acquired through observation, imitation and emulation, and not necessarily through questions.⁹⁷ Hence, NGOs need to make human rights education as a communicative and interactive discourse with the communities for the mutual exchange of ideas and learning from each other. Once human rights NGOs recognise that they have obligations towards their stakeholders they would have regular communication of information that involves explaining what the NGO is doing and why, taking advice from stakeholders, and collaborating together on implementing an agreed policy.⁹⁸

Another dilemma is the impact of 'NGOisation' on popular participation. The worldwide professionalisation of the NGO sector accentuated by the quest for value for money gradually distanced organisations from the people who are closest to the problem.⁹⁹ The fact that some strategies require technical and financial expertise gained through formal education inadvertently impedes participation. It is therefore often regretted that the professionalising of NGO work has inadvertently promoted 'paper qualified' professionals who are not necessarily passionate about their work.¹⁰⁰

NGOs face difficult trade-offs between the professionalisation of their organisations and the strengthening of grassroot ties.¹⁰¹ While professionalism should not necessarily conflict with popular participation, it is a fact that NGO professionals are prone to put personal interests or those of their social classes first.¹⁰² Nonetheless, as tritely observed by the ICHRP, although professionalism has resulted in exclusion, the issue is not professionalism as such but rather the unequal power relations within the professionals and the communities they work with or represent.¹⁰³

95 Kenyatta (n 94 above) xiv.

96 Kenyatta (n 94 above) 100-104 & 192.

97 N Mandela *Long walk to freedom: The autobiography of Nelson Mandela* (1994) 11.

98 ICHRP (n 31 above) 63 & 121.

99 Edwards (n 61 above) 35; Sheelag & Taylor (n 71 above) 218-220; S Dicklitch *The elusive promise of NGOs in Africa* (1998) 153; S Greenberg 'The landless people's movement and the failure of post-apartheid land reform' (2004) 20 & 24 www.ukzn.ac.za/ccs (accessed 7 July 2006); Friedman & Mottair (n 14 above) 9; Just Associates *Making change happen: Power, concepts of revisioning power for justice, equality and peace* (2006) 14.

100 C Bell & J Keenan 'Human rights, non-governmental organisations and the problems of transition' (2004) 26 *Human Rights Quarterly* 368; S Tamale 'Law, sexuality and politics in Uganda: Challenges for women's human rights NGOs' in Mutua (n 22 above) 66-67.

101 Fisher (n 90 above) 85.

102 Lehr-Lehnardt (n 85 above) 20-23.

103 ICHRP (n 31 above) 102.

Consequently efforts at 'NGOisation' require building the necessary organisational governance structures to ensure broader participation.

The above challenges notwithstanding, there are some positive examples of NGO/community relationships. The growing trend of donor funding of large NGOs as conduits to smaller CBOs has further strengthened NGOs and CBOs working relationships.¹⁰⁴ For example, in South Africa, Foundation for Human Rights (FHR) facilitates CBOs' mentoring workshops and also encourages collaboration between NGOs and CBOs. The Centre for Policy Studies, Centre for Conflict Resolution, and Human Sciences Research Council worked collaboratively to conceptually inform public debates, strategies and priorities in the human rights sector.¹⁰⁵ Similarly, its small size notwithstanding, SECC located its campaign in everyday struggles such as the re-connection of electricity, which turned the electricity crisis into a political issue.¹⁰⁶ The Homeless People's Association (HPA) in South Africa initiated a grassroots driven and non-hierarchical process that mobilised the community to assess their needs, understand how external interventions can benefit them, and set their development priorities.¹⁰⁷ Subsequently, the professionals placed the housing issue within the national and international arena.¹⁰⁸ HPA maximised beneficiary participation to enhance, womens' status in the communities while simultaneously tightening the bonds of trust.¹⁰⁹

In Kenya, the Green Belt Movement (GBM) relies on the local expertise of rural women in its tree planting to contribute to their self-reliance, ultimately enhancing women's agency for change.¹¹⁰ Increasingly NGOs are holding their workshops or meetings in familiar and walking-distance venues such as a local school halls, community centres, markets grounds and church venues. Furthermore, discussions are practical and everybody is given an opportunity to speak, while concurrently obliged to listen to others.¹¹¹ FIDA-Uganda's community projects mobilises the villages to discuss local issues with the legal officers pointing out the law and answering legal questions of interest to the congregation. Consequently, the community is enabled to link women's rights to their daily life experiences.

104 South African Department of Social Development *An impact assessment of the Non-Profit Organisation (NPO) Act No 71 of 1997* (2005) 45.

105 Foundation for Human Rights *Organisational review* (2005).

106 Egan & Wafer (n 15 above) 16 & 21.

107 Khan, F & Pieterse, E (2004) 'The homeless people's alliance: Purposive creation and ambiguated realities' (2004) 6, 8 & 11 www.ukzn.ac.za/ccs (accessed 7 July 2006).

108 Khan & Pieterse (n 107 above) 11.

109 Khan & Pieterse (n 107 above) 18.

110 SN Ndegwa *The two faces of the civil society: NGOs and politics in Africa* (1996) 82.

111 A Desai & R Pithouse 'But we are in thousands: Dispossession, resistance, repossession and repression in Mandela Park' (2004) 23-24 www.antieviction.org.za/; www.southafrica.indimedia.org; and www.nu.ac.za/ccs; www.ukzn.ac.za/ccs (all accessed 7 July 2006, 23-24; Egan & Wafer (n 15 above) 16-21.

It is noteworthy that government commissioned studies in Uganda and South Africa revealed that NGOs command considerable respect from communities.¹¹² In Uganda, over 60 per cent disagreed that NGOs exist to serve the purpose of its staff rather than the community and by inference serve the communities they work with.¹¹³ Fifty percent strongly agreed that NGOs are an important part of their lives and are good at what they do.¹¹⁴ Likewise, in South Africa, the majority of respondents disagreed that NGOs are as bureaucratic and unresponsive as government.¹¹⁵ A majority were of the opinion that NGOs were closer to the people and that the public would suffer if not catered for by NGOs.¹¹⁶ The fact that the NGOs in Kenya are appreciated for creating about 100 000 jobs and injecting an annual estimated 200 billion Kenyan shillings in the country as well as providing for the general welfare of the public¹¹⁷ contributed to the continued success of the CSO Reference groups to safeguard its rights.

Ensuring the participation of the people to support an environment conducive for the operation of NGOs is also morally compelling because NGOs purport to act in the interests of the people. Where NGOs mobilise the public, government finds it difficult to ignore their issues. A case in point is the National Land Forum (NALAF)'s mobilisation of the public over the land question in Tanzania.¹¹⁸ In Uganda, the Save Mabira Crusade demonstrated that while there are many ways of activism, governments succumb to pressure from social mobilisation,¹¹⁹ thus the Mabira Forest give away was averted. In contrast, the failure of the NGOs in Uganda to mobilise the communities particularly in the aftermath of the financial scandals of the misappropriation of the GAVI funds resulted in the public support of the government to streamline the sector by amending the NGO law in 2006.¹²⁰

In summarising the debate on NGO/community participation, while many NGOs involve communities in identifying, planning and implementing NGO projects, in some instances, the participation of communities is paternalistic. Meaningful participation and accountability would involve working with communities on their self-identified interests and providing real decision-making opportunities.

112 See Barr et al (n 92 above); NPO Impact Assessment (n 104 above).

113 Barr et al (n 92 above) 42.

114 As above.

115 NPO Act Impact Assessment (n 104 above) 46.

116 As above.

117 S Kiplagat 'Kenya: 100,000 jobs at risk over law on NGO funding' *The Star* 27 October 2014 <http://allafrica.com/stories/201410270250.html> (accessed 3 August 2015).

118 E Mallya 'Civil society and the land question in Tanzania' in Kiondo & Nyang'ro (eds) *Civil society and democratic development in Tanzania* (2006) 57-63.

119 Interview with Muramuzi, Executive Director, NAPE, 30 August 2007, Kampala.

120 Interview with Kwesiga, then Executive Director, Development Network of Indigenous Voluntary Associations (DENIVA), Uganda, 6 December 2006, Kampala.

6 Peer NGO networks and coalitions

Cognisant that a divided front weakens NGO effectiveness in protecting and promoting human rights, this discussion examines how NGO networks or coalitions have enhanced inclusiveness, participation and collective voice to address the welfare, dignity and rights of the human person. Networking is frequently suggested as a panacea of NGOs' weaknesses because it facilitates addressing issues in a holistic manner and the optimum utilisation of resources.

I broadly define a network as a voluntary association of autonomous groups in search of common interests. The mutual sharing of skills, resources and information creates a critical mass for advocacy to defend and represent network interests.¹²¹ Although networks are prone to power inequities accruing from inequitable access to resources and information, many members gain from mutual learning and collective efforts.¹²² The Commonwealth Secretariat advocates for cooperation and networking to pursue common interests and the development of the common standards, codes of conduct, monitoring and evaluation, information directories amongst others.¹²³

Within the countries of the study, there are numerous networks and coalitions according to different themes, target groups and geographical scope. In South Africa, 46 per cent of NGOs are affiliated to a network or forum.¹²⁴ Likewise, in Uganda, 21 per cent of the NGOs belong to a local NGO network.¹²⁵ Networks vary in form, from loose coalitions, formal establishments or temporary arrangements that address specific issues within a given time frame.

Loose coalitions are preferred because they have specific objectives and definite timeframes.¹²⁶ Loose networks are usually hosted by a member organisation or members merely coalesce and divide the tasks amongst each other. For example, SECC is not one organisation but a network of associate organisations which come together during mass action.¹²⁷ The disadvantage of loose coalitions is that they are difficult to coordinate and maintain a sense of accountability.¹²⁸ For example,

121 P Starkey *Networking for Development* (1998) 20-42; Kotze (n 31 above) 1; REPOA (n 29 above) 14-15.

122 ME Keck & S Sikkink *Activists beyond borders: Advocacy network in international politics* (1998) 207.

123 South African Department of Social Development *An impact assessment of the Non-Profit Organisation (NPO) Act No 71 of 1997* (2005).

124 NPO Act Impact Assessment (n 104 above) 57.

125 Barr et al (n 92 above) 8.

126 ICHRP (n 31 above) 68-69; C Bunch et al 'International networking for women's human rights' in M Edwards & J Gaventa (eds) *Global citizen action* (2001) 227.

127 A Egan & A Wafer 'The Soweto electricity crisis committee' (2004) 10-11 www.ukzn.ac.za/ccs (accessed 7 July 2006).

128 As above, 12.

because the 'Coalition to Safeguard Women's Gains' in Kenya functioned in an ad-hoc manner, the committees ceased to function that the tasks were divided up amongst the core organisations.¹²⁹

The lack of institutional framework renders a Coalition tentative. For example, the Coalition for Political Accountability to Women (COPAW) in Uganda was short lived because none of the members was willing to invest the administrative resources in it. Similarly, although the hosting of FEMACT in Tanzania was supposed to be rotational among its networks, Tanzania Gender Networking Programme (TGNP) has been hosting it since inception due to the lack of interest by other members in doing so.¹³⁰ Moreover, in situations where a network is hosted by a member and is successful, it is often complained that the host organisation is undermining the network by usurping power and 'stealing' credit for the network activities.

Participation, inclusiveness and the contribution of finances, skills and time are vital to networking success.¹³¹ Ironically, networks are more effective when there is a core group of committed members willing to invest time and resources to coordinate and manage the network activities. For example, at the 'heart of SECC is a small core of activists who operate from a small office of Careers Centre Community hall, working on a single computer'.¹³²

The core group of the 'Coalition for Safeguarding the Gains of Women' in the constitution was composed of individuals from FIDA-Kenya, Kenya Human Rights Commission (KHRC), Institute of Education and Democracy (IED) and League of Women Voters, who first and foremost made a personal commitment to the campaign and secondly committed their respective organisations.¹³³ The formation of a strategic alliance was premised on a clear recognition of the need for different expertise and strategies.¹³⁴ The coalition developed shared positions for women in the draft constitution, a majority of which were adopted with the exception of the question of sexual and reproductive rights.¹³⁵

In many instances, however, the networking relationships are based on good will without clearly written common interests, values, roles or responsibilities of the different organisations. When the terms of reference are not clearly defined, one party is capable of dominating and redefining

129 JK Muteshi 'Women's advocacy: Engendering and reconstituting the Kenyan state' in Mutua (n 22 above) 138.

130 Interview with Mallya, then Executive Director, Tanzania Gender Networking Programme, Member Tanzania NGO Council, 15 October 2013.

131 Starkey (n 121 above) 38; Keck & Sikkink (n 122 above) 27.

132 Egan & Wafer (n 127 above) 13.

133 Muteshi (n 129 above) 128-129.

134 Muteshi (n 129 above) 127 & 136.

135 Muteshi (n 129 above) 128.

the terms of engagement to their benefit.¹³⁶ At times members abdicate from their agreed roles, leaving a few to bear the burden. On the flip side of the coin, the inability to acknowledge the contribution of all the members of the network aggravates the network's relationship, that members are dissuaded from investing their energies. Nonetheless, the core group has to safeguard against dominating others and ensure that the network is participatory and accountable to all its members.

Tensions between NGOs and CBOs in South Africa revolve around issues of representativeness and unequal resource distribution,¹³⁷ a situation that readily applies to the rest of Sub-Saharan Africa. A case study of the Rural Development Initiative (RDI), a temporary coalition formed by the National Land Committee (NLC) in collaboration with other rural NGOs to construct the land movement illustrates the power dynamics between NGOs and CBOs.¹³⁸ The top-down character of the RDI led by professional NGOs led to its immediate collapse once funding for the big gathering in Bloemfontein was exhausted.¹³⁹ Eventually, the Landless People's Movement (LPM) splintered into two factions: one headed by the NLC which sought a less radical engagement of government and the other preferring mass based demonstrations against government.¹⁴⁰ The smaller NGOs were pressured to align themselves with the position of the NLC or face withdrawal of resources.¹⁴¹ The NLC succeeded in stifling the radical potential of the grassroots landless movement.¹⁴² The case study demonstrates the ability of the large NGOs to use their better access to resources to dominate and control the Landless People's Movement network.

Formal networks are equally problematic. Often formal networks are the result of top-down initiatives by international research centres, and the aid agencies of funding NGOs but 'are not true networks based on active participation and interaction of autonomous members'.¹⁴³ Despite a common focus and shared objectives, LegalNet in Tanzania is quite dormant.¹⁴⁴ Likewise, the Uganda Legal Aid Service Providers Network (LASPNET) is more sustained by donor interest than the commitment of its membership.

136 ICHRP (n 31 above) 68.

137 H Kotze 'Responding to the growing socio-economic crisis? A review of civil society in South Africa' in *Development Update, The deepening divide: Civil society and development in South Africa* Annual Review 2001/2002 (2003) 21.

138 Greenberg (n 99 above) 16.

139 As above.

140 Greenberg (n 99 above) 19.

141 Greenberg (n 99 above) 20.

142 Greenberg (n 99 above) 2.

143 Starkey (n 121 above) 17.

144 Interview with Ginwas, Programme Officer, Tanzania Women Lawyers' Association, Tanzania, 23 July 2007, Dar-es-Salaam.

Formal networks are challenging because they are not based on a thorough understanding of each others' mission and values.¹⁴⁵ Networks are not only neutral zones for a collective voice on common objectives, but are also based on competing interests and mandates.¹⁴⁶ Despite the appearance of the harmonious relationships, networking is considered a very painful relationship, because organisations are so dissimilar. And yet there is no room for resolving the conflicts without being misunderstood for being non-cooperative. Within the SADC countries, it is an 'era of survival for the fittest; all NGOs are struggling to crystallise their niches and are therefore less enthusiastic about being coordinated'.¹⁴⁷ Post 1998, SANGOCO weakened because of internal conflicts and ideological differences particularly over the relationship with the state.¹⁴⁸ Following the NARC government in 2002, the NGO sector is less united and organisations are more preoccupied with their personal strategies than shared objectives.¹⁴⁹

Furthermore, given that the rationale for joining networks is not based on a deep-rooted conviction of mutuality of interests, it is common for an NGO to be a member of all networks, but committed to none.¹⁵⁰ For example, despite the different thematic focus, with, for example Tanzania Association of NGOs (TANGO) being rights based and Tanzania Council for Social Development (TACOSODE) development focussed, they are largely seen as competitors for legitimacy, mandates and membership.

In Uganda, the lack of coherence of the NGO sector against the amendments of the NGO law in 2004-2006 accounts for the ease with which government passed the law, without resounding public outcry.¹⁵¹ The petition to the President not to assent to the Bill was signed by only eight NGOs,¹⁵² that the President did not even acknowledge the petition, highlighting his disdain for the sector.

In contrast, in Kenya, The CSO Reference Group on the PBO law is yet a sterling example of a loose network jelled together by a specific agenda of protecting the enabling environment for CSOs. The positive

145 Interview with Kwesiga (n 120 above).

146 Keck and Sicking (n 131 above) 3.

147 Interview with Jansen, Executive Director, Lawyers for Human Rights, 19 November 2007, Pretoria.

148 Interview with Logart, then Executive Director, SANGOCO, South Africa, 29 November 2007, Johannesburg.

149 K Ombati & C Orina-Nyamwamu 'The Kenya NGO sector governance: From crises to renewed mandate' (2004) 6 unpublished (on file with the author).

150 B Nyangabyaki *Contemporary civil society and democratisation process in Uganda: A preliminary exploration* (2000) 43.

151 Interview with Kwesiga (n 120 above).

152 Petition on file with author. The NGOs were NGO Forum, Development Network of Indigenous Voluntary Associations (DENIVA), Human Rights Network (HURINET), Advocates Coalition for Development and Environment (ACODE), Uganda Child Rights Network (UCRN), the African Network for the Prevention and Protection Against Child Abuse and Neglect (ANPPCAN), Environmental Alert and Anti-Corruption Coalition of Uganda.

legal environment for PBO was a spirited struggle by a core group of individuals, popularly known as the 'Committee of the wise', who trusted each other and spoke with one voice that they succeeded in mobilising 40 other organisations, into the 'CSO Reference Group'.¹⁵³ As a result, the CSO Reference Group's draft Bill was adopted by the government NGO Board and became a government sponsored Bill,¹⁵⁴ which was passed by Parliament in 2012 and assented to in January 2013 by President Kibaki. Clumsily, on 30 October 2013 government attempted to introduce the Miscellaneous Act which amongst others included the amendment of the PBO Bill of 2013. Since then, the CSO Reference group rejuvenated its campaign which amongst others included:¹⁵⁵ The establishment of a face book page and the NGO Muzzle online which published the campaign to mobilise broad support; organising itself into Committees, namely, the Legal Committee responsible for analysing the implications of the amendments, The Lobby Group responsible for strategising influencing key opinion makers, the Media/Publicity Group responsible for the press releases conferences and interviews, The Outdoor Committee for stimulating public participation through protests and petitions; and special assignments were allocated to networks such as the Health Network (Henet) for health, The Poverty Eradication Network (Pen), the inter-religious groups, the INNGOS, CBOS, Trust and foundation. For example, Henets' campaign was buttressed by facts and figures of NGOs contribution to the ordinary person, such as 89 per cent of the HIV budget; 47 per cent of the basic health service; 56 per cent of the maternal health to mention but a few. Overall the coherence and thoroughness in articulating the issues, values and principles to guide the sector earned them the respect of both their peers and government. Parliament rejected the amendments for violating the right to freedom of association of CSOs to carry out their activities effectively, independently and free from governmental interference.¹⁵⁶ Dramatically, in October 2014 Gatundu South MP Moses Kuria reintroduced the same Bill, with the exception of the restriction on funding.¹⁵⁷ Subsequently, the Presidency introducing a PBO Amendment Task Force, under the leadership of Honourable Sophia Abdi Noor, the mover of the original Act, which move was welcomed by the CSO Reference Groups' Chairperson, Ezra Mbogori for ensuring a broader and

153 Interview with Mbogori, Executive Director, Akiba Uhaki, East African Human Rights Fund, 19 August 2013; CSO Reference Group Commissioned Report *The fight for democratic space of CSOs in Kenya: The case of the Public Benefit Organisations Act 2013 Amendment* (2014) 9.

154 As above.

155 Post by PBO Act on Facebook, 14 November 2014 <https://www.facebook.com/PBOAct2013/photos/pcb.618273158283677/618272674950392/?type=1&theate> (accessed 29 July 2015); CSO Reference Group (n 363 above) 16-17.

156 'Kenya: Parliament decides to withdraw controversial amendments targeting Public Benefit Organisations (PBO)' *Fidh* 5 December 2013 <https://www.fidh.org/International-Federation-for-Human-Rights/Africa/kenya/14469-kenya-parliament-decides-to-withdraw-controversial-amendments-targeting> (accessed 29 July 2015).

157 Kenya Gazette Supplement 75 (National Assembly Bills 24), 30 May 2014; NGO Monitor Kenya <http://www.icnl.org/research/monitor/kenya.html> (accessed 29 July 2015).

deeper consultation on ways of strengthening and commencing the PBO Act and as such committed its participation in the process.¹⁵⁸

Ironically, formal networks are also prone to manipulation by donor agencies primarily due to the inability of the membership to finance its agenda. In other words, power and influence within NGO networks is contingent on the money contributed to the network. Consequently, INGOs were in a better position to shape both Policy Forum in Tanzania and NGO Forum in Uganda's agendas.¹⁵⁹ Ironically, while donors have encouraged the formation of formal networks they are hesitant to fund typical networking activities such as information sharing and coordination, because of the difficulty to monitor and evaluate its impact. In the words of Paul Starkey, 'a network is not a goal but a means of achieving a goal', and the impact of a network is determined by the achievements of its members.¹⁶⁰ Consequently, very few formal networks fulfil their core role of mobilising and communicating with their memberships, collecting membership fees and initiating controversial debates to articulate alternative agendas. Consequently, the lack of resources for the typical network activities compels networks to compete with its membership by engaging in similar activities as those of their membership.

The above notwithstanding, the root problem is not the source of funding but rather the fact that networks operate in the same terrain and implement similar activities as their membership. However, the ambiguity of the roles and responsibilities between the networks and its members is a source of confusion. The membership can undertake the work of the network such as coalition hosting, while the network itself becomes yet another NGO engaging in similar activities as its membership. For example, the shift by the Tanzania Chapter of the Southern Africa Human Rights NGOs Network (SAHRiNGON-TZ) to provide legal aid to the grassroots was considered as competition against its membership.¹⁶¹

Many networks have also largely failed to demonstrate the value in networking. Meaningful networking is frustrated by the work overload of most NGOs. Thus, most networking is casual, relating to attending each others' activities and workshops to brainstorm on issues. Commonly, the management of networks complain that maintaining a network is a complex task. More often than not, the membership is not accountable to the network and fails to meet its side of the bargain.¹⁶² At one of

158 Post on Facebook by PBO Act, 4 December 2014 <https://www.facebook.com/PBOAct2013/photos/pcb.627749817336011/627749680669358/?type=1&theater> (accessed 29 July 2015).

159 Interview with Nyamugasira, then Executive Director, NGO Forum, Uganda, 3 August 2007, Kampala.

160 Starkey (n 121 above) 89; Keck & Sicking (n 122 above 203).

161 Interview with Soka, Women Legal Aid Centre, 23 July 2007, Dar-es-Salaam.

162 Interview with Akatsi-Bukachi, Executive Director, EASSI, 13 August 2007.

UWONET's Annual General Meetings, an intern was elected to represent a member organisation.¹⁶³ Yet, she neither had any decision-making powers within the member organisation nor could she ensure the implementation of the network's decisions.

Networking is appreciated where the network serves as an information hub or mobilises resources which it channels to its members to implement common programmes. For instance, Policy Forum serves as an information and resource hub and solicits the participation of the membership to implement the programmes depending on expertise. All members claim credit for Policy Forum's products. In Kenya, the lack of a cohesive image and voice of the sector to amplify its contribution was decried that the CSO Reference Group Study recommended a coordinated information strategy to correct the misrepresentations and outline the sector's contributions to national development and dignity.¹⁶⁴

Prior to 1999, the currently defunct SANGOCO innovatively demonstrated the added value of networking to its membership. In 1998, SANGOCO had 4000 registered members and attracted diversified funding from over twenty donors to a tune of R3 677 048.¹⁶⁵ A membership survey *Talking to our Members* that solicited feedback from members on SANGOCO's role revealed that 25 per cent of the members had the highest satisfaction with its advocacy role in creating an enabling environment for the NGO sector, 22 per cent with uniting the sector, 12 per cent with the war on poverty, 7 per cent with information, 6 per cent with the development of the Code of Ethics, 1 per cent with the NGO week and 2 per cent with funding.¹⁶⁶ In recognition of the fact that the NGO sector was a significant consumer of a range of goods and services, SANGOCO negotiated for reduced rates with potential providers such as Budget-Rent-A-Car, Canon Stationeries, Southern Sun Hotel, Damelin College, Toyota, Microsoft, Spin and South African Airways as well as in 1998, in collaboration with the South African Grant makers Association (SAGA) and Charity Aid Foundation commissioned Liberty Life, Old Mutual and Sanlam to establish a United NGO Provident Fund to provide a lump sum retirement benefit and basic deaths and disability cover for its membership.¹⁶⁷ In 1997, SANGOCO in partnership with *Interfund* launched the *Development Update*, a quarterly journal, in partnership with Interfund and the e-prodder, a weekly e-mail service providing information about upcoming events. In partnership with the Human Sciences Research Council (HRSC) it established a fortnightly fax to donors and Board members and *NGO Matters*, a monthly 24 page newsletter.¹⁶⁸ In

163 Interview with Nakawesi, previously Executive Director UWONET, then Executive Director Akina Mama wa Africa (AMWA), 2 August 2007.

164 CSO Reference Group (n 153 above) 20.

165 SANGOCO Annual Report (1997-98) 23 & 33.

166 SANGOCO (n 165 above) 27.

167 SANGOCO (n 165 above) 22.

168 SANGOCO (n 165 above) 33.

collaboration with the South Africa Grant Makers Association (SAGA), SANGOCO introduced awards during the NGO week.¹⁶⁹

Given that no NGO can achieve much of its work alone, each NGO needs to determine the values and priorities that should regulate or shape its alliances with other NGOs. As a good practice, TAC networked with COSATU for its two million memberships, the Medical Research Council for its critical information, and the Catholic Church for its social mobilisation potential, despite its anti-condom stance.¹⁷⁰ NAPE and ACODE's 'Save the Mabira Crusade' success was essentially due to the unusual alliance with the private sector, religious and cultural institutions and the politicians.¹⁷¹ However, alliance building does not mean working with everybody on any terms.

Allegiance to a network is often dependent on an NGO's institutional needs.¹⁷² Consequently, because institutional needs are not static but are dependent on the immediate interests, resources and leadership of a given NGO, networking relations are often unsteady, requiring continuous nurturing of the relationship. The experience of Tanzania Gender Networking Programme (TGNP) highlights that openly proclaiming each member's stance and providing an opportunity for members to opt out in case of disagreements protects the vision of the coalition from being compromised.¹⁷³ Likewise, any network has to balance speed with efficiency in order to forge a consensus strategy.¹⁷⁴

The women's movement has been described as one of the most organised, mature, vibrant and effective movement, having greater cohesion than other social actors.¹⁷⁵ Nonetheless, the women's movement is also faced with the challenge of how to deal with differences and diversities within the movement. In South Africa, the decision of the Women's National Council (WNC) to exclude women who held elected party positions from participating in the WNC¹⁷⁶ was short-sighted because it resulted in the loss of leadership which fragmented the women's

169 SANGOCO (n 165 above) 28.

170 Friedman & Mottair (n 14 above) 30.

171 Interview with Muramuzi (n 119 above).

172 ML Wanyeki 'The African Women's Development and Communications Network: Pan African organising in human rights' in Mutua (n 22 above) 219.

173 D Kitunga 'Policy advocacy and lobbying in feminist activism' in M Mbilinyi et al (eds) *Activists voices: Feminist struggles for an alternative world* (2003) 42.

174 Kitunga (n 173 above) 43.

175 I International Human Rights Internship Program (IHRIP) & the Swedish NGOs Foundation for Human Rights *The status of human rights organisations in sub-Saharan Africa* (1994) 5 & 6; J Oloka-Onyango 'Modern-day missionaries or misguided miscreants? NGOs, the women's movement and the promotion of human rights in Africa' in W Benedek et al (eds) *The human rights of women: International instruments and African experiences* (2002) 292; S Tamale 'The Right to culture and the culture of rights: A critical perspective on Women's sexual rights in Africa' *Urgent Action Fund-Africa, Sex Matters* (2008) 37.

176 S Hassim 'Voices, hierarchies and spaces: Reconfiguring the women's movement in democratic South Africa' (2004) 10-11 www.ukzn.ac.za/ccs (accessed 7 July 2006).

movement.¹⁷⁷ There is also some concern that the women's movement in Africa is lacking internal cohesion as evidenced by the lack of consensus on obvious but critical issues such as land ownership, domestic relations/family law and sexual autonomy.¹⁷⁸

Most networks are established amongst like-minded NGOs hardly involving other critical stakeholders. Needless to say, alliance building goes beyond accepting the support of those who happen to agree as natural allies to include reaching out to those who voice controversial opinions.¹⁷⁹ Successful campaigns require flexibility to determine at any given time who is an opponent or an ally. For example, although YWCA in Uganda is one of the largest NGOs in Africa, it is ignored by the women's movement for being conservative by supporting the unequal power relationships between men and women as morally upright.¹⁸⁰

The negative identity associated with women as a disempowered and marginalised group further compounds the mobilisation of women as a sex. According to Lips:

[W]omen accept the negative stereotypes of femininity for other women but not for themselves. They may say that they do not enjoy the company of other women and may give low priority to female friendships. If they succeed in the male dominated career, they may encourage the view that they are exceptional, with more talent than the average woman, and discourage other women from aspiring to similar success. Female politicians may repudiate involvement in women's issues in an attempt to disengage themselves from the low status groups and blend in with the dominant group.

Likewise, not all women organisations are feminist in outlook, having as their core purpose the struggle for fair egalitarian gender relations. In reality, gender concerns compete with many other interests, priorities and identities of women such as survival, class, ethnicity, religion, rendering it difficult to target women as a social category. In spite of repeated disillusionment, women have continued to mobilise on the basis of homogeneity based on womanhood.¹⁸¹ Similarly, African Women's Development and Communications' Network (FEMNET) has not lived up to its potential as an African network due to differences in mandates,

177 As above.

178 *Feminist connection: Reconnecting with ourselves and our communities* The 3rd African Feminist Forum Conference Report, 21-24 October 2010 <http://www.africanfeministforum.com/wp-content/uploads/2012/04/AFF-Report-2010.pdf> (accessed 20 September 2013).

179 Friedman & Mottair (n 14 above) 30-31.

180 AM Tripp & JC Kwesiga *The women's movement in Uganda: History, challenges and prospects* (2002) 6.

181 T Awori 'Gender and constitutionalism in Africa: Bridging the gap – From constitutionalism to people's lives' in J Oloka-Onyango & CM Peter *Gender and constitutionalism* (2004) 66-69.

ideological underpinning of development and linguistic barriers amongst Anglophone, Francophone, Arabophone and Lusophone Africa.¹⁸² Networks are also afflicted by ethnicity, religion, and class and egoistic power struggles.¹⁸³

In concluding the discussion of NGO networks, the inability to internally apply human rights principles to them has made them fragile, with a preference for loose coalitions. Successful networking entails applying the following human rights principles: respect of members as voluntary autonomous groups in pursuit of common interests coupled with dialogue to agree on the similar interests as well as negotiate the competing interests of the membership; empowerment to enhance collective voice, common identity and organisational synergy through collaborative exchange of information, skills, knowledge and experiences as well as shield members from arbitrary state power; and participation of partners to nurture ownership while concurrently providing an opportunity for members to opt out in cases of disagreement, expanding the network beyond peer organisations, to recruit new allies to the human rights discourse and to mobilise wider populations and accountability to avoid duplication and competition of members and dedicate time and resources to the networking activities.

7 Participation of NGOs in political society

Given that government is the main duty bearer to deliver rights, NGOs have to engage the state and political society. It is thus necessary to discuss the nature of the participation of NGOs in politics highlighting the challenges and opportunities of NGOs obligation to be inclusive and promote participation with political society. In making the case for NGO's political participation, the discussion examines the various strategies NGOs use to participate or influence the political discourse. It begins with the discussion of the collaboration and confrontation, followed by litigation and civil disobedience and lastly, entering the state.

7.1 Making the case for NGO's Political participation

Human rights struggles are essentially political. The Universal Declaration acknowledgement that

182 Wanyeki (n 172 above) 216 & 219.

183 Nyangabyaki (n 150 above) 43-44; Interview with Aina (n 59 above); Starkey (n 121 above) 21-28; BA Andreassen 'Bridging human rights and governance – Constructing civic competence and the reconstruction of political order' in HO Sano & G Alfredsson (eds) *Human Rights and good governance: Building bridges* (2002) 115; Research on Poverty Alleviation (REPOA) *Tanzania Non-Governmental Organisations – Their perceptions of the relationship with government of Tanzania and donors, and their role in poverty reduction and development* (2007) xi.

if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

makes human rights part and parcel of the political realm of human affairs.¹⁸⁴ ICHRP contends that the work of human rights NGOs is political because it is:¹⁸⁵

centrally about resisting abuse of power by government or by others who are in position to affect the lives of individuals or communities ... NGOs therefore need to take account of the responsibilities that they incur because they act in a political context and have influence.

NGOs impact on state policies by serving as an alternative source of credible solutions in clear and powerful messages that appeal to human rights principles.¹⁸⁶

Mutunga identifies three NGO positions in relation to the issue of political participation in East Africa: The dominant view perceives NGOs as apolitical; the middle ground argues that although NGOs have political views, they must not support partisan political interests and the radical view argues that because the contest for political power is not the exclusive business of political parties, NGOs are nurseries of alternative political leadership and therefore have political views and can participate in politics, while simultaneously refraining from being partisan.¹⁸⁷ Mutunga traces the principle of non-partisanship as 'defined as no expression on the political situation in a given country' to Amnesty International's operational strategy which was aimed at affording it the impression of impartiality during the Cold War.¹⁸⁸

The commitment of NGOs to actions that determine the social contract between the state and its citizens make them essentially political.¹⁸⁹ Such actions include defending the cause of marginalised groups, operating as interest groups, influencing policies and holding power to act in a particular way and serving as important sources of alternative policy ideas and promoting the political consciousness of the

184 MK Bromley 'The International Human Rights Law Group: Human rights and access to justice in post-conflict environments' in Welch (n 25 above) 149.

185 ICHRP (n 31 above).

186 Keck & Sikkink (n 122 above) 19.

187 W Mutunga 'Constitutions, law and civil society: Discourse on the legitimacy of people's power' in J Oloka-Onyango (ed) *Constitutionalism in Africa: Creating opportunities, facing challenges* (2001) 137.

188 Mutunga 'So what really is non-partisanship?' in Mutunga & Mutua (2003) *Eyes on the prize* (2003) 36.

189 HJ Steiner *Diverse Partners: NGOs in the human rights movement – A report of a retreat of human rights activists* (1999) 70.

people to engage the state from an informed point of view.¹⁹⁰ As has been tritely argued by Boule:¹⁹¹

As educationists, CSOs provide training ground for democratic citizenship; develop political skills and new leaders; stimulate political participation and educate the broader citizenry on a wide range of public interest issues. As watch-dogs, they act as a check on the State's inclination towards centralising power and evading civic accountability. As service deliverers, they supplement government programmes by providing goods and services directly to the people who need them. Often, overlooked are their political role-supplementing political parties as varied and flexible mechanisms through which citizens define and articulate a broad range of interests and exert their demands on government.

Despite the above obvious facts, East African governments have been quite antagonistic to human-rights and pro-democracy organisations, accusing them of being part of the opposition and elitist, urban-based, self-seeking, and facilitators of foreign agendas.¹⁹² Participation in associational life promotes political consciousness and encourages more involvement in politics, through voting, campaigning and a willingness to stand for elective office.¹⁹³ Given the collective power derived from the right of freedom of association and its potential to challenge the status quo, it is often restricted.

Globally, the space for civic engagement is shrinking under the guise of curbing terrorism or protecting state security and law and order.¹⁹⁴ NGOs involved in advocacy are considered political. Accordingly, many human rights NGOs in East Africa hardly monitor government actions, or undertake public protest. Instead, they prefer to engage in non-contentious awareness raising and legal aid.¹⁹⁵ Thus, whereas 68 per cent of NGOs in Tanzania claimed to have worked on advocacy, only 25 per cent had targeted government in their various activities.¹⁹⁶

Inadvertently, by accepting the myth of being non-political or apolitical, NGOs effectively take sides with the status quo because policy

190 Dicklitch (n 99 above) 12; Blair Commission for Africa (2005) *Our common interest: Report of the Commission for Africa* http://www.commissionforafrica.org/english/report/thereport/english/11-03-05_cr_report.pdf (accessed 3 June 2006) 28.

191 J Boule 'Putting the voluntary sector back on map in The development agenda and the voluntary sector' (1997) 1 *The Development Update, Quarterly Journal of the South African NGO Coalition and Interfund* 21.

192 CM Peter 'Conclusion: Coming of age: NGOs and state accountability in East Africa' in Mutua (n 22 above) 305-317.

193 Edwards (n 61 above) 102.

194 ICNL & WMD Defending civil Society <http://www.defendingcivilsociety.org/en/index.php/principles> (accessed 12 July 2013) 3

195 IG Shivji *The concept of human rights in Africa* (1989) 36; J Oloka-Onyango *Cajoling the state in Uganda: Analysing the influence of NAWOU and HURINET on the formulation of government policy* (2000) 83;

196 REPOA (n 183 above) 8.

making is a political process characterised with competing interests.¹⁹⁷ Umar and Kuye provide a simple definition of public policy as:¹⁹⁸

whatever government choose to do or not to do, because even inactions have impact. NGOs engage in policy advocacy because it is only government that can authoritatively act on the whole. Therefore policy advocacy relates to the efforts of understanding what, why, when and how governments do. Hence, policy advocacy is essentially political in nature, for policy making is a struggle over ideas.

7.2 Collaboration and critical engagement with government

Engaging with popular governments is more complex than challenging autocratic ones. In overtly dictatorial regimes, NGO/state relations are usually confrontational with NGOs serving as a bulwark against government excesses. However, in transition governments overt confrontations with government is perceived as unrealistic and unwarranted. For example, in South Africa opposing government policies is essentially seen as anti-ANC and therefore disruptive.¹⁹⁹ Likewise, in Kenya the relationship between Jubilee government and NGOs worsened because of the latter's overt push for accountability of the 2007 post-election violence at the Hague-based International Criminal Court and their open support for the Salaries and Remuneration Commission to have Parliamentarian's salaries reduced.²⁰⁰ One political consultant equated the call for accountability to provocation of 'war' and hostilities with the government for both 'criminalising' and 'delegitimising' the state.²⁰¹ In such circumstances, the attempts to reform of the PBO were predictable. Government has justified its action on grounds of national security with CSOs accused of engaging in terrorism, criminal activity and radicalisation of the youth and being unpatriotic.²⁰² Cognisant that holding power to account requires boldness particularly in view of governments' tendency to retaliate when overtly challenged most NGOs define themselves as apolitical.

At the same time collaborating with transitional governments in order to support the fragile democracies may compromise NGOs to merely serve

197 IG Shivji *The silences in the NGO discourse: The role and future of NGOs in Africa* Occasional paper No 1 (2006) 24-25.

198 K Umar & JO Kuye 'Rationalism and the problematique in policy making and analysis: The case of public policy targeting in Africa' (2006) 41 *Journal of Public Administration* Special Issue 807 & 817.

199 S Oldfield & K Stokke 'Building unity in diversity: Social movements activism in the Western Cape anti-eviction campaign' (2004) 21 www.ukzn.ac.za/ccs (accessed 7 July 2006); Hassim (n 176 above) 17; Friedman & Mottair (n 14 above) 9.

200 Kenya-The New NGO's law good for the sector <http://nguzoafrica.blogspot.com/2013/04/kenya-new-law-good-for-sector-proposed.html> (accessed 16 July 2013).

201 Ngunjiri Wambugu, 'State War on NGOs not good for Kenya,' <http://www.the-star.co.ke/news/article-189934/state-war-ngos-not-good-kenya> (accessed 3 August 2015).

202 KM Seronei 'Civil society needs to be regulated' *Daily Nation* 13 November 2014.

as the implementing arm of government.²⁰³ Close proximity to government has contradictory effects. On the positive side, it facilitates access to opportunities and timely information. On the negative side, proximity to government may compromise an NGO's mission and autonomy to independently influence policies. The Uganda National Development Plan predominantly perceives NGOs as 'appendages of government whose programmes and financing should be integrated in the government plans'.²⁰⁴ Likewise, in South Africa, all provinces heavily rely on NGOs to deliver services.²⁰⁵ In Kenya, President Uhuru Kenyatta has urged NGOs to desist from the 'wasteful confrontation' of the past and work with it.²⁰⁶ In Uganda, the suspension of direct budgetary support to government for 2013, while maintaining support to projects, agencies and civil society²⁰⁷ has prompted the President to publicly castigate NGOs as 'internal saboteurs and acting on behalf of foreign interests'.²⁰⁸ The desire to align NGOs' work with government's priorities contradicts the very essence of advocacy work. It is the very controversy of the national policies and programmes that give rise to the advocacy work of providing alternative ideas in contested discourses. Put differently, the role of NGOs is not merely to engage in service delivery but also to draw attention to human rights violations and to participate in policy formulation.

Many NGOs recognise that they have been co-opted to serve as the cheaper or cost effective service delivery mechanism without challenging the root causes of abuse, rights violations or poverty. In a critique of humanitarian organisations in Kenya, Juma observes that in most cases NGOs acquiesce in their co-option by the state in order to freely operate, which amounts to condoning the abuse.²⁰⁹ For example, although in 1998 the South African Ministry of Housing adopted the Homeless People's Housing process based on self-help participatory processes, the Ministry subsequently backtracked on the people driven housing delivery strategy.²¹⁰ Another practical challenge of working with government is that it derails an NGO's focus. For example, in Zanzibar government abdicated from its key responsibility of assuring the rights of persons with

203 NPO Impact Assessment (n 104 above) 34.

204 Government of Uganda *National Development Plan* (2010) 28.

205 RG Wyngaard 'The South African NPO Crisis: Time to Join Hands' (2013) 15 *International Journal of Not-for-Profit Law* 5.

206 The Presidency 'President Kenyatta's speech at the 25th Anniversary of the NGO Coordination Act' <http://www.president.go.ke/president-kenyattas-speech-at-the-25-anniversary-of-the-ngo-co-ordination-act/> (accessed 5 Nov, 2014).

207 M Lowcock 'Ugandan Citizen and donors must not tolerate stealing of public funds' *Daily Monitor* 7 December 2012 2; S Sanya & A Mugisha 'Government to cut budget to fund critical sectors' *New Vision* 5 December 2012 1.

208 Halima Abdalla 'Under Siege Museveni seeps support on oil law, aid cuts' *The East African* 15-21 December 2012 5.

209 MK Juma 'The compromised brokers: NGOs and displaced populations in East Africa' in PT Zelaza & PJ McConaughay (eds) *Human rights, the rule of law, and development in Africa* (2004) 236, 237 & 247.

210 Khan & Pieterse (n 107 above) 18 & 21.

disabilities, which it delegated to Zanzibar Association of persons with disabilities.²¹¹

Generally, women NGOs are most notorious for their apolitical role. In all the East African Countries, mass women's organisations were appendages to government as was the case with National Association of Women Organizations in Uganda (NAWOU), Maendeleo ya Wanawake in Kenya and Umoja wa Wanawake wa Tanzania. In South Africa, although the appointment of individuals of the WNC into government, resulted in the integration of gender concerns into key law reform and social policies, it equally blunted women's advocacy.²¹² While many women are active in the civil society sector, women's issues have mainly been located in the discourse about development that many women do not perceive their engagement in the social and economic arena as political engagement. Amadiume argues that women in Africa find the state a burden, and therefore seek to defend their autonomy from the state, as a 'right against domination and violation'.²¹³ Either concerned about conflicting with governments or motivated by safeguarding their autonomy against state co-optation, women's organisations have misconstrued being non-partisan as being apolitical.²¹⁴

The experience of TAMWA which mainly relied on its good relationship with government to achieve the enactment of the Sexual Offences Special Provisions Act in 1998²¹⁵ reflects the NGO's capacity to hold government to account in situations of common interests. Probably in the cases of disagreement between government and NGOs, the relationship with the former would be jeopardised. Despite the engagement of NGOs in the drafting of the NGO Policy in Tanzania, government enacted the NGO Act with minimal reference to the NGO Policy.²¹⁶ In Uganda, during the Petroleum Exploration and Development Bill, 2012 (Oil Bill) debates, two Coalitions, Oil Watch Coalition and the Civil Society Budget Advocacy Groups, worked with Parliamentarians to contest the Minister's unilateral powers to negotiate, grant and revoke licenses, with the minority in Parliament seeking to

211 Focus group discussion, Zanzibar Society for person with disabilities (UWZ), 26 July 2007.

212 Hassim (n 176 above) 9-10 & 17-19.

213 I Amadiume 'Gender, political systems and social movements: A West African experience' in M Mamdani et al (eds) *African studies in social movements and democracy* (1995) 35 & 63.

214 Oloka-Onyango (n 195 above) 36.

215 AS Kiondo 'Policy advocacy: The case of Tanzania Media Women Associations' in AS Kiondo & JE Nyang'oro (eds) *Civil society and democratic development in Tanzania* 46; REPOA (n 183 above) 20.

216 L Ndubaro & A Mvungi 'The Non-Governmental Organisations Act 2002: A suffocation of the NGO struggle' in Kiondo & Nyang'oro (n 215 above) 148.

introduce checks and balances in the form of guidance of the Petroleum Authority and approval of the Cabinet.²¹⁷ Unfortunately, the NRM's numerical strength was used to frustrate legitimate minority voices and the Bill was passed on 6 December 2012 under a 'mock debate' and a vote.²¹⁸ Likewise, while the collaboration between Uganda Women's Parliamentary Association (UWOPA) and the women's movement resulted in the enactment of numerous less contentious laws,²¹⁹ the long awaited Marriage and Divorce Bills previously known as Domestic Relations Bill whose major contention focuses on the property rights of women in marriage is still pending for over six decades. Of what use is collaboration if it merely results in the delay of retrogressive legislation, as was the case in both Uganda and Tanzania? Significantly, in Uganda, the unrestricted and unstructured collaboration with government has entrenched the co-option of the women's movement. At the Uganda's 50th Anniversary dinner hosted by UWONET and UWOPA, the President paternalistically cited the Biblical fourth commandment of 'honour and obey your parents', equating the NRM under his leadership to the parent of the women's movement.

Many NGOs have members from political society. It is also fashionable for politicians to form organisations to complement their political role by providing social services. ECOSOC recognises that NGOs can accept members working in government so long as they do not interfere with the free expression of views of the organisation.²²⁰ The challenge lies in the failure of NGOs to candidly discuss the different expectations between women NGOs and politicians in order to collectively forge a mutually agreeable consensus on strategies to achieve common goals. During the Bomas Constituent Assembly debate in Kenya, women delegates and the women's coalition disagreed on how to choose the representatives of women to the Bomas. The differences became so divisive that efforts at consensus building failed as both sides stood firm about their respective stands.²²¹ Similarly, the Sexual offences Bill advocacy campaign in Kenya illuminated the divisions between women politicians and activists. Although Njoki acknowledged the support of WNGOs such as providing administrative services, researching on and drafting the bill, she maintains that she neither received monetary support nor worked effectively with NGOs on the matter.²²² An outstanding issue

217 'Bribery claims dog debates, ministers go into hiding' *Red Pepper* 9 December 2012 5; 'MPs support Kadaga in bid to Reject Bill' *Daily Monitor* 5 December 2012 7; 'Civil Society Present Petition to Kadaga' *New Vision* 6 December 2012 6.

218 'Government insists on Oil law Powers' *Daily Monitor* 7 December 2012 1; *Red Pepper* (n 807 above) 5.

219 The Prevention of Trafficking in Persons Act 7 of 2009; Domestic Violence Act 3 2010; The Prohibition of Female Genital Mutilation Act 5 of 2010.

220 ECOSOC Resolution 1996/31 of 25 July 1996 <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm> (accessed 17 August 2007).

221 JK Muteshi 'Women's advocacy: Engendering and reconstituting the Kenyan state' in Mutua (n 30 above) 130.

222 Interview with Njoki, UN woman of year 2007, 7 September 2007, Nairobi.

amongst NGOs was why the Bill was personalised and code-named 'Njoki's Bill',²²³ oblivious to the fact that it is legislators who make laws.

Ndegwa demonstrates that while the presence of high government officials on the Ndugu Board in Kenya enhanced the amicable relationship with government, it also hampered it from undertaking radical action.²²⁴ In contrast, Green Belt Movement's distance from government enabled Wangari Maathai to stop the building of the skyscraper in Uhuru Park.²²⁵

Governments have patronised some NGOs and use them to exert control over others. Bell and Carens observe that cooperation with undemocratic governments weakens the impact of criticism by other NGOs.²²⁶ For example, Tanzania Association of NGOs (TANGO) – a government sponsored network – is relied on by the Registrar of Societies to screen applications before registration.²²⁷ In South Africa, by offering the South African National Civic Organisations (SANCO) a 20 per cent commission on fees collected, the ANC made it co-sign the demand letters and eviction notices instead of representing the evictees.²²⁸ Likewise, the National Land Committee (NLC) was used to control the radical activism of the Landless People's Movement.²²⁹

Mindful of the need to keep a critical distance from government, in South Africa, NGOs coined the term 'critical allies' to permit a flexible relationship between cooperation and confrontation.²³⁰ For example, TAC conflicts and collaborates with government by monitoring the roll-out plans while simultaneously importing anti-retroviral drugs.²³¹ In the 1990s, IDASA adopted a critical strategy by analysing the political landscape to ensure more informed debates to strengthen democratic practices.²³² SANGOCO worked collaboratively with SAHRC and the Commission for Gender Equality on Speak out on Poverty Hearings.²³³ Similarly, the Homeless People's Association (HPA's) promotes workable alternatives to official shelter policy and its implementation.²³⁴

223 As above.

224 Ndegwa (n 18 above) 60.

225 Ndegwa (n 18 above) 94 & 99.

226 Bell & Carens (n 17 above) 320-322.

227 IG Shivji & WB Kapinga *Maasai rights in Ngorongoro conservation authority area* (1998) 51.

228 Desai & Pithouse (n 111 above) 13; Egan & Wafer (n 127 above) 7.

229 Greenberg (n 99 above) 18 & 21.

230 Koetz (n 137 above) 29; Desai & Pithouse (n 111 above) 24 & 28.

231 Friedman & Mottair (n 14 above) 6, 21 & 23.

232 S Gupta & A Kellman 'Democracy organisations in political transitions: IDASA and the New South Africa' in Mutua (n 22 above) 268-269.

233 H Lorgat 'Are we on track? MDGs 777 halfpoint' *The Millennium Development Goals: Africa and South Africa 2007 Review* (2007) 15; Human Rights Institute of South Africa (HURISA) *Report The effectiveness and impact of constitution building institutions in South Africa* (2007) iii.

234 Khan & Pietersen (n 107 above) 27-28.

NGOs have collaborated with government to strengthen its capacity as the main duty bearer in protecting rights. This has mainly involved capacity building for law enforcement agencies. Moreover, NGO's work becomes sustainable where government adopts the former's agenda. This is the case with the on-going establishment of legal aid clinics alongside the court system in Uganda and the making of mediation and arbitration an integral part of the justice system in Uganda. In South Africa, government adopted the Mvula Trust participatory health and sanitation transformation approach and the cost-effective school sanitation programme.²³⁵ In East Africa, KCK's Human Rights Bill was adopted by the East Africa Legislative Council.²³⁶ The above notwithstanding, NGOs have found collaboration with government quite expensive. Throughout East Africa, working with parliamentarians and the judiciary requires catering for their escorts and drivers, in addition to working in venues commensurate with their status and security concerns.

7.3 Civil disobedience

Many human rights struggles are secured through the law. Indeed, ICHRP asserts that one of the values of human rights NGOs is that of non-violence and lawful methods of engagement.²³⁷ Nevertheless, at times the relationship with government and NGOs is plagued with conflict that the law is manipulated as a political tool, hence compelling NGOs to resort to civil disobedience. The use of civil disobedience has been prominent in South Africa due to the history of struggles against apartheid.²³⁸ Social movements sprouted to challenge economic inequalities and expand the enjoyment of ESCRs. However, most African constitutions restrict citizen civil action because it undermines government authority and creates uncertainty. Citizen civil action includes the constructive criticism of government policies through mass media and public debate, voting, withdrawal of support from government programmes, policies, facilities, support of the opposition, demonstrations, strikes, processions and boycott to mention but a few.²³⁹ However, the above citizen civil actions do not constitute civil disobedience as long as they are carried out through lawful means.²⁴⁰ Civil disobedience entails a deliberate choice to break the law

235 The Mvula Trust Field Note 14, August (2002) 7.

236 East African Community 'EALA Passes Bill on Human Rights' http://www.eac.int/index.php?option=com_content&view=article&id=988:eala-passes-bill-on-human-rights&catid=146:press-releases&Itemid=194 (accessed 14 October 2013).

237 ICHRP (n 31 above) Table 3.1.

238 L Seafeld 'South Africa: The interdependence of all human rights' in AA An-Na'im (ed) *Human rights under African constitutions: Realising the promise for ourselves* (2003) 317; NPO Impact Assessment (n 104 above) 41.

239 K Kibwana 'The right to civil disobedience' in K Kibwana (ed) *Search for freedom and prosperity Constitutional reform in East Africa* (1996) 363.

240 Kibwana (n 239 above); Mutunga (n 188 above) 131.

with the intention that citizens will secure the desired change of the law or policy.²⁴¹ Under the social contract concept, civil disobedience can be justified to compel the state to perform its obligations in the interest of the common good.²⁴²

Civil obedience is a legitimate means to demonstrate people power against oppression.²⁴³ An’Naim argues that struggle is a form of resistance to oppression.²⁴⁴

In fact, the violator’s power is usually dependent on the victim’s perception of, and response to, the situation. If the victim is somehow able to refuse to submit to the apparent power of the violator, and able to resort to whatever means of resistance are available, the terms of the relationship between the victim and the violator would already have begun to shift or change.

Likewise, Heyns argues that human rights and struggle are two sides of the same coin.²⁴⁵

Human rights ... is not about asking favours, and not theoretical concepts: they are guides to action and triggers of opposition to the illegitimate use of power, particularly state power. Human rights are therefore not dependent on recognition by a state-people can claim them even when the law, whether made by a dictator or by the majority, denies those rights ... The concept of human rights does not challenge the state as an institution; in fact it endorses the state but claims that the protection of these rights is a primary obligation of the state and holds the state accountable to this standard. The human/rights/legitimate resistance approach emphasises that, to the extent that the state fails in this regard, the obligation to obey the state lapses.

Mandela contends that

it is the oppressor who defines the nature of the struggle and the oppressed is often left no recourse but to use the methods that mirror those of the oppressor. At a certain point ... one can only fight fire with fire.²⁴⁶

In Uganda, despite the positive constitutional petitions that have reaffirmed human rights,²⁴⁷ the government has ignored these court decisions and has continued to disperse peaceful demonstrations and harass journalists.²⁴⁸ For the above reasons, at times NGOs use the law as

241 Kibwana (n 239 above) 362.

242 Fowler (n 29 above) 244.

243 J Ihonvbere *Economic crisis, civil society and democratisation: The case of Zambia* (1996) 39.

244 AA An-Nai’m ‘Expanding legal protection of human rights in Africa contexts’ in An’Naim (n 238 above) 6-7.

245 C Heyns ‘Struggle as approach to human rights’ in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: A reader* (2006) 15-16.

246 Mandela (n 97 above) 155.

247 See *Charles Onyango Obbo & Anor vs AG* (Constitutional Petition 2/2001) [2004] UGSC 1, and *M Kivumbi petition Constitutional Petition No 9/2005*.

248 ‘Court throws out Monitor scribes case’ *Daily Monitor* 7 Dec 2012 11; NTV News Bulletin ‘Killing the Messenger’ 13 January 2015.

a political tool to place an issue on the public agenda. In the Western Cape anti-eviction campaign, the Legal Coordinating Committee used the law to frustrate the process:²⁴⁹

The LCC's goal is not to win cases but to f-up the system, and to buy time for families. In response lawyers get furious. We talk very loud, we skell them out and yet they are not allowed to talk back because are bound by the code of conduct. But lawyers try to scare us and belittle us, we laugh at them.

Civil disobedience can yield some limited tangible and immediate benefits. By 2002, the evictions in Mandela Park had been halted and the new owners agreed to surrender the homes in exchange for alternative accommodation.²⁵⁰ Within six months, SECC had illegally reconnected 3000 households and ESKOM (the electricity company) was forced to write off the electricity arrears.²⁵¹ In the Western Cape, anti-eviction campaign activists dug a 4-metre hole in the middle of the road when the local government council failed to repair it and within a day the road was repaired.²⁵²

The above notwithstanding, NGOs should only resort to civil disobedience where all lawful negotiations and engagements fail to yield acceptable outcomes.²⁵³ The Gandhian tactics of breaking the law in an open but non-violent way which was adopted by Treatment Action Campaign (TAC) by importing HIV/AIDs drugs was morally justified because most people consider the making of profit out of illness immoral.²⁵⁴ Other social movements did not attract equivalent public empathy. For example, the media labelled the SECC and MPAEC 'criminal, leftist and terrorist'.²⁵⁵ In Uganda, the Code of Honour of NGOs bars civil disobedience as 'subversive'.²⁵⁶ Occasionally, NGOs in Uganda are increasingly asserting their watchdog role, such as the opposition of UJCC, HURINET and UWONET to the constitutional amendment in support of life presidency and the condemnation of the 2006 elections as not free and fair, the Black Monday campaign against corruption spearheaded by NGO Forum and Action Aid, the advocacy on the Oil bill, such incidents are rare. The Save Mabira Campaign spearheaded by the National Association of Professional Environmentalist (NAPE) which involved a public protest demonstration attracted very few NGOs. Major NGOs preferred to work with ACODE's coalition on the

249 Oldfield & Stokke, (n 199 above) 24.

250 Desai & Pithouse (n 111 above) 16.

251 Egan & Wafer (n 127 above) 8.

252 Oldfield & Stokke (n 199 above) 15-16.

253 Kibwana (n 239 above) 363.

254 Friedman & Mottair (n 14 above) 28-29.

255 Oldfield & Stokke (n 199 above) 24 & 20; Desai & Pithouse (n 111 above) 18; Egan & Wafer (n 127 above) 9 & 17.

256 DENIVA & NGO Forum *Uganda NGO Code of Honour: The quality assurance certification mechanism* (2006) 8.

Save Mabira Campaign whose strategy involved workshops and litigation.²⁵⁷

In concluding the above discussion, civil disobedience should only be used as a last resort because it can easily deteriorate into lawlessness and anarchy.²⁵⁸ Caution must be taken to ensure that civil disobedience does not impair the liberty of others, be coercive and should cease when concessions have been made.²⁵⁹

7.4 Entering the state

Given the frustrations of influencing governments to realise positive change, some NGOs leaders have opted to join government in order to cause positive change themselves. Cynics have thus joked that the acronym 'NGO' stands for 'next-government officer'. The use of NGOs for prestige and as a basis for political careers is a global phenomenon.²⁶⁰ During the transitions in Kenya, South Africa, Namibia, Mozambique, Zambia and Uganda, many local activists transitioned into government. Indeed, prominent women leaders within East Africa assert that their activism in NGOs has acclimatised them to leadership roles.

However, once former activists join government they invariably side with the government.²⁶¹ A more fundamental danger is that ordinary people get disillusioned with the:

[P]aradox of change without change when they see the radical activists, the 'fire-eaters' who organised protest marches, hobnobbing with the government and 'arrogating' themselves the right to determine ... the political order.²⁶²

In Kenya, it is generally observed that 'entering the state' is a form of self-co-option because former NGO activists get captured by it.²⁶³ Moreover, former NGO activists who entered government design similar programmes to those of NGOs. At the same time, NGOs were reluctant to criticise their colleagues in government.²⁶⁴ The minority NGOs critical of NARC's betrayal of the reform agenda remained largely incoherent in their strategies.²⁶⁵ In contrast, during the dictatorial Moi regime in Kenya,

257 Interview with Tumushabe, then Executive Director, Advocates Coalition for Development and Environment (ACODE), 17 July 2007.

258 Kibwana (n 239 above) 363-364.

259 Kibwana (n 239 above) 366.

260 P Uvin *Human rights and development* (2004) 100.

261 WJ Miano 'Governance and democracy in Kenya: Challenges for human rights' in Mutua (n 22 above) 226; J Oloka-Onyango *Civil society, democratisation and foreign donors in contemporary Uganda: A conceptual and literature review* (2000) 9.

262 Ihonvbere (n 243 above) 38 & 40.

263 Interview with Mutuma, then Acting Dean, Kenya Human Rights Institute, 24 August 2007, Nairobi.

264 K Kanyinga 'Contradictions in the neo-liberalism: Donors, human rights NGOs and governance in Kenya' in Mutua (n 22 above) 199.

265 Kanyinga (n 264 above) 200.

NGOs set the agenda for reform and significantly influenced the National Alliance and Rainbow Coalition (NARC) government.²⁶⁶

Likewise, in South Africa, the proximity of NGOs to the NRC government constrained their ability to articulate an alternative agenda or challenge the human rights violations arising from its economic policy.²⁶⁷

In summarising NGO's and participation in political society, it is imperative to appreciate that life itself is political. As Peter aptly asserts, politics include, issues such as:²⁶⁸

How one earns his or her living, whether there is medicine in hospitals, whether teachers are teaching in schools, whether bureaucracies are corrupt or not, how much one is paid as wages, what one listens to on the radio or reads in the newspaper, who owns what in the country—all these are political issues ... A reasonable government needs to be tolerant, to listen to other points of view and accept criticism with grace.

Maintaining that human rights NGOs should be apolitical is a dishonest way of producing political results in an apolitical way.²⁶⁹ Any successful struggle for social justice is first and foremost a political struggle 'to redefine the subjects and their entitlements'.²⁷⁰ Yet, human rights as political struggles must be fought in the political arena. In effect, being apolitical amounts to being political in the face of rampant corruption, the violation of rights and the exclusion of the majority of the populace from decision-making processes.²⁷¹

Against the preceding background, which largely analysed the functioning of NGOs at the domestic level, the next discussion critiques the participation of NGOs in the operations of the African Commission on Human and Peoples' Rights – the main regional organisation charged with the responsibility of upholding the promotion and protection of human rights.

8 NGOs and the African Commission on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights establishes the African Commission as a quasi-judicial body responsible for human

266 Ombati & Orina-Nyamwamu (n 149 above) 6.

267 Khan & Pietersen (n 107 above) 5.

268 CM Peter 'The state and independent civil society organisations: The case of Tanzania Women Council BAWATA' in AS Kiondo & JE Nyang'oro (eds 215) 113-114.

269 Uvin (n 260 above) 99.

270 Mamdani in 'Electronic Round Table: "Democracy and Human Rights"' (February, 2000) 50 www.africaaction.org/rtb2/rtb2.pdf (accessed 2 August 2006).

271 W Mutunga 'The human rights movement and the struggle for human rights states in East Africa' The Ford Foundation (2004) 21-22, unpublished (on file with the author).

rights.²⁷² In its promotional role, the African Commission is mandated to generate knowledge on African human rights and to cooperate with other institutions concerned with promoting and protecting human rights.²⁷³ The discussion begins with an outline of the regulatory framework for NGOs and assesses the effectiveness of NGO participation at the regional body.

To enable the participation of NGOs in the Commission's work, the Commission initiated the system of observer status. Initially the procedure of granting observer status was simple based on mere receipt of a written application, attached with the constitution, names of office bearers and funding sources.²⁷⁴ It was also not necessary that an applying NGO be registered in a country in which it is based. The Commission rightly argued that it had to independently apply its own rules and procedures and could not aptly examine the reasons for denial of registration of a given NGO at the national level.²⁷⁵ However, the revised criteria of 1999 requires an applying NGO to prove legal existence in the country of operations and submit the NGO's founding documents, list of members, constituent organs, sources of funding, latest financial statements, past and present activities, plan of action and any other information that may help to identify the purpose, objectives and field of actions as part of the application.²⁷⁶ An NGO seeking observer status must have objectives and activities that are similar to the OAU Charter and the African Charter as well as declare its financial resources.²⁷⁷ Furthermore, an Observer must work in the field of human rights.²⁷⁸ The application must be lodged 3 months prior to an ordinary session of the Commission in order to enable the Secretariat process it.²⁷⁹ The above notwithstanding, as Viljoen observes the practice of granting observer status 'fluctuates between legalistic formulations and substance-based flexibility', without clarity of reasons of denial or granting of observer status.²⁸⁰

An observer is entitled to be present at the opening and closing of all sessions, and to have access to the documents of the Commission that are

272 African [Banjul] Charter on Human and Peoples' Rights (African Charter) adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986, (1981) art 30.

273 African Charter (n 272 above) art 48(1); ACHPR 'Rules of procedure of the African Commission on Human and Peoples' Rights' (2010) rule 71(2) http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf (accessed 12 July 2013).

274 A Motala 'NGOs in the African system' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 249-250.

275 Motala (n 274 above) 249.

276 'Criteria for Observer status for NGOs' in C Heyns & M Killander (eds) *Compendium of Human Rights Documents of the African Union* (2006) Ch I, para 3-4.

277 'Criteria for Observer status for NGOs' (n 276 above) Ch I, para 2.

278 'Criteria for Observer status for NGOs' (n 276 above) Ch I, para 2; ACHPR Rules of procedure (n 273 above) rule 68(2).

279 'Criteria for Observer status for NGOs' (n 276 above) Ch I para 3.

280 F Viljoen 'The African Commission: Promotion Mandate' in *International human rights law in Africa* Oxford (2007) 408.

not of a confidential nature,²⁸¹ be present at closed sessions²⁸² and may propose issues to be included in the provisional agenda.²⁸³ In a reciprocal relationship, an observer is obliged to closely cooperate with the African Commission²⁸⁴ and present their activity report to the Commission every two years.²⁸⁵ The Commission may invite an NGO to enlighten it on a particular issue.²⁸⁶ Further, an observer may also request the Commission to include on its agenda a discussion on any human rights situation in Africa.²⁸⁷ On failure of an observer to fulfil its obligations, the Commission may deny it participation in the session, documents and the opportunity to propose views to the agenda.²⁸⁸ In the worst-case scenario, an observer may be suspended or observer status may be withdrawn.²⁸⁹

The joint workshop between the African Commission and NGOs held in 1991 resolved that NGOs perform the following functions: prepare comments on state reports, maintain constant contacts between the Commission and NGOs, be actively involved in the processes of nomination and appointment of Commissioners and create a coordination Committee whose functions would include the establishment of a voluntary fund to assist African NGOs to maximise their contributions to the work of the Commission.²⁹⁰ How effective has NGO participation actually been at the African Commission? This question is the focus of the following discussion.

At its third session in 1988, the African Commission started granting observer status to the first three NGOs, which were all INGOs.²⁹¹ By 1990, only 16 NGOs had observer status.²⁹² Under the leadership of Adama Dieng, ICJ-Geneva initiated NGO Forums immediately preceding the Commission sessions, thus enabling African NGOs to get more intimately involved in the Commission's work.²⁹³ In 2013, there were 455 NGOs with observer Status.²⁹⁴

281 'Criteria for Observer status for NGOs' (n 276 above) Ch II, para 1-2.

282 'Criteria for Observer status for NGOs' (n 276 above) Ch II, para 3.

283 'Criteria for Observer status for NGOs' (n 276 above) Ch II, para 6; ACHPR Rules of Procedure (n 901 above) rule 32(3).

284 'Criteria for Observer status for NGOs' (n 276 above) Ch III, para 1.

285 'Criteria for Observer status for NGOs' (n 276 above) Ch III, para 2.

286 ACHPR rules of procedure (n 273 above) rule 62.

287 ACHPR rules of procedure (n 273 above) rule 63(1).

288 'Criteria for Observer status for NGOs' (n 276) Ch IV, para 2.

289 'Criteria for Observer status for NGOs' (n 276) Ch IV, para 3.

290 African Commission 'Conclusions and recommendations of a workshop on NGO participation in the work of the African Commission, Gambia' (1991) 3 *African Journal of International and Comparative Law* /RADIC also see http://www1.chr.up.ac.za/images/files/documents/ahrdd/theme02/african_commission_conclusions_recomendations_ngo_1991.pdf (accessed 13 April 2007).

291 Viljoen (n 280 above) 406; Motala (n 274 above) 249.

292 Viljoen (n 280 above) 406.

293 As above.

294 ACHPR <http://www.achpr.org/network/> (accessed 17 September 2013).

Initially, only a handful of NGOs attended the Commission's sessions, primarily due to the cumbersome and costly travel to Banjul, Gambia (the seat of the Commission).²⁹⁵ South African NGOs remain largely aloof to many forums of the African Commission.²⁹⁶ NGOs from the West Africa sub-region in which the seat of the Commission is situated dominate the Commission's activities. For example, during the drafting of the Protocol on Women, NGOs from outside West Africa complained about not being consulted.²⁹⁷ This complaint was subsequently acted upon and NGOs from SADC and East African sub-regions were enabled to make vital contribution to the draft Protocol.²⁹⁸ The African Centre for Human Rights and Democracy studies coordinates the NGO Forum as one of its key activities, but has not been proactive in broadening the number of NGOs that attend the African Commission sessions. According to Foster, the African Centre contacts only those organisations whose addresses it has.²⁹⁹ Regrettably, a number of NGOs work more with UN agencies than the African Commission.³⁰⁰ Progressively, the practice of holding sessions in different countries has increased the participation of NGOs in the Commission sessions.³⁰¹ For example, at the 53rd Session, of the 632 delegates, 453 were NGOs and others observers.³⁰²

Despite the large numbers of African NGOs with observer status, a majority of them do not fulfil their responsibilities of attending Commission sessions and submitting their activity reports every two years.³⁰³ A scrutiny of the status of submission of activity reports reveals that both INGOs and NGOs have failed to submit reports in a timely manner, with many having ceased doing so altogether.³⁰⁴ Ironically, even NGOs that are vigilant in submitting communications and fundraising with the Commission are guilty in this regard.³⁰⁵ Of the 351 observers, an

295 Interview with Fall, then Founder and Executive Director, Institute for Human Rights and Development in Africa, 24 April 2006, Pretoria; interview with Nyanduga, then Commissioner, African Commission, 16 June 2007.

296 Seafeld (n 238 above) 234.

297 F Banda *Women, law and human rights: An African perspective* (2005) 75.

298 As above.

299 Interview with Foster, Executive Director, African Centre for Human Rights and Democracy, 7 May 2008, Manzini.

300 Interview with Letlojane, Executive Director, HURISA, 5 November 2007, Manzini.

301 R Murray 'The African Charter on Human and Peoples' rights 1987-2000: An overview of its progress and problems' (2001) 1 *African Human Rights Law Journal* 6 & 8.

302 ACHPR Report para 8, 2 <http://www.achpr.org/activity-reports/34/> (accessed 15 October 2013).

303 Motala (n 274 above); Viljoen (n 280 above) 409.

304 African Commission 'Status of submission of NGOs' activity reports to the African Commission' ACHPR/40/OS/578 October (2006).

305 Constitutional Rights Project, International Human Rights Law Group, International Association of Lawyers for Human Rights, SERAC, Kenya Human Rights Commission, Institute for Human Rights and Development and HURILAWs have never submitted any report.

alarming 221 have never submitted any report. Fifty-five observers have only submitted one report.³⁰⁶ The rest are in arrears of many reports.³⁰⁷ It is mainly due to the leniency of the Commission towards NGOs that it has not taken any disciplinary actions such as suspension or withdrawal of observer status against them.³⁰⁸

In effect, many NGOs have failed to hold themselves accountable. Comparatively, INGOs such as ICJ, Interights, Penal Reform Initiatives, Amnesty International and International Working Group for Indigenous Affairs (AWGIA) have played a dominant and visible role within the NGO community.³⁰⁹ Outstandingly, it is noteworthy that the Centre for Human Rights has partnered with the African Commission to author the Convention of Internally Displaced Persons and the General Comment on Sexual and Reproductive Rights with a special focus on HIV/AIDs.³¹⁰ Likewise, IPAS is spearheading the drafting of a General Comment on safe abortion.³¹¹

The fact that the NGO reports are merely received but not discussed discourages them from submitting more reports.³¹² Moreover, there is no binding obligation to do so under the Charter. The Charter confines the obligation to submit bi-annual reports on the protection and promotion of human rights to state parties.³¹³ It was only after 2010 that the regulations made it categorical that an observer has both rights and duties.³¹⁴ NGO reports were not aimed at holding NGOs accountable for their human rights obligations but rather to provide useful information that enables the Commission to hold the state accountable.³¹⁵

It is instructive that the Commission has not addressed the governance of NGOs as a sector nor required the application of human rights principles to NGOs. Yet, governments have persistently questioned NGOs' credibility as was the case at the Brainstorming Meeting on the

306 Status of Submissions of NGO Activity Reports (n 894 above).

307 For Example, Human Rights Watch last submitted in 1998, Interight in 2001, Human Rights Africa in 1996, Lawyers for Human Rights in 1996, Swedish NGO Foundation in 1997, International Alert in 1997, WILDAF in 1996 (n 931 above).

308 Murray (n 301 above).

309 Viljoen (n 280 above) 409.

310 General Comments on articles 14(1)(d) & (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa <http://www.achpr.org/news/2012/11/d65/> (accessed 10 October 2013), information provided by C Ngweni at the Expert Consultation Meeting organised by IPAS on General Comments on art 14(1)(a), (b), (c) & (g) & art 14(2)(a) & (c) of the Maputo Protocol, 19 August 2013.

311 As above.

312 Interview with Viljoen, Director of the Centre for Human Rights Pretoria, 18 July 2013.

313 African Charter (n 272 above) art 62.

314 ACHPR (n 273 above) rule 68(3).

315 ACHPR (n 273 above) 74(5).

Africa Commission held on May 2006 under the auspices of the African Union Commission.³¹⁶ Significantly, the said Brainstorming meeting urged the African Commission to address the human rights violations committed by non-state actors.³¹⁷ Furthermore, governments are insistently demanding that the Commission takes action against NGOs that do not fulfil their observer obligations.³¹⁸ Ironically, all the governments of Kenya, Uganda, Tanzania and South Africa were in violation of their legal obligation to submit periodic report,³¹⁹ warranting NGO activism to hold them accountable. As underscored by Heyns, Africans must own the African human rights system by consistent engagement with the African Commission to build a human-rights jurisprudence.³²⁰

In summarising the above, most NGOs have largely failed to appreciate the potential of the African Commission to guide NGOs' own governance. The fact that only a few NGOs have adhered to the obligations of their observer status illustrates their external outlook to issues of human rights and governance as concerning the state but not themselves. It also erodes NGOs' legitimacy to hold others accountable for what they commit themselves to. Regrettably, NGOs have resisted establishing a body to coordinate their activities despite calls by the African Commission to do so, primarily because of fear of being dominated by INGOs.³²¹

9 NGO participation with National Human Rights' Institutions (NHRIs)

The Paris Principles oblige national human rights commissions to collaborate with NGOs that are devoted to promoting and protecting human rights.³²² This is reiterated under the national constitutions.³²³ However, it is only the South African Human Rights Commission

316 Report of the Brainstorming meeting on the African Charter (2006) African Commission, 20th Annual Activity report (2006) 30, Annex II, Item 4 para 53-58 http://www1.chr.up.ac.za/images/files/documents/ahrdd/theme02/african_commission_20th_activity_report.pdf (accessed 13 April 2007).

317 Report of the Brainstorming meeting (n 316 above) Annex II, Reco a, 30.

318 Report of the Brainstorming meeting (n 316 above) Annex II recommendation (a), 30.

319 ACHPR 34th Activity report of the African Commission on Human and Peoples' Rights (2013) para 21 <http://www.achpr.org/activity-reports/34/> (accessed 15 October 2013).

320 C Heyns 'The African regional human rights system: In need of reform?' (2001) 2 *African Human Rights Law Journal* 174.

321 Motala (n 274 above) 254-255.

322 Paris Principles (1991) United Nations Commission on Human Rights resolution 1992/54 (3 March 1992) 1993/A/RES/48/134 Methods of operation 6(g) www.ohchr.org/english/law/parisprinciples.htm (accessed 18 May 2006).

323 South Africa Constitution, art 184(2).

(SAHRC) that has developed principles to guide the governance of the voluntary sector.³²⁴ However, NGOs are not enthusiastic about being regulated by SAHRC, as voiced by Brewis of the NGO Consortium in urging the HRC to respect the autonomy of NGOs.³²⁵ In 1999, SAHRC disbanded the 5 Committees which it had established to advise it on account of safeguarding its independence from civil society.³²⁶ However, the Asmal Parliamentary Commission on the effectiveness of the Chapter 9 institutions recommended the reconstitution of the Committees to tap into outside expertise, and promote access to the majority of the people.³²⁷ Consequently, participation with SAHRC is not structured but dependent on the initiative of a particular NGO, such as the defunct SANGOCO, Community Law Centre and HURISA. While the Gender and Equality Commission is the only Commission that is explicitly required to work with civil society, there is more favourable relationship between SAHRC and NGOs than between the Gender Equality Commission and NGOs.³²⁸

In 2008, both Chairpersons of Kenya National Commission of Human Rights (KNCHR) and the Uganda Human Rights Commission revealed that at times NGOs consider the Commissions as competitors.³²⁹ In order to build trust, the KNCHR has undertaken joint programmes with NGOs in recognition of their expertise, such as the symposium on the human rights agenda held in 2006 in collaboration with the Kenya Human Rights Commission (KHRC), an NGO and a public inquiry on insecurity in Kenya with Kenya Human Rights Network.³³⁰ In 2006, the KNHRC put in place a framework for partnership with NGOs.³³¹ An NGO may be considered as a focal point if it is credible and adheres to good governance practices, has a track record in promoting and protecting human rights and subscribes to the values of the Commission.³³² The focal points investigate complaints, undertake research, conciliate complaints, assess and inspect conditions of detention and educate the public on human rights. In undertaking the task, the focal point must act professionally, observe principles of impartiality and be accurate.³³³ The KNHRC is obligated to support the focal point in the event of harassment or intimidation and link

324 South African Human rights Commission (SAHRC) 'The exclusionary policies of voluntary associations: Constitutional considerations' (2005) <http://www.sahrc.org.za/home/21/files/Reports/Report%20on%20Voluntary%20Associations.pdf> (accessed 23 July 2007).

325 SAHRC (n 324 above) 11.

326 HURISA Human Rights Institute of South Africa Report, *The effectiveness and impact of constitution building institutions in South Africa* SAHRC, CGE and the Public Protector (2007) 17.

327 Asmal Commission Report (2007) 178 http://www.parliament.gov.za/content/chapter_9_report.pdf (accessed 14 May 2008); HURISA (n 233 above) iii & 17; Lorgat (n 233 above) 15.

328 HURISA (n 326 above) 37.

329 Interview with Kiai (n 34 above).

330 As above.

331 KNHRC CSOs partnership Code of conduct (2006).

332 KNHRC (as above) para 3.

333 KNHRC (n 331 above) para 5.

it to potential sources of support and to appropriately acknowledge its contribution.³³⁴ The memorandum of understanding may be terminated by a written notice of at least two months.³³⁵ Nonetheless, there is no overt effort to promote governance. Rather, it is assumed that the NGO would be democratically governed.

In Uganda, there is no working document to guide the relationship between the two. Engagements are nominal and mainly entail officiating as a guest of honour at NGO events and the referral of cases to the UHRC.³³⁶ Only a few NGOs have effectively engaged with UHRC, namely, Prisons Aid Foundation, African Centre for the Rehabilitation and Treatment of Torture Victims, HURINET, Foundation for Human Rights Initiatives (FHRI), UWONET, Uganda Joint Christian Council (UJCC), African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) and Kituo Cha Katiba. The quasi-judicial mandate of UHRC makes joint activities difficult because the UHRC maintains that it has to safeguard its independence as a court.³³⁷

With the increasingly government repression of civil society, NGOs have found a partner in the Uganda Human Rights Commission (UHRC). The UHRC has issued press statements in support of marginalised groups such as LGBTIs,³³⁸ criticising the anti-gay Bill as redundant and contravening the freedom of expression and association and violating the rights of privacy, equality and non-discrimination.³³⁹ Further, to mitigate the erosion of Constitutionalism against freedom of expression and association, in 2011, the UHRC issued guidelines on public demonstrations,³⁴⁰ underlining the Polices' duty to only intervene in cases of criminal behaviour, breach of peace, anticipated imminent violent situations, sight of dangerous weapons and to disperse demonstrations in an orderly manner while at all times guaranteeing free and unrestricted media coverage.³⁴¹ The UHRC has also partnered with various coalitions for legal and policy reform, including the campaign against torture and prisons reforms.

334 KNHRC (n 921 above) para 6.

335 KNHRC (n 921 above) para 8.

336 Focus group discussion with Sekaggya, then Chairperson of UHRC; Nduru, Senior Human Rights Officer, UHRC; Karugonjo Segawa, then Director of Monitoring and Inspection, UHRC; 12 Sept 2007, Kampala.

337 As above.

338 Civil Society Coalition on Human Rights and Constitutional Law (2012).

339 As above.

340 UHRC *Guidelines on public demonstrations and processions in Uganda* UHRC Annual Report (2011) 76-77.

341 As above.

The Tanzania Commission on Human Rights and Good Governance (TCHRGG) is generally perceived as a compromised body, doubting its ability to strengthen the governance of NGOs.³⁴² The lack of independence of TCHRGG is exemplified by an incident where one of its Commissioners and the leaders of Mbulu District forced the Wahadzabe, a minority group, to surrender their village land of Yaeda Chini and Mkono wa Mono to an investor.³⁴³ Unfortunately, the Commission failed to denounce the individual commissioner's action. Instead, one Commissioner criticised the Legal and Human Rights Centre (LHRC) for being antagonistic because it issued a press statement condemning the act of the Commission.³⁴⁴

Within East Africa, none of the NHRIs have guided NGOs to apply human rights principles to their practices. In all Commissions, including SAHRC, the ability of NHRIs to influence the governance of NGOs is constrained by the fact that HRCs are established by government coupled with the competition over space, influence and resources. Thus, both NGOs and HRCs safeguard their autonomy from each other.

10 Conclusion

This chapter has examined two critical issues relating to the notion of participation as far as NGOs are concerned, namely: how NGOs applied the principles of participation and inclusion in their internal governance; and how the NGOs have broadened participation amongst the different stakeholders that they work with. It is argued that the nature of most NGOs where the founders are risk-takers with an unusual commitment and sacrifice, makes NGOs vulnerable to 'founder power' and 'star syndrome' where the founder executives deny opportunity for inclusive participatory management. The donors also accentuate power imbalances within NGOs, as they often work with a single individual, usually the Executive Director, thereby making NGO institutional profile associated with a particular person and narrowing participation.

It is recommended that the founder power should diminish with the institutionalisation of teamwork guided by the institutional needs and broad based policy outlook to provide support that fosters diversity of ideas and sustainability of the organisations. As change is inevitable, NGO missions also become irrelevant, activists get burnt out and strategies become ineffective. Therefore, there should be organisational regeneration

342 Interview with Peter, Chairperson, International Governance Alliance, 3 October 2013, Kampala.

343 As above.

344 Legal and Human Rights Centre, Press release: 'Forcing the Wahadzabe tribe to accept the investor in their area is a violation of their rights' Ref: LHRC/HRM MON.REP.VOL.IV, 6 July 2007.

where NGOs renew their human resources to broaden participation and properly manage their transitions and change processes.

Communities cannot achieve any political and developmental change without coalition building from influential social groups such as NGOs. Likewise, NGOs have an obligation to foster community participation in a non-patronising manner in order to enable the communities to develop their own initiatives and act on their own agency to deal with the different forms of marginalisation. The benefits, bottlenecks and the efforts of NGO participation in networks and coalitions have been underscored, but with a call to the participating bodies to establish formal frameworks that articulate the common interests, roles, obligations and terms of engagement to provide a basis for common understanding, mutual respect and resolution of conflicts. Despite the dilemmas and risks involved, NGOs must participate in political society especially if they are to promote the social contract between the state and its citizens. Thus, NGOs must abandon their apolitical stance and proactively influence public policy, since promoting human rights entails addressing the power relations in the political and social struggle for societal transformation.

1 Introduction

The legitimacy of NGOs is socially constructed and raises several questions about issues of power in society.¹ The core of activism is about challenging existing power structures and imbalances, and to address the wrongs committed by those who hold power over others.² However, power is largely ignored in the human rights corpus.³ Although NGOs have mobilised shame against those in power, they have not been as self-critical and honest in analysing their own power, despite getting powerful themselves.⁴ Globally, within the NGO sector there is a myth that the NGO sector is 'clean' and powerless.⁵ NGO perception of power as bad or corrupting has shielded the probing of the situation of unequal relationships within the NGO sector.⁶

The Oxford Dictionary defines 'power' as the authority to do something, influence people or events, and strength. Power is defined as the 'possibility of imposing one's will on the behaviour of others'⁷ or the 'capacity to influence behaviour'.⁸ Power is inherent in all relationships

- 1 S Lister 'NGOs legitimacy: Technical issue or social construct' Institute of development studies, UK in *Critique of anthropology* (2003) 175 & 184 <http://coa.sagepub.com/cgi/content/abstract/23/2/175> (accessed 11 January 2008).
- 2 Gitari, then Programme Officer Ford Foundation, Lagos, 5 June 2006
- 3 M Mutua *Human rights: A political and cultural critique* (2002) 3.
- 4 D Hulmes & M Edwards 'NGOs, state and donors: An overview' in D Hulmes & M Edwards, *NGOs, state and donors: Too close for comfort* (1997) 283; C Nyamu-Musembi & A Cornwall *What is the 'rights based approach' all about? Perspectives from international development agencies* (2004) 5; Mutua (n 3 above) 24; ICHRP (n 6 above) 3 & 37.
- 5 ICHRP *Deserving trust* (2003) www.ichrp.org/credo.md/archiva/documente/HumanRightsNGOAccountability.doc (accessed 2 August 2006) 2.
- 6 ICHRP (n 5 above) 2.
- 7 J Chandan *Organisational behaviour* (1994) 319.
- 8 SP Robbins & TA Judge *Organisational behaviour* (2007) 470.

and is dynamic changing according to context, circumstances and interests.⁹ Relying on the theory of social exchange, Lips argues that 'one person's ability to influence another depends on the first person's control over resources that the other wants'.¹⁰ These resources can be tangible, such as food, shelter, objects, sex, money, job advancement, awards, honours, grades; or intangible, such as love, approval, acceptance and emotional support. In a power-based social exchange, the power of the parties in the exchange is usually unequal, as the party that is least dependent on the other for rewards has the greater power.¹¹

Therefore, power is not a commodity but it is a process underpinning human relationships.¹² The continuation of power relations depends to some extent on the cooperation of the weak to quietly accept it.¹³ Power can also be used to manipulate and control others, instead of using it to improve the common good. Thus power is a forerunner and a dilemma of human rights, such that whenever human rights violations occur, negative power relations are often prevalent. Thus NGOs as growing power holders have to self-reflect on how they address the power imbalances in their policies, strategies, programming and relationships. Hence this chapter discusses power as a relationship issue and specifically examines how NGOs have negotiated the unequal power within the organisation, the NGO sector and between NGO relationships with the different stakeholders, such as communities, donors and the state.

The principle of empowerment requires respecting people as equals,¹⁴ with the ability of people to exercise their rights and improve their lives. Empowerment espouses taking a conscious personal commitment to confront individual or organisational power particularly in the NGOs' practice, programmes, fundraising, constituency building, structures, systems and management.¹⁵ Hitherto NGOs have been outward looking focusing mainly on the empowerment of communities to the exclusion of their own empowerment. Consequently, a number of critical enquiries have to be undertaken, first of all to consider how NGOs have empowered

9 Just Associates *Making change happen: Power, concepts of revisioning power for justice, equality and peace* (2006) 4.

10 HM Lips *Women, men and power* (1991) 57-58.

11 As above.

12 Lips (n 10 above) 3-4.

13 Lips (n 10 above) 3 & 8.

14 Universal Declaration on Human Rights (1948), GA res 217A (III), UN Doc A/810 (1948), art 1; International Convention of Civil Political Rights (ICCPR) (1966), adopted and opened for signature, ratification and accession by GA resolution 2200A (XXI), 21 UN GAOR, Supp (No 16) 52, UN Doc A/6316, 999 UNTS 171, entry into force 23 March 1976, art 3; International Convention of Economic, Social and Cultural Rights (CESCR) GA resolution 2200A (XXI), 21 UN GAOR, Supp (No 16) at 49, UN Doc A/6316, 993 UNTS 3, entry into force 3 Jan 1976 (1966) art 2(2) & 3; African [Banjul] Charter on Human and Peoples' Rights (African Charter) adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986, (1981) arts 5 & 19.

15 M Edwards & G Sen 'NGOs, social change and the transformation of human relationships: A 21st century civic agenda' (2000) 21 *Third World Quarterly* 611-612.

themselves in order to achieve their missions and ensuring their sustainability.

I begin the discussion with an examination of the internal empowerment of NGOs in terms of human rights and governance skills, the tension between voluntarism *vis-à-vis* competitive remuneration of NGO human resource and providing an environment conducive to sustaining activism. In part three, I engage the issue of mobilisation of resources to achieve the NGOs' mission. In so doing, I analyse the tensions of government or donor resources imposing a duty on the NGO to safeguard against mission drift. The chapter also addresses how NGOs have dealt with the unequal power imbalances within the NGOs, by addressing the issues of exploitation, marginalisation and exclusion affecting marginalised groups such as women, youth, sexual and racial minorities in part four. Furthermore, in an era of globalisation, part five addresses the unequal power between Northern NGOs (NNGOs) and Southern NGOs (SNGOs). The chapter adopts the term 'South' to describe the global South which includes the African NGOs. In analysing the extent to which NNGOs have empowered SNGOs as the weaker party in the international relations, it is noteworthy, that the role of NNGOs as donors is highly appreciated and they are found to be comparatively more accessible and sensitive to the realities of SNGOs than bilateral donors.¹⁶ However, tensions emerge around the role of NNGOs as direct implementers of programmes in Africa.

2 NGOs, empowerment and human rights and governance expertise

A typical lament heard today is the claim that the human rights movement in Africa is floundering.¹⁷ There is also a realisation that the responsibility of strengthening the human rights movement squarely lies on NGOs themselves. NGOs have a responsibility to self-empower themselves as organisations in terms of expertise, money and personnel in order to influence other stakeholders.

2.1 NGOs and human rights and governance expertise

Globally, most NGOs derive their legitimacy from the duty to act or speak

16 Research on Poverty Alleviation (REPOA) *Tanzania Non-Governmental Organisations – Their perceptions of the relationship with government of Tanzania and donors, and their role in poverty reduction and development* (2007) xii & 10.

17 2006 World Social Forum, Frank talk in the family workshop, 18 January 2007 (on file with author); the 11th AWID International Forum on women's rights and development: The power of movements, Nov 2008, African Feminist Forum 2010 (the author participated in both forums).

out, but not necessarily from a large constituency or interest group.¹⁸ According to Orlin, NGOs are the 'gatekeepers of the meaning of human rights', because they have a responsibility of determining what constitutes a human rights violation.¹⁹ Given that knowledge is power, the ability of the NGO to act as an alternative source of credible and powerful information to challenge inequalities, identify the responsible party and propose credible solutions enhances its legitimacy. However, most NGOs are not sufficiently empowered to champion human rights discourse.

Globally, the study of human rights as an academic discipline is a recent phenomena beginning in the 1970s.²⁰ Originally, international human rights law was expressed in exclusively western terms with a focus mainly on civil and political rights (CPRs).²¹ Non-western experiences and heroes were ignored, to the extent that even African academics and activists blindly echoed the western human rights discourse.²² It is only in the 1990s that academia began to interrogate the power dynamics and contradictions within the human rights discourse and sought to have it more culturally grounded.²³

In relation to Africa, the development of the discipline is even fresher. Vocal and critical human rights thinking developed in the late 1980s and early 1990s.²⁴ Academic Centres primarily focussing on human rights were also established around that time. For example, the Centre for Human Rights at Pretoria University was established in 1986 as an NGO. The Masters of Laws (LLM) programme in Constitutional Practice was launched in the late 1990s and the LLM in Democratisation and Human Rights in 2000.²⁵ The Human Rights and Peace Centre (HURIPEC) at Makerere University in Uganda was established in 1993, as a department in the Faculty of Law.²⁶ Moreover, human rights studies are most exclusive to law faculties and not a cross-cutting discipline within the social and political sciences or the humanities.²⁷ In almost all academic institutions across Africa, human rights is not a compulsory and basic

18 ICHRP (n 5 above) 16.

19 ST Orlin 'The local non-governmental organization: The human rights gatekeeper' in SS Akermark et al (eds) *Human rights education: Achievements and challenges* (1998) 130.

20 P Alston 'Foreword: Coming to grips with tomorrow's human rights agenda' (1998) 4 *Buffalo Human Rights Law Review* 1.

21 Mutua (n 3 above) 12, 33, 154 & 155.

22 Mutua (n 3 above) 33-34, 40 & 46.

23 IG Shivji *The concept of human rights in Africa* (1989); AA An-Na'im & FM Deng *Human rights in Africa: Cross-cultural perspectives* (1990); S Gutto *Human and people's rights for the oppressed: Critical essays theory and practice from the sociology of law perspectives* (1993); Mutua (n 3 above); U Baxi *The future of human rights* (2002)

24 Mutua (n 3 above) 38.

25 Interview with Viljoen, Office Manager, Centre for Human Rights, Pretoria, 13 May 2008.

26 Interview with Viljoen, Director, Centre of Human Rights, University of Pretoria, 23 March 2007 and 18 July 2013; interview with Oloka-Onyango, then Director, Human rights and Peace Centre, 25 February 2008, Kampala.

27 HJ Steiner *Diverse Partners: NGOs in the human rights movement – A report of a retreat of human rights activists* (1999) 48.

subject for legal qualification, but is either offered as an optional course or at the post-graduate level. Expectedly, an evaluation of the legal aid service providers commissioned by DANIDA in Uganda found that lawyers sought continuing legal education covering basic knowledge such as human rights, gender, project management and mediation to mention but a few.²⁸ Hence, the assumption that lawyers are automatically knowledgeable about human rights work and NGO governance is not tenable.

In Africa, the Centre for Human Rights at Pretoria has taken leadership in post graduate studies in human rights. It has a Masters' Degree programme on Human Rights and Democratisation in Africa and short courses in good governance that are attended by students, academia, government officials, practitioners and NGOs across Africa.²⁹ Its two flagship programmes in Human Rights and Democratisation in Africa and the Africa Human Rights Moot Court Competition bring together eight Universities representing all regions of Africa namely, Cameroon, Egypt, Ethiopia, Ghana, Mozambique, South Africa, Tanzania and Uganda.³⁰ The unconventional training offered in this programme has a distinctive practical approach incorporating field-visits to problematic human rights situations, writing judgments and living with communities.³¹ In his congratulatory speech on CHR winning of the award of human rights education, the UNESCO Director-General, Koichiro Matsuura, underscored human rights education as a powerful tool for building an inclusive society by 'liberating minds from prejudices, stereotypes and intolerance, shaping attitudes and translating human rights knowledge into everyday practices'. The Kigali Declaration adopted by the African Union Ministerial Conference on Human Rights in Africa, underlines the imperative of teaching human rights as a core aspect of the school curriculum and for the law enforcement officers.³²

Within East Africa, only the higher levels of NGO staff clearly understand the ideology of human rights.³³ Few human rights activists have any serious training in human rights.³⁴ Yet, it is important that all

28 Interview with Asimwe, then Executive Director, East African Human Rights Institute, Uganda, 28 August 2007, Kampala.

29 Interview with Viljoen (n 26 above).

30 Interview with Taku, Director, Centre for Human Rights: Pretoria, 13 May 2008.

31 As above.

32 Kigali Declaration on Human Rights in Africa, The 1st African Union (AU) Ministerial Conference on Human Rights in Africa meeting on 8 May 2003 in Kigali, (2003) para 30 www.achpr.org/english/declarations/declaration_kigali_en.html (accessed 25 July 2006).

33 M Mutua 'Human rights NGOs in East Africa: Defining the challenges' in M Mutua (ed) *Human rights NGOs in East Africa: Political and normative tensions* (2009) 10; Orlin (n 19 above) 137.

34 Mutua (as above); N Byamukama 'Underdeveloped leadership potential in civil society advocacy in Africa: A case study of human rights NGOs in Uganda, 1986-2000' in A Bujra & S Adejumobi (eds) *Leadership, civil society and democratisation in Africa: Case studies from Eastern Africa* (2002) 21.

staff apply human rights principles to their work. Livingstone Sewanyana, a human rights activist in Uganda, is on record that 'qualifications are not a necessary prerequisite to promote human rights'.³⁵ Government is equally cynical of NGOs' governance record and of the failure on the part of NGOs to propose credible alternative solutions beyond mere criticism. The poor theoretical foundations of NGO work explains why human rights discourse on the continent is essentially apolitical. NGO activists are 'jacks of all trades', with limited orientation on how to expand the human rights discourse, beyond mere awareness raising.³⁶ This further marginalises NGOs engagement with the state and general public, and marks the failure to link human rights to social practices.

Related to the knowledge gap in the human rights discourse is the gap in governance and organisational development. Many reasons have been advanced to account for the weak governance of NGOs. Some have associated the poor governance of NGOs to the nascent growth of the NGO sector.³⁷ The lack of training has compelled NGOs to learn on the job in a trial and error manner. Unlike other professionals that have institutions that train leaders in management and governance, civil society in general has for a long time had none, resulting in 'mediocre leadership'.³⁸ While NGO activists have passion for human rights work, they are not necessarily good managers.³⁹ NGOs in Africa fail because activists assume that they can be

everything and everybody: from the director as the entrepreneur who envisions the strategic direction of the NGO, to the manager who plans the execution of programmes and to the technician who executes the programme.⁴⁰

While many NGOs aspire to be learning organisations, very few have learning as an objective that uses experience and information to continuously improve practice.⁴¹ NGO culture often sees learning as indulgent and secondary to real work that it is poorly planned for without clear incentives or linking it to individual self-empowerment. Learning requires a willingness to accept failure and criticism with humility and to welcome error as a learning opportunity rather than a mistake to be

35 Byamukama (n 34 above) 42.

36 Interview with Jjuuko, Chairperson, The Free Movement, Uganda, 29 August 2007, Makerere University.

37 S Dicklitch *The elusive promise of NGOs in Africa* (1998) 27.

38 A Bujra & S Adejumbi 'Introduction: Civil society, leadership and the democratic process in Africa: What Prospects' in Bujra & Adejumbi (n 34 above) xviii.

39 Kituo Cha Katiba (KCK) & Board Source *NGO Governance Workshop report* (2002) 17 unpublished (on file with the author) 10.

40 Interview with Fall, then Founder and Executive Director, Institute for Human Rights and Development in Africa, 24 April 2006, Pretoria.

41 M Edwards 'Organisational learning in Non-governmental organizations: What have we learned?' in M Edwards & A Fowler (eds) *The Earthscan reader on NGO Management* (2002) 331; J Taylor 'On the road to becoming a learning organization' in Edwards & Fowler (as above) 347 & 351.

concealed.⁴² Most learning within NGOs is through short term workshops and similar interventions. Capacity building programmes are primarily geared to ensuring programme implementation rather than develop the NGO's overall capacity.⁴³ The most common components of capacity building are financial management, advocacy skills and proposal writing. Human rights NGOs often overlook institutional building and rarely document institutional experiences. A respondent observed that majority of NGOs are not institutionally driven, but are a 'shell with a fantastic sales person'.⁴⁴

Therefore, it is important to provide space for career development beyond the execution of the NGO's programme. However, investing in employees' development is one-sidedly perceived as merely a cost, thus jeopardising the NGO's growth.⁴⁵ Yet, Staff development entails more than learning specific skills to do the job, but includes long term career goals.⁴⁶ The investment in talent management as a deliberate approach based on a people-oriented organisational culture would stimulate the attraction and retention of people with aptitude and abilities to meet organisational needs.

It is fairly common knowledge that the quality of the people within an NGO ultimately determines the effectiveness and efficiency of the organisation. A good staff retention strategy includes giving people space to grow and enjoy their work. The ability of an NGO to retain good staff in great part accounts for the growth and sustainability of many successful organisations. Critical questions include:

Are we attracting the people we are willing to entrust this organisation to?
Are we developing them so that they are going to be better than we are? Are we ... recognising them?⁴⁷

The fragile intellectual foundation of NGOs is aggravated by the weak relationship between activists and academia.⁴⁸ Historically, NGOs did not explicitly develop and apply theory.⁴⁹ Likewise, Smillie notes a strong bias in the NGO culture against learning, with the majority of activists being 'generalists with no specialisation'.⁵⁰ Similarly, Uvin observes that:

42 Edwards (n 41 above) 335.

43 BA Andreassen 'Bridging human rights and governance – Constructing civic competence and the reconstruction of political order' in HO Sano & G Alfredsson (eds) *Human Rights and good governance: Building bridges* (2002) 108.

44 Interview with Gitari (n 2 above).

45 Ruka Nyoka Talent Management, Advisor- Human Resources Companies, Markets Column Ernest and Young *Financial Gazette* April 11-19 (2007) 3.

46 PF Drucker, *Managing the non-profit organisation: Practices and principles* (1990) 113.

47 Drucker (n 46 above) 120.

48 S Tamale 'Law sexuality and politics in Uganda: Challenges for Women's Human Rights NGOs' in Mutua (n 33 above) 65-66.

49 Steiner (n 27 above) 30.

50 I Smillie 'The World Bank' in I Smillie & H Hendricks (eds) *Stakeholders government-NGO partnership for the international development* (1999) 20.

practitioners hardly read scholarly materials because they are often 'lengthy, opaque, heavily footnoted and unconcerned with operational implications ... Scholars, hardly read the little written by practitioners that often have a superficial knowledge of the practice.'⁵¹

Shivji observes that in Africa:

[T]he NGO discourse eschews theory, [and] emphasises and privileges activism. In the African setting in particular, whatever is left of critical intellectual discourse is largely located at Universities, runs parallel to and is divorced from NGO activism ... Theory is dismissed as academicism unworthy of activists who rely on common sense ... Yet, every practice gives rise to theory and every action is based on theoretical premises and philosophical outlook.⁵²

In South Africa, difficult questions on the role of human rights within the broader political context are left to academic theorists,⁵³ a situation which is common on the continent. In East Africa, the strategies and change processes of NGOs are 'intellectually backward' with limited philosophical and conceptual analysis, rendering human rights movements reactive and ad-hoc.⁵⁴ Concurrently, while activists expect academia to help them overcome dilemmas encompassed daily, the latter are often too theoretical to be of use that fail to address their practical dilemmas experienced in day-to-day struggles.⁵⁵

While as far back as the 1990s, The Dar-es-Salaam Declaration on Academic Freedom and Social Responsibility of Academics, adopted on 19th April 1990, by Six Staff Associations of Institutions of Higher Education in Tanzania, asserted that academia have a 'human obligation and social responsibility towards our peoples' struggles for rights, freedoms, social transformation and emancipation,⁵⁶ this has remained theoretical. In reality intellectual engagement in human rights struggles remained 'muted, anecdotal, intermittent and informed by cynicism and to some extent a sense of resignation', because 'the average intellectual either fears or shuns politics'.⁵⁷ In Kenya, by appointing professors to the management Board of public enterprises, former president Moi ensured

51 P Uvin *Human rights and development* (2004) 4.

52 IG Shivji *The silences in the NGO discourse: The role and future of NGOs in Africa* Occasional paper No 1 (2006) 21.

53 C Bell & J Keenan 'Human rights, non-governmental organisations and the problems of transition' (2004) 26 *Human Rights Quarterly* 371.

54 Shivji (n 23 above) 9-11; Uvin (n 51 above) 19; M Mbilinyi 'Introduction' in M Mbilinyi & D Kitunga (eds) (2003) *Activists voices: Feminist struggles for an alternative world*, 1; Mutua (n 33 above) 15, 17 & 25; Tamale (n 48 above) 65-66.

55 DA Bell & JH Carens 'Ethical dilemmas of international human rights and humanitarian NGOs: Reflection on a dialogue between practitioners and theorists' (2004) 26 *Human Rights Quarterly* 303; Bell & Keenan (n 53 above) 317.

56 M Baregu 'Activism, apathy and conformity: Intellectuals' responses to political change in Eastern Africa' in J Oloka-Onyango, CM Peter & K Kibwana (eds) *Law and the struggle for democracy in East Africa* (1996) 158.

57 Baregu (n 56 above) 158.

that universities remained in the background during the struggle for multi-party politics.⁵⁸ In East Africa, only a handful of academics have challenged societal inequalities and the abuse of power albeit in their individual capacities.⁵⁹

NGOs are too busy 'getting the job done' to engage in serious training and research aimed at developing the institutional knowledge to alter social inequities, and analyse the strategic options for the NGO sector.⁶⁰ Given that most NGOs lack the expertise to conceptualise research, they have abdicated this responsibility to external consultants whose reports they hardly internalise. The research is often done as an 'output' of funding instead of generating new knowledge to help improve an NGO's effectiveness. NGOs are also accused of being academically dishonest, irresponsible in their position papers or for exaggerating claims.⁶¹

There is clearly a need for a more deliberate link between the academia and activists. The successful linking of activism with academic rigour strengthens the ability of an NGO to analyse options and continuously reinvent itself to suit the ever changing landscape. NGOs at the top of the sector in both South Africa and East Africa have a pool of academic resources which reflect and map their strategic directions. There is also a strong perception that think-tanks and academic-related NGOs are better managed and more guided by objectivity and can innovate solutions that address the root causes of abuse. Some of the good practices from academia worth emulating by NGOs are the practice of peer review and academic refereeing used to maintain high standards of work; engagement in critical and objective debate; arguing from an informed point of view; and the internalised commitment to academic autonomy. Peter has reflected that when he presented an issue that was not well thought-out, 'it is trashed ... people would joke about it and dismiss it subtly in a very gentle way that focuses on the demerits and merits of the issue without making you angry'.⁶² In contrast, globally there are no 'procedures for

58 MG Ngunyi 'Building democracy in a polarised civil society: The transition to multi-party democracy in Kenya' in Oloka-Onyango et al (n 1032 above) 266.

59 Mutua (n 33 above) 323.

60 I Smillie 'At sea in a sieve? Trends and issues in the relationship between Northern NGOs and Northern governments' in Smillie & Hendricks (n 50 above) 30; S Nge'ethe *In search of NGOs: Towards a funding strategy to create NGO research capacity in Eastern and Southern Africa* (1989) 11 & 43; CE Welch 'Amnesty International and Human Rights Watch: A comparison' in CE Welch (ed) *NGOs and human rights: Promise and performance* (2001) 10.

61 UN Press Release NGO/296, P1/1029 (10 September 1997), P1/1272 (28 August 2000); Stanley Foundation, quoted in R Lehr-Lehnardt (2005) 'NGO legitimacy: Reassessing democracy, accountability and transparency' (2005) 2, Paper presented at Cornell Law School Inter-University Graduate Student Conference <http://lsr.nellco.org/cornell/lps/clacp/6> (accessed 7 January 2008); 28; D Shulman 'More lies than meet the eyes: Organizational realities and deceptions in nonprofit organizations' (2008) 10 *International Journal on Not-for-Profit Law* 12.

62 Interview with Peter, Chairperson, International Governance Alliance, 3 October 2013, Kampala.

making criticism when shortcomings are noticed' amongst NGOs.⁶³ NGOs are not used to being questioned by their peers and such questioning is detested as amounting to 'unreasonable criticism or a form of networking imperialisms'.⁶⁴ The Kampala Declaration on Strengthening the Human Rights Movement in Africa calls for NGOs (particularly HURINGOs) to strengthen their transparency, accountability and leadership skills.⁶⁵

Related to the issue of skills development is the failure to retain NGO personnel. The most common reason why activists leave the NGO sector is poor remuneration. NGOs face the dilemmas of balancing volunteerism and ensuring competitive remuneration which would ensure high quality products.

2.2 The dilemmas of volunteerism and the payment of competitive remuneration

The INGO movement has its roots in the missionary movements that have been in existence since the sixteenth century characterised by volunteer-sending organisations.⁶⁶ Because many people offer time and services instead of money, volunteerism is an important aspect of NGO work. The concept of voluntary association has two main aspects: the first element is the non-compulsory one, meaning that the NGO was formed voluntarily without legal compulsion, and an 'element of voluntary participation', requiring that the Board or its membership give their services voluntarily without expectation of remuneration.⁶⁷ In the industrialised world, voluntary action flourished from the 19th century and was spearheaded by the wealthy classes to provide welfare to the poor and less privileged through charitable or philanthropic work.⁶⁸ African countries have a high percentage of volunteers accounting for over half of the CSOs' workforce.⁶⁹ Nonetheless, in conditions of acute poverty and unemployment, voluntarism may be manipulated to hide and entrench exploitation and inequality. While in developed countries voluntary work was predominantly the domain of the middle and upper class women with the financial freedom and necessary leisure time at their disposal, in poor

63 ICHPR (n 5 above) 54.

64 P Starkey *Networking for development* (1998) 27.

65 www.wmd.org/documents/demnews-nov2003/kampala-declaration.on-human-rights.doc (accessed 27 May 2007).

66 Smillie (n 60 above) 8.

67 Commonwealth Foundation *Non-Governmental Organisations: Guidelines for good policy and practice* (1995) 14.

68 As above.

69 LM Salamon et al 'Global civil society: An overview' in LM Salamon et al (eds) *'Global civil society: Dimensions of the non-profit sector' Vol 2* (2004) 50.

countries voluntary work is symptomatic of the failure of the state to meet its obligation to its citizens.⁷⁰ The difficulty of running a successful workshop unless participants receive a transport allowance and a per diem is usually attributed to shrinking volunteerism. However, it also reflects the poverty levels of most African countries. Ordinary people tend to think of NGO workshops as income generating activities instead of capacity building strategies for political and human rights consciousness.⁷¹

Consequently, the question of the remuneration of NGOs employees is controversial. One view holds the misperception that activists are motivated by self-aggrandizement: work in fancy hotels and travel in 4-wheel drive vehicles.⁷² Another concern is why some activists should be paid for work that others do voluntarily. It is further decried that with the establishment of NGOs, there is more focus on fundraising and globe-trotting than on societal transformation, a situation Sylvia Tamale refers to as 'careerism'.⁷³ NGOs, donors and the media perpetuate the myth that NGO work is cheaper than that in any other sector, resulting in unrealistic low budgets.⁷⁴ The continual myth that NGO work is undemanding reinforces NGOs' practice of paying meagre salaries. Asking for a 'good' salary tends to be misinterpreted as not being loyal to the cause. There is a tendency to perceive NGO activists as 'selfless, poorly paid workers and dedicated amateurs rather than slick professionals'.⁷⁵ A respondent recalls being found at a supermarket and looked at quizzically by the Chair who immediately ordered a reconciliation audit.⁷⁶ Generally, most NGOs rely much more on low cost labour or volunteers for their internal expertise.⁷⁷ In South Africa, it is estimated that 49 per cent of the total work force of CSOs consists of volunteers⁷⁸ and 88 per cent of CBOs do not have paid staff.⁷⁹

70 H Kotze 'Responding to the growing socio-economic crisis? A review of civil society in South Africa' in *Development Update, The deepening divide: Civil society and development in South Africa* Annual Review 2001/2002 (2003) 24.

71 W Nyamugasira 'Government Civil Society Relations in 2006: Implications for the NGO Registration (Amendment) Act 2006 on the Role of CSOs in promoting respect for human rights and democratic governance' paper presented at the 1st Uganda Annual State of Governance Conference HURIPEC, 24 November 2006 [unpublished] 2-3.

72 Lehr-Lehnardt (n 61 above) 22; Dicklitch (n 37 above) 27, 128 & 159; CO Okafor *Legitimising human rights NGOs: Lessons from Nigeria* (2006) 218.

73 Tamale (n 48 above) 67.

74 Smillie (n 60 above) 11 & 14.

75 Commonwealth Foundation (n 67 above) 34.

76 Respondent requested for anonymity.

77 CE Welch *Protecting human rights in Africa: Roles and strategies of non-governmental organizations* (1995) 292.

78 Kotze (n 70 above) 23.

79 South African Department of Social Development *An impact assessment of the Non-Profit Organisation (NPO) Act No 71 of 1997* (2005) 58.

The other view holds that the quality of staff is a key determinant of the effectiveness and credibility of an NGO.⁸⁰ Consequently, it is argued that NGOs employees should be paid competitive salaries based on recognition of the demanding nature of their multi-tasked work and to be respected by their peers in other sectors.⁸¹ Offering good salaries is a realistic measure to attract and retain skilled and committed staff. Even the Commonwealth Foundation remarks that it is wrong to expect NGOs to be largely dependent on voluntary labour.⁸² Bisesi uses the term 'Mother Teresa with an MBA syndrome' to ridicule the misconception that organisations can be well run without operational costs.⁸³ Donors demand professionally audited accounts, well written reports that document impact and continuous monitoring and evaluation in addition to disseminating results and continuous engagement of stakeholders. Although all these activities cost money, donors are unwilling to invest to this end. Often times, when NGOs take the unrealistically budgeted project funding, they hide their administrative costs or do only what is feasible within the limits of the resources.⁸⁴

Thus, Fall is clear that 'it is not shameful to create good paying jobs through an NGO nor is it realistic to stretch voluntarism'.⁸⁵ Similarly, Fowler asserts that while 'consultations, dialogue, listening and joint reflections are an important source of motivation of staff and psychological motivation it does not put food on the table'.⁸⁶

Tensions over money are exacerbated by the lack of a uniform salary scheme within the sector, with salaries being contingent on the NGOs' fundraising abilities. In East Africa, male Executive Directors earn between US\$4 000 and US\$10 000 per month while female Executive Directors generally earn between US\$1 000 and US\$3 000, with a few exceptions.⁸⁷ Perplexingly, women NGOs have internalised the devaluing of women's work. For many women, NGO work and activism are taken as the natural extension of women's mothering and nurturing roles.⁸⁸ And

80 J Barry & J Dordevic *What is the point of revolution if we can't dance?* (2007) 35; Smillie (n 60 above) 11; A Fowler 'Human resource management' in M Edwards & A Fowler (eds) *The Earthscan reader on NGO management* (2002) 442.

81 Barry & Dordevic (n 80 above) 35-36.

82 Commonwealth Foundation (n 67 above) 19.

83 M Bisesi 'The Penalty of Nonprofit Leadership' (2008) 10 *International Journal of Not-for-Profit Law* 15 http://www.icnl.org/research/journal/vol10iss2/vol10_iss2.pdf; (accessed 13 July 2013).

84 Smillie (n 60 above) 12; Bell & Keenan (n 53 above) 364; REPOA (n 16 above) 12-13.

85 Interview with Fall (n 40 above).

86 A Fowler 'Assessing NGO performance: Difficulties, dilemmas and a way ahead' in Edwards & Fowler (n 80 above) 442.

87 Although salaries are very sensitive issues within the NGO sector because ideally NGO activists are expected to be working for the moral good, I made it a point to ask each of the Executive Directors I interviewed the salary bracket of their organisation. It is instructive that none of them was willing to let me know the exact figure.

88 Barry & Dordevic (n 80 above) 13.

yet women also have the same financial demands and equally desire self-actualisation as their male counterparts.

Given the poor pay and pressure to meet financial demands, staff tend to either adopt a casual attitude towards work or do not commit their time to only one NGO. In Uganda, one third of all NGO directors are involved in another NGO and half of the directors have other occupations, such as professional work, farming, trade or business.⁸⁹ Within East Africa, most Executive Directors are compelled to double as programme officers in order to earn a salary, leaving limited room for leadership reflection and planning. Similarly in South Africa, many activists 'moonlight doubling as consultants' in order to meet their survival needs.⁹⁰ Such multiple occupations dis-empower an NGO in achieving its mission. In the alternative, many activists are forced to drop out of activism in a 'painful and guilty-ridden transition equated to a "sell out" or else work day and night to make ends meet'.⁹¹ Asking for a competitive salary does not amount to being less passionate about human rights work, as activists also have survival needs and social obligations and as such need jobs that pay commensurately. Consequently, asking for a decent salary is simply a request for recognition and to be valued.⁹² It tantamounts to enabling the employees realise their economic rights.

2.3 Empowerment and sustaining activism

It is expected that individuals within NGOs would easily exercise their rights and work in a supporting environment. The Vienna Declaration provides that 'NGOs and their members should enjoy the rights and freedoms recognised in the Universal Declaration of Human Rights ... and the protection of the national law without interference'.⁹³ The adoption of the 'Declaration on the rights and responsibility of individuals, groups and organs of society to promote and protect universally recognised human rights and fundamental freedoms'⁹⁴ is further testimony of the increasing recognition of the necessity to protect both human rights activists and their organisations. The African Commission has also passed a resolution for the protection of human rights defenders⁹⁵ and appointed a Special Rapporteur to that effect.

89 Barr et al *Non-governmental organisations in Uganda: A report to the Government of Uganda* (2003) 20.

90 N Van de Walle 'Introduction, the state and African development' in *Beyond structural adjustment: The institutional context of African development* (2003) 25.

91 Barry & Dordevic (n 80 above) 37-38.

92 Barry & Dordevic (n 80 above) 14.

93 Vienna Declaration and Program of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, paras 8 & 74 <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> (accessed 13 August 2006, para 38).

94 GA/RES/53/144, 8 March 1999 <http://www.unhcr.ch/huridocda/huridoca.nsf/%28Symbol%29/A.RES.53.144.En> (accessed 8 August 2008).

95 African Commission Annual Report (2004) www.acphr.org/english/_info/index_hrd_en.html (accessed 8 August 2008).

The above notwithstanding, there is hardly any interrogation of power dynamics within the NGO sector. In examining the power dynamics within the NGO sector, I focus on women's organisations not because they are the most abusive but because they have bravely spearheaded the interrogation of power within the human rights movement.

NGO work is found to be very stressful and at times results in chronic stress and even death. Kulsum Wakabi of Law and Women Association (LAWA) collapsed in office and was announced dead on arrival at hospital; Koki Muli almost gave birth at the Electoral Commission; Nyangabyaki Bazaara of the Centre for Basic Research was hospitalised after continuous globetrotting and died soon thereafter.

Reflecting on their workload, many Executive Directors noted:

'I have not felt normal in a year ... I could not sit and talk normal.'
 'An Executive Director works at a mad pace.'
 'I do not have a life beyond the NGO. I do not live.'
 'The organisation creeps in my sleep.'
 'My office assistant says I need roller skates.'

A former Executive Director reflected:

We are always on the run ... We never walk. I would go to Church on Sunday but did not pray, for my brain is going round and round the NGO. Now I feel it is time to look after myself ... I even have lunch.⁹⁶

The above quotes highlight the toll NGO work imposes on Executive Directors. The workload is accentuated by the poor timekeeping culture. A respondent who worked with the private sector on corporate social responsibility found that he wastes about 5 hours a week, waiting for NGO activists to turn-up at a pre-agreed meeting.⁹⁷ After a lapse of an hour, an activist would call to inquire whether the meeting had started. In contrast, a member of the private sector turns up ten minutes to the scheduled time in order to ensure that the meeting starts on time.⁹⁸

Further, NGOs tend to focus on programme results with a minimal focus on staff welfare. Given that the human rights edifice addressed injustices, many activists shun self-care in order to fit the profile of the fighters for the victims: the poor, the vulnerable and the helpless.⁹⁹ The conventional position expects human rights activists to be 'martyrs for the

96 Interview with Sila, Former Executive Director, Tanzania Women Lawyers Association, 24 July 2007, Dar-es-Salaam.

97 Interview with Odembo, then Executive Director, Ufadhili, 5 September 2007, Nairobi.

98 As above.

99 Barry & Dordevic (n 80 above) 35-36, quoting Nassali. Mutua (n 3 above) 11.

cause' yet human rights defenders are equally entitled to their rights.¹⁰⁰ Drawing from the analogy of the Judeo-Christian teaching of 'love thy neighbour as thyself,' Edwards and Sen argue that:¹⁰¹

to love our neighbours as ourselves, requires an understanding of our own inner being -to recognise that in our deepest essence we are compassionate, capable of giving love and worthy of receiving it ... It then becomes easier to empathise with what it means to be the 'other' from whom we usually distance ourselves in subtle or overt ways. This shift is crucial because it provides the foundation for personal behaviour that is more expansive and less damaging of others-for why would we damage the life chances of someone who is much a part of ourselves?

In a publication primarily focussing on the sustainability of activism, Barry and Dordevic observe that the gap in addressing the physical, spiritual and emotional needs of activists, amidst the challenges of balancing family and professional obligations contributes to the burn-out, depression, anger, fatigue, break down in family life, betrayals, and cynicism amongst activists.¹⁰² The stigma associated with talking about one's fears and needs unintentionally aggravates the stress and makes activists part of the oppressors.¹⁰³ Some of the disempowerment is thus self-imposed. Evidently, self-martyrdom breeds fatigue and sustaining activism begins with self-empowerment and loving oneself. Although women are expected to nurture the family, female bosses can also be antipathetic to employees who request time off for care related duties.¹⁰⁴ A respondent recalls how her female boss asked in disgust over her overtly protruding belly, whether she was pregnant, implying that she was likely to be less productive.

The women's movement is also found to be exclusive, in that activists have to 'earn their stripes' before they are accepted as genuine activists. Barry and Dordevic underline the point that activism isn't a 'member only club' but anyone can be an activist – 'for a minute or a life time and in whatever ways'.¹⁰⁵ Simultaneously, there is an erroneous understanding that feminism infers a lack of authority and conformity to basic management systems. One Executive Director told of how, when she asked a member of staff to account for her absence from office for a week, the staff members was not only surprised but also complained of being unduly harassed by the questioning.¹⁰⁶

100 Real & Chai (2005) 52 www.defendingwomen-defendingrights.org/pdf/WHRD-Resource-English-press.pdf, (accessed 3 June 2007).

101 Edwards & Sen (n 15 above) 610.

102 Barry & Dordevic (n 80 above) 4, quoting Adeleye-Fayemi.

103 Barry & Dordevic (n 80 above) 49.

104 S Sheelag & J Taylor 'Women organising women: Doing it backwards and in high heels' in AM Goetz (ed) *Getting institutions right for women and development* (1997) 201; AM Goetz 'Introduction: *Getting institutions right for women and development*' in Goetz (as above) 22.

105 Barry & Dordevic (n 80 above) 70.

106 Interview with Mallya, then Executive Director, Tanzania Gender Networking Programme, Member Tanzania NGO Council, 15 October 2013.

Although conferences and workshops have been criticised as ‘talk-shops that talk to the converted’, without grounding activists within the communities they work with, they play a vital role in resuscitating activists’ morale. Face-to-face interactions generate trust and cement common interests that strengthen NGO relations and build camaraderie. Workshops and meetings facilitate the renewal of passion as activists share common goals, create rapport and comfort each other. As a good practice in South Africa, the South African NGO Network (SANGONET) coordinates the ‘CEO Circle’ support forum for Executive Directors to discuss contemporary challenges, opportunities and trends.¹⁰⁷

A similar circle was established in Uganda in 2008 to provide peer support to the Executive Directors of WNGOs¹⁰⁸ on a monthly basis. However by 2013 it had laxed. African Women Development Fund (AWDF) has flexible working home hours, three months paid sabbatical leave every three years, statutory pension and a severance package according to the years worked, staff medical services, time off in lieu of long trips equivalent to one day a week, staff wellbeing budget, social secretary to take note of birthdays, enabling staff at AWDF to play hard and work hard.¹⁰⁹ Likewise, the Centre for Human Rights at Pretoria has succeeded in attracting the ‘centre person’ characterised as innovative and self-motivated people by providing for flexible hours and relaxed dress codes with the primary goal being the achievement of set targets.¹¹⁰ Some activists have learnt to switch off mobile-phones at night and are inaccessible on weekends.

It is becoming common practice to build collegiality with organisations by being present at all major personal events of staff and the membership such as funerals and weddings. Tseliso asserts that applying human rights principles to management is ‘pure common sense’:¹¹¹

A good manager must lead by example and be a team player who acknowledges that he or she is a small component of the team, be firm while concurrently making staff enjoy their work, do not bestow favours and lastly, acknowledge that she is a human being capable of making mistakes.

The principle of empowerment requires that NGOs must first empower themselves before proceeding to empower others. Therefore, NGOs must strengthen their skills, provide an environment which is conducive to work as well as nurture safe spaces to coalesce as peers. The following discussion

107 Interview with Jansen, Executive Director, Lawyers for Human Rights, 19 November 2007, Pretoria.

108 Minutes of the inaugural Uganda Executive Directors Forum 22 February 2008 (on file with author).

109 Barry & Dordevic (n 80 above) 112-113.

110 Taku (n 30 above).

111 Interview with Tseliso, Chief Executive Officer, South African Human Rights Commission (SAHRC), 22 February 2008, Johannesburg.

questions whether NGOs mobilise resources in a manner that advances their individual missions.

3 Empowerment and resource mobilisation to achieve an NGO's mission

Ensuring resources to achieve the mission of an NGO is a core governance function of the Board. The funding profile, autonomy in designing strategic direction and policy development reflects the extent to which an NGO is considered empowered.¹¹² The discussion analyses the obligation of NGOs to mobilise resources in order to empower itself to fulfil its mission. It underscores an obligation of NGOs to demand equitable partnership with donors, irrespective of whether such donors are governments, foreign bilateral donors, foundations, individuals or businesses, to mention but a few.

Globally, with the exception of Amnesty International (AI) which exclusively relies on membership dues, most INGOs receive funding from a combination of government agencies, private donations, corporations, business and governments.¹¹³ Similarly, the majority of NGOs in sub-Saharan Africa are largely unable to generate their own funding, but depend on either government or other donors. In Uganda, in 2003 only 2,5 per cent of the funding of NGOs was locally generated.¹¹⁴ In Tanzania, 90 per cent of NGOs are donor funded.¹¹⁵ Outstanding examples such as Gani Fawehinmi, 'Nigeria's most famous human rights activist' who supports his activism exclusively by his private resources, are rare.¹¹⁶ Hence, I discuss the implications of externally or internally generated resources on the empowerment of NGOs.

3.1 NGOs and government funding

In order to safeguard against compromising an NGO's mission and promote autonomy, globally, human rights NGOs have resisted taking government funding.¹¹⁷ It is noteworthy that the UN ECOSOC requires that any government funding to an NGO with observer status should be reported to the Council Committee on NGOs,¹¹⁸ inferring that doing so is problematic. Amnesty International (AI), Human Rights Watch (HRW) and Oxfam-USA in principle do not accept government funding in the

112 Fowler (n 86 above) 304.

113 Mutua (n 3 above) 51.

114 Barr et al (n 89 above) 22.

115 REPOA (n 16 above) x & 6.

116 Okafor (n 72 above) 143.

117 ICHRP (n 5 above) 39; Table 3.1, Welch (n 60 above) Smillie (n 60 above) 9.

118 ECOSOC Resolution 1996/31 of 25 July 1996 <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm> (accessed 17 August 2007) para 13.

interest of protecting their autonomy.¹¹⁹ In contrast, INGOs working in the development sector usually serve as conduits of government funding.¹²⁰

Bell and Carens compare CARE with Oxfam-USA and observe that the reliance of CARE on United States government funding constrains CARE from criticising US Policy while OXFAM-USA which does not get government funding can easily do so.¹²¹ Within East Africa and South Africa, government funding to civil society varies, with Kenya providing 5 per cent, South Africa 42-44 per cent, Tanzania 27 per cent and Uganda 7 per cent of NGOs' funding.¹²² Likewise, in East Africa, the bulk of government support is directed towards development NGOs working in service delivery.¹²³

Some NGOs in East Africa have found government funding beneficial for having reduced fundraising anxieties and eased reporting requirements which enabled NGOs to concentrate on realising their mission. However, such funding through government co-opted NGOs to unquestioningly implement governments' development strategies and policies, at the cost of holding government accountable to its human rights obligations.¹²⁴ And yet, the comparative advantage of NGOs in development is in monitoring government and policy advocacy to ensure the reduction of inequalities and promote the respect for rights.¹²⁵ Although NGOs may continue to complement the state in service delivery, they have to concurrently monitor the state as the primary duty bearer to deliver rights. Failing to monitor and challenge government reduces an NGO's ability to promote the interests of the marginalised groups it is supposed to represent.¹²⁶ For example, it is only after the reviews of the PRSPs in 2004-2006 in East Africa that human rights and women's rights issues were incorporated into the poverty alleviation processes, as advocated by NGOs.

It seems that the critical issue is not government funding but the ability of a given NGO to articulate its mission, and safeguard its autonomy,

119 Welch (n 60 above) 14.

120 Bell & Carens (n 55 above) 324.

121 Bell & Carens (n 55 above) 32.

122 Salamon et al (n 69 above) 51; NPO Impact Assessment (n 79 above) 30; L Seafeld 'South Africa: The interdependence of all human rights' in AA An-Na'im (ed) *Human rights under African constitutions: Realising the promise for ourselves* (2003) 233.

123 Barr et al (n 89 above) 13; B Nyangabyaki *Contemporary civil society and democratisation process in Uganda: A preliminary exploration* (2000) 45; JJ Barya *The state of civil society in Uganda: An analysis of the legal and politico-economic aspects* (2000) 25; S Dicklitch & D Lwanga 'The politics of being non-political: Human rights organisations and the creation of a positive human rights culture in Uganda' (2003) 25 *Human Right Quarterly* 489.

124 Smillie (n 60 above) 10; A Fowler 'Beyond partnership: Getting real about NGO relationships in the Aid system' Edwards & Fowler (n 80 above) 641; Hulmes & Edwards (n 4 above) 280.

125 A Fowler 'Organising Non-profits for development' in Edwards & Fowler (n 80 above) 593.

126 Fowler (n 124 above) 643.

while simultaneously ensuring accountability to the various stakeholders such as communities, donors and government. It is hypocritical of NGOs to refuse national government funding but to readily embrace funding from foreign governments. In any case, government money is public money derived from public taxation or debts to be paid by the public. NGOs and government serve the same people. As rightly argued by SAHRC, all organisations pursuing constitutionally permissible goals, improve the quality of life, benefit society, address disadvantages and discrimination should be eligible to apply for state funding.¹²⁷ Given that in practice NGOs resist government funding, the following discussion interrogates whether or not reliance on donor funding has empowered NGOs.

3.2 NGOs and foreign donor funding

The question of whether NGOs mobilise resources in a manner that empowers themselves to achieve their mission is a highly contested one. A comparative study of Ghana, Uganda and South Africa found that whether or not the source of funding is internally or externally generated is not a determinant of an NGO's effectiveness or of its organisational autonomy.¹²⁸ Rather, the success of an NGO is the function of internal accountability, technical expertise and the certainty of funding.¹²⁹ On the other hand, the dependence of NGOs on external funding raises questions about the NGO's independence and empowerment to fulfil the NGO's mission. It is criticised that donor dependence diverts NGOs from their mission, erodes accountability to the communities, aggravates competition between NGOs and fuels leadership wrangles within NGOs. Against these claims, what are the opportunities, challenges and dilemmas facing NGOs which seek to empower themselves by balancing competing accountabilities to the NGO's mission and the donor?

The heavy reliance on external funding has prompted governments to criticise NGOs as foreign stooges. Expectedly, in order to qualify for observer status under the ECOSOCC, NGOs are required to have raised 50 per cent of their funding internally.¹³⁰ Smuts, David and Holland recalled that at the 50th National Conference of NRC in December 1997, former President, Mandela, challenged NGOs for lacking a popular constituency and working with foreign donors to undermine the government's development programme.¹³¹ Likewise, then South African

127 SAHRC 'The exclusionary policies of voluntary associations' (2005) 32 <http://www.sahrc.org.za/home/21/files/Reports/Report%20on%20Voluntary%20Associations.pdf> (accessed 18 May 2007).

128 B Nyangabyaki et al *Civil Society, democracy assistance and public policy in Africa* Sussex: Institute of Development Studies (2001) 10 (unpublished) (on file with the author) 21.

129 As above.

130 Statute of the ECOSOCC of the African Union (2004) art 2 v & vi.

131 Smut, Davids & Hollands (2005) *Cape Times* 25 Oct 2005, and *Star* 26 October 2005 www.search.subnet.co.za/innopac.up.ac.za (accessed 9 December 2005); African

President, Thabo Mbeki, publicly questioned NGOs' independence and manipulation by donors.¹³² In an open letter to government, Smuts, Davids and Holland responded to the unsubstantiated attacks by government for damaging NGO's public credibility.¹³³ They clarified that.¹³⁴

While concerns about donors' setting the agenda are valid, it erroneously implies that NGOs are unable to assert their independence within unequal power relations between funder and recipient. It is also naïve to assume that donors do not have specific agendas – but these agenda are not necessarily sinister or antagonistic to South African policy and law ... Obviously governments are also recipients of donor funding ... The political insecurity that NGOs concentrate on criticising government and assumption that good NGOs should be pliant servants of the government is unsophisticated and shows intolerance ... Political pluralism rests heavily with the voices from below expressed through a diverse range of NGOs and civil society organisations.

In a spirit of public debate, former President Thabo Mbeki in his address to the National Assembly in 2005 maintained that the issue of the genuineness of the African NGOs due to donor dependence is also discussed within the NGO community and that foreign funding prescribes particular programmes leaving limited room for negotiation.¹³⁵

Likewise, in Kenya, President Uhuru Kenyatta in his address at the 25th Anniversary of the NGO Co-Ordination Act, while appreciating the imprint of NGOs to Kenya, criticised NGOs for not owning their agenda.¹³⁶

Quite frequently, there have been NGOs promoting alien and even unacceptable agendas in Kenya that have no bearing on the aspirations of any local constituency ... The only reason these organizations do so, is because their donors make the execution of such agendas a condition for funding. Contrary to maintaining unwavering fidelity with our people, such organizations sell their souls, and attempt to sell ours too for donations.

National Congress Report of the President of the ANC, Nelson Mandela to the 50th National Congress of the ANC, 16 December 1997.

132 As above.

133 As above.

134 As above.

135 Thabo Mbeki (2005) *Cape Times* 15 November 2005 13, Topic 8, Ref No 18233, ID 03285003-01 www.search.subnet.co.za/innopac.up.ac.za/ (accessed 4 February 2006).

136 The Presidency 'President Kenyatta's speech at the 25th Anniversary of the NGO Coordination Act <http://www.president.go.ke/president-kenyattas-speech-at-the-25-anniversary-of-the-ngo-co-ordination-act/> (accessed 5 Jan 2015).

In Uganda, the scramble for scarce resources is aggravating the tensions between NGOs and government. In 2009 the Ministry of Finance Survey on the NGO's revenue¹³⁷ decried that donor inflows into the country are not

effectively documented, monitored or aligned to government priorities.¹³⁸ Thus it recommended the coordination of donor aid flows by the Ministry of Finance and monitoring by the Local Governments; revocation of a NGOs' licence on failure to disclose the financial information and to make the registration and renewal of the NGO licence stricter.¹³⁹ Such obsessive surveillance is likely to stifle the NGOs' watch-dog role. Further, in 2012, President Museveni questioned how ACODE could expend more Parliamentary allowances than government could provide.¹⁴⁰ Thus, the President instructed the IGG to investigate the asset base of NGO officials. Nonetheless, NGOs reiterated their civic duty to demand accountability by ensuring a legal framework that safeguards public resources.¹⁴¹ Government's accusation that NGOs are promoting foreign interests is absurd given that both government and NGOs receive resources from the same donors.

A critical question that flows from the above discussion is whether NGOs have empowered themselves to promote a genuine NGO/donor partnership. In an ideal situation, the relationship between donors and NGOs is based on partnership.¹⁴² Authentic partnerships between donors and NGOs require 'joint commitment to long term interaction, shared responsibility for achievements, reciprocal obligations of equality, mutuality and balance of power'.¹⁴³ The Commonwealth Foundation defines partnerships as:¹⁴⁴

[A] relationship in which the parties involved have mutual respect for each other. Partnership means working together to find solutions and achieve goals. It also assumes a willingness to learn from each other for while equal, the parties have different but complementary skills and experiences. It means sharing power and pooling resources.

137 Uganda NGO Board Records (2005) ADM/79/158/02, 11 April 2007.

138 Uganda Government, Ministry of Finance, Planning and Economic Development & Belgian Technical Cooperation *Data collection on donor support in local government and the development of a tool for tracking donor support at the micro level* (2009) 33 & 37.

139 As above, 9,13-14.

140 The Monitor Team 'Museveni hits back at MPs in the Oil Bill row' *Daily Monitor* 14 December 2012.

141 Vision Reporter 'NGOs react to President's accusation' *New Vision* 15 December 2012.

142 Commonwealth Foundation (n 67 above) guideline 12.

143 Fowler (n 124 above) 244.

144 Commonwealth Foundation (n 67 above) 52.

Ironically in practice, the term partnership inadvertently masks the power inequalities inherent in the donor/NGO relationship and assumes a similarity of experiences and contexts between NGOs and donors.¹⁴⁵

There is no doubt that donor resources and goodwill have contributed significantly to the execution and survival of NGO programmes. Due to a weak local philanthropic culture, resisting donor money can also be disadvantageous. For example, Western Cape Anti Eviction Campaign (WCAEC), which does not take money from outsiders, could not sustain its activism.¹⁴⁶ In comparison, through the agency of the National Land Committee (NLC), HPA was facilitated to host the Landless People's Assembly in 2002, alongside the World Summit on Sustainable Development in Johannesburg.¹⁴⁷

Nonetheless, the high dependence on external resources implies that many organisations are so fragile that they would not survive without donor support further contributing to the sector's marginalisation. In South Africa, after 1994, donors shifted funding from NGOs to government, forcing several NGOs to close down,¹⁴⁸ prominent of which were the Human Rights Committee of South Africa and InterFund.¹⁴⁹ Even those NGOs that survived shrunk considerably. For example, the Lawyers for Human Rights (LHR) budget decreased from R14 million to R8 million, its offices from 14 to six and its employees from 105 to only 37.¹⁵⁰ In 2002, SANGOCO's personnel shrunk from 23 to three employees, and in 2007 it had been reduced to a one man's office being hosted by the Methodist Church.¹⁵¹

A related dilemma is that the success of an organisation is often measured by its budget. There is a tendency to wrongly equate the size of an organisation budget to being empowered, due to the false idea that bigger connotes more impact and effectiveness.¹⁵² In fact, most NGOs are incapable of maintaining a large staff similar to that of INGOs, although they are effective in their work. For example, because WNGOs remain

145 Smillie (n 60 above) 12 & 29; Fowler (n 124 above) 642; Ngondi-Houghton 'Donors and human rights NGOs in East Africa: Challenges and Opportunities' in Mutua (n 33 above) 149.

146 S Oldfield & K Stokke 'Building unity in diversity: Social movements activism in the Western Cape anti-eviction campaign' (2004) 21 www.ukzn.ac.za/ccs (accessed 7 July 2006) 18.

147 S Greenberg 'The landless people's movement and the failure of post-apartheid land reform' (2004) 20 www.ukzn.ac.za/ccs (accessed 7 July 2006) 18.

148 NPO Impact Assessment (n 79 above) 41.

149 JC Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (2004) 216.

150 Interview with Jansens (n 107 above).

151 Interview with Logart, then Executive Director, SANGOCO, South Africa, 29 November 2007, Johannesburg.

152 A Fowler 'NGO futures: Beyond aid: NGDOs values and the forth position' (2000) 21 *Third World Quarterly* 560; M Edwards & D Hulme 'NGO performance and Accountability: Introduction and Overview' in Edwards & Fowler (n 80 above) 195.

small they are misconceived as vulnerable and weak.¹⁵³ Drawing on the analogy of cars, Smillie observes that size is irrelevant to the impact and efficiency of an NGO.¹⁵⁴ The rapid expansion of an NGO can prove detrimental. In the early 2000s, FIDA-Uganda's rapid expansion without a clear strategic plan and monitoring processes adversely resulted in projects functioning as independent NGOs within the organisation. Unfortunately, the bulk of the staffing was support staff without clearly defined roles which derailed management's strategic focus.

Buttressed by the financial power, donors easily define NGO strategies and ideological frameworks. Donors refrain from funding projects that overtly challenge globalisation, the IMF and the World Bank.¹⁵⁵ In Uganda, from the late 1980s to the early 2000s donors were quite antagonistic to civil society challenging the Movement regime which faithfully implemented World Bank's economic reforms.¹⁵⁶ In South Africa, donors preferred to fund safe areas framed in acceptable donor language but not transformative advocacy work.¹⁵⁷ For example, the Landless People's Movement (LPM) could not secure donor resources for land occupation, but to advocate for equitable land redistribution.¹⁵⁸ In Uganda, ACODE's coalition that relied on awareness raising and litigation was heavily donor funded because it was less radical than NAPE's public protest campaign.¹⁵⁹

The Aid industry reflects 'patrimony not justice', because it is based on 'benevolent self-interest' rather than obligations with recipients expected to be thankful.¹⁶⁰ Consequently, globally most NGOs assimilate the donor's agenda in terms of thematic focus, methodologies, and reporting formats to mention but a few.¹⁶¹ Donors wield power because they define the parameters of what they would fund and it is up to the grantee to assess how best the mutual interest would be achieved. There is neither transparency in donor criteria nor clear mechanisms of dialogue with donors, but the relationship is primarily determined by the particular individuals. The power dynamics in the NGO donor relationship is captured by the Gambian proverb 'the hand that receives is always under

153 Association of Women in Development (AWID) (2006) *Where is the money for women's right?* (2006) 21.

154 Smillie (n 60 above) 8.

155 Interview with Mutunga, then Programme Officer, The Ford Foundation, Kenya, 17 July 2007, Nairobi; Ngondi-Houghton 'Donors and human rights NGOs in East Africa: Challenges and Opportunities' in Mutua (n 33 above) 154-155.

156 Dicklitch & Lwanga (n 123 above) 482 & 484; J Oloka-Onyango *On the barricades: Civil society and the role of human rights and women's organisations in the formulation of the bill of rights of Uganda's 1995 Constitution* (2000) 3-4 & 23.

157 Bell & Keenan (n 53 above) 364 & 366.

158 Greenberg (n 147 above) 24 & 25.

159 Interview with Muramuzi, Executive Director, NAPE, 30 August 2007, Kampala; interview with Tumushabe, then Executive Director, Advocates Coalition for Development and Environment (ACODE), 17 July 2007.

160 Fowler (n 152 above) 593.

161 Hulmes & Edwards (n 4 above) 8.

the hand that gives'.¹⁶² Indeed, 'un-equals do not negotiate: One can beg and plead, whilst the other may at best magnanimously concede'.¹⁶³

Power imbalances are also reflected in the fact that questions remain unidirectional from the donor to the NGO.¹⁶⁴ A majority grumbles quietly, for fear of falling out of favour.¹⁶⁵ TrustAfrica's evaluation noted that joint meetings with grant-makers and grant-seekers are characterised by an 'awkwardness and pressure'.¹⁶⁶ Likewise, Kingman observed that:¹⁶⁷

Grantees find it impolitic to speak absolute truths to donors. Meetings with donors reveal subtle changes in body language with the activist hanging on every word of the donor, laughing at every unfunny joke and praising at every small and at times insignificant contribution.

The above power imbalance notwithstanding, it is necessary to underline the obligation of NGOs to empower themselves and safeguard their autonomy, while simultaneously achieving their mission. By accepting to be defined by other interests, NGOs connive in their marginalisation.¹⁶⁸ Therefore, NGOs have largely failed to alter the power imbalances in their favour. Moreover, donor dependence mainly accounts for the competition within the NGO sector. Andreassen finds that donor dependence has resulted in the 'marketisation of civil society'.¹⁶⁹

The 'marketisation' of civil society reflects a trend where civic society programmes are seen as 'commodity' or products with buyers (donors as 'funders') and sellers [NGOs]. With competition among organisations (about funding) as well as among donors (for good projects) the relationship that occurs is very close to a market relation directed at equilibrium between demand and supply at a certain price (the expenses of the programme).

A related challenge is the reluctance of NGOs to ask for money for fear of receiving a 'No'. As amply articulated by Worth, a 'no' should be embraced and interrogated:¹⁷⁰

'No' means many different things, but – to repeat what all accomplished sales folks understand – rarely is it a personal rejection. 'No' may mean not now, not yet, not for that amount, not in cash, not for this programme, or not until

162 I Toure *Where is the money for women's rights workshop* 8 November 2007, Johannesburg.

163 C Bayles & J Bujra *Aids, sexuality and gender in Africa: collective strategies and struggles in Tanzania and Zambia* (2000) xii.

164 Smillie (n 60 above) 30.

165 Interview with Angila, former CEO, Kenya NGO Council, currently programme officer PACT-Kenya, 6 September 2007.

166 TrustAfrica Programme Evaluation, October (2005) 8.

167 Interview with Kingman, then Executive Director, ALLAVIDA, 21 July 2007, Nairobi.

168 Interview with Kisare, Executive Director, EASUN, Centre for Organisational Learning, 8 August 2007, Arusha.

169 Andreassen (n 43 above) 115.

170 G Worth *Fearless fundraising for non-profit Boards* (2003) 10.

I feel more comfortable. When you take the risk, make the request and hear 'no,' don't despair. Don't flee the conversation in embarrassment. On the contrary, keep it going. Find out what kind of 'no' the prospect is expressing. If volunteers do not take the risk and make some errors, they have no chance to learn and grow. Fear is expensive! It can prevent you from finding and winning supporters.

A study of the women's movement unveiled a very uncomfortable and suspicious attitude towards money which they associate with corruption, criminality and erosion of independence.¹⁷¹ Those activists who give money are sometimes seen as the 'other' or part of the oppressors to such an extent that their monetary donations are not valued in the same way as time and skills.¹⁷² Consistently, the Africa Feminist Forums and CEO/Chairs Forums organised by Africa Women Development Fund (AWDF) reveal a discomfort of women with money. Unsurprisingly, some NGOs are visibly under-resourced. For instance, until the late 2000s, the Association of Non-Governmental Organisations in Zanzibar (ANGOZA) was run by one woman who also served as Director, administrator, secretary and office attendant. The office moved and closed with the director because there was no other staff to keep it running, thus undermining ANGOZA's effectiveness.¹⁷³ Until 2013, Zanzibar Female Lawyers' Association (ZAFELA) had no permanent staff but relied on volunteers from the Ministry of Constitutional Affairs, thus its Secretariat was usually closed.¹⁷⁴

Peter distinguishes between the few NGOs with an established track record and diversified funding that are able to control their agenda and the majority who are controlled by donors, to an extent that they function as donor departments.¹⁷⁵ Donor's control can take the form of sitting in meetings, vetting decisions, determining employment criteria and providing technical assistance that aligns the NGO to the donors' preferences.¹⁷⁶ The above notwithstanding, the combination of diversified funding, the reputation to deliver high quality work and strong internal governance shields some NGOs from the unequal donor-recipient relations. Progressively, donors also encourage diversification of NGO funding as a demonstration of a particular NGO's credibility. NGOs that diversify funding are capable of setting the agenda as well as influencing that of the donor.¹⁷⁷ A few NGOs are able to secure core support from

171 Barry & Dordevic (n 80 above) 38.

172 Interview with Barry, International consultant UAF, 2 February 2008, London.

173 Interview with Abubakar, Executive Director, Association of NGOs in Zanzibar (ANGOZA), 26 July 2008, Zanzibar.

174 Interview with Othman, then Chairperson, Zanzibar Legal Service Centre, 27 July 2007, Zanzibar.

175 CM Peter 'Conclusion: Coming of age: NGOs and state accountability in East Africa' in Mutua (n 33 above) 311.

176 Peter (as above) 285.

177 S Gupta & A Kellman 'Democracy organisations in political transitions: IDASA and the New South Africa' in Mutua (n 33 above) 273; Ngondi-Houghton (n 155 above) 157; ICHRP (n 4 above) 40.

donors. Core funding is a litmus test for trust and commitment to invest in any NGO.¹⁷⁸ Core support boosts an NGO's esteem and its strategic institutional development and governance.

It is incumbent on the NGO to expose the inequalities between donors and grantees in order to devise honest strategies to improve the achievement of common goals. Donor agencies are rarely held accountable for the impact of their decisions or pressured to be transparent about the theories of social change they apply.¹⁷⁹ Unless there is a deliberate effort of making donors realise the importance of building egalitarian relationship, both NGOs and donors are curtailed from working to their fullest potential.¹⁸⁰ Experience demonstrates that if a donor wields power in a manner that strengthens the NGO partner, the funded projects are more sustainable. Donors with human rights consciousness advance the space and opportunities for NGOs to achieve common objectives.¹⁸¹ The Keystone Accountability Survey revealed that donors are rarely interested in grantee feedback.¹⁸² Only a few, and mostly Foundations solicit grantees' input into their reflection processes.

Cognisant of the common adage people give to people, 'friend-raising' is the most critical first step in building meaningful relationships.¹⁸³ Each board member has an obligation to introduce the NGO to individuals with whom they have a level of personal relationship.¹⁸⁴ NGOs make choices in terms of relationship with donors, mission and strategies to achieve them. NGOs are also capable of influencing donors in a manner that enables each party to achieve their objectives. Conversely, an NGO that is a 'prisoner of money-raising suffers from an identity crisis and is prone to being confused about its identity by being derailed from its mission'.¹⁸⁵ Given that the purpose of raising money is to achieve the mission, it is wrong to subordinate the mission to fundraising. Drucker distinguishes between fund-raising and fund-development in that:¹⁸⁶

Fund-raising is going around with a begging bowl, asking for money because the need is so great. Fund development is creating a constituency which supports the organisation because it deserves it. It means developing a

178 Association of Women in Development (AWID) *The Second Fundher Report: Financial sustainability for women's movements worldwide* (2007) 75; Barry & Dordervic (n 80 above) 131.

179 M Edwards *Civil Society* (2004) 17 105.

180 Interview with Aleman, Programme Officer, Advancing Women's Leadership, 23 August 2013.

181 Interview with Mutunga (n 155 above).

182 Keystone Accountability Survey 'How well are donors and NGOs performing on accountability to their beneficiaries?' (2006) 4 <http://keystoneaccountability.wordpress.com/2006/06/01/how-well-are-donors-and-NGOs-performing-on-accountability-to-their-beneficiaries-survey-results-released> (accessed 21 July 2015) 10.

183 Greenfield (n 147 above) 14.

184 AWID (n 178 above) 117.

185 Drucker (n 46 above) 13.

186 Drucker (n 46 above) 41-42 & 43.

membership that participates through giving ... the ultimate goal of fund development is self-fulfilment.

Any effective actor for social change must have a clear vision, mission and objectives, which practically translate into having an agenda. Thus donors like NGOs or government have agendas which are publicised in the call-for-proposals or websites which each NGO must familiarise themselves with. Significantly, the role of donors is not merely to distribute money to NGOs, but rather to meet the objectives of their agencies. Therefore, a donor will give money to an NGO that can best facilitate the objectives of the donor agency. Thus, it is important to have a quality proposal that highlights how both the NGO and the donor agency can realise their common goals.¹⁸⁷ It is also incumbent on the NGO to deliver what it committed itself to do in the proposal in order to build the trust that both the donor and the NGO would achieve their mutual goals.

Yet, it is commonplace that NGOs habitually accept money for projects that divert NGOs from their mission and jeopardise their independence. Indeed, NGOs often confess that they compromise their mission in order to suit donor priorities and that they tend to compete amongst each other.¹⁸⁸ Consequently, NGOs have a responsibility to assert their own power, including saying 'No' to the money that does not support the NGO's mission or else take responsibility for being corruptible.¹⁸⁹ Each NGO has a responsibility not to seek 'opportunistic funding'.¹⁹⁰ For example, some women NGOs resisted the US Global AIDS funding because of the 'Prostitution Loyalty Oath' restrained NGOs to work on prostitution but yet, it impacts on HIV/AIDS prevention and human rights protection.¹⁹¹

The need to demonstrate funding outputs infers that the NGO with the best proposal gets funded. Due to a lack of technical expertise, strong personal connections and fluency in English, many CBOs shy away from engaging the donor processes.¹⁹² For example, in South Africa, the introduction of the European Union Practical Rules and Guidelines Procedures (PRAG) in 2003 constrained CBOs to meet the technical requirements of the proposal. As a good practice, the Foundation for Human Rights (FHR) in South Africa provided a system where NGOs

187 Donor round table: Ayanda Mvimbi OXFAM-UK, John Campbell- HIVOS, Barbra Phillips AWDF-US, Alice Brown – Ford Foundation 'Where is the money for women's rights' 9 November 2007, Johannesburg.

188 AWDF & AA-Africa wide workshop: *Where is the money for women's rights* 8 November 2006, Johannesburg.

189 Interview with Brown, Resident Representative, Ford Foundation, Southern Africa, 5 November 2007, Johannesburg.

190 Commonwealth Foundation (n 67 above) 46 & 48.

191 Barry & Dordevic (n 80 above) 17. AIDS policy Watch: The Global Working Group 'US anti-prostitution policy and HIV/AIDS' www.aidspolicywatch.org/sex-work/ (accessed 28 August 2007).

192 Barr et al (n 89 above) 25.

mentored CBOs in order to enable the latter access funding.¹⁹³ Likewise, the Ford Foundation is undertaking training in proposal conceptualisation and Monitoring and Evaluation Frameworks for all its grantees to proactively contribute to their sustainability.

NGOs have to put their house in order by strengthening their governance. Most donors are attracted to innovations, success, accountability, transparency, positive impact, strong grantees and team work for the common purpose of social justice. Hence, NGOs should not be modest about their achievements but need to demonstrate the impact of their work. According to Adeleye-Fayemi, successful fundraising entails working on the three 'Ms': the Mission, Message and the Messenger: a well conceptualised mission, a crisp and dynamic message that resonates with a cross section of stakeholders as to why it is important to fund a particular NGO and the messenger: credible individuals to market the NGOs' mission to all levels of society.¹⁹⁴

It is acknowledged that a key ingredient of fundraising is 'friend-raising'.¹⁹⁵ Nevertheless, the reason money is given is not because one is a friend, but rather there is a mutual goal and demonstrable capacity to fulfil the obligations of the agreement. Specifically, the relationship is not simply about friendships but shared platforms to achieve mutual benefiting objectives. Another donor reflected that when proposals from former colleagues in the NGO sector are turned down, NGOs tend to question one's loyalty to the cause. Having discussed how NGOs address their internal empowerment, I now turn to examine how they have addressed the unequal power relationships within the NGO sector.

4 Empowerment of marginalised groups within the NGO sector

Cognisant that power dynamics are in continuous flux, the following discussion examines how NGOs have applied the principles of gender equality within their organisations.

4.1 NGOs and the empowerment of women

From a feminist perspective, empowerment relates to the growth and development of women's autonomy and agency. While feminists distinguish between bad power as 'power over others' and good power as

193 Foundation for Human Rights (2005) *Organisational review* FHR: Pretoria (on file with author) 25.

194 Interview with Adeleye-Fayemi, then Executive Director, Africa Women Development Fund, 7 November 2007, Johannesburg.

195 AWID (n 178 above) 115.

'the capacity to achieve one's goals',¹⁹⁶ the two models of power are inter-related because an empowered person is better able to challenge power-over.¹⁹⁷ Ironically, individual empowerment characterised by self-confidence and self-efficacy on its own is not a key determinant of women's choices. Women's choice is also shaped by societal inequalities, such as heavy domestic work, internalised inferiority and a simple lack of time.¹⁹⁸ Therefore, the empowerment of women requires social gender transformation that privilege men and marginalise women.

The disconnection between human rights and women's rights is reflected in the HURINGOs and WNGOs relationship. Despite the conceptual clarity that women's rights are human rights,¹⁹⁹ generally there is a gap between HURINGOs and WNGOs. The seclusion of women's rights is traced to the international human rights framework. The establishment of the Commission on the Status of Women in 1947, with the noble goal of paying attention to specific women issues, inadvertently resulted in a parallel track within the UN: One addressing human rights in general and the other taking up women rights.²⁰⁰ The parallel track fuelled the illusion that the safeguarding of women's rights was exclusively a women's job.²⁰¹ To address this anomaly, in April 2007, the UN Secretary General reiterated that gender equality is a mandate of all UN entities and committed himself to the recruitment of competent women to his senior team.²⁰²

Further, the state-centric human rights discourse, characterised by the private/public dichotomy trivialises women's rights as private and not as public (human rights) issues. The individualistic orientation of human rights hides the structural inequalities accruing from patriarchy, class and state. Consequently, until the 1990s, most African constitutions omitted 'sex' as a ground of non-discrimination, thus locking women's struggles out of the arena of legal discourse. While HURINGOs mainly monitor the observance of legally binding treaties, WNGOs mostly focus on advocacy for law reform to protect women's rights as legal rights.²⁰³

196 As above.

197 Lips (n 10 above) 7.

198 AM Goetz 'Social justice, gender justice, and local government' Background paper for Workshop on Assessing the Social Justice Outcomes of Participatory Local Governance, June 23-24, (2005) 5, unpublished Sussex: Institute of Development Studies (on file with author).

199 Vienna Declaration (n 93 above) para 18.

200 CA Brautigam 'International human rights law: The relevance of gender' in Benedek, Kisaakye & Oberleitner (eds) *The human rights of women: International instruments and African experiences* (2002) 4.

201 As above.

202 Report A/61/836, www.un-ngls.org, 16 April (2007) paras 17 & 18, also refer www.cwgl.rutgers.edu/globalcenter/policy/unadvocacy/gea.html (accessed 14 October 2007).

203 ML Wanyeki 'The African Women's Development and Communications Network: Pan African organising in human rights' in Mutua (n 33 above) 238.

In view of the above, in the 1980s, the concept of gender mainstreaming was created in order to integrate women's rights within all processes of development planning. Gender mainstreaming addresses the different ways in which gender relations shape women's and men's access to rights, resources and opportunities. Genuine gender mainstreaming casts women's issues as societal issues. Cognisant of the high obstacles to women's equal participation in public spaces, the decrease in inequalities between men and women is an 'appropriate proxy measure of progress towards social justice goals'.²⁰⁴ The Beijing Platform of Action requires all institutions and organisations to have equality of men and women in their ranks.²⁰⁵ Having women at the decision making tables has the potential of promoting gender accountability within the organisation processes and goals. Genuine engendering of HURINGOs is important because organisations cannot achieve social justice outcomes without a value system based on equity, respect and the participation of marginalised groups not as passive recipients of good gestures but as active participants.²⁰⁶ Both women and men have to participate in the building of an egalitarian society.

In reality, most workplaces are gendered institutions making it difficult for women to have parity with men.²⁰⁷ Even when women are included, there is hardly any efforts to 'dislodge the male norm according to which personhood, non-discrimination and equality continue to be understood'.²⁰⁸ Such masculine solidarity does not mean that all men are against all women, but is rather about the social order that make both men and women opposed to the idea of a woman holding public power.²⁰⁹ While it is expected that HURINGOs would apply the principles of equity and empowerment, very few HURINGOs have empowered women as leaders in their organisations. The resistance to women's leadership role is expressed by both men and women. A female Executive Director in South Africa reflected that when she was confirmed, she did not receive any congratulations from her female peers, and also a female colleague challenged her confirmation to the Board.

A good example, of making women's rights part and parcel of NGO work is the Ford Foundation. A globally-renowned critical ally of

204 Goetz (n 198 above) 1.

205 Beijing Platform of Action (1995) objective G.1, para 192 (c).

206 J Gaventa 'Assessing the social justice outcome of participatory local governance concept note of a project of the Ford Foundation Local Governance Learning Group (LOGO)' (2005) 16-23.

207 D Peacock 'We exist! Voices of male feminists' in S Wilson et al (eds) *Defending our dreams: Global feminists voices for a new generation* (2005) 198.

208 Human Rights Council, Report of the Special Rapporteur on violence against Women *Multiple and intersecting forms of discrimination and violence against women*, 2 May 2011, A/HRC/17/26, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A-HRC-17-26.pdf> (accessed 4 September 2013) 12.

209 J Ahikire 'Localising democracy: Gender, political space and decentralisation in contemporary Uganda' Unpublished PhD thesis, Faculty of Humanities and Social Sciences, University of Witwatersrand, Johannesburg, 2004 227.

women's rights,²¹⁰ the Foundation applies the Diversity Table as a mandatory prerequisite for its funding. The Diversity Table outlines how a grantee promotes the participation of marginalised groups in both leadership and staffing. Placing women at the decision making tables is a starting point in altering power dynamics within the NGO sector. While progressively mainstream organisations have strong women leadership at both the governance and management levels, this is an exception and the pace is slow.

In Uganda, a government-commissioned study on the status of NGOs revealed that despite women and children being the dominant target group of 70 per cent of NGOs, 75 per cent of the directors are men, with women mostly occupying the lower levels of these organisations,²¹¹ a trend which has persisted to date. Likewise, in South Africa, the leadership of most NGOs and CSOs is predominantly male, irrespective of the fact that the majority of members are women.²¹² For example, although 60 to 70 per cent of TACs' membership is women, its public face is predominantly male, with women only constituting about one third of office bearers.²¹³ Even when men are absent from the Landless People's Movement (LPM), household heads are usually taken to mean men.²¹⁴ Recognising the importance of women's participation in the democratic governance discourse, KCK in East Africa mobilised resources from the Ford Foundation to support women lawyers to undertake a Masters' degree programme in Democratisation and governance.²¹⁵

Following the Vienna Declaration, major INGOs such as Amnesty International and Human Rights Watch established women's projects.²¹⁶ However, they are comparatively marginalised and under-funded.²¹⁷ The Gender Unit at the Centre for Human Rights in Pretoria is managed by one staff member and was so poorly funded that at one point the programme manager spent 90 per cent of her time fundraising.²¹⁸ To address this anomaly, in 2008, the Centre budget integrated the Gender

210 AWID (n 178 above) 88.

211 Barr et al (n 89 above) 16-20.

212 A Egan & A Wafer 'The Soweto electricity crisis committee' (2004) 10-11 www.ukzn.ac.za/ccs (accessed 7 July 2006) 14; S Friedman & S Mottair 'The rewarding engagement? The treatment action campaign and the politics of HIV/AIDS' (2004) 1 www.ukzn.ac.za/ccs; (accessed 7 July 2006). 11; S Hassim 'Voices, hierarchies and spaces: Reconfiguring the women's movement in democratic South Africa' (2004) 10-11 www.ukzn.ac.za/ccs (accessed 7 July 2006) 15; H Lorgat 'Are we on Track? MDGs 777 halfpoint' *The Millennium Development Goals: Africa and South Africa 2007 Review* (2007) 31

213 Friedman & Mottair (n 212 above) 11-12.

214 Greenberg (n 147 above) 9 & 21.

215 KCK Annual Report (1999).

216 ME Keck & S Sikkink *Activists beyond borders: Advocacy network in international politics* (1998) 184-185

217 As above.

218 Interview with Stefiszyn, Programme Manager, Gender Unit, Centre for Human Rights Pretoria, 13 May 2008, Pretoria.

Unit.²¹⁹ Likewise, HURISA concedes that donors are reluctant to fund women's specific work on the assumption that it is addressed under 'gender'.²²⁰ Many HURINGOs plead that it is pragmatically impossible to engage the gender discourse, which further reinforces the misconception that gender programming is not integral to the rights discourse.²²¹

The technical application of gender mainstreaming has neither challenged the status quo nor safeguarded women's rights. In practice very few HURINGOs generally take on women rights' issues and very few WNGOs conceptualise their work within the rights framework. The use of silo approaches to women's rights makes it possible to reinforce discrimination while attempting to alleviate another.²²² With the increasing fundamentalism against women's struggle for bodily autonomy, even astute and prominent human rights activist vehemently oppose women's rights to choose. WNGOs tend to be mostly situated within the development arena with only a handful having a defined feminist ideology.²²³ Inadvertently, the exclusive focus on women's rights by WNGOs further ghettoises women's rights.²²⁴ During the land reform debate in Tanzania, Mallya noted a disconnection between the National Land Forum (NALAF) and the Gender Land Task Force (GLTF) in that NALAF focused on protecting land for the poor in order to guarantee the equitable distribution between men and women, while GLTF contended that poverty is gendered and thus exclusively worked on women's access to land.²²⁵

Similarly, WNGOs are still ambivalent about including men in their work because of the likelihood of diluting the women's rights agenda or the possibility of the public misappropriating women's creative ideas to men.²²⁶ While conceding that the enemy of women is not men but patriarchy, it is preferred that women lead the feminist agenda because men do not have personal experiences of being marginalised on the basis of gender.²²⁷ The Africa Feminists Charter underlines the importance of women's organisations to be led and managed by women.²²⁸

219 Interview with Taku (n 30 above).

220 Interview with Letlojane, Executive Director, HURISA, 5 November 2007, Manzini.

221 Interview with Aina, then Resident Representative, the Ford Foundation, 5 December 2007, Nairobi.

222 A/HRC/17/26 (n 208 above) 11.

223 Feminist connection: Reconnecting with ourselves and our communities, The 3rd African Feminist Forum Conference Report, 21-24 October 2010 <http://www.africanfeministforum.com/wp-content/uploads/2012/04/AFF-Report-2010.pdf> (accessed 10 July 2013).

224 J Oloka-Onyango 'Modern-day missionaries or misguided miscreants? NGOs, the women's movement and the promotion of human rights in Africa' in W Benedek et al (n 200 above) 293.

225 E Mallya 'Civil society and the land question in Tanzania' in Kiondo & Nyang'ro (eds) *Civil society and democratic development in Tanzania* 64.

226 On going discussion within the African Feminist Forums.

227 Tamale (n 48 above) 72.

228 African Feminist Charter (2006) 13.

At the same time, some women contend that WNGOs have to address their 'own fundamentalism,' requiring women to engage the so called 'other'.²²⁹ The fact that a great deal of female mobilisation occurs outside women-dominated organisations necessitates forging strategic alliances to be set up between WNGOs and civil society organisations in general. Since feminism is a political process that seeks to alter patriarchy by emancipating women, WNGOs have to entrench gender equality in society but with a distinct mission of articulating women's rights. For example, the success of the advocacy over the Sexual Offences Bill in Kenya is partially attributed to the positioning of the campaign as a societal issue in collaboration with Sam Thenya of Nairobi Women's Hospital, who served as the male face of the campaign.²³⁰ Tritely, Rashida Manjoo recommends a holistic approach that places women's rights as a societal issue by:

- (a) considering human rights as universal, interdependent and indivisible,
- (b) situating violence against women on a continuum, (c) acknowledging the structural and institutional inequalities and (d) analysing social and/or economic hierarchies between women and men and also among women.²³¹

It is important to point out the fact that since the advent of gender mainstreaming, there has been a steady decline of funding to women specific programmes.²³² For example, in 2005, 726 WNGOs had a combined income of only US\$ 76 million, constituting less than 4 per cent of World Vision's income of US\$ 2 billion.²³³ While there is no current survey, there is a general frustration that funding to the women's movement is dramatically shrinking.

Engendering of the governance processes entails: being sensitive to the constraints on women's participation; targeting both men and women to mirror real life situation in order to address gender-based challenges; providing closed sessions to enable women raise the controversial issues as a collective; using time that is sensitive to women's multiple roles; working from familiar and walking distance venues; using local languages to stimulate the eloquence of both men and women in a local setting; and using local drama to de-package complex concepts by relating them to real life situations and having training facilitated by both men and women.²³⁴ To mitigate the sense of disempowerment experienced by men, a popular strategy of community dialogues engages the communities to dialogue about the unequal sexual division of labour. For example, in *Yiga Ng'okola*

229 S Pritchett 'Will dualism tear us apart? The challenges of fragmentation in identity politics for young feminists in the new global order' in S Wilson et al (eds) *Defending our dreams: Global feminists voices for a new generation* (2005) 17.

230 Interview with Njoki, UN woman of year 2007, 7 September 2007, Nairobi.

231 A/HRC/17/26 (n 208 above) 2, 21-22.

232 AWID (n 178 above) 20, 42 & 51.

233 AWID (n 178 above) 13.

234 M Nassali 'The Ford Foundation evaluation of the Governance and Civil Society Programme' (2006) unpublished (on file with author).

men voluntarily began to share feminised household chores such as fetching water and firewood on their motorcycles.²³⁵ Likewise, Organisation for Rural Association for Progress (ORAP) in Zimbabwe works with both men and women within the family unit in order to create fairer gender relations and indeed women have taken leadership roles in most groups.²³⁶ The family approach also impacted positively on men, by enabling them to appreciate the benefits of balanced gender roles.²³⁷ FEMNET's men-to-men initiative in South Africa, Kenya, Malawi and Namibia was focussed on increasing men's role in combating gender-based violence and HIV/AIDS.²³⁸ Men's Initiative for South Africa addresses the power imbalance between men and women that enables men to influence and determine reproductive health, choice, family planning, condom usage and sexual abstinence.²³⁹ Although Men for Equality (MEW), an NGO in Kenya founded by Rev Njoya works parallel to the women's movement and focuses on the socialisation of men it uses reference materials from the feminist movement.²⁴⁰ In March 1997, SANGOCO's Pretoria march under the banner 'Real men do not abuse women and children', was the first in the world to break male silence around violence against women.²⁴¹ It drew the participation of ministers, business leaders, bishops and sports representatives, amongst others and was addressed by then President, Mandela.²⁴²

Nonetheless, the major challenge is to secure a definite, consistent and committed constituency of men.²⁴³ NGOs do not have a legitimate basis to exclude gender issues, while WNGOs have a legitimate interest to protect their space from capture by men. In the submission to SAHRC, Woolman argues that the only proper basis for exclusionary practices would be to prevent capture.²⁴⁴ Capture means 'a legitimate fear that new members would fundamentally alter the character of the organisation'.²⁴⁵ The SAHRC advised that a voluntary association that excludes women must demonstrate a 'reasonable apprehension that the inclusion of women would adversely and prejudicially affect the objectives of the voluntary association and would not perpetuate the disadvantages against women'.²⁴⁶

235 DW Nabudere (2009) 'Social transformation in Uganda: A Study of grassroots NGOs' in Mutua (n 33 above) 248-249.

236 AE Sibanda 'Voicing a peasant alternative: The organisation of rural associations for progress (ORAP) in Zimbabwe' in B Romdhane & S Moyo *Peasant organisations and democratisation in Africa* (2002) 327.

237 Sibanda (n 236 above) 327.

238 W Mutunga (2009) 'Feminists masculinity: Advocacy for gender equality and equity' in Mutua (n 33 above) 123-124.

239 Peacock (n 207 above) 189.

240 Mutunga (n 238 above) 130.

241 SANGOCO (Annual Report 1997-98) 12-13.

242 As above.

243 Mutunga (n 207 above) 114.

244 SAHRC (n 127 above) 23.

245 As above.

246 SAHRC (n 127 above) 29.

The SAHRC further clarified that any organisation seeking to adopt exclusionary policies would have to:²⁴⁷

- (a) identify the right or interest it seeks to protect;
- (b) identify the right that may be infringed or limited by the adoption of the policy;
- (c) determine the alternative ways of achieving its objectives;
- (d) adopt the alternative without unreasonable and unfairly limiting or restricting rights; and
- (e) maintain reasons as to why a particular method or means was adopted and other alternatives disregarded.

In view of the disconnect between women's NGOs (WNGOs) and human rights NGOs (HURINGOs) within the NGO practice, there is a need for a dual strategy that applies gender-mainstreaming strategies to supplement but not replace specific women's rights programming. Engendering NGOs circumvents the adverse effect of the decline of funding to women specific programmes in favour of gender programming, situates women's rights as a societal issue, targets the high numbers of women mobilised outside WNGOs, and helps to mobilise men to participate in achieving an egalitarian society, based on equity, respect and participation of marginalised groups.

4.2 NGOs and the empowerment of the youth

It is noteworthy that until the adoption of the African Youth Charter in 2006 there was no human rights document at a continental level that paid special attention to the situation of the youth. Youth issues were addressed either under the African Charter on the Rights and Welfare of the Child or generally as adults. The African Youth Charter defines a youth as a person aged between 15 and 35 years of age.²⁴⁸ The African Youth Charter provides that youth programmes and organisations should be led by youth.²⁴⁹ Youth are entitled to participation in all spheres of life.²⁵⁰ They are also obliged to defend democracy, the rule of law and human rights²⁵¹ and encourage the culture of voluntarism, human rights protection and participation in civil society.²⁵²

Throughout Africa, issues affecting the youth have been marginalised and mainly used as tools of violence particularly during elections and armed conflicts. Up until the 2003 when MWENGO launched the *Triple F Initiative* for youth from Southern and Eastern Africa to reflect on the

247 SAHRC (n 127 above) 31.

248 African Youth Charter (2006) <http://www.africa-union.org/root/ua/conferences/mai/hrst/charter%20english.pdf> Preamble (accessed 1 October 2007).

249 African Youth Charter (n 248 above) art 10(2).

250 African Youth Charter (n 248 above) art 11.

251 African Youth Charter (n 248 above) art 26(j).

252 African Youth Charter (n 248 above) art 26(k).

Vision of Africa for 2050, youth struggles have been entirely left to youth organisations.²⁵³

Further, the predominant model of power within NGOs is hierarchical. Young activists complain of being excluded by the current leaderships in organisations. Although 70 per cent of TAC's membership fall in the 14 to 24 year age groups, it is uncertain whether the grassroots youth inform the TAC agenda.²⁵⁴ Younger activists are expected to conform to the existing structures and systems established by older activists or else start their own organisations. Likewise, although WNGOs claim allegiance to sisterhood premised on equality within WNGOs, the mother-daughter dynamic is predominant in the way activists relate to each other.²⁵⁵

The challenge for HURINGOs is to utilise creative and non-traditional strategies that appeal to the youth such as drama and music as well as taking on issues that are of interest to them. Youth are crucial to the continuity of the human rights movements, hence the imperative of intergenerational learning. Young feminists consider the movements as irrelevant to their concerns and feelings, because older feminists are 'patronising, arrogant or misdirected'.²⁵⁶ Even where issues of concern are similar, there are different interpretations reflecting different contexts and perceptions between young and older generations.²⁵⁷ For instance, most NGOs are reluctant to take on board issues of interest to youth such as sexuality. For example, during the Jacob Zuma rape case, Khwezi's supporters were young, black and political feminists.²⁵⁸ The few NGOs that address sexuality largely adopt a purely legalistic approach focussing on criminal sexual abuse. While older women are genuinely compassionate of the young, they tend to repress youth's sexuality under the guise of protecting the youth from HIV/AIDs.²⁵⁹ Sex, death, HIV/AIDs and STDS are seen as synonymous, ignoring the fact that sexual pleasure is the primary motivation for having sex amongst most youth.²⁶⁰ In contrast older women activists perceive issues of sexuality as self-indulgent.²⁶¹ It is only in the late 2000s that the women's movement experimented with the engagement with sexuality as one of the leading root causes of women's sexual, political, economic and social exploitation.

253 Interview with Mbogori, Executive Director, Akiba Uhaki, East African Human Rights Fund, 19 August 2013;

254 Friedman & Mottair (n 212 above) 8.

255 Barry & Dordevic (n 80 above) 54.

256 P Antrobus 'Foreword' in Wilson et al (n 207 above) xii & xv.

257 Antrobus (n 256 above) xiii.

258 J Bennett 'Keeping our heads but losing our hearts: Some current sexualities and gender debates in South Africa' (2009) 15 *East Africa Journal on Peace & Human Rights* 121.

259 Bayles & Bujra (n 163 above) xiii.

260 A Ahmed 'Channelling discourse, effecting change: Young women and sexual rights' in Wilson et al (n 207 above) 27.

261 Barry & Dordevic (n 80 above) 96.

Activists have difficulties with generational transition.²⁶² Barry and Dordevic observe that the structures within the women's movement are about 'hierarchies, competition, control and approval. If a daughter wants to become a leader she has to symbolically push her mother away. She has to reject her'.²⁶³ Consequently, many NGOs fail to honour or recognise the contribution of the pioneers, yet most of them do not have a pension to retire to.²⁶⁴ Paradoxically, many senior activists are deemed to have abandoned the cause. Where there is no concerted effort to seek out predecessors, it becomes very difficult for them to engage with the organisation, hence diminishing the possibilities of learning from and building on the past gains. Many predecessors contend that they are careful not to impose their unsolicited relevance, mindful that it may be misunderstood as intermeddling. Gradually, efforts to promote intergenerational relations based on mutual trust, respect and learning are emerging. At the AWID and AFF Forums youth were given an opportunity to sit on the same panel as senior activists without confining them to youth-only panels.²⁶⁵

Graca Machel still engages with women activists because she recognises that it is 'important to give back to young generations who remain voiceless'.²⁶⁶ Many organisations have established mentoring programmes based on the joint implementation of activities by teams of young and old activists as an integral part of organisational renewal and the sustainability of the women's movement.²⁶⁷ 'Power, Body and Soul' is an outstanding example of documenting African feminist voices across generations, as part of reclaiming 'her-stories'.²⁶⁸

Nonetheless, youth must demonstrate the creativity and dynamism as their unique contribution to the movement, rather than seek inclusion as a favour on account of age. Indeed many young people have competently assumed leadership roles.

4.3 NGOs and sexual minorities

NGOs have generally ignored the rights of sexual minorities. During the drafting of the Maputo Protocol, there was a loud silence on issues of sexual orientation,²⁶⁹ due to the misconception that issues of Lesbian,

262 Barry & Dordevic (n 80 above) 55.

263 Barry & Dordevic (n 80 above) 54.

264 Barry & Dordevic (n 80 above) 63 & 67.

265 African Feminist Forums, 15-19 Nov 2006 and 17-21 September 2008; 11th AWID Women's Rights and Development, 14-17 November 2008.

266 G Machel, Closing address 'Where is the money for Women's Rights' 10 November 2007, Johannesburg.

267 Movement building has become a popular programme in the recent years.

268 Africa Women Development Fund (2008).

269 F Banda *Women, law and human rights: An African perspective* (2005) 77.

Gay, Bisexual, Transgender and Intersex (LGBTI) are un-African.²⁷⁰ At the Africa Feminist Forum in 2008, only five NGOs could be identified as consistently working on LGBTI issues. A more common excuse is the lack of mandate of the NGO, and yet mandates are internally defined by NGOs. It is only at the 43rd session of the African Commission that the NGO Forum acknowledged that rights of LGBTI persons are human rights.²⁷¹ Only recently, ICJ Kenya began working on litigation on LGBTI issues.²⁷² In Uganda, all legal aid service providers such as Legal Aid Project (LAP) of Uganda Law Society, FIDA-Uganda, the Public Defenders Association of Uganda failed to litigate for the rights of LGBTI persons arguing that they are illegal under the Penal Code, without seeking to change the discriminatory law. The case of *Victor Juliet Mukasa & Yvonne Oyo v Attorney General*²⁷³ on the right to privacy of the person's home, the right to liberty and the rights to protection from torture, cruel, inhuman and degrading treatment of LGBTI activists was privately represented by Advocate Rwakafuzi.²⁷⁴ Although celebrated as a landmark achievement for the protection of LGBTI persons' rights, it is instructive that the learned judge cautiously explained that the case was about human rights and not homosexuality.²⁷⁵ Nonetheless, given that Victor Mukasa is a prominent LGBTI activist, it provides a good starting point for appreciating LGBTI rights.

In Uganda, while the LGBTI persons are entitled to rights as human beings, only twenty-four organisations are part of the Civil Society Coalition. Most NGOs are fearful of conflicting with the initial President's and First Lady's vocal positions on LGBTI.²⁷⁶ Only Uganda Law Society and FIDA-Uganda issued Press Statements against the LGBTI Bill in February 2012. One would have expected WNGOs to empathise with the LGBTI community on account of shared social marginalisation. In reality, most women NGOs do not discuss LGBTI issues under the pretext that it is not part of their strategic priorities.²⁷⁷ While members of UWONET claimed ignorance of LGBTI issues, only Centre for Domestic Violence Prevention (CEDOVIP) attended the awareness workshop organised on

270 www.washblade.com/pics/020215-kassemhisham.jpg, quoted in Banda (n 120 above) 77.

271 Statement at the NGO Forum, presented by Hanna Foster, 7 May 2008, Foster, NGO resolution, at the Official Opening of the African Commission, 7 May 2008.

272 Interview with Kegoro, Executive Director, ICJ-Kenya, 22 August 2007, Nairobi.

273 Misc Cause No 247/06.

274 B Kabumba 'The Mukasa judgment and gay rights in Uganda' (2009) 15 *East Africa Journal on Peace and Human Rights* 220.

275 www.iheu.org/node/3369 (accessed 14 July 2010).

276 How Uganda's President created kill-the-gays mentality' *Black Star News*, 27 January 2011, <http://www.blackstarnews.com/others/extras/how-ugandas-president-museveni-created-kill-the-gays-mentality.html> (accessed 10 April 2013).

277 Uganda Women Network (UWONET) Documenting of pluralism within the women's movement in Uganda, re-echoing voices of women activist: Sustaining women's activism (2012) 15.

the Anti-Homosexuality Bill.²⁷⁸ Most women activists perceive being gay as a choice associated with sexual pleasure that is also against culture and religion.²⁷⁹ More extreme views shun associating with the LGBTI community.²⁸⁰ As a compromise, an informal agreement not to publicly contradict each other was forged.²⁸¹ Nevertheless, UWONET's official position is that a strong women's movement needs to be premised in human rights.²⁸² In spite of the President publicly disowning the Anti-Homosexuality Bill as a private member's Bill,²⁸³ on 24 February 2014, he made a U-turn by signing the bill into law,²⁸⁴ further fuelling homophobia in Uganda. Instructively, the Anti-Homosexuality Bill not only dehumanises the LGBTI community, but also castrates human rights organisations for criminalising the promotion and failure to report LGBTI.²⁸⁵ In summation, NGOs have failed to combat discrimination and exclusion within their realm and their silence against the signing into law of the LGBTI Act was highly conspicuous. It is instructive that the Anti-Homosexuality Act was nullified on technical ground for lack of quorum but not for the rights violations.²⁸⁶

4.4 NGOs and the empowerment of racial and ethnic minorities

Within East Africa, questions of racial minorities are considered irrelevant because the Asian and White minorities are economically dominant. In South Africa, race is a big issue even amongst NGOs because of internalised white supremacy.²⁸⁷ In one NGO, a white accountant resigned upon the recruitment of a black Executive Director.²⁸⁸ However, considering white as a minority is contested even amongst the white community because they recognise the historical advantages they have enjoyed. Moreover, in South Africa, most well established organisations are predominantly white, given that NGOs established by blacks were

278 UWONET (n 277 above) 12, Telephone interview with Aciro, Executive Director, UWONET, 19 Nov 2012.

279 UWONET (n 277 above) 14.

280 UWONET (n 277 above) 19.

281 UWONET (n 277 above) 15.

282 As above.

283 Uganda's President Yoweri Museveni: *Don't kill gay people* <http://www.bbc.co.uk/news/world-africa-20754891>; UGANDA: *Museveni distances himself from 'cruel' anti-gay bill* <http://www.irinnews.org/Report/87728/UGANDA-Museveni-distances-himself-from-cruel-anti-gay-bill> (accessed 10 April 2013).

284 Museveni 'Homosexuals have lost arguments in Uganda' *Daily Monitor* 25 February 2014 4-5 <https://news.yahoo.com/uganda-president-signs-harsh-anti-gay-law-165249542.html?vp=1> (accessed 25 February 2014).

285 Anti Homosexuality Bill (2010) clause, 7, 8, 13 & 14.

286 http://www.nytimes.com/2014/08/02/world/africa/uganda-anti-gay-law-struckdown-by-court.html?_r=0 (accessed 30 January 2015) <http://www.advocate.com/world/2014/08/01/breaking-ugandan-court-throws-out-jail-gays-law>; <http://www.natlawreview.com/article/uganda-nullifies-anti-homosexuality-act-and-backs-away-pursuit-similar-legislation> (accessed 30 January 2015).

287 Mubangizi (n 149 above) 217; interview with Letlojane (n 220 above)

288 Interview with Letlojane (n 220 above).

largely 'localised, less formalised and survivalist'.²⁸⁹ To compound the problem many black lawyers and activists moved into politics and government, leaving the NGO sector predominantly white.²⁹⁰

In East Africa, very few NGOs work on ethnic and racial minorities in a sustained and substantial manner. In Tanzania, NGOs working on minorities are nascent, have weak organisational capacities and suffer resistance by governments as demonstrated by lengthy registration procedures.²⁹¹ The Ngorongoro Pastrolist Development Organisation (NGOPADEO) took years to be registered.²⁹² In Kenya, only the Centre for Minority Rights Development (CERIMIDE) seems to be working on minority rights in a sustained and comprehensive manner. In Uganda, the focus of NGOs seems to be on welfare oriented activities, with the engagement of the rights discourse being quite nascent.²⁹³

In South Africa, the Constitution establishes the Commission for the Protection of Rights of Cultural, Religious and Linguistic Communities²⁹⁴ and amongst others provides for affirmative action on the basis of culture, language, ethnic and social origin.²⁹⁵ The state is obliged to advance and protect indigenous languages.²⁹⁶ However, NGOs are not aggressively taking advantage of the law to pursue minority rights.

The proceeding part analyses how NNGOs and SNGOs have attempted to promote egalitarian relationship.

5 The contemporary efforts of promoting equality and empowerment within the NNGOs/ SNGO relationship

'Think globally and act locally' or 'think locally and act globally' are common clichés amongst NGOs, suggesting that effective advocacy requires strategic linkages between the North and South. A viable and vibrant international human rights movement cannot exist unless NGOs

289 M Swilling & B Russell *The size and scope of the non-profit sector in South Africa* (2002) 69; International Human Rights Internship Program (IHRIP) & the Swedish NGOs Foundation for Human Rights *The status of human rights organisations in sub-Saharan Africa* (1994) 81; Hassim (n 212 above) 14.

290 Bell & Keenan (n 53 above) 366-7.

291 IG Shivji & WB Kapinga *Maasai rights in Ngorongoro conservation authority area* (1998) 51-52.

292 Shivji & Kapinga (n 291 above) 53-55.

293 Interview with Hansungule, Professor, Centre for Human Rights: Pretoria, 14 May 2007, Pretoria.

294 South African Constitution (1996) art 185.

295 South African Constitution (n 294 above) art 9 (3).

296 South African Constitution (n 294 above) art 6.

across all levels of society are 'vibrant, permanent, irrevocable and irreversible'.²⁹⁷ An empowering relationship between SNGOs and NNGOs needs to be premised on mutual trust, respect and co-responsibility amongst its members. However, the power imbalances arising from unequal access to resources, information and centres of global power significantly impacts on the relationships between SNGOs and NNGOs.

While acknowledging that not all NGOs based in the North are INGOs and some are as weak as SNGOs, influence, recognition, and resources remain concentrated in the North, with those in the South scratching from grant to grant.²⁹⁸ Before 1966, ECOSOC only granted observer status to INGOs,²⁹⁹ which compounded the power of INGOs over national NGOs. By 2007, only 33 per cent of NGOs from the Global South had consultative status with the ECOSOC.³⁰⁰

A 2006 study by the Association of Women's Rights in Development (AWID) found that US\$1.8 billion to the South was channelled through INGOs, with only US\$ 595 million being spent directly on the rest of the world.³⁰¹ In 2005, INGOs received three times much more overseas development support than the global SNGOs.³⁰² In Sub-Saharan Africa, only 1 per cent of WNGOs have a budget of more than US\$ dollars 500 000.³⁰³ A study in Uganda found that INGOs are the largest sources of funding, accounting for 53 per cent of funding to NGOs.³⁰⁴

The disparity of power and resources between African NGOs and NNGO makes the 'notion of an international civil society a mockery'.³⁰⁵ As observed by ICHRP, '... issues of power and subordination influence the level of trust that NGO's place in their ... partnerships'.³⁰⁶ Within the hierarchy of NGOs, NNGOs have a higher level due to better pay, working facilities and ability to influence critical processes within the South. Both SNGOs and NNGOs largely prize their autonomy and seek to be treated as equal partners.

297 W Mutunga 'The human rights movement and the struggle for human rights states in East Africa' The Ford Foundation (2004) 21-22, unpublished (on file with the author).

298 Welch (n 60 above) 276.

299 ECOSOC Resolution 1296 (XLIV) 23 May 1968 on Consultative relations between UN and NGOs <http://habitat.igc.org/ngo-rev/1296.html> (accessed 17 August 2007); ECOSOC Resolution 1996/31 of 25 July 1996 http://www.un.org/documents/eco_soc/res/1996/eres1996-31.htm (accessed 17 August 2007).

300 L Nader 'The Role of NGOs in the UN Human Rights Council' (2007) 7 *Sur - International Journal on Human Rights* 9 www.surjournal.org/eng/index7.php?artigo=7,artigo_nader.htm (accessed 17 October 2008) 10.

301 AWID (n 153 above) 49.

302 AWID (n 178 above).

303 AWID (n 178 above) 26.

304 Barr et al (n 89 above) 22 & 25.

305 Mutua (n 33 above) 30.

306 ICHRP (n 5 above) 68.

The nature of relationships varies. In discussing the relationships between African NGOs and INGOs, Welch identified three possible types of theoretical linkages between African NGOs and INGOs: The ideal relationship is based on a partnership between equals, but this is rarely the case due to major differences in levels of funding, staffing and savvy-ness in utilising international media for publicity; secondly, the relationships are characterised by subordination in which either an African NGO or NNGO takes leadership, with the partner receiving far less recognition; and thirdly both the African NGO and NNGO take up similar issues but with potentially different strategies.³⁰⁷

Until the late 1990s, there was little interaction between SNGOs and NNGOs.³⁰⁸ In an era of globalisation, the locus of power extends beyond national borders, making international networking and solidarity between the SNGOs and the NNGOs inevitable. The World Social Summit: A civil society forum held parallel to the Aid Consortium of the WB-IMF meetings draws between 20 000 and 40 000 delegates from all over the world demonstrating the growth of global movements.³⁰⁹

The benefits of international partnerships between SNGOs and NNGOs are well documented. Before 1966, INGOs provided many African NGOs with institutional cover to participate in the UN and in turn, INGOs gained credibility by demonstrating that they work in partnership rather than on behalf of their SNGO partners.³¹⁰ International networks amplify the voices of SNGOs in the international arena, provide SNGOs some leverage at the UN, World Bank, European Union over economic and political policies and contribute to the monetary and technical resources of SNGOs. In turn, NNGOs look for local expertise, dynamism, solid connection with target groups and legitimacy from their partnership with SNGOs.

However, NGOs might ignore the crucial fact that the very coming together of different experiences, interests, and inequities in resources generates tensions within the SNGOs/NNGOs relationship. Although there is a shared commitment to human rights, there are historical differences in understanding about the goals, priorities and strategies amongst SNGOs and NNGOs.³¹¹ Keck and Sikkink's study aptly identifies international networking as 'political spaces' where different

307 CE Welch 'Human rights and development in Africa: NGOs' in PT Zelaza & PJ McConaughay (eds) *Human rights, the rule of law, and development in Africa* (2004) 205.

308 Fowler (n 124 above) 242.

309 S Kothari 'Inclusive, just, plural, dynamic: Building a "civil" society in the Third World' in M Kothari and D Eade (ed) *Development and social action: Selected essays from development in practice*, (1999) 38.

310 Keck & Sikkink (n 216 above) 12-13; I De Senolissa 'A new age of social movements: A fifth generation of non-governmental development organisations in the making?' in M Kothari & D Eade (eds) *Development and social action* (1999) 90; Welch (n 60 above) 267.

311 Steiner (n 49 above) 17.

actors negotiate the social, cultural and political meanings of their joint activities.³¹²

Tensions between SNGOs and NNGOs were most prominently manifested at the Vienna Conference NGO Forum in 1993. Korey details the crux of the contention between NNGOs and SNGOs relations during the preparations and the actual NGO Forum at the Vienna Conference.³¹³ The major split centred around the INGOs' domination of the Joint Planning Committee (JPC), a body responsible for the general strategy of NGOs and liaison with the UN Centre for Human Rights and major regional government caucuses. The SNGOs accused JPC of not consulting them on the appointment of chairs, rapporteurs and speakers. The marginalisation of SNGOs resulted in chaos at the actual NGO Forum due to a number of differences between them. In the first instance, the NNGOs considered the role of the NGO Forum as strengthening the UN human rights system by creating consensus, while SNGOs argued that the failure to expose human rights abuses in specific countries frustrated SNGO activism. Secondly, the decision to dis-invite His Holiness the Dalai Lama from addressing the Forum at the Austrian Centre but instead host him at AI's tent was found disrespectful of the South and lastly, the JPC invited former US President Jimmy Carter to address the closing session, while the Latin American NGOs preferred Nobel Laureate Adolfo Peres Esquirel. At the closing, Carter's speech was booed. The JPC was subsequently disbanded and replaced by a 30 member NGO Liaison Committee representing all regions of the world and specialised groups.

Korey attributed the NGO Forum fracas to the 'lack of sophistication' on the part of SNGOs in international conferencing and diplomacy.³¹⁴ In contrast, Phillip Alston urged SNGOs to be more 'confrontational and less well-behaved' in demanding mutual respect in the international human rights movements.³¹⁵ On the positive side, collectively NGOs ensured the affirmation that human rights were universal, inalienable and indivisible.³¹⁶

Likewise, during the first Women's Conference in 1975, feminists in the South criticised their sisters in the North for monopolising the international women's agenda.³¹⁷ In contrast, the healthy partnership between NNGOs and SNGOs at the Nairobi 1985 women's conference resulted in the adoption of violence against women as a common platform that bridged the gap between the NNGOs and SNGOs.³¹⁸ Comparatively,

312 Keck & Sikkink (n 216 above) 3.

313 W Korey *NGOs and the universal declaration of human rights: A curious grapevine* (2001) 286-291.

314 As above

315 As above.

316 Vienna Declaration (n 93 above)

317 Banda (n 269 above) 8-9.

318 Keck & Sikkink (n 216 above) 170 & 196.

at the Vienna Conference, the women's movement was better organised with shared leadership between Charlotte Bunch of the Centre for Women's Global Leadership at Rutgers University and Florence Butegwa, then Chief Executive Officer of Women in Law and Development in Africa (WILDAF).³¹⁹ The active participation of WNGOs in the Vienna Conference resulted in the official acknowledgment that women's rights were indeed human rights.³²⁰

Since the 1990s, many NNGOs are in the process of internationalising themselves. Many are moving their headquarters to the South, employing more local staff in the leadership positions and allowing more financial independence of the affiliates.

Different countries have adopted different strategies to address the influx of NNGOs into the South. In Kenya, government is against hiring expatriates where local expertise exists and has warned against inequitable remuneration between expatriates and local staff.³²¹ In Tanzania, the 2005 Amendment Act requires all INGOs to register in Tanzania and establish a founder Board in Tanzania.³²² However, because the NGO Act does not specify the criteria for forming a founder Board, one INGO made its staff the Founder Board members to qualify for the certificate of compliance, which signifies resistance to subject itself to the decision-making of the Tanzanians.³²³ The original draft of Tanzania 2002 law had obliged INGOs to refrain from 'causing competition' with local NGOs.³²⁴ Furthermore, INGOs are not allowed to participate in the NGOs District Assembly, Regional NGOs Assembly or the Nationally Operating NGOs Assembly.³²⁵ In addition, although the Tanzanian NGO Council provides for an INGO representative, Tanzanian NGOs insisted that the INGO's representative be a Tanzanian.³²⁶ In South Africa, following the influx of NNGOs, local NGOs mandated South African Non-Governmental NGO Council (SANGOCO) to formulate a Code of Conduct to address issues of the use of local skills and working in partnership with South African NGOs.³²⁷ In 2012, proposals to amend the law to make it mandatory for INGOs to register where proposed by the Directorate.³²⁸ Uganda is yet to take any stand on the relationship between SNGOs and NNGOs.

319 Korey (n 313 above) 286 & 388.

320 Vienna Declaration (n 93 above) para 18.

321 Kenneth Ogosia 'Incompetent expatriates to go says Mutua' *Daily Nation* 17 August 2007.

322 Interview with Katemba, Director, Government NGO Board, Tanzania, 25 July 2007, Dar-es-Salaam.

323 Respondent requested anonymity.

324 Tanzania NGO Act (2002) sec 31(c).

325 Draft Code of ethics (2005) para 15.

326 Interview with Tweve, then Programme Officer, PACT-Tanzania and INGO Representative to the Tanzania NGO Council, 10 August 2007, Dar-es-Salaam.

327 SANGOCO Annual Report (1997-98) 29.

David and Machini's thorough critique of ActionAid's (AA) process of internationalisation aimed at distributing equitable power within the organisation, offers important lessons that highlight the successes and contradictions in the process.³²⁹ In internationalising itself, AA moved its headquarters to South Africa and appointed Noreen Kaleeba, an African woman as head of its international board of trustees.³³⁰ Initially, there was confusion, disagreement and struggles to retain power due to the anxiety of the London office that the decentralised country programmes would decrease the information flow and make their work more difficult.³³¹ ActionAid's international workshop in Bangladesh analysed the power dynamics within AA and acknowledged that:³³²

Participatory methods, tools and techniques can easily become manipulative, extractive, distorted or impotent without an understanding of power dynamics. This meant looking inwards, at our own personal experiences of power, with which to see our work with our partners, our allies and crucially with poor people.

Through the Accountability, Learning and Planning Systems (ALP), AA was able to adapt to local context, analyse the power dimensions in its work and receive honest criticism and feedback.³³³ Nonetheless, a respondent from the South observed that money remains a key determinant of the status within AA. She observed that

the criterion for becoming an associate is primarily based on capacity to raise funds that most associates are based in the North. Yet, basing associate status on money fundamentally contradicts the rationale of internationalisation, which is to enhance legitimacy, relevance and respect of all AA sections regardless of money.³³⁴

The Urgent Action Fund (UAF) case study provides a different process of NNGOs/SNGOs internationalisation efforts:³³⁵ UAF-Africa was originally registered as an affiliate of UAF-Global to undertake collaborative initiatives that would bring UAF closer to Africa as a conflict ridden area. The spin-off of UAF-Africa as an independent fund was prompted by pragmatism in the aftermath of 11 September 2001 which

328 Republic of South Africa, Department of Social Development: Policy framework for non-profit organisations law: Proposed amendment to the non-profit organisation Act 71 of 1997, 1 July 2012, Third Draft, ver. 3, Nonprofit Organisations Directorate; www.icnl.org/research/library/files/.../policy-framework-npo-law.pdf (accessed 7 July 2006)

329 R David & A Machini *Going against the flow: The struggle to make organisational systems part of the solution rather than part of the problem, lessons for change in policy and organisations* (2004) 4.

330 David & Machini (n 329 above) 5.

331 David & Machini (n 329 above) 6.

332 David & Machini (n 329 above) 14.

333 David & Machini (n 329 above) 18-22.

334 Respondent requested anonymity.

335 Interview with Chigudu, Naiyar & Murungi, Board members, Urgent Action Fund-Africa, 12-14 April 2007, Harare.

resulted in the tightened US funding laws. UAF-Africa registered as an independent organisation with an independent board, programmes and finances. The Chairperson of UAF-Africa continued to be a board member of UAF-Global, which ensured institutional continuity. At the joint board meeting of UAF-Global and UAF-Africa in October 2006, the UAF family agreed to have an equal partnership based on 'sisterhood' instead of 'motherhood', with each fund independent but united by common values.³³⁶ The sister funds share information, occasionally hold collaborative activities of mutual benefit to both, share successes and represent each other at forums where it is impossible for both to attend. UAF-A also acknowledges that the UAF-Global has a right to claim it as its off-shoot and therefore is its success story. The UAF model is unique because it is purely based on trust in women's leadership and is not reduced into a written Charter or Constitution. There is no overseer body. Such an arrangement is common with professional NGOs whose values and ethics are inculcated by years of academic discipline as is the case with the Federation of Women Lawyers (FIDA) Chapters.

Positive examples of partnership are increasing: International solidarity strengthened TAC's campaign.³³⁷ The affiliation of Homeless People's Association (HPA) with Slum Dwellers International not only enhanced solidarity and the exchange of information, but also increased HPA's 'prestige in local political negotiations and helped to raise the difficult questions about social exclusion and inequitable power relations'.³³⁸ Similarly, SANGOCO attests that it collaborates with NNGOs as an equal partner, with the latter providing the resources while the former offers intricate local knowledge necessary for successful programming.³³⁹ The advocacy of Save Bujagali in Uganda was a joint-effort between International Rivers Network in California, Bank Information Centre, Washington DC and Swedish Society for Nature Conservation and NAPE. The NNGOs did not dictate but rather enabled NAPE's voices to be heard in the international arena, offered vital information about processes, procedures and contact persons at the African Development Bank and the World Bank, discussed the effects of any proposed strategy on NAPE and secured NAPE's approval before implementing it.³⁴⁰ Although NNGOs are part of the CSO Reference Groups in Kenya, they have played a supportive role working in the background and letting local NGOs take the lead while they concentrate on exerting pressure at the government leadership.³⁴¹

336 Resolution of the UAF-Global and UAF-Africa joint retreat, Kathmandu, October 2006.

337 Friedman & Mottair (n 212 above) 33.

338 F Khan & E Pietersen 'The homeless people's alliance: Purposive creation and ambiguated realities' (2004) 16 www.ukzn.ac.za/ccs (accessed 7 July 2006); 13.

339 Interview with Lorgat (n 151 above).

340 Interview with Muramuzi (n 159 above).

341 CSO Reference Group Commissioned Report *The fight for democratic space of CSOs in Kenya: The case of the Public Benefit Organisations Act 2013 Amendment* (2014) 18.

Genuine partnerships are reciprocal, with each party bringing and gaining comparative advantage for the shared goals, buttressed with mutual respect to honouring the commitments made to each.³⁴²

In 1999, the staff and board of all major INGOs were predominantly Northern.³⁴³ Whether increasing the number of Africans in NNGOs empowers SNGOs is still a moot question. On the one hand, Mutua was critical that when NNGOs engage Southerners, it is usually in their native region which perpetuates the perception that it is only experts from the North that can work internationally.³⁴⁴ Moreover, according to Mutua, Pierre Sane of Amnesty International and Adama Dieng of International Commission of Jurist (ICJ) in spite of being Africans 'think white', by championing the universalising of the human rights corpus and liberal democracy.³⁴⁵ On the flip side of the coin, having Africans at the decision-making tables within NNGOs has resulted in a better spotlight on African priority issues.³⁴⁶ Adama Dieng strengthened African NGOs' capacity to influence the ratification of the African Charter.³⁴⁷ Salil Shetty, who comes from the South, initiated the internationalisation campaign of Action Aid.³⁴⁸ The Ford Foundation has systematically recruited Africans to head regional Offices in Africa.

The above notwithstanding, in some instances, INGOs do not respect or utilise existing capacities in Africa.³⁴⁹ A respondent scorned at an incident where an INGO in Tanzania commissioned an expert from the North to do 'energisers': small exercises that boost energy levels during meetings. Instead of recruiting competent Africans, NNGOs would rather use 'interns' masquerading as 'experts' to head their offices in the South, with most of the work done by African consultants.³⁵⁰ In most NNGOs in the South, key decisions such as Head of Programme, Finance and Resident Representative are reserved for the North. It is therefore not surprising that during the donor roundtables, a respondent was often queried whether he was qualified to speak on behalf of a particular Embassy, irrespective of the fact that the Ambassador himself had authorised his participation. Yet another respondent working in a NNGO noted that '... recruitment from the North is justified under the pretext of objectivity, protecting local employees from state harassment and emphatically because it is Northern tax payers' money'.

342 PLAN-International *Framework for partnerships* (2003).

343 Steiner (n 49 above) 61.

344 Mutua (n 3 above) 181.

345 Mutua (n 3 above) 50-51.

346 F Viljoen 'The African Commission: Promotion Mandate' in *International human rights law in Africa* Oxford (2007) 409.

347 Welch (n 307 above) 206; Welch (n 60 above) 15.

348 David & Machini (n 329) 5.

349 A common lament of most Africans working in INGOs.

350 Interview with Mutuma, then Acting Dean, Kenya Human Rights Institute, 24 August 2007, Nairobi.

The lack of recognition of local capacities frustrates innovativeness. Some professionals are reduced to clerks, receiving and acting on instructions from the Northern office without real decision-making powers to influence the implementation of joint programmes. There is also concern that NNGOs deliberately undermine the local leadership of SNGOs to justify their continued presence in the South. For instance, in the case of Help Mission Development Services (HMDS)³⁵¹ involving a partnership between CO-OPERAID Switzerland and HMDS, the crux of the problem arose over the management style.³⁵² The local manager complained that the Director in the North was undermining his authority by directly communicating with local staff and defending them when he exercised his authority. It is noteworthy the HMDS had no Board but was governed by CO-OPERAID.

Often times, NNGO assimilate the culture of the mother country. For example, a respondent recalled how on the death of a colleague, only one employee was given permission to attend the burial and the rest of the staff were expected to 'continue working as usual', which was found insensitive to African culture.

Some cases exhibit overt power struggles between NNGOs and SNGOs. In the case of International Cooperation for Integrated Rural Development (CIDRI), a respondent argued that it was not an INGOs but a local NGO, having been registered as an independent organisation in Kenya but not as a regional office of CIDRI in Canada.³⁵³ Notice was posted in the local dailies that the Chairman of CIDRI-International was not associated with CIDRI Kenya.³⁵⁴

There is also concern that some NNGOs fundraise on the pretext of helping the South, but selfishly utilise the funding. In Uganda, the Gulu District Chairperson rejected the services of one INGO which had secured 800 000 Euro but had only budgeted about 30 000 Euro for Gulu.³⁵⁵ Yet another respondent who had worked for a number of INGOs in Tanzania condemned the glaring difference in fees:

It is ironical that INGOs claim that we are fighting poverty together. They wear sandals, jeans and t-shirts as a camouflage. The gap in salary is humongous, almost a quarter of that earned by the local person. Although the actual salary is about \$3000, it is compensated by the benefits such as a four-wheel vehicle, an international school for children's education, and a house in a posh and safe neighbourhood, totalling to about 15000\$... (sic) When the

351 *Nicholas Silingi v Board of Help Mission Development Services* Reg/04/06.

352 Nicholas email: info@co-operaid.ch; email from Rao Satapati, 2 Feb 2006, 12:36, Subject HMDS Team Work 'Please do not forget the past'.

353 *International Cooperation for Integrated Rural Development (CIDRI) of Montreal (Quebec) Canada v Patric Konieczniak NGO Council of Kenya* Reg No /02/05.

354 Daily Nation and Standard, 25 May 2005.

355 Chris Ocowin 'Mao, Okumu blasts NGOs' *New Vision* 31 August 2007, 9.

financial controller is an African, she or he earns 1200 dollars in spite of being the second in command.

There is also controversy about how NNGOs and SNGOs should empower each other. Various propositions to strengthen the capacity of African NGOs have been experimented with. Orlin suggests that SNGOs either become members or affiliates of NNGOs, in order to access training, guidance and international recognition with the parent body serving as the quality controller akin to a franchise in the business sector.³⁵⁶ This well-intentioned approach is paternalistic and confines the problem of poor skills to African NGOs. In criticising the dismissal of expertise in the South in respect to HIV/AIDs, the Commonwealth has observed:³⁵⁷

Since the beginning of the international response to HIV in 1986, there has been numerous 'training programmes' designed to transfer North American expertise to Africa. The common approach of these programmes is to 'trickle down' the knowledge of a small group of northern experts, through a 'training of trainers' mechanism, to large groups of African field workers. Meanwhile, many African organisations developed extraordinary skills and knowledge because they had to find ways of living with a serious situation affecting them directly. However, little attention was paid to validating and disseminating this local knowledge ... In retrospect, it should have been recognised that people facing challenges to life and livelihood tend to work out solutions long before international experts even grasp the nature of the problems.

The erroneous assumption that the North has the monopoly of human rights conceptualisation is reflected even within SNGOs. The ability to translate lived experience into internationally acceptable conceptual frameworks is relatively weak amongst most local NGOs. Even if SNGOs lacked skills, NNGOs should empower them to acquire the requisite skills and act on their own. Hence, the critical question that NNGOs should ask is 'We are here to help. How can we help?'³⁵⁸ It is possible to design projects that strengthen the technical capacities and resources of SNGOs and professionals without entering into formal parenting relationships.

Building an egalitarian international human rights movement is not a one-way process whereby activists in one country help victims in another, but an interactive process. Southern Non-Governmental Organisations such as CUTS of India and SEATINI of Zimbabwe have provided intellectual and organisational capacities to NNGOs.³⁵⁹ The Aids Support Organisation (TASO) in Uganda is a renowned international expert on HIV/AIDs. Although SNGOs should not automatically shun expertise from NNGOs, it is more cost effective and politically prudent to access the capacities from within the country, the sub-region, the continent, the South

356 Orlins (n 19 above) 135.

357 Commonwealth Secretariat *Gender mainstreaming in HIV/AIDs: Taking a multisectoral approach* (2002) 108.

358 Interview with Mbogori (n 253 above).

359 Mutunga (n 155 above) 14.

and ultimately from the North, in that order.³⁶⁰ For example, the Schools without Walls (SWW), a network of eighteen African organisations active in HIV, transferred skills and local knowledge from one organisation to another within Southern Africa.³⁶¹

On the positive side, the competition has accentuated the urgency of SNGOs to strengthen their governance and management implementation. Having offices in the South demonstrates solidarity and results in more realistic analysis and effective implementation of programmes. On the negative side, generally, African NGOs are apprehensive that NNGOs are not empowering them but are becoming their competitors over political influence, funds and skilled personnel.³⁶² For example, International Republican Institute (IRI), National Democratic Institute (NDI) and International Foundation for Electoral System (IFES) which are all American NGOs funded by the US government have made it almost impossible for the Institute for Education in Democracy (IED) to secure USAID funding to do electoral monitoring which had hitherto become its niche.³⁶³ As a result, IED has shifted to training political parties and strengthening and monitoring the Electoral Commission in Kenya. Even in situations of partnership, some SNNGOs complain that NNGOs brand their activities with their logos without acknowledgement of SNGOs which accentuates NNGOs visibility in Africa.³⁶⁴ Also of concern is NNGOs' paternalism and micromanagement of SNGOs' partners.³⁶⁵ The fact that almost all respondents who criticised NNGO/SNGO relationship chose to speak off the record, further highlights the power of NNGOs. As aptly articulated by AWID, NNGOs are criticised for four main tendencies:³⁶⁶

- Absorbing local capacity by offering better wages and benefits and as such cherry picking the best ... leaders out of local ... organizations,
- Repackaging and claiming credit for ... innovations and programme efforts that are the product of long term struggles of under resourced ... groups which are then sidelined,
- Funding their own ideas and campaigns rather than the work happening on the ground- especially in term of what would best build strong and effective local and national ... organisations; and

360 As above.

361 Commonwealth Secretariat (n 357 above) 108.

362 B Adeleye-Fayemi 'Financing for the gender equality and the empowerment of women: The Critical role of Autonomous women's funds in the strengthening of women's movement' Paper presented for the Division of the Advancement of women, Department of Economic and Social Affairs (2007) 18; Bromley (n 744 above) 146; AWID (n 178 above) 50 & 73; SANGOCO (n 241 above) 29; Commonwealth Foundation (n 67 above) 51, ICHRP (n 5 above) 119, Steiner (n 27 above) 66-67.

363 Interviews with Michuki, Chair of IED; and Kooki-Muli, Executive Director, IED, 7 September 2007.

364 IHRIP (n 289 above) 7; Mubangizi (n 149 above) 218; AWID (n 178 above) 41.

365 Mutua (n 3 above) 9.

366 AWID (n 153 above) 74.

- Increasingly positioning themselves as leaders ... raising further concerns about competition over resources, given the relative scale of INGOs, they can overshadow key ... rights actors in the eyes of the donors and public opinion ... as they are no longer seen as valid interlocutors for these issues, with government and funders preferring to work with INGOs.

NNGOs should not stop offering material and technical support to SNGOs. SNGOs desire partnerships with NNGOs in coalition building, joint ownership of projects, exchange of information and expertise, avoidance of duplication and substitution of local capacity. There are advantages in collaboration such as supporting SNGOs to influence the business, financial and development policies of their governments and of multilateral institutions, sensitise the Northern publics about global poverty, unfair trade relations and the human rights violations within their midst; support SNGOs financial sustainability and facilitate SNGOs to speak in their own voice and influence debates in the international arena. Keck and Sikkink have found that international advocacy is more likely to succeed around issues where:³⁶⁷

- (i) The channels between domestic groups and their governments are blocked or hampered or where such channels are ineffective for resolving conflict;
- (ii) activists or political entrepreneurs believe that networking will further their mission and campaigns and actively promote the relationship;
- (iii) conferences and other forms of international contact create arenas for forming or strengthening networks.

In order to transform the power imbalance, NNGOs need to base the relationship with SNGOs on solidarity. As argued by Manji:³⁶⁸

Solidarity is not about fighting other people's battles. It is about establishing co-operation between different constituencies on the basis of mutual self-respect and concerns about injustices or processes that reproduce injustices. It is not about sympathy or charity or the portrayal of others as objects of pity. It is not about fundraising to run your projects overseas but fundraising funds which others can use to fight their own battles. It is about taking action within one's terrain, which will enable the capacity of others to succeed in their fights against injustices.

In concluding the discussion on empowerment amongst SNGOs/NNGOs' relationships, a case can be made for the strengthening a mutually benefiting global human rights movement facilitated by open, principled and respectful dialogue to forge mutually agreed solutions and shared responsibilities. While the role of NNGOs as donors is highly appreciated, generally, NNGOs are criticised for poaching the best personnel from SNGOs, appropriating credit for innovative programmes

367 Keck & Sikkink (n 216 above) 12.

368 F Manji 'The depoliticisation of poverty' in D Eade (ed) *Development and rights* (2004) 29.

of the SNGOs; superimposing and funding their ideas rather than supporting SNGOs agendas, and displacing SNGOs as leaders.³⁶⁹ Unless NNGO is adding value by expanding new resources, opportunities, knowledge, networks which otherwise would have been inaccessible to SNGO, it is considered irrelevant to the survival of the NGO sector in sub-Saharan Africa. Strengthening equality in partnership requires mutual respect and acknowledgement of each other's contributions, material and intellectual resources as well equal ability to set the agenda and participate in the implementation processes.³⁷⁰

6 Conclusion

This chapter has explored the application of the principle of empowerment to NGOs. It firstly interrogated how NGOs have internally empowered themselves, and evaluated the obligations and possibilities that NGOs have to empower themselves in terms of skills capacity, resource mobilisation, the provision of conducive working environment for staff and remuneration to enable them achieve their missions. Secondly, it examined the extent to which NGOs have influenced and helped to empower their constituents and beneficiaries, and considered how they have addressed empowerment issues involving exploitation, marginalisation and exclusion of groups like women, youth, sexual and racial minorities in their midst.

NGOs need to cultivate a human rights culture before they can sufficiently champion the human rights discourse elsewhere. The lack of training and the NGO culture that often relegates learning as secondary to real work has created knowledge gaps in human rights, governance and organisational development, amongst most activists who often exhibit weak organisational leadership. Thus, there must be a link between the activists and the academia to strengthen the NGOs' intellectual, analytical and research base, aimed at developing institutional knowledge to alter societal inequities.

NGOs are greatly disempowered by the failure to raise their own funding and having to depend on hand-outs from government and donors. The frequent co-option of NGOs to endorse governments' and donors' development policies has often diverted NGOs from addressing the issues of marginalisation and rights abuses, or offer alternative strategies and ideologies from those imposed by the funder. The NGOs' internal empowerment is further derailed by the poor pay and failure to meet the financial demands of their employees, which forces the staff to take multiple occupations and relegate NGO work as secondary and voluntary.

369 AWID (n 178 above) 41 & 74; IHRIP (n 289 above) 7; Mubangizi (n 149 above) 218.

370 AI Africa Consultative Workshop Report July 2005, Kampala.

The critical issue should not merely be government or donor funding, but the obligation of a given NGO to articulate its mission, and safeguard its autonomy while simultaneously ensuring accountability to various stakeholders such as members, communities, donors and government. The NGO-donor relationships need to be premised on partnership, characterised by mutual respect, shared obligation and credit. NGOs' empowerment of marginalised groups exhibits both dilemmas and accomplishments. While conceding that the enemy of women is not men but patriarchy, and the fact that gender based imbalances mirror a general societal problem, there is a need for programmes that target both men and women, as well as creating strategic alliances between WNGOs and CSOs in general to spearhead women emancipation. On their part, the youth must exhibit vibrancy and competence to benefit the movement rather than rely on age as a favour. While the role of NNGOs is highly appreciated, SNGOs criticise NNGOs of draining them of skilled personnel, monopolising credit for innovations, imposing their agenda thus ultimately displacing SNGOs. Nonetheless, SNGOs and NNGOs partnerships are equally critical in the evolving of an international human rights movement.

WALKING THE TALK: HOLDING NGOs ACCOUNTABLE TO HUMAN RIGHTS PRINCIPLES

1 Introduction

The rationale for civil society organisations and NGOs in particular in the governance and development discourse is that they are forerunners and custodians of human rights and good governance. This book was conceived from the general concern that because NGOs criticise the human rights performance of government and business, increasing attention is paid to NGOs' own human rights and internal governance issues. The internal governance of NGOs has not effectively upheld the principles of human rights and good governance. And yet, as advocates of human rights, NGOs have a moral obligation to adhere to the same human rights principles in their own organising as what they advocate for and demand from others. Put differently, NGOs need to internalise and cultivate a human rights culture before they can legitimately advocate for the application of the human rights discourse and principles elsewhere. NGOs must set an example to society by respecting and valuing their members, employees, partners and other stakeholders as well as fight discrimination, practice internal democracy and use organisational power in ways that promote the interest of all, particularly the most vulnerable in society.

It is clear that NGOs individually and collectively contribute to the institutionalisation of a human rights culture. But it is essential to interrogate whether NGOs have applied the human rights principles of express linkage to rights; accountability and transparency; participation; and equity, non-discrimination and empowerment, to their governance processes, policies, strategies and relationships. These human principles informed the critical research questions and the constituent chapters of the book.

This concluding analysis of the issues begins with a recap and summary of key arguments of the chapters in part 2, 3 and 4. Part 2 begins

with the question of whether NGOs have human rights obligations under the law. Part 3 outlines the human rights obligations of NGOs and articulates what is expected of them in fulfilling each human rights principle in an ideal situation. The findings of the status of NGOs' fulfilment of their human rights obligations are presented in part 4, while part 5 makes recommendations for each principle. The final section of the chapter concludes with general recommendations and highlights the significance of the book.

2 NGOs' human rights obligations

In order to shift the focus of responsibility to uphold human rights onto NGOs, it was necessary to consider, as a threshold question, whether NGOs have any human rights obligations under the law from both a legal and moral perspective. There is obviously some disagreement in the debate surrounding the three schools of thought over the human rights obligations of NGOs. The first and dominant view that of the legal liberalism school, which argues that NGOs have neither legal nor moral duties under international human rights law, is in my view obviously flawed. The dominant school argues that the state has the obligation to ensure that non-state actors, including NGOs, do not violate rights by putting in place relevant civil and criminal legislation that regulates non-state actors and intervenes when they violate human rights. The dominant school further argues that extending human rights obligations to NGOs would dilute the state's responsibility to ensure rights. While acknowledging that the state is a primary duty bearer of human rights, a focus on state-based systems ignores the shrinking capacity of states to ensure the realisation of rights. The dominant school is also too legalistic, and ignores the clear limitations in the operation of the law in third world countries. Although governments have put in place specific NGO legislation, the law falls short of enhancing NGO governance.

The second school of thought acknowledges that both the state and NGOs have human rights obligations under international law, given that both the ICCPR and CESCR provide that human rights are to be respected by 'everyone'. In its Preamble, the African Charter also reiterates that everybody has duties, and articles 27 to 29 of the Charter outline the duties of the individual (including non-state entities such as NGOs). Nonetheless, although it is possible to argue that NGOs have legal duties to promote and respect rights, the theoretical orientation of the second school remains weak.

It is contended that the third school, which is grounded in the sociology of law, and conceptualises human rights as a normative concept that outlines principles aimed at enhancing human dignity and welfare, provides the most solid foundation for the arguments developed in this book. It is a school that is complementary to the dominant legal liberalism

school. While conceding that NGOs do not have legal obligations under international law, it argues that they have a moral responsibility to promote and respect human rights. I have demonstrated that human rights is resourceful as a discipline to tame power by all actors and at all levels of society. There is no moral reason to exclude its operation in respect of NGOs.

The rights-based approach to development offers most support in extending the rights obligations to NGOs. Although the rights-based approach mechanism was developed by OHCHR for application to UN agencies, it should equally apply to NGOs as important actors in the domain of human rights, governance and development. The critical issue is not to encourage the state to abdicate its human rights obligations, but rather to diversify the human rights obligations to the NGO sector in order to complement the state in its role of promoting and respecting rights. After all, applying human rights principles to the day-to-day policies and practices of NGOs ultimately strengthens a human rights culture. NGOs must exhibit the principle of express linkage to rights; accountability and transparency; participation; as well as equity, non-discrimination and empowerment in their internal policies and practices if they are to measure up to the challenge of being the watchdogs of human rights and good governance.

The theoretical utility of the rights-based approach is that it reinforces the imperatives of good governance. Although not a magic potion for the resolution of societal problems, the value of the rights-based approach lies in highlighting how power inequalities affect the processes of governance and development. The application of the rights-based approach does not in any way suggest that the law is unimportant to the realisation of rights. Rather, in addition to law, the rights-based approach offers a more proactive approach to people-centred development, human rights and good governance cultures by addressing the root causes of human rights violations. The following discussion elaborates on the implications of the rights based approach to the governance of NGOs.

3 NGOs' human rights obligations elaborated

In discussing the principles of the rights-based approach, it is underscored that they are neither mutually exclusive nor clearly demarcated. Rather the principles are complementary and overlapping, aimed at the respect of the inherent equality and dignity of the human person.

3.1 The principle of express linkage to rights (mainstreaming)

The principle of express linkage to rights requires that all NGOs mainstream human rights in their work because human rights are

universal, inter-dependent and indivisible. Mainstreaming human rights does not change the focus of what an NGO does, but rather entails paying particular attention to the root causes of inequity, exclusion, discrimination and rights violations. It requires each NGO to undertake a right-duty analysis by identifying the rights addressed in its programme, and by demarcating the relevant rights holders and duty bearers as well as the content of the duty.¹ Put differently, each NGO has an obligation to articulate the implication to rights of specific policies and practices as well as the roles and responsibilities of the different stakeholders.²

3.2 The principles of accountability and transparency

NGO accountability refers to how an NGO holds itself responsible for its actions, beliefs and the utilisation of resources. Accountability safeguards against the abuse of authority or power and strengthens ethical behaviour. Accountability also provides assurance that the NGO is fulfilling its responsibility as outlined in the NGO's constitution, mission, policies, programmes, administrative procedures, mechanism of redress and relationships with stakeholders in managing unequal power relations. NGOs have multiple accountability obligations under the law, to the governmental regulatory NGO Boards, NGO governing boards, their membership, communities, public, NGO sector-wide self-regulatory Councils and donors.

Accountability under the law is mainly related to registration. In order to register, an NGO is mostly obliged to have a written constitution outlining the roles and responsibilities of each organ, a governing Board and a membership. The governing Board is vested with authority to oversee the governance of the NGO. Accountability under the law imposes a duty of respect or obedience on the Board to respect the law and be guided by its mission as its primary reason for existence. Each NGO is required to submit periodic financial and narrative programme reports to the government Regulatory NGO Board. An NGO must explicitly prohibit the distribution of profits to leaders and members with the exception of reasonable compensation. The duty of loyalty obliges the Board not to compromise the interests of the NGO in favour of individual interests. Lastly, the duty of care obliges the Board to at all times act diligently in furthering the NGO's mission. The fulfilment of an NGO's mission is the basis upon which an NGO's effectiveness is measured. Common accountability mechanisms used by the Board include having a

- 1 International Council on Human Rights Policy (ICHRP) 'By what authority? The legitimacy and accountability of Non-governmental Organisations' A paper presented by Hugo Slim at the meeting on *Global trends and human rights – Before and after 11* (2002) 12 www.jha.ac/articles/a082.htm (accessed 2 August 2006) 14.
- 2 P Alston 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 802 & 811.

clear and concise mission and having participatory monitoring, evaluation and strategic planning processes. Accountability to donors entails submitting narrative and financial reports that account for the proper use of resources and justify the outcome of the funding. Accountability to the NGO sectors wide self-regulation mechanism requires that the supervisory body itself obeys the Code of Ethics.

Accountability to the community that the NGO works with and membership requires respecting them by enabling them to question the NGO's policies and programmes and to participate in taking critical decisions affecting them. Accountability carries a moral obligation on NGOs to enable the communities they work with to hold the NGO responsible for what it commits itself to do in its mission statements and proposals for funding.

Accountability to the general public requires transparency. An NGO should publicise its mission, objectives, policies, methods, activities, achievements, evaluations, geographical scope, organisational structures, sources of funds, profiles of staff and governance leadership. The principle of transparency imposes an obligation on NGOs to provide accurate and objective information. Common mechanisms of community and public accountability include public forums to solicit feedback, documentation of grassroots strategies, public hearings, audits, debates, needs assessments, stakeholders' analysis, monitoring and evaluations of programmes.

3.3 The principle of participation and inclusion

Participation guarantees that the human person is a central subject of human rights and the principal actor in determining his or her welfare and rights. The right to participation is entrenched within international treaty law.³ It guarantees every person a right and opportunity to take part in the conduct of public affairs and to have access to public services. Participation is a major means by which people collectively determine their interests, priorities, engage in local dialogue, generate diverse ideas and promotes collective commitment for the common good.⁴ Participation must be

3 Universal Declaration on Human Rights (1948), GA res 217A (III), UN Doc A/810 (1948), art 21; International Convention of Civil Political Rights (ICCPR) (1966), adopted and opened for signature, ratification and accession by G.A. resolution 2200A (XXI), 21 UN GAOR, Supp (No 16) 52, UN Doc A/6316, 999 UNTS 171, entry into force 23 March 1976, art 25; CRC (n 87 above) art 12; Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted 18 Dec 1979, GA Res 34/180, UN GAOR, 34th Sess, Supp No 46, UN, Doc A/34/46(1980) entered into force 3 Sept 1981, arts 7, 13 & 14(2); African [Banjul] Charter on Human and Peoples' Rights (African Charter) adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986, (1981) art 13.

4 African Charter for Popular Participation in Development and Transformation (1990) para 10 <http://www.afrimap.org/english/images/treaty/file4239ac8e921ed.pdf> (accessed 17 March 2006).

'active, free, meaningful' and broadly involve diverse stakeholders.⁵ Participation extends 'beyond having a right to participate in a given space to include the right to define and shape that space'.⁶ Given that the people closest to the problem have ingenious experience in solving them, NGOs are required to address the barriers that keep people from participating and expose them to processes and skills of asking the right questions and contribute diverse ideas to ensuring their rights. Instead of acting for the community, NGOs must act with the community to achieve the desired change.

3.4 The principles of equity, non-discrimination and empowerment

The human rights discourse rests on the value system of equity and non-discrimination.⁷ In order to achieve equality, focus is placed on formal equality by treating people alike and on substantive equality by addressing the systemic and underlying causes of discrimination through affirmative action.⁸ Affirmative action rectifies the unintended results of neutral laws, policies and practices, on the vulnerable groups in order to afford them substantive equality thus empowering them. The principle of empowerment derives from the cardinal human rights principle of respect of the inherent equality and dignity of the human person.⁹ Empowerment means the ability of people to claim and exercise their rights in order to improve their lives. The concept of empowerment within NGOs is two dimensional. Firstly, empowerment relates to internal empowerment with each NGO obliged to strengthen itself in terms of skills capacity, resource mobilisation, competitive remuneration and supportive working environment for staff. Secondly, empowerment entails addressing power inequities to enable the weaker party to take action themselves. Therefore, each NGO has to address how it deals with power in its governance structures and fundraising policies as well as management systems, procedures, programmes and stakeholders.

5 UN Declaration on the Right to Development: A/RES/41/128, 4 December 1986, 97th plenary meeting, <http://www.un.org/documents/ga/res/41/a41r128.htm> (accessed 13 August 2006); Vienna Declaration and Program of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 25 <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> (accessed 13 August 2006); African Charter on Popular Participation (n 4 above) paras 6 & 15.

6 J Gaventa 'Strengthening participatory approaches to local governance' (2004) 16 *National Civic Review* 29.

7 UN Charter (1945) <http://www.un.org/en/documents/charter/> (accessed 13 June 2006) art 1; International Convention of Economic, Social and Cultural Rights (CESCR) GA resolution 2200A (XXI), 21 U.N. GAOR, Supp (No 16) at 49, UN Doc A/6316, 993 UNTS 3, entry into force 3 Jan 1976 (1966) art 2(2); ICCPR (n 3 above) art 2(1); UDHR (n 3 above) art 1; African Charter (n 3 above) arts 2 & 3.

8 CEDAW (n 3 above) para 8.

9 UDHR (n 3 above) art 1; ICCPR (n 3 above) art 3; CESCR (n 7 above) arts 2(2) & 3; African Charter (n 3 above) arts 5 & 19.

Furthermore, empowerment addresses how the NGO sector addresses societal inequalities accruing from age, gender, ethnicity, race and sexuality amongst others which marginalise and exclude women, youth, ethnic, racial and sexual minorities. In the era of globalisation, I also addressed the marginalisation accruing from resource distribution within the NGO sector that manifests itself in the power dynamics between NNGOs and SNGOs.

In order to target marginalised groups, each NGO must develop data disaggregated by race, religion, ethnicity, language, sex, age and sexual orientation. Further, each NGO must have policies that provide for diversity, gender equity and balance, impartiality and non-discrimination.¹⁰

4 Status of NGOs' observance of human rights obligations in Kenya, Tanzania, Uganda and South Africa

4.1 The status of observance of the principle of linkage to rights

Despite the recognition that human rights are universal, human rights are predominantly understood as Western ideas and its genesis is tied to Western history. Yet, the ideological and strategic differences between SNGOs and NNGOs influence the differences in priorities and strategies of achieving human rights. For example, NNGOs prefer the traditional legal liberalism approach to rights, while SNGOs largely prefer a more expanded role that also addresses the root causes of human rights violations. Ironically, African NGOs often forget that human rights are universal and ignore how ordinary people adapt human rights to their practices and debate. NGOs tend to erroneously present African culture as mainly a source of human rights violations and an impediment to the enjoyment of rights, without looking at the reverse side of the coin.

Despite the theoretical acceptance of the indivisibility of rights and the fact that both DNGOs and HURINGOs aim to promote the welfare and dignity of the person traditionally, NGOs have maintained a distinction between them. HURINGOs prefer to use human rights as a normative concept that imposes moral obligations on all actors to address the abuse of power. HURINGOs have not embraced the struggles of DNGOs such as the anti-globalisation or poverty campaigns ostensibly because they have a weak legal basis. Likewise, because DNGOs consider rights as

10 INGO Accountability Charter (2005) 3 www.amnesty.org/resiurces/downloads/INGO_Accountability_charter.pdf (accessed 3 June 2007).

legalistic and impractical in the context of scarce resources, they tend to focus on economic development and address rights in a technical manner in a bid to achieve better programming without addressing the root causes of inequalities. Generally, although all regional blocs provide an opportunity for civil society participation and apply human rights as a core principle,¹¹ few NGOs have engaged them.

At the national level, many NGOs do not actively participate in the donor-government poverty reduction strategies on the pretext that such consultations merely endorse already-adopted positions. It is also true that NGOs have weak expertise in economic and development issues such that they have failed to hold government accountable by having thorough critiques that address the rights dimensions of poverty and development. Progressively, many NGOs are beginning to pursue a dual mandate by addressing both development and rights and are currently experimenting with rights-based approaches.

4.2 The status of observance of the principles of accountability and transparency

Although accountability relates to how ethical and responsible an NGO is in fulfilling its mission, it is often confined to financial issues. Accountability to the law requires respecting the law. In East Africa, NGO registration is mandatory, while in South Africa it is voluntary. However, some NGOs in East and South Africa chose not to register because the process of registration is so cumbersome. In South Africa, some organisations are apprehensive that registration may constrain their flexibility and widen the gap between formal leadership and membership. In some instances, the unregistered NGOs operate as projects of registered NGO. The unregistered organisation is constrained from opening bank accounts, renting office premises or receiving donor funding in its independent capacity.

While acknowledging that many human rights victories have been won through law, sometimes, civil disobedience manifests some tangible immediate results as demonstrated by the venting of emotions, voicing of concerns, the halting of the evictions from Mandela Park in 2002, writing off electricity arrears by ESKOM as a result of reconnections by SECC and repair of the road in Western Cape anti-eviction campaign.

Government NGO Boards are primarily established to control registration and operations of NGOs as opposed to ensuring accountability

11 Constitutive Act of the African Union, adopted in Lome, Togo in July 2000 and entered into force in May 2001, http://www.au.int/en/about/constitutive_act (accessed 11 November 2006) preamble, arts 3(g) & 22; Statute of the ECOSOC of the African Union (2004) art 2.

to the law and good governance. Other than the requirement of establishing a Board, having a constitution and the submission of reports, the law has not ensured better governance of NGOs. Neither do government regulatory Boards have the capacity to enforce compliance nor guide good governance.

NGO Governing Boards – despite their inherent potential of enhancing the internal governance – are not properly functioning but tend to be established to satisfy the condition for registration. Many suffer from poor induction, conflict of interest, poor transitions, multiple engagements, serving on similar boards, weak voluntarism, poor gender representation and failure to democratise Boards practices. Although an NGO governing Board has a fundamental role of ensuring that the NGO is accountable to its missions and memberships, many exhibit conflicts of interest when they benefit from NGO programmes such as consultancy work, the hiring of close relatives and directly engaging in routine management issues of which they are only supposed to supervise. Not all Boards have written conflict of interest policies. In cases of financial impropriety, Boards tend to merely request the responsible person to resign while the rest of the membership exonerates itself from responsibility. Very few cases have been referred to court or are comprehensively addressed by NGOs.

Accountability to the NGO missions is largely deficient, because constitutions and strategic plans to achieve the missions are often hurriedly patched up, recycled or plagiarised from other organisations' documents in order to fulfil donor requirements.

Many NGOs desist from having membership because it is expensive and does not guarantee that the elected leadership is competent to advance the NGO's mission. Often leaders are elected without adequate information of the competence of the leaders. Further, in most NGOs, membership is unable to set the NGOs' agenda or to ask hard questions to hold leaders accountable, but merely implements NGOs' programmes. At the same time Boards which are nominated based on skills are also criticised for not governing with the consent of the governed.

The quality of NGO accountability to communities is also problematic due to the commonly top-down methods where the views of the communities are solicited after major decisions have been taken. Often communities are perceived as beneficiaries or inputs of NGO's work. Nonetheless, incidents of joint implementation or facilitation of communities to work within their environment are increasing.

NGO transparency is frustrated by almost non-existent organisational documentation and poorly updated websites, much so that NGOs are misunderstood as being secretive. NGOs partially attribute their opacity to a lack of opportunities to reflect and write. Many NGOs depend on oral

testimonies for institutional memory resulting in poor institutionalisation of NGO systems and the exhaustion of the interviewees. In all countries, although it is mandatory to submit narrative and financial reports, there is poor compliance with this obligation. Even internally within NGOs, information about finances is often confined to the signatories to the accounts.

Globally, there are no international standards for criticising or addressing shortcomings within the NGO sector.¹² NGO accountability through the sector-wide self-regulatory mechanisms are largely inadequate, owing to mistrust, voluntarism in participation and inconsistencies in applying the rules and regulations. The legally constituted NGO Council in Tanzania is yet to operate at optimum capacity mainly due to a lack of funding. In Kenya, since the contested 2004 elections of the National NGO Council, legitimacy to supervise the sector was eroded. In Uganda and South Africa, there is no legally binding self-regulatory mechanism. The existing Codes of Ethics are voluntary and hardly enforced.

Similarly, accountability to the donors, which is perhaps the most respected form of accountability by NGOs, has its drawbacks. Donors rarely verify whether NGOs are accountable to their target groups or missions, as their preoccupation is often limited to compliance with specific funding conditions. However, in *S v Boesak*,¹³ the South African Supreme Court of Appeal observed that audited accounts are 'hopelessly ineffective' in ensuring checks and balances of NGOs. Besides, donors rarely prosecute or publicly expose NGOs that misappropriate funding. Instead, most donors only withdraw funding, which is hardly a deterrent given that it is rarely publicised. Yet NGOs have traditionally utilised 'name and shame', as a strategy to enforce human rights compliance.

4.3 The status of observance of the principles of participation and inclusion

There are numerous challenges in the application of the principles of participation and inclusion in NGO internal governance as well as broadened participation amongst the different stakeholders. It is acknowledged that founders are risk-takers with unusual commitment and sacrifice. However, most NGOs continue to be vulnerable to 'founder power' and 'star syndrome' where the founder Executive is perceived as the 'owner' of the NGO. Donors have also accentuated the power imbalances within NGOs as they often work with a single individual, usually the Executive Director, thereby making the NGO institutional

12 ICHRP Deserving trust (2003) 54, www.ichrp.org/credo.md/archiva/documente/HumanRightsNGOAccountability.doc (accessed 2 August 2006).

13 *S v Boesak* 2000 (3) SA 381 (SCA).

profile associated with a particular person, which limits participatory management. Often employees tend to work at the sufferance of the leadership, although some may even work on labour rights. Disciplinary mechanisms are abrupt with persons complained of, often part of the disciplinary panel or having the ability to influence its outcome.

Successions and transitions within NGOs are generally badly managed. Transitions often happen at the end of contracts, in response to crises or when the leaders move out of the sector. In East Africa, most successful NGOs have not had a transition at the Executive Director's level for more than two decades, resulting in organisation inertia mainly accruing from a difficulty in challenging their decisions. Where succession has happened, previous leaders and employees feel discarded. Thus, many transitions are volatile, resulting in chaos or shrinking effectiveness for the first one to two years following transitions from powerful Executive Directors.

Many NGOs involve communities in identifying, planning and implementing NGO projects. In some instances, the participation of communities is paternalistic, reducing communities to customers or branches of NGOs. Demand for quality results has been used as a pretext by NGOs to exclude the ordinary persons closest to the problems from their work as actors. Nonetheless, generally NGOs public surveys have confirmed that NGOs are closer to the communities and are important actors in advancing their welfare and rights.¹⁴

Despite the existence of numerous formal institutionalised networks, they have not promoted egalitarian relationships between the partners other than merely working together. Often networks are dominated by those who contribute skills and financial resources. Given that the success of the network is dependent on the achievement of the members, it is difficult to fundraise for the networks' activities. Thus networks end up competing for the same activities and resources as its members. Inevitably, members tend not to be committed to most of the networks, and many NGOs are members of different networks without the necessary allegiance

NGOs' commitment to advocate actions that determine the social contract between the state and its citizens is often dismissed as being elitist, self-seeking and a masquerading political opposition. Consequently, there is still ambivalence over NGOs' engagement with political society. The direct relationship between NGOs and those in power weakens the former's potential for effective advocacy. Proximity to government while facilitating access to information may compromise the NGOs capacity to independently influence policies and is not sustainable in situations of

14 Barr et al *Non-Governmental Organisations in Uganda: A report to the Government of Uganda* (2003) 42; South African Department of Social Development *An impact assessment of the Non-Profit Organisation (NPO) Act No 71 of 1997* (2005) 46.

competing priorities and interests. Simultaneously, out-right antagonism is counterproductive particularly where government is popular as is common in countries of political and economic transitions. Hence, the term 'critical ally' that balances confrontation with collaboration was coined.

Conflicts are part and parcel of participation because of the diverse experiences, opinions and interests of people. However, conflicts within NGOs are poorly managed and their root causes hardly interrogated. The covering up of power inequalities further accentuates the unofficial power within NGOs and compounds the muddling of roles and responsibilities between management and governance functions. In some instances, some aggrieved activists form parallel NGOs. The situation is more acute with WNGOs, particularly in East Africa who often treat the slightest differences as fundamental. The weaknesses in addressing conflicts results in burn-out, gossip, backstabbing, withholding information and false accusations such as misappropriation of funds, harassment and nepotism.

4.4 The status of observance of the principles of equity, non-discrimination and empowerment

Regarding NGOs' empowerment of marginalised groups, I unveil a picture of both failings and accomplishments. Some of the failings are linked to their training. Non-profit governance and non-profit law courses are not options available in any academic institutions of learning within East Africa or South Africa. Similarly, human rights is not a compulsory subject of law nor the social sciences for the first degree.

Lack of training and NGOs' relegation of learning as secondary to real activism are noted to have created knowledge gaps in human rights, governance and organisational development amongst most NGOs. NGOs tend to trivialise theory as academicism and irrelevant to daily operational dilemmas. Most learning within the NGO sector is through short term courses or workshops aimed at programme implementation without critical conceptual analysis. Although research is undertaken, it is mainly seen as an output of funding, rather than an input to improve NGO effectiveness. Consequently, NGOs often exhibit poor governance and application of human rights principles.

I acknowledge that donor resources and goodwill have contributed to NGOs' execution of programmes and their survival. Nonetheless, NGOs are greatly disempowered by the failure to raise their own funding and the inability to ensure equitable partnerships with donors. Consequently, many organisations cannot survive without donor support. Frequently, NGOs are co-opted to endorse donor strategies and priorities or are at times diverted from addressing the issues of marginalisation and rights abuses. A few NGOs with a reputation for high quality work and

diversified funding are able to control their agenda as well as influence that of the donors.

NGOs' perception of power and money as mainly bad or corrupting has largely constrained the willingness of NGOs to empower themselves to realise their mission or enforce their rights. Surprisingly, many NGOs are reluctant to ask for money for fear of refusal. Some NGOs associate money with corruption, criminality and the erosion of independence. Although DNGOs readily accept government funding, HURINGOs often resist government funding as one of the strategies of protecting their independence.

Many NGOs rely on low cost employees or volunteers for their internal expertise. The NGOs' internal empowerment is greatly constrained by the poor pay and consequential failure to meet the financial demands of NGOs' employees. Thus, staff members are forced to take multiple occupations as consultants or move on to better paying jobs. Similarly, most Executive Directors double as programme officers to earn a salary, which marginalises strategic thinking for the NGO. The stressful nature of NGOs' work compounded by the stigma associated with talking about personal needs and fears contributes to burn-out, depression, and fatigue amongst activists and renders the NGO sector oppressive.

The state-centric human rights discourse, which places women's rights in the private sector, and the individualistic orientation of human rights which hides the structural inequalities accruing from patriarchy, class and state have contributed to the marginalisation of addressing women's rights by HURINGOs. There is a strong misconception that women's rights are the exclusive domain of women and not integral to human rights. In all countries of the study, the leadership of NGOs is predominantly male with the exception of WNGOs. While a few NGOs have established gender programmes, they are under-funded. Similarly, very few WNGOs conceptualise their work within the rights framework, or have a defined feminist ideology. Women are reluctant to include men in their NGOs because of the fear of co-optation, misappropriation of women's ideas to men and lack of male experience of marginalisation on account of gender.

Likewise, before the adoption of the African Youth Charter in 2006, there was no human rights document at the continental level that focussed on the situation of the youth. In practice, the youth have been mainly left to themselves. Where the youth are included, they are expected to conform to existing power systems and structures. Their choices are simple, accept it, repeat it or leave and start their own NGOs. Unsurprisingly, they repeat the same power dynamics without realising it. Rarely are issues of contemporary relevance to youth such as sexuality taken on board. Intergenerational relationships with NGOs are problematic because both young and older activists complain of exclusion. In order to promote more inclusion, some NGOs have honoured founders in ceremonial events,

increased mixed panels of older and younger generations, have initiated intergenerational projects and have mentoring teams.

The rights of sexual minorities are largely ignored due to the misconception that they are 'un-African' and claims of lack of mandates. It is only at the 43rd session of the African Commission that the NGO Forum for the first time acknowledged the rights of LGBTIs. Likewise, issues of ethnicity and race are not addressed in a concerted and sustainable manner. The complexity of addressing race issues is that the numerical and political minority are economically dominant.

The contemporary relationship between INGOs and African NGOs reveal numerous empowerment challenges to the African NGOs, amidst some positive gains. While the ideal relationship between NNGOs and SNGOs should be based on a partnership between equals, characterised by mutual trust, respect and shared responsibility amongst partners, this is rarely the case. Major differences in levels of funding, staffing and access to international media for publicity and unequal access to global centres of influence affect the relationship. As a result, the relationships are characterised by subordination in which NNGOs, often use their vantage positions to exercise undue patronage and micromanagement in determining the needs, structures, mandates and priorities of SNGOs as well as rebrand SNGOs innovations as their own.

On the positive side, NNGOs have increasingly established offices in Africa in order to promote solidarity with SNGOs and achieve programme results in a more realistic and effective way, which also ensures mentorship of the latter. Likewise, there have been increasing numbers of Africans recruited to influential positions in NNGOs. Having Africans at the decision-making tables within NNGOs has resulted in better spotlight on African issues and strengthened African NGOs' capacity to influence the global agenda.

5 Recommendations

In the quest for NGO renewal, NGOs are posing hard questions about their relevance and strategies to achieve their self-prescribed goals of social justice, good governance, equity, human rights and development. It is now customary for NGOs to enumerate in bold print and in visible areas of their organisations values that in many ways resonate with human rights principles. NGOs are also rethinking their terminologies to make them more respectful. Instead of using such terminologies as 'masses, beneficiaries and grassroots communities', NGOs are using terminologies such as 'stakeholders, communities or citizens'. In the human rights discourse, there is shift from 'victims' to 'rights holders'. How can NGOs better realise their specific human rights obligations?

5.1 NGO obligations under the principles of linkage to rights

NGOs have a moral obligation to mainstream human rights principles into their governance processes irrespective of whether or not they define themselves as HURINGOs. The building of a human rights culture must voluntarily begin with NGOs as part of their ordinary practice. Building on positive culture and local people's knowledge and understanding of rights is a critical step in socialising human rights. NGOs should further address economic development, political issues, social welfare and rights as interlinked discourses. Applying human rights principles to NGO governance would strengthen their legitimacy in the eyes of the public that NGOs exist for the public good. There is a higher responsibility upon HURINGOs to respect their own values and reflect on how they have addressed their own power and privilege.

The benefit of mainstreaming human rights is that it addresses discrimination, tames the exercise of power and provides checks and balances against arbitrary decision-making by all actors, which are critical aspirations in the NGO tradition. Significantly, human rights is an ideology against domination, exploitation and oppression in society. Mainstreaming human rights provides minimum standards of achievements and makes all actors accountable for the implication of their work. At a practical level, mainstreaming human rights would expand the human rights movements as well as the resources invested in the human rights discourse.

The principle of universality means that human rights are present in all societies. Therefore the legitimacy of NGOs is also derived from the common norms that they pursue and the communities they work with. It is therefore incumbent upon NGOs as proponents of human rights to build on the positive aspects of cultural values that resonate with human rights and support a cross-cultural perspective that promotes the interplay between the universal human rights standards and cultural norms in order to stimulate mass support for the human rights discourse. The danger lies in the blanket glorification or rejection of the African culture. Culture is capable of both enhancing and detracting from human rights. Given that culture is a way of life and an identity, it provides a basis for making rights discourse a living and dynamic concept. The core values pursued under human rights are similar to the concept of *ubuntu* amongst the Bantu people of sub-Saharan Africa. In a positive way, the concept of *ubuntu* loosely defined as humanness provides a basis for linking rights to culture because it preaches mutual respect and responsibility towards each other, solidarity, compassion and collective unity. The African Charter, the African Protocol on Women's Rights, UNESCO's Declaration of the Principles of International Cultural Cooperation, the Commonwealth Foundation NGO guidelines for good policy and practice and the African

Feminist Charter all provide for the promotion of positive cultural values.¹⁵

The main reason for mainstreaming rights across the socio-economic and political spectrum is that human rights mutually reinforce development and governance discourses to which all NGOs directly or indirectly subscribe. Indeed, at the African level, all African treaties provide for the promotion of democracy and human rights in the same sentence or article.¹⁶ Moreover, all NGOs share the common goal of promoting the dignity and welfare of the human person and societal wellbeing. Therefore, just like DNGOs cannot afford to ignore the centrality of human rights in development work, HURINGOs cannot afford to remain aloof to the development agendas such as globalisation and the privatisation of essential services that have a serious implication for the realisation of rights. Similarly, HURINGOs have the responsibility to monitor the realisation of ESCRs as well as the non-marginalisation of rights in the merger of the discourses of rights, development and governance. Given that none of the development frameworks are written under a human rights framework to challenge corruption, abuse of power and the unequal global economy, HURINGOs can also use litigation to stimulate public debate, prompt consumer boycotts with non-compliant businesses or work on apparently business issues like corporate social responsibility and fair trade relations.

5.2 NGO obligations under the principles of accountability and transparency

The right to freedom of association does not require the mandatory registration of NGOs. However, registering an NGO facilitates accountability to the laws and enhances an NGO's legitimacy for others to invest in it as well as providing a legal basis for engaging in serious advocacy. In fact, although in South Africa registration is voluntary, NGOs register in order to qualify for tax exemptions or to attract donor or government funding, not necessarily to strengthen their systems of internal governance. Therefore, it is in the best interest of NGOs to advocate for law reform that ensures their independent existence.

Likewise, NGOs need to strengthen their self-regulatory mechanism to circumvent undue interference by the government in NGOs' internal

15 African Charter (n 3 above) art 29(7); Protocol on the African Charter on Human and Peoples' Rights on the rights of women in Africa (2003) preamble, http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf (accessed 13 July 2006); UNESCO Declaration of principles of cultural cooperation (1966) arts 1(1), 1(3), 4(2) & 11(2) http://portal.unesco.org/en/ev.php-URL_ID=13147&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 1 April 2007); Commonwealth Foundation *Non-Governmental Organisations: Guidelines for good policy and practice* (1995) guideline 5; African Feminist Charter (2006) 11.

16 African Union Constitutive Act (n 11 above) art 4(m).

affairs. An NGO sector-wide self-regulatory mechanism can effectively police the NGO sector to respect the human-rights principles, guide the NGOs on governance, serve as an independent ombudsman for the sector and promote mutual learning. In order to be effective, Codes of Ethics designed by the NGO sector-wide self-regulatory mechanism should apply to all NGOs but subject to judicial review as is the case with professional Councils. Significantly, the NGO Council must also adhere to the same human-rights principles to earn the legitimacy to police the NGO sector. Hence, it must be independent, impartial and an excellent information processor.

The individual NGO Board is the most important accountability mechanism for NGOs. NGOs are created to pursue common interests independent of governments. An NGO Governing Board is necessary and imperative for the following reasons: Excessive state monitoring of NGOs can actually result in the violation of the right to freedom of association. Moreover, registration on its own does not guarantee that the NGO will observe the human-rights principles. Thus, it is recommended that each NGO puts in place a Governance Committee or Board Development Committee to ensure Board renewal and effectiveness in ensuring accountability. To ensure that neither Board nor staff put personal interests above those of an NGO, each NGO must put in place a conflict of interest policy and respect it. As a good practice, each Board member is obliged to disclose the potential conflict of interests, the interested party must be absent from the decision-making process and the reasons and decisions taken to address a conflict of interest must be documented.¹⁷ In order to strengthen accountability to the mission, the mission should be clear and concise because it is easier to achieve and to mobilise collective efforts. In addition, a mission must be dynamic to adapt to the changing environment, as well as be evaluated in participatory monitoring, evaluation and strategic planning processes.

Although most monitoring and evaluations are instigated by donors, self-monitoring and evaluation enables an NGO to address its unique circumstances. Monitoring is a continuous process to track achievements while evaluation is usually an external process undertaken to analyse the quality of the results. In order to remain accountable to the NGO mission, each NGO must undertake the continuous monitoring and evaluation of its work to enable it to measure the effectiveness of its strategies to achieve the mission, correct mistakes, learn from failure, reward successes, highlight results and cultivate public support. Having clear monitoring indicators improves data collection, knowledge building, facilitates the writing of comprehensive reports and ultimately energises the NGO as it celebrates the achievement of its mission.

17 Kituo Cha Katiba (KCK) & Board Source *NGO Governance Workshop report* (2002) 17 unpublished (on file with the author) 20-21.

The right to freedom of association is premised on voluntary action by individuals. Thus, having a wide membership is not a mandatory prerequisite of NGOs. The critical question is not whether a Board is elected or nominated by the membership but rather that the members have effective control over the NGO's policies and actions by either voting or other appropriate democratic and transparent decision making mechanisms.¹⁸ Having a strong membership, however defined, does not automatically translate in better holding of the governing Board accountable. Payment of membership fees is one way of demonstrating a members' commitment to the NGO and increases a memberships' willingness and legitimacy to demand accountability of the leadership. Further, coordinating membership is a full time engagement that each NGO should have in place a liaison person to ensure their effective participation and the processing of their voices.

The principle of transparency ensures public accountability that the NGO serves the people and is ethical. It also facilitates the exposure of fraudulent NGOs. Further, transparency about NGO's challenges reaffirms to the public that the NGO acknowledges its mistakes and adjusts its strategies to respond to unintended consequences. Transparency also calls for timely and wide dissemination of accurate information. To enhance the accountability and transparency of NGOs, there is a need to enlist communities, work with them on a broad spectrum of human rights issues, compile and analyse their testimonies in order to affirm and validate their experiences and promote mutual learning between NGOs and communities. It is also crucial for each NGO to identify the appropriate mechanism of accountability to each stakeholder.

5.3 NGO obligations under the principles of participation and inclusion

The principles of participation and inclusion are crucial to the process of institutionalising an NGO. This can be achieved through teamwork and broad-based policy that promotes the diversity of ideas. However, the solution for institutionalising an NGO does not lie in diluting the founder's passion and power but rather putting in place checks and balances to manage it. Change is inevitable because NGOs' missions become irrelevant, activists get burnt-out and strategies become ineffective. Therefore, sustainability calls for organisational regeneration where each NGO renews its human resources, sets new goals and harnesses new opportunities, priorities and approaches. Properly managing succession requires putting in place systems that build on old gains and reassure the public that the succession is well planned in the interest of the NGO but not a result of crises. Most importantly, succession is not restricted to

18 ECOSOC Resolution 1996/31 of 25 July 1996 <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm> (accessed 17 August 2007) para 12.

recruiting individuals but to identifying organisational needs and the strategies to achieve them. Each NGO must document its experiential learning in order to institutionalise good practices. This entails creating a 'how to do' manual detailing important facts about the practical operations of the NGO, such as details about each funder including preferences, working styles, reporting dates, the dos and don'ts of the organisational culture, lessons learnt, debates and the rationale of major decisions taken, amongst others.

While recruiting former Executive Directors on the Board should be resisted for compromising the process of organisational renewal, it is strategic to create space for a predecessor to continue contributing to an NGO. Preferably, the exiting staff may interact with the Board to afford the successor ample space to imprint on the organisational mission by fitting in his or her own shoes. NGOs are supposed to address common interests and provide all parties with identity, contact addresses, social networks and psychological attachment which founders and former employees are also entitled to. A good succession is planned right from the beginning of one's term by mentoring a broad pool of potential successors and not necessarily anointing one. This may be achieved through the delegation of office to different staff and giving every staff member the authority to be financially accountable.

Community participation is critical to the legitimacy of NGOs because NGOs purport to act in the interests of the voiceless and marginalised people. The participation of the ordinary people in decisions about their lives ensures that they are the central beneficiaries of interventions, while simultaneously enhancing the ownership, sustainability and legitimacy of interventions made. Numbers are critical for public advocacy as demonstrated by the struggles of social movements in South Africa. Professionalism should include the ability of an NGO to ensure the active participation of the communities it works with and ultimately their empowerment to act on their own to achieve positive change. Conversely, mere participation and awareness-raising of the poor communities without empowering them to act on their own to challenge violations and marginalisation further accentuates their frustration.

Each NGO needs to make human rights awareness a participatory and interactive discourse that encourages reflection, inquiry and action to enable the communities to initiate action themselves. Meaningful participation and accountability requires working with communities on their self-identified interests and providing real decision-making opportunities. NGOs need to recapture traditional methods of learning as an interactive and enjoyable social activity aimed at building character and promoted through observation, imitation and emulation, songs, games,

riddles and puzzles to mention but a few.¹⁹ Working from familiar places and accessible venues; giving opportunity to everyone to speak, taking services closer to the people and encouraging community dialogue on common issues are some of the strategies of ensuring active participation of the target groups. Increasingly, NGOs are undertaking joint implementation with communities, grounding activism in everyday issues, such as electricity, housing, domestic violence, economic activities and the environment to enable people to link rights to everyday struggles.

Formal networking is not mandatory, but is one of the strategies for broadening participation. Successful networking entails applying the following human rights principles: firstly, respect of members as voluntary autonomous groups in pursuit of common interests; secondly, empowerment to enhance their collective voice and common identity, improve overall competencies of members, shield members from arbitrary state power and foster organisational synergy through collaborative exchange of information, skills, knowledge and experiences; and thirdly, active participation and inclusiveness of parties to nurture ownership while concurrently providing an opportunity for members to opt out in cases of disagreement without compromising the network's agenda. NGOs also need to diversify their networks beyond peers in order to recruit new allies to the human rights discourse. Each NGO needs to continuously reflect on whom to work with and who they have to influence or to ignore. The participating partners must continuously negotiate the network relationship and have written frameworks or memorandums of understanding that articulate the common interests and differences, roles and responsibilities as well as terms of engagement to provide a basis for common understanding and resolution of conflicts.

Civil society is a place for public debate and argument over competing views. Given that conflicts are part and parcel of managing divergent views, each NGO needs to put in place a conflict resolution mechanism to process the competing interests of the parties. Nonetheless, this does not mean unnecessarily questioning each decision but rather that stakeholders are involved in the deliberation of strategic decisions that affect them to promote ownership of agreed positions. Creating room for open disagreements encourages appreciation of the different opinions and promotes ownership of consensus decisions. The failure to dialogue over the diverse experiences, concerns and knowledge, frustrates the development of common positions, breeds negative conflicts and organisational inertia.

NGOs have collaborated with political society to reform the legal and policy environment. Nonetheless, the situation becomes problematic

19 J Kenyatta (1938) *Facing Mount Kenya: The tribal life of the Gikuyu* (1938) 100-104 & 120-121; N Mandela *Long walk to freedom: The autobiography of Nelson Mandela* (1994) 11.

where there is competing interests between NGOs and government. Thus at times, NGOs have had to engage in resistance to oppression as part of the human rights struggle. In exceptional cases, NGOs may deliberately break the law under civil disobedience in order to achieve their pressing immediate demands. However, because civil disobedience can degenerate into lawlessness and anarchy, it is only justified as a last resort where all lawful engagement with governments is exhausted. At the same time, while undertaking civil disobedience, an NGO should not impair the rights of others or coerce others to join. Ultimately, civil disobedience should cease once appropriate concessions have been made.

Given the inevitability of NGOs' participation with the body politic of society, NGOs must abandon their apolitical stance and proactively influence public policy. Each NGO must candidly articulate its relationship with the state and with politicians. Participating with political society, while simultaneously remaining non-partisan is critical because NGOs act in a political context given that human rights and social justice struggles are political struggles to promote an egalitarian society. Politics is about how, when and why power, resources and influence are distributed in society. NGOs serve as watch-dogs over the abuse of power, offer alternative sources of information and complement the state's role in service delivery. Most importantly, an NGO's work becomes sustainable where government as the main duty-bearer adopts the NGO's agenda. Significantly, participation in NGOs is believed to promote democratic practices and strengthen pluralism, build trust and cooperative behaviour, strengthen voluntary service, team work, analytical thinking and promote alternative solution to societal issues.

At whatever level of participation, whether internally within an NGO or externally with the different stakeholders, participation must be based on the equitable participation of all partners in order to influence the outcome of the process. Hence, it is imperative to address the power dynamics within a given NGO and in its relationships with other stakeholders. Participation obliges NGOs to reconceptualise people as makers and shapers of their own destiny, with NGOs learning to work with the different stakeholder's they engage within an open and respectful manner.

5.4 Equity, non-discrimination and empowerment

NGOs must first empower themselves internally before they can attempt to champion the empowerment of others. The responsibility of empowering NGOs squarely lies on NGOs themselves. Because NGOs have the responsibility of determining what constitutes a human-rights violation and translate everyday practices into human rights knowledge, NGOs must have human-rights expertise. Indeed, the Kigali Declaration recommends the teaching of human rights as a permanent feature in the

school curriculum and for law enforcement officers.²⁰ NGOs must invest in learning and accept failure and criticism as an opportunity for growth. Linkages need to be established between activists and academia to strengthen NGOs' intellectual, analytical and research base, in order to develop institutional knowledge and propose concrete alternative voices on societal issues. Whereas NGOs are not accustomed to peer review, and shun peer reviews as unreasonable criticism and undue interference, academia have successfully used peer reviews to maintain high standards of performance, academic autonomy and honesty.

The extent to which an NGO is empowered is reflected by its funding profile, autonomy in designing strategic direction and policy development, staff skills competence and retention. Ensuring resources to achieve the mission is a core governance function of the Board. An NGO should fundraise to achieve its mission and not to violate it in the interest of money. Each NGO has to safeguard its autonomy by resisting opportunistic money or take responsibility for being corruptible and participating in its own marginalisation. Rather than begging for money, each NGO has to develop constituencies to support its work. However, the practice of HURINGOs resisting government funding is not sustainable in the context where NGOs cannot raise their own funding and is hypocritical because NGOs take foreign governments' money. Moreover, government money is public money. Both government and NGOs serve the same people and seek to advance the constitutional rights and the quality of lives of the same people.

Given that power is a process of human relationships, the continuation of power relations depends to some extent on the cooperation of the weak to quietly accept it.²¹ It is therefore also incumbent upon NGOs as the weaker party to exercise their agency and demand equitable relationships with whatever dominant stakeholder they work with, such as business, government and donors. In an ideal partnership, there are equitable power relations, reciprocal obligations, mutual respect, shared achievements and commitment to long term mutually benefiting working relationship. NGOs must learn to collectively speak the truth to donors rather than grumble quietly while mimicking donor rhetoric.

The critical issue should not merely be that of government or donor funding, but the ability of a given NGO to articulate its mission, and safeguard its autonomy while simultaneously ensuring accountability to various stakeholders such as membership, communities, donors and government. While friend-raising is critical in fundraising, the role of

20 Kigali Declaration on Human Rights in Africa, The 1st African Union (AU) Ministerial Conference on Human Rights in Africa meeting on 8 May 2003 in Kigali, (2003) para 30 www.achpr.org/english/declarations/declaration_kigali_en.html (accessed 25 July 2006).

21 HM Lips *Women, men and power* (1991) 3 & 8.

donors is not to distribute money but to achieve the donor's mission. Thus, each NGO must write quality proposals that highlight how both the NGO and the donor agency can realise their common goals. Further, each NGO should also publicise the impact of its work by credible advocates, in a clear but interesting ways that appeal to the broad public at all levels of society.

Payment of competitive salaries is essential because of the multi-tasked nature of NGO work and the imperative to ensure professional results. Significantly, NGO employees also have rights and survival needs. An NGO's effectiveness and sustainability depends on the quality and retention of staff. Flexible working hours, paid sabbaticals, leave for reflection, statutory pension and severance package, staff medical services, time off in lieu for long trips, and staff wellbeing budget are some of the good practices for sustaining activism.

In order to address the marginalisation of women, there is need for a dual strategy that applies gender-mainstreaming strategies to supplement but not replace specific women's rights programming. Gender mainstreaming was introduced to address the ways in which gender relations shape women's and men's access to rights, resources and opportunities. The Beijing Platform of Action requires all institutions and organisations to have equality of men and women in their ranks.²² Although not all men are against women's rights, the gender-based violations mirror a general societal problem of power imbalances in favour of men. Hence, the imperative of programmes to target both, men and women, as well as create strategic alliances between WNGOs and other NGOs and CSOs in general to address gender injustices. It is also neither desirable nor feasible that women solely shoulder the burden of an egalitarian society because men have to participate in the dismantling of their power. Support should be extended to the African Feminists Charter that underlines the importance of women's organisations to be led and managed by women.²³ While WNGOs have a legitimate interest to protect their space from being fundamentally altered by men, NGOs do not have legitimate reasons to exclude women, for it would perpetuate the disadvantages against women.²⁴

Drawing from the analogy of gender mainstreaming, marginalised groups have the legitimacy to have their own NGOs, while concurrently all NGOs should mainstream empowerment of marginalised groups as part of their contribution to an equal society. In respect of marginalised groups, empowerment requires an actor-oriented approach that starts with the participation of those directly affected by social exclusion and making

22 Beijing Platform of Action (1995) objective G.1, para 192(c).

23 African Feminist Charter (n 15 above) 13.

24 SAHRC 'The exclusionary policies of voluntary associations' (2005) 23 <http://www.sahrc.org.za/home/21/files/Reports/Report%20on%20Voluntary%20Associations.pdf> (accessed 18 May 2007).

them the principal agents of action in the struggle for recognition, presence and influence.²⁵ This includes having policies and programmes that promote diversity and empowerment of marginalised groups. For example, equity in NGO processes by giving marginalised groups an opportunity to be at the decision-making tables, work as facilitators of their programmes, providing safe places to mirror real life situations in order to raise controversial issues as a collective and addressing the barriers to participation. Nonetheless, the recruitment of representatives from marginalised groups should not be a favour, but must equally add value of their participation and inclusion.

An international human-rights movement needs to be premised on viable and vibrant movements at all levels of society beginning from the grassroots and extending up to the international arena. This is not to suggest that NNGOs should stop offering material and technical support to SNGOs. Rather, NNGOs ought to empower SNGOs to acquire the requisite skills, opportunities and resources to act on their own. More importantly, it is also in the interest of NNGOs to strengthen SNGOs to promote the evolution of dynamic and vibrant international human-rights movements. SNGOs desire partnerships with NNGOs as donors, partners in coalition building, joint researches, and advocacy to influence national, regional and global processes, and sensitise the Northern public about global poverty, unfair trade relations and enable SNGOs to speak in their own voice and influence debates in the international arena. In turn, NNGOs look for local expertise, dynamism, solid connection with target groups and legitimacy derived from partnership with SNGOs. Building an egalitarian international human-rights movement is an interactive process of exchange of resources and knowledge based on mutual self-respect, acknowledgement of each other contributions and interests and shared responsibility.

6 Concluding thoughts

I neither prescribe nor offer a single comprehensive definition of the rights-based approach but rather urge each NGO to critically reflect on how it has internalised the human rights principles in its policies, programmes and practices. As advocates of human rights, NGOs are obliged to reflect on the way they mediate unequal power dynamics with other stakeholders, particularly in instances where the NGOs' stakeholders have weaker social, economic and political standing. In discussing the principles of the rights-based approach, it is demonstrated that the human rights principles are mutually reinforcing.

25 J Gaventa 'Assessing the social justice outcome of participatory local governance concept note of a project of the Ford Foundation Local Governance Learning Group (LOGO)' (2005) 29.

In essence, the functional linkages between empowerment, participation and accountability should be understood as facilitating human development and the promotion of a culture of human rights. Empowerment in the NGO sector relationships requires enabling the marginalised groups to act as autonomous individuals or organisations to analyse their challenges and develop self-efficacy to take action themselves, supported by other stakeholders. For empowerment to happen, participation must be active and meaningful so as to enforce accountability on the part of the NGO to respect the participants as active agents in the promotion of their rights, welfare and dignity. In other words, NGOs have to ensure that they are accountable to the people but not reduce them to victims or mere technical providers of information necessary for efficient programme implementation. Therefore, each NGO has to facilitate communities to participate as partners to claim and exercise their rights. Thus, NGOs must act 'with' the community instead of 'for' the communities to enhance the communities' capacities to have a say in matters that affect their lives. Encouraging partnerships and broad participation further requires applying the principle of equity and non-discrimination to address inequities in the relationships while simultaneously respecting the different stakeholders as equals. Accountability requires NGOs to address the unequal power distribution in their policies, mechanisms and practices. Transparency also requires offering the right information to influence the way people think about themselves and encourage them to struggle against injustices thus strengthening their empowerment. Consequently, transparency entails openness about NGOs' programmes, income and decision-making processes to safeguard against abuse of power by any actor.

This book constitutes part of the numerous efforts to merge governance and human rights, arguing that the governance of NGOs is critical to the strengthening of the human rights movements. It would be both simplistic and inaccurate to suggest a lack of tensions, contradictions and ambivalence in the process of linking human rights to governance. Numerous dilemmas coupled with a lack of crystallised consensus on how governance and human rights can or should complement each other abound. It is this ambivalence and ambiguous status that presents an opportune moment for this book to contribute to the development of good governance and best practices based on NGO experiences, rather than reacting to already-made models. Subsequently, the plurality of interpretations is both inevitable and necessary for the strengthening of good governance and human rights as an integral element of the global agenda. In large measure, the materials and principles that have been developed to address these issues come from Western/Northern countries, particularly the United States. While appreciating the principles of non-profit governance in general, there are limitations of grafting concepts largely derived from the North to local realities.

There is an eagerness on the part of NGOs to learn from each others' experience in an effort to guarantee their own survival. Yet, there is a scarcity of thorough investigation of the processes, policies and practices of NGOs let alone a serious examination and cataloguing of factors that induce growth, in order to strengthen NGOs. Therefore, the theoretical interpretation of the experience, challenges, contradictions, dilemmas, lessons learnt and achievements of NGOs' right to organise has enabled the harnessing of NGOs' experiences to inform the evolution of its work within the human rights discourse. In other words, this book contributes to the development of the human rights jurisprudence in honour of the experiences of activists. It documents the experiences of NGOs for lesson learning, to fill the void of essentially learning in a trial and error manner without adequate conceptual clarity and lesson sharing. It has also become customary for discussions of NGOs to focus on dismissing their positive attributes as unproven and as such focus on NGOs' obvious limitations. I depart from this tendency by also highlighting the positive contribution of NGOs to human-rights development.

In pursuit of building an international civil society, there is a quest for a more complete articulation of normative principles and the articulation of rights and responsibilities of civil society in general. Regretfully, the precise parameters and critical elements of the obligations of NGOs remain vague and ill defined at the national, regional and international human rights supervisory bodies. The failure to have a more effective framework to hold major actors such as NGOs accountable may erode the credibility of the human rights discourse to offer protection from abuse of power.

It is acknowledged that in order to qualify for observer status at supra-national levels, an NGO must be registered, have a constitution, governance structure and membership. However, very few NGOs seek observer status. Moreover, being accredited is primarily aimed at enabling the human rights body to access alternative information but not necessarily to guide an NGO in governance or monitor NGO's human rights observance. Yet, not all Governing NGO Boards have the capacity to enforce compliance to human-rights principles. However, neither the African Commission nor the national commissions have legal basis for holding NGOs accountable. The Paris Principles merely recommend a collaborative relationship between NGOs and HRCs.²⁶ There is yet to evolve a systematic relationship that strengthens the governance of NGOs. Only the South African Human Rights Commission (SAHRC) has developed principles to guide the governance of the voluntary sector.²⁷

26 Paris Principles (1991) United Nations Commission on Human Rights resolution 1992/54 (3 March 1992) 1993/A/RES/48/134 Methods of operation 6(g) www.ohchr.org/english/law/parisprinciples.htm (accessed 18 May 2006).

27 SAHRC (n 24 above) 11.

While the KNHRC has a draft framework for partnership with NGOs, it is mainly targeted at joint programming and not at governance.

Even in South Africa, where the Board is mandated to strengthen the governance of NGOs, it has not done so. Good governance is marginally promoted through submissions of narrative and annual reports to government organs. None of the government NGO Boards had a comprehensive status report of the NGO sector, scope, characteristics, trends or accurate numbers of NGOs. Further, the government commissioned reports in Tanzania and Uganda observed that it was unrealistic and extremely costly for government alone to monitor NGOs. Instead, the government commissioned reports recommend the strengthening of existing mechanisms such as grant agencies, NGO Boards, trustees and beneficiaries to play an oversight role.²⁸ It is therefore in the best interest of states to strengthen NGO sector wide self-regulatory mechanisms. Providing a supportive working environment also includes tax policy incentives which can help stimulate local public philanthropy which would in turn enhance public scrutiny of NGO governance. Currently, the governance of NGOs is largely left to the discretion of the Governing NGO Boards who suffer from numerous limitations.

Consequently, I advocate for the further evolution of the human rights discourse to codify what can currently be described as moral obligations into legal obligations. Indeed, ECOSOC recognises the evolving relationship between NGOs and the UN and suggested reviews to facilitate the effectiveness of the NGOs' contribution to the UN's work.²⁹ OHCHR has already taken the strategic role of articulating the human rights obligation for UN agencies which can easily be stretched to NGOs. Similarly, International NGOs have taken the initiative to articulate their responsibilities under the International Accountability Charter. Likewise, the African Feminist Charter is another attempt to that effect. The Charter on Popular Participation also underlines the relationship between popular participation and empowerment and recommends that NGOs are participatory, democratic and accountable.³⁰

The African Commission has a strategic role to play in articulating NGO human rights obligations given its experience of building an African jurisprudence and initiating new paradigms. The incorporation of collective rights and duties in the African Charter provides a conceptual basis for applying human rights to NGOs. From a pragmatic perspective, because of the full ratification of the African Charter by all African states,³¹

28 Barr et al (n 14 above) 48; Research on Poverty Alleviation (REPOA) *Tanzania Non-Governmental Organisations – Their perceptions of the relationship with government of Tanzania and donors, and their role in poverty reduction and development* (2007) xiv.

29 ECOSOC Resolution 1996/31 (n 18 above) para 17.

30 Charter on Popular Participation (n 4 above) part 111.

31 African Commission 13th Annual Report (2000) para 2 www.acphr.org/english/_info/index_hrd_en.html (accessed 8 August 2008).

African governments will be more receptive to respecting the African Commission. Increasingly, states are challenging the legitimacy of NGOs to serve as human rights monitors and questioned NGOs' independence and accuracy of the information of NGOs' shadow reports on government human rights performance. It is instructive that the Brainstorming Meeting on the African Commission and the African Union Commission urged the former to address the human rights violations committed by non-state actors.³² As a starting point, the African Commission can highlight the basic tenets of governance, reporting structures, guidelines and methods of authoring shadow reports on governments, fact-finding missions to mention but a few.

Under international law, states are obliged to provide the legal and regulatory framework for civil society to function independently. Under international law there is no legal obligation on NGOs to register.³³ However in case of compulsory registration, the procedures for registration must be quick, straightforward, cheap and denial of registration must be subject to judicial review by an independent and impartial court. Furthermore, the criminalisation of non-registration violates the right to freedom of association.

This book has profiled NGOs as serious actors within the human rights, governance and development arena. Ultimately, it shall contribute to advocacy for better policy formulation in respect of NGOs' development assistance and strategies. I do not suggest that NGOs should reject donor funding but rather that NGOs strengthen their governance and autonomy to negotiate for equitable partnerships. Donors need to shift from a paternalistic approach to strengthen NGOs to organise as autonomous entities. It is strategic for donors to solicit grantee feedback because it demonstrates solidarity for common goals and respect in the donor/NGO relationships. The Commonwealth defines partnerships as a relationship of mutual respect, learning and sharing skills, experiences, resources and power in a complementary manner.³⁴ Thus, donors are urged to pay attention to governance because although participatory processes and consensus building appear time-wasting, they are instrumental in guaranteeing ownership and sustainability of funded projects as value for money invested. Further, evaluations should not only be done on the basis of giving or withdrawing support but as a mechanism for experiential learning to strengthen the weakest links within NGOs. Put differently, although donors are more interested in quick and measurable results, effective human rights realisation requires long term commitment to processes that support institutional development and innovativeness for

32 Report of the Brainstorming meeting on the African Charter (n 944 above) 30, Annex II, Reco a.

33 Lawyers Committee on Human Rights (LCHR) *The neglected right: Freedom of association in international human rights law* (1997) 20-22.

34 Commonwealth Foundation (n 15 above) 52.

experiential learning. Publicising bad practices and financial impropriety as a strategy of name and shame may further act as a deterrent for errant NGOs. Cognisant that donors shape the development policies, strategies and agenda, they can also use policy dialogue with government to influence the creation of an environment conducive to NGOs' growth. Until recently, with the exceptions of foundations, INGOs and local funds, most donors have rarely supported institutional development programmes. Yet, experience affirms that block grants are empowering to NGOs because they enhance an NGO's effectiveness and creativity to achieve goals. Otherwise, the refusal of donors to meet administrative costs is unrealistic and exploitative of NGOs. The practice of a publicised 'call for proposals' with guiding questions for key aspects of the proposal is a welcome development.

Issues of power are customarily glossed over within the NGO sector or misdiagnosed as petty, but hardly subjected to academic scrutiny and analysis. Nonetheless, changing NGO power relationships cannot simply be achieved through labels, partnership agreements or memoranda of understanding. It also requires organisational commitment to build a more egalitarian society. This entails scrutinising the power inequalities to ensure the advancement of the common interests of all parties. For example, we use power with each other by excluding or including others, such as minority groups. NGOs need to reflect on their assumptions and fears about power before they can truly challenge power outside. Significantly, the tendency to treat power as inherently bad or shameful or manipulative inhibits NGOs' optimisation of their positive power to the fullest. It is clear that whether power advances justice and transforms inequalities depends precisely on its purpose, the values guiding it and the way it is used.³⁵

Further research needs to be done on key challenges that afflict the NGO sector such as financial autonomy and local philanthropy, Board-Staff relationships and succession sustainability and transitions. Further, issues requiring a more thorough analysis include: How does financial sustainability translate itself in practice? What factors promote donor attractiveness? How have NGOs balanced social entrepreneurship with the not-for-profit identity while safeguarding their missions? Is there a clear cut distinction between NGO governance and corporate governance? Can they complement each other or are they mutually exclusive? What are the lessons to be learnt from re-granting NGOs in order not to simply be conduits of donor funds? What is the impact of local funds on the governance of NGOs? In what ways can the membership be promoted to strengthen the financial status and accountability of NGOs? Is transition meaningful for the activist who is transiting from the sector? Are

35 Just Associates (2006) *'Making change happen: Power, concepts of revisioning power for justice, equality and peace'* 4.

transitions a mechanism for sustaining activism? Where do the leaders go after transitions? How best should the relationship between the successor and the predecessors be managed? What are the dilemmas involved? Why does an NGO often flounder with the transition of a powerful leader? What are the lessons learnt to sustain gains? In what ways and to what effect has the African Commission strengthened a human rights culture amongst NGOs?

NGOs have resilience, passion and have worked tirelessly in making human rights a reality. Since the concept of human rights relates to all aspects of human interaction, it is best protected when all people voluntarily observe human rights norms as part of their culture of doing things. It is my sincere hope that activists will be energised to beat the human right drum for themselves.

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Interviews

	RESPONDENT	DESIGNATION	DATE
1	Akwaasi Aidoo	CEO and President, TrustAfrica	8 June 2006
2	Barry Jane	International consultant, Urgent Action Fund,	2 February 2008
3	Bujra Abdallah	Founder Executive Director, Development Policy Management Forum	17 February 2007
4	Chigudu Hope	Organisational Development Consultant	16 March 2007
5	Ebo Sall	Programme Director, CODESRIA	7 June, 2006
6	Fall Apha	Founder CEO, Institute for Human Rights and Development in Africa, Gambia	24 April 2006
7	Gitari Joseph	Programme Officer, Ford Foundation, Lagos	5 June 2006
8	Gregoire Crispin	Former Training Programme Officer, Board Source	10 and 16 August 2008
9	Bhekinkosi Moyo	Director, Programmes, TrustAfrica	13 July 2013
10	Sibongile Ndashe	Programme Officer, Interrights	19 July 2013
SADC SECRETARIA, BOTSWANA			
11	Atwine Jeffrey	Trade Policy Analyst, USAID, Trade Hub Southern Africa	5 March 2008
12	Faye Lisa Marie	Technical Advisor, Gender Unit, SADC	6 March 2008
13	Hembe Antonica	Head SADC HIV Unit	8 March 2008

14	Katagira Kabunga Grace	Public Enterprises evaluation and Privatisation Agencies	5 March 2008
15	Madibela Matiba	Director, Gender Unit, SADC	6 March 2008
16	Molokomme Athali	Attorney-General of Botswana	8 March 2008
17	Simba Penny	Customs Legal and Technical Advisor	5 March 2008
18	Tlale	Executive Director, Botswana Council for NGOs	6 March 2008
INTERVIEWS MANZINI, AFRICA COMMISSION SESSION			
19	Beedwantee Keetharuth Sheila	Africa Institute for Human Rights and Development in Africa	10 May 2008
20	Eno Robert	Senior Legal Officer, Africa Commission Human and People's Rights	9 May 2008
21	Foster Hanna	Chair, NGO Forum and Executive Director, Africa Center for Human Rights and Democracy	7 May 2008
22	Kane Ebrima	Interrights, London	9 May 2008
23	Masiga Martin	Legal Officer, ICJ- Geneva	7 May 2008
24	Ruhindi Fred	Minister of State, Justice and Constitutional Affairs, Uganda	8 May 2008
25	Tsungu Arnord	Senior Legal Officer for Africa, ICJ-Geneva	7 May 2008
TANZANIA			
26	Aboubakar Mariam	Executive Director, Association of NGOs Zanzibar (ANGOZA)	27 July 2007
27	Ginwas Redimna	Programme officer, TAWLA	23 July 2007
28	Haroub Othman	Executive Director, Zanzibar Legal Resource Centre	27 July 2007
29	Jairo Rosemary	Commissioner, Tanzania Commission of Human Rights and Good governance	25 July 2007
30	Juma Asha Abdalla	Ministry of Labour, Women, Children And Development	26 July 2007
31	Katamba Micheal	Director, Tanzania NGO Board	25 July 2007
32	Mahahdi Mohammed	Permanent Secretary, Ministry of Good Governance	27 July 2007
33	Mallya Usu	Executive Director, TGNP	8 Nov 2007
34	Mandari Vicky	Chairperson, TAWLA	8 August 2007
35	Mwalayimbi Ben, Mburo Ruby	Programme officers, Tanzania NGO Bureau	24 July 2007
36	Nyanduga Bahame	Commissioner, ACHPR	16 June 2007
37	Shivji Issa	Director, REPOA	27 April 2007
38	Silaa Tumaini	Former CEO, TAWLA currently in government	24 July 2007
39	Soka Athanisia	Women Legal Aid Centre	23 July 2007
40	Sungusia Harold	Programme officer, Legal and Human Rights Centre	25 July 2007

41	Talah Sais, Mwandawa Khamis and Sadar Salma Hajo	Zanzibar Association Of People With Disabilities: UWZ	27 July 2007
42	Toufiq Salum	President, Zanzibar Law Society and Chair KCK	26 July 2007
43	Twalangeti Zaa	Information and Communication Manager, Tanzania Association of NGOs (TANGO)	10 August 2007
44	Tweve Godfrey	Programme Officer, PACT-TZ and INGO representative to NGO Council	10 August 2007
EAC SECRETARIAT ARUSHA			
45	Bossa Solome	Judge, East Court of Justice and ICTR	7 August 2007
46	Deya Don	CEO, East Africa Society	7 August, 2007
47	Kaahwa Wilbert	Legal Council EAC	6 August
48	Kiraso Beatrice	Deputy Secretary-General, EAC	4 May 2009
49	Kisare Mosi	ED EASUN Centre for Organisational Learning	8 August 2007
KENYA			
50	Abdalla Amina	MP, Kenya	7 Sept 2007
51	Adhanja George	CEO, Kenyan NGO Council	24 August 2007
52	Aina Tade	Resident Representative, Ford Foundation, Nairobi	22 January 2007 5 September 2007
53	Angila Francis	Programme Officer, PACT-Kenya and former CEO Kenya NGO Council	6 Sept 2007
54	Anyona Simon	Programme Office, Resource Mobilisation	22 August 2006
55	Kegoro George	CEO, International Commission of Jurist-Kenya, former Secretary Law Society of Kenya	22 August 2007
56	Kiai Maina	CEO, Kenya National Human Rights Commission	23 August 2007
57	Kingman Andrew	Executive Director, ALLAVIDA	21 July 2007
58	Kinsiga Faith	Programme Officer, East African Grant Makers Association	21 August 2007
59	Kiragu Jane	Former ED, FIDA-Kenya, Former NGO Council Care Taker team member,	7 Sept 2007
60	Koki Muli	ED, IED	7 Sept 2007
61	Manduli Orie Rogo	Chairman, Kenya NGO Council	24 August 2007
62	Michuki Jane	Chairperson Institute for Education in Democracy (IED)	20 August 2007
63	Murauri-Mwololo	Lead Consultant, Koobi Consult, Kenya	4 December 2007
64	Murunga Godwin	Lecturer, Nairobi University	22 August 2006
65	Murungi Kaari	Founder, Executive Director, Urgent Action Fund-Africa	12 April 2007

66	Mutuma Rutere	Dean, Human Rights Institute	24 August 2007
67	Mutunga Willy	Programme Officer, Ford Foundation, East Africa	17 July 2007
68	Njoki-Ndugu	MP, Kenya, UN woman of the year 2006	7 Sept 2007
69	Obura Hellen	Secretary, Uganda Law Council	31 August 2007
70	Odembo Elkanah	ED, UFHADILI and inaugural Chair Kenya NGO Council	5 September 2007
71	Ogombe Andrew	Deputy Director, NGO Board	4 September 2007
72	Okello Duncan	CEO, Society for International Development	23 August 2007
73	Oloka-Onyango Joe	Director, Human Rights and Peace Centre	25 Feb 2008
74	Onyango Jane	ED, FIDA-Kenya	6 Sept 2007
75	Thenya Sam	CEO, Nairobi Women's Hospital	7 Sept 2007
76	Wambui Kimathi	Commissioner, Kenya National Human Rights	21 July 2007
77	Wangari Kinoti	Coordinator, Women Direct	6 Sept 2007
78	Mary Wandira	Programme Officer, Open Society East Africa	2 July 2013
79	Binaifer Nowrojee	Country Representative, Open Society East Africa, Nairobi	2 July 2013
80	Renalda Momba	Programme Officer, Swedish Development Agency	3 July 2013
81	Faith Kisinga	Independent Consultant	12 July 2013
82	Ezra Mbogori	Executive Director, Akiba Uhaki, CSO Reference Group Chairperson	19 August 2013
83	Maurice Makoloo	Resident Representative, The Ford Foundation, Office for Eastern Africa	20 August 2013
84	Monica Aleman	Programme Officer, Ford Foundation, Office for Eastern Africa, Advancing women's leadership	23 August 2013
85	Rosemary Okello-Orlale	Programme Officer, Ford Foundation, Office for Eastern Africa, Media	18 September 2013
UGANDA			
86	Akatsi Bukachi Marren	Director, East African Support Services Institute (EASSI)	13 August 2007
87	Asiimwe Allen	CEO, International Human Rights Network	28 August 2007
88	Assimwe Jackie	Programme officer, European Union Civil Society Capacity Building	28 August 2007
89	Bagalaaliwo Sarah	Former Chairperson, FIDA-U	18 June 2007
90	Bunga Idembe, Aheebwa Maisurah, Ndyabawe Alice and Mugenyi Margaret	Focus Group Uganda Women's Network	13 August 2007

91	Jjuko Fredrick	Professor of Law, Makerere University	6 November, Dec 2012
92	Kaduru Rosemary	CEO, Club de Madrid	30 August 2007
93	Kampi Josephine	Accountant, HURINET Human Rights Fund	14 August 2007
94	Kamusime Thomas and Tumwine Patrick	Programme Officer, HURINET	13 August 2007
95	Kasente Deborah	Director, Makerere Institute of Social Research,	10 July 2003
96	Kibalama Edith	Executive Director, Kituo Cha Katiba	19 July 2007
97	Kwesiga Jessy	Founder Director, DENIVA	6 December 2006 8 Jan 2007
98	Kyeyune Rebecca	Programme Officer, European Union Civil Society Capacity Building	31 August 2007
99	Matembe Miria	Founder, Action for Development	27 July 2007
100	Matovu Norah	then Chairperson, FIDA-Uganda	12 Jan 2006
101	Muramuzi Frank	Director, National Association for Professional Environmentalists (NAPE)	30 August 2007
102	Mwebaze Rose	CEO, Uganda Land Alliance	17 July 2007
103	Nabiryo Justine	Administrator, HURINET	13 August 2007
104	Nakawesi-Kimbugwe,	formerly Executive Director, UWONET, the Executive Director, Akina Mama wa Africa	2 August 2007
105	Namubiru Mukasa Sylvia	Head Legal Department, Legal Aid Programme (LAP)	29 August 2007
106	Ninsima Sandra, Namanya Winnie, Gakire Marlene and Nansonga Irene	Documentalists, Uganda NGO Board	12 July 2007
107	Nkutu Freda	Programme Officer, World Vision, Kampala	12 March 2008
108	Nshemerweire Peruth, Asimwe Allen, Oguli Margaret, Mugisha Linda, Webale Theo, Ovonji Odida Irene and Bitabareho Jennifer	FIDA Focus Group Interim Board	20 July 2007
109	Nyamugasira Warren	Director, NGO Forum Uganda	3 August 2007
110	Rukare Don	Head of Party, European Union Civil Society Capacity Building	14 August 2007
111	Sewanyana Livingstone	Director, Foundation for Human Rights Initiative (FHRI)	14 August 2007
112	Tamale Sylvia	Dean, Faculty of Law Uganda	12 December 2007
113	Tumushabe Gober	CEO, Advocates Coalition for Development and Environment (ACODE)	17 July 2007

114	Wante Eliaja	Director, Law Development Centre	30 August 2007
115	Richard Mugisha	Uganda Country Director, Open Society Office of Eastern Africa	12 August 2013
116	Christopher Mbazira	Coordinator, Public Interest Law Clinic, Makerere University	15 June 2013
117	Justus Rugambwa	Executive Director, DENIVA	13 November 2012
118	Richard Sewakiryanga	Executive Director, NGO Forum	31 October 2012
119	Aciro Rita	Executive Director, UWONET	1 & 19 November 2012
120	Hon Medi Kaagwa	Chairperson, UHRC	21 November 2012
121	Ambassador, Kangwagye	Chairperson, Uganda NGO Board	29 November 2012
122	Esther Obaikol	Executive Director, Uganda Land Alliance	10 November 2012
123	Arthur Bainomugisha	Director Research, ACODE	12 November 2012
124	Ruth Ochieng	Executive Director, ISSIC-WICCE	12 November 2012
SOUTH AFRICA			
125	Adeleye Fayemi Bisi	Executive Director, African Women Development Fund	7 November 2007
126	Amina Mama	Formerly of the Gender Institute, University of Cape Town	20 Sept 2008
127	Brown Alice	Then Resident representative, Ford Foundation, Johannesburg	5 November 2007 9 November 2007
128	Campbell John	Programme Officer, HIVOS	9 November 2007 Donor round table: <i>Where is the money for women's rights workshop</i>
129	Hansungule Michelo	Professor, Centre for Human Rights, University of Pretoria, Advisor SADC Cultural leaders Association	14 May 2007
130	Ivor Jenkins	Director Special Projects, IDASA, Pretoria	14 November 2007
131	Jansen Rudolf	National Director, Lawyers for Human Rights	19 November 2007
132	Kaguongo Waruguru	LLD candidate, Centre for Human Rights, University of Pretoria	19 March 2007
133	Killander Magnus	Research, Centre for Human Rights, University of Pretoria	12 October 2007
134	Letlojane Corlette	Executive Director, Human Rights and Institute for Southern Africa	5 November 2007
135	Lingalireni Mary	Programme Coordinator, LISEP, Oxfam-Malawi, Johannesburg	8 November 2007
136	Logart Hassan	Executive Director, SANGOCO	29 November 2007
137	Made Pat	Board member, Gender Links	20 Sept 2008

138	Mvimbi Ayanda	Programme Officer, OXFAM-UK	9 November 2007 Donor round table: <i>Where is the money for women's rights workshop</i>
139	Mbele Kgoto	Capacity Building Officer, Directorate of Non-Profits	22 November 2007
140	Michele Odovan	Organisational consultant	11 November 2007
141	Modiba Sami	Human Rights and Democracy Programme Officer, OSISA	5 November 2007
142	Moodliar Mogam	Programme officer Legal Unit, Foundation of Human Right	30 November 2007
143	Mpho Mngaitama	Director, Registration Compliance, Directorate of Non-Profits	22 November 2007
144	Morgan Yvonne	Programme Officer, Charity Aids Foundation	26 February 2008
145	Mvimbi Ayanda Phillips Barbra AWDF-US	Programme Officer, OXFAM-UK	9 November 2007 Donor round table: <i>Where is the money for women's rights workshop</i>
146	Stefiszyn Karen	Head of Department, HIV/AIDs and Gender, Centre for Human Rights, University of Pretoria	13 May 2008
147	Steyn Justin, Mgudlnwa Noxoco	Programme Officers, IDASA: CSOs capacity building and researcher	5 October 2007
148	Taku Norman	Director, Centre for Human Rights, University of Pretoria	13 May 2008
149	Tseliso Thipanyane	Chief Executive Officer, South African Human Rights Commission (SAHRC)	22 February 2008
150	Van Garderen Jacob	Executive Director, Lawyers for Human Rights	14 May 2008
151	Viljoen Carole	Office Manager, Centre for Human Rights, University of Pretoria	13 May 2008
152	Viljoen Frans	Director, Centre for Human Rights, University of Pretoria	23 March 2007 and 18 July 2013
153	Wilson Shamila	Formerly AWID Youth Programme Coordinator	19 Sept 2008