



THE SUDD INSTITUTE

RESEARCH FOR A PEACEFUL, JUST AND PROSPEROUS SOUTH SUDAN

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Weekly Review

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The Enactment of the NGO Act and its Implications on Humanitarian Operations

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I. Introduction

The South Sudan National Legislative Assembly (NLA) passed on February 2, 2016 for the second time the non-governmental organizations bill, along with the Relief and Rehabilitation Commission (RRC) bill. The lawmaking body first endorsed the NGO Bill on May 12, 2015, but it was returned to the Parliament for review early this month after President Kiir refused to append his signature. It is said that the President made some comments on the bill that the lawmakers needed to consider before it became a law. Both the NGO and RRC bills have just become statutory laws following a presidential assent. But as it was in 2015, the time during which the NLA first endorsed the bill whose primary aim is to regulate and monitor NGO activities in the country, opponents of the NGO Act wasted no time to express their “grave concerns,” particularly with the bill’s alleged “catastrophic effects” for civilians in the war-torn nation.

Radio Tamazuj published on its website on February 6, 2016 some negative reactions to the recent passage of the NGO Bill by the NLA¹. Responding to the bill’s endorsement by South Sudan’s legislative branch, Radio Tamazuji quoted Eugene Owusu, UN Humanitarian Coordinator for South Sudan as saying, “I am deeply concerned that the adoption of this Bill will have wide-ranging and negative ramifications for the humanitarian operation at a time when needs are higher than ever.” According to Lindsay Hamsik, Policy and Advocacy Advisor for South Sudan NGO Forum, a consortium of national and international NGOs, “we are confused about why the two Bills were passed when the peace agreement says it should be reviewed by the Transitional Government.” “We are disappointed that NGOs were not consulted,” she says. Of those who harbor the view that the passage of the Act presents some real challenges to humanitarian efforts include, among others, a group of diplomats

¹ See Radio Tamazuj February 6, 2016 publication at <https://radiotamazuj.org/en/article/eu-peace-deal-requires-review-ngo-bill>

accredited to the Republic of South Sudan, international non-governmental organizations, some South Sudanese politicians and representatives of the civil society and non-governmental organizations.

This weekly review attempts to explore the content of the NGO Act, particularly a number of provisions, which the opponents of this legislative measure claim, albeit indirectly, present imminent, serious impacts, on humanitarian operations in South Sudan. Equally, the undertone, which the reactions unleashed thus far, carry that the Act does not seem to have been well intended at all, is examined. Moreover, the context in which the statutory act of parliament emerges, as this might explain the seemingly emotive reactions, which ostensibly have extra bases outside the content of the recent enacted law, is highlighted. Lastly, the paper examines the context of this Act in light of similar regulatory frameworks in the region.

II. Context Overview

To appreciate why the passage of the NGO Act draws what clearly seem to be swift and highly emotive reactions, one has to look at the context in which this piece of legislation emerges. Since independence from its northern neighbor, Sudan, in 2011, the Republic of South Sudan allowed NGOs to continue to operate on the basis of the seemingly less comprehensive regulatory framework adopted back in 2003 under the then SPLM administered Sudan's southern region. It should be mentioned here that the controversy over this bill arose because of the fact that the international non-governmental organizations (INGOs) operating in South Sudan have largely been reliant on expatriates for their operations and South Sudanese, like citizens of other nations, feel that they should represent a major share of the NGOs' workforce. In this respect, complaints abound as to the constant "lack of capacity" mantra, which is often used by the INGOs as a basis to recruit personnel outside the country, even for non-technical professional positions like drivers and cleaners. This situation was set to completely change when the NLA passed the NGO Bill on May 12, 2015.

With the change coming during this war-induced divisive environment in South Sudan, it makes sense to suspect that this reality informs the prevailing reactions to the legislation. That is, those who are suspicious of the government's efforts to effectively regulate and monitor NGO activities and operations view it as a sinister move intended to serve government interest. For its part, the government strongly believes to be legitimately exercising its constitutionally given mandate to ensure that the NGOs operate in accordance with the laws of the land and to protect the interest of the people of South Sudan.

In a sense, there is a feeling that the NGOs have been operating without a sufficient legal guidance, as the 2003 regulatory regime is deemed awfully inadequate. To the proponents, the new law is therefore, seen as an answer to this state of affairs. That is, it is there to seriously require that the delivery of humanitarian and development services would be done in a transparent and accountable manner and to give nationals employment priority over expatriates. On its part, the NGO community, as well as their

ardent supporters, see the government's resolve to push through this piece of legislation as a move designed to restrict or manipulate the flow of services, particularly to the needy populations. It should be stated here that no provision in the bill could necessarily be cited as corroborating this feeling. Perhaps, the fear on the part of NGOs is the uncertainty surrounding how various actors in the theatre of operations could interpret the provisions of this Act, including security agents as well as labor regulators.

III. Purpose and Content

Before examining what underpins reactions, it is appropriate to briefly say something about the purpose and content of this new legislation. As already mentioned, the work of NGOs has been guided by the 2003 Act, which understandably the government is currently working to repeal. The purpose of this new legislation is to create a legal framework that will regulate registration, coordination, and monitoring of the non-governmental organizations.

However, the NGO Act does not seem to be terribly comprehensive when it comes to the different functions NGOs are often expected to perform. It seems to intimate that the work NGOs are called to deliver primarily consists of relief and emergency assistance, economic and social rehabilitation and development assistance. As important as the aforementioned functions are, they by no means exhaustively constitute the focus of NGOs. As part of the larger civil society sector, NGOs are generally regarded as important partners in governance, particularly to ensure that governments operate in open and transparent manner, and are held to account for their actions.

In addition to the said areas of focus, NGOs also advocate for human rights, good governance, and social equity. Unfortunately, the Act is dead silent on these issues, and this reality presumably prompts the critics to accuse the government as trying to limit NGOs work to focus on the delivery of humanitarian assistance only.

Besides the referenced, apparent limited scope that the legislation defines for NGOs activities in South Sudan, the law seems to be perfectly in a league with the regulatory frameworks found in the region. Relatively speaking, South Sudan's NGO Act 2016 is not as restrictive as its critics would want the public to believe. Of course, like any law, it has some weaknesses as pointed out but on a whole, it is a positive development that could be improved with time. For comparative purposes some requirements that Rwanda and Kenya impose on NGOs as conditions for their operations, are highlighted below.

Rwanda requires an NGO that intends to operate within its territories to first sign a memorandum of understanding (MoU) with a line ministry. For those organizations that seek to work at the subnational level, they are additionally required to harmonize

their action plans inline with the district development programs where they are going to operate.²

Kenya under its Non-governmental Organizations Co-ordination law, which was first enacted in 1990 and amended in 2012, requires as one of the conditions for an NGO registration identification of the districts, divisions and locations of the proposed activities, the proposed average annual budgets, the duration of the activities, and all sources of funding, among others. Concerning employment of foreign nationals by an NGO working in Kenya, entry permit is required as a condition to complete the hiring process. Issuance of such entry permit by relevant migration official is conditioned on the organization proving that “the services of such employee are necessary for the proper function of the organization; or no persons with comparable skills are available locally; or such employee will contribute towards the training of Kenyans to obtain scientific, technical and managerial skills.”³

IV. Contentious Provisions

Designed, perhaps with the operating experience of the NGOs at hand, the bill, which intends to regulate and monitor the activities of this critical sector quickly runs into opposition from the humanitarian workers themselves, activists and their supporters. As alluded to already, reactions from a wide range of actors, namely diplomats such as the Heads of the European Union, Denmark, Germany, Italy, The Netherlands, Spain, Sweden, The United Kingdom, Canada, Japan, Norway and Switzerland, activists, and humanitarian workers have fallen short of pointing out how exactly the bill really threatens to curtail the provision of humanitarian services in South Sudan.

To register their objection to the passage of the bill by the NLA, representatives of the aforementioned nations released a statement bearing the European Union logo on February 5, 2016. According to the diplomatic statement, “The Heads of Mission express their grave concern at the potential consequences of the passing of the non-governmental organizations bill, and the Relief and Rehabilitation Commission bill in Parliament on 2 February”. “The Heads of Mission however have significant concerns that in their current form these bills could restrict the operation of NGOs that are providing life-saving services to the people of South Sudan,” further reads the statement. The media also reports that “non-citizens will lose their jobs to give way for nationals”⁴.

To continue to flame the undesirable fire of what is certainly neither an emergency nor a priority by all accounts, the Chairperson of the Joint Monitoring and Evaluation

² See Procedures for Registration of International Non-governmental Organizations/INGOs in Rwanda at <https://www.migration.gov.rw/index.php?id=209>

³ See Non-governmental Organizations Co-ordination Act, Revised Edition 2012 (1990), [www. Kenyalaw.org](http://www.Kenyalaw.org)

⁴See Sudan Tribune February 11, 2016 publication <http://www.sudantribune.com/spip.php?article57988>

Commission (JMEC), a body charged to monitor and evaluate the implementation of the peace agreement, Botswana's former president, His Excellency Festus G. Mogae joined in to sing the chorus of opposition against the country's NGO Act. Like all those before him, who publicly expressed their "concerns" against the passage of the law, Mr. Mogae in his opening statement at the JMEC meeting held on February 23, 2016 in Juba repeated the now famous line in the peace agreement used to anchor the opposition to the Act, which states, "the TGoNU shall submit the legislation to a process of public consultation, to ensure that such legislation complies with international best practice in regulating the activities of non-governmental organizations in South Sudan." "At this time of acute humanitarian need, any action that potentially complicates the difficulty of the humanitarian response is undesirable,"⁵ further remarks the JMEC chief.

Despite the sense one gets from these highly emotive phrases such as "grave concern", "potential consequences," and "significant concerns," a quick glance at the recently passed law presents a less clearer picture as to the exact danger it immediately poses to the NGOs operations in South Sudan. But for those who certainly know something about the politics of development aid, which is often used as a tool to both achieve certain sets of foreign policy agenda and cater to a whole gamut of domestic contractors and subcontractors, this rhetoric is both familiar and makes sense.

For what it is worth, what might honestly be construed as "restricting the work of NGOs" in South Sudan could possibly and indirectly be inferred from some of the Act's stipulations we examine below.

- 1) In section 18, 2 (C), the bill requires any NGO operating in South Sudan to employ at least "80 percent of South Sudanese nationals in all managerial, middle and junior levels."
- 2) Section 9, b (XI) demands as a condition of operation for an NGO to sign a country agreement with the government, and
- 3) Section 9, b (XIV) requires the opening of a bank account in South Sudan by an NGO in order for it to operate.

Since the rhetoric directed at the recent passage of the NGO Bill by the NLA does not give any specific examples to substantiate the claim that the government, indeed, intends to restrict the provision of humanitarian services, it is appropriate to highlight the Act's provisions, particularly the ones that might be seen as the ground upon which opposition hangs. As the aforementioned quotations from the diplomatic press release as well as from the Humanitarian Coordinator, representative of the South Sudan NGO Forum and JMEC chief show, claims that seem to form the basis upon which opponents are objecting to the NGO Act include restriction on the delivery of humanitarian

⁵ See the Opening Statement by His Excellency Festus G. Mogae, Chairperson of the Joint Monitoring and Evaluation Commission, at the meeting of JMEC held in Juba on 23 February 2016

services, lack of public consultation, and the fact that the peace agreement requires that the would be Transitional Government of National Unity will review the NGO Bill.

As discussed previously, the alleged restrictive nature of the law is not clearly stated at all by its exponents. However, it is plausible to think that sections 9 b (XI) and 18 2 (C), which require any NGO operating in South Sudan to sign a country agreement with the government, as well as employing not less than 80 percent of South Sudanese nationals in its work force, respectively, are the target. The signing of the country agreement, according to the opponents, gives the government power to control and direct the work of an NGO, and understandably, this is “restrictive.” Still, these are requirements in the right direction. Moreover, South Sudan, according to some humanitarian workers and others, does not have sufficient human resources to meet the 80 percent requirement. Hence, the law’s directive for employment of not less than 80 South Sudanese is seen as having a real ability to slowing down humanitarian service delivery at the time they are seriously needed. Equally, section 9 b (XIV), which sets opening of a bank account as one of the conditions to operate in the country, is also seen as problematic. This concern is reasonable, as the Central Bank of South Sudan allows the government to spend private deposits. Alternatively, the basis for this objection concerns the prevailing fragile financial sector, which is susceptible to corruption and misappropriations, resulting in real fears,

While it may not be completely reasonable to dismiss out of hand the aforementioned concerns, it is equally difficult to accept them all. For sure, South Sudan has one of the lowest literacy rates in the world, but to suggest that there are no sufficient human resources to fill the required 80 percent quota is perhaps stretching the truth. For years now, international organizations working in South Sudan have been singing the song of “lack of capacity” to justify excluding South Sudanese nationals from both non-professional and professional positions where they can help in the provision of humanitarian and development related services. A simple question that ought to be asked is, how long does it actually take to acquire or transfer these skills? This law attempts to correct this situation, and the international organizations would be making a great mistake if they fail to embrace this opportunity in order to allow South Sudanese to meaningfully contribute in delivering services. Section 18, 2 (d) of the Act allows NGOs to hire professional staff abroad in the event that those cannot be found among the South Sudanese nationals.

Given the fact that the government has a constitutional mandate and duty to regulate, guide and run the affairs of the state, requiring a country agreement between the government and an international non-governmental organization does not seem unreasonable at all. Since the NGOs deliver services, which include relief and development, it makes sense that the government is finally seeking to closely work with them to ensure effective, planning, monitoring and coordination of related activities to benefit the citizens. The banking requirement, though in a seriously fragile environment, is also to ensure that the NGOs operate in accordance with the law.

Under normal circumstance, nothing in the aforementioned sections can really raise any eyebrows. But since life in South Sudan is not being lived under ordinary times, thanks to the costly war, which has introduced a number of unfavorable conditions, including placing the legitimacy of the current government in question. Since the outbreak of the conflict, the South Sudanese Government has struggled to get recognized by certain quarters that really see it as illegitimate. As well, for many years, the government has done little to deliver basic services countrywide and instead granted the NGOs a parallel operation in this realm. These conditions have now combined to influence local and external reactions to the regime's decisions that seem to solidify its authority. To this effect, the criticism GoSS suffers is that it has not been true to its fundamental functions, understandably rendering contest for its legitimacy.

V. Implications on the Delivery of Humanitarian Services

Whatever the suspected intentions of the government and heightened rhetoric of opposition are based on, one thing is clear, no any meaningful impact emanating from the Act on the operation of NGO could immediately be felt at least in the next three months. Although President Kiir immediately signed the NGO Bill into law, it would at least be a distant 90 days away before any real impact could emerge. This is because section 21 of the Act sets the legislation to come into force 90 days after its enactment. That is, organizations already registered under the 2003 Act have 90 days before they are re-registered under the new legislation. In other words, with the 90-day waiting period, none of the activities of any organization currently operating in South Sudan could immediately be halted by the new law. Moreover, no serious influx in terms of organizations rushing in to help rescue any war-related dire humanitarian need is being experienced. Considering other factors, which, among others, include the formulation and adoption of regulations that will govern the application of the NGO Act, effective enforcement and formation of the transitional government of national unity, which as per the peace agreement has the power and authority to review this new law, it is difficult to see how the delivery of humanitarian services could immediately be negatively affected.

In a sense, what has clearly been laid bare by the storm, the passage of the NGO Bill created, is that relations between the government and certain pockets of the South Sudanese society and international circles remain rocky. This existence of mistrust and bitter relations between the government and some of its partners and sections of the citizenry, explains the nature of the row surrounding the recently enacted legislation. More than any immediate and practical impact of the Act on the NGO operation in South Sudan, both the passage and the opposition it engenders seem to be about making a point. For the government, the fact that there is going to be formed a transitional government of national unity does not mean that it cannot continue to operate as it sees fit. In other words, the government contends that the peace agreement does not necessarily inhibit its core functions, among which lawmaking is part and parcel. Opponents on the other hand, seem to posit that key governmental functions should be reserved for transitional government. This situation is exacerbated by the fact that the prevailing government demonstrated limited effectiveness in the last decade.

VI. Conclusion and Recommendations

Given the prevailing war-induced situation in South Sudan, which is characterized by a high level of mistrust and bitter divisions, the work of rebuilding trust and constructive engagement is direly needed. To kick-start this process, it is incumbent upon the different camps that the war has created to realize that it is important to avoid any unnecessary confrontation, particularly when that has a potential to continue the engendered rifts. The passage of the NGO Act and its resultant strong opposition is such an example of the unnecessary negative engagement the parties should resist.

As discussed, nothing in the new law poses any immediate, practical negative impact on the delivery of humanitarian services in South Sudan. When closely examined, the Act is not outlandish by any stretch of imagination, as its provisions seem reasonably measured and in concert with other regional contexts. Moreover, it is scheduled to come into force well beyond the envisaged formation of the transitional government of national unity, which could alter any potential harm if it deems necessary.

To enable South Sudan's emergence out of this crisis, there is need for the partners to cooperate with the government. No doubt the government is one of the primary parties to the conflict whose cooperation is essential for any successful implementation of the peace agreement. Besides the vital role the government is expected to play during the transitional period and beyond, it is also important to remember that it is, indeed, within its power, to continue discharging constitutionally mandated functions, which, among others, include lawmaking.

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The Sudd Institute is an independent research organization that conducts and facilitates policy relevant research and training to inform public policy and practice, to create opportunities for discussion and debate, and to improve analytical capacity in South Sudan. The Sudd Institute's intention is to significantly improve the quality, impact, and accountability of local, national, and international policy- and decision-making in South Sudan in order to promote a more peaceful, just and prosperous society.

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