

# ENABLING THE FLOW OF DONATIONS

---

International standards that  
safeguard cross-border  
giving to CSOs

The paper was prepared by Alice Thomas, with the assistance of Eszter Hartay, Senior Legal Advisor with the European Center for Not-for-Profit Law Stichting.

The author is grateful for the information and/or feedback provided by Jeremy McBride, Nick Robinson, Tamara Otiashvili, Ziya Cağa Tanyar, Natalia Bourjaily, Francesca Fanucci, Debbie Gild-Hayo, Dima Jweihan, Zach Lampell, Jocelyn Nieva, Elly Page, Irene Petras, Margaret Scotti and Olga Smolianko.



*This document has been produced in part within the framework of the Action “Monitoring Progress, Empowering Action”, implemented with the financial assistance of the European Union. The contents of this document are the sole responsibility of the authors and can under no circumstances be regarded as reflecting the position of the European Union.*

# CONTENTS

I. INTRODUCTION	4
II. OBJECTIVE AND SCOPE OF THE PAPER	6
III. THE RIGHT TO RESOURCES UNDER INTERNATIONAL LAW	7
3.1. The Right to Freedom of Association and Other Relevant Human Rights	7
3.2. Permissible Restrictions to the Right to Freedom of Association and Related Rights	9
IV. RESTRICTIONS RELATED TO INTERNATIONAL FUNDING IN DIFFERENT STATE LAWS	10
4.1. Defining International Funding	10
4.2. Types of Restrictions	11
4.2.1. <i>Obligations imposed on CSOs wishing to receive international funding</i>	11
4.2.2. <i>Obligations imposed on foreign states, entities and individuals wishing to fund CSOs in certain countries</i>	13
4.3. Who/which types of organisations are affected?	13
4.4. Sanctions for Failure to Comply	13
V. EFFECTS OF INTERNATIONAL FUNDING RESTRICTIONS	14
VI. PERMISSIBILITY OF RESTRICTIONS ON INTERNATIONAL FUNDING UNDER INTERNATIONAL LAW AND LEGAL ARGUMENTS TO USE IN LAW REFORM	19
6.1. Compliance with the Right to Freedom of Association	19
6.1.1. <i>Legal basis</i>	20
6.1.2. <i>Legitimate aim</i>	21
6.1.3. <i>Necessity and proportionality</i>	24
6.2. Compliance with the Non-Discrimination Principle	30
6.3. Compliance with the Right to Private Life	31
VII. CONCLUSION	33
ENDNOTES	37

# 01

## INTRODUCTION

- 1 While the basic rights of civil society organisations (CSOs)<sup>1</sup> to exist and operate are widely recognized nowadays, the last decade has seen many attempts across the globe to hinder, stigmatize and at times even ban the legitimate activities of CSOs. Such measures are often justified with the need to reduce foreign influence on state policies, combat money laundering or terrorism financing or generally enhance transparency of the civil sector. At the same time, these measures appear to often target organisations that are critical of the state, and of its government and policies.
- 2 One way to silence critical voices from the civil society sphere is to deprive, directly and indirectly, relevant organisations of access to the funds that they need to organise and implement their activities. General restrictions on funding still remain the exception rather than the rule, and the majority of states in the world do not regulate such matters. However, there is a growing trend, over recent years, to restrict the amount and manner in which organizations may receive funds from abroad (international funding, which means both funding by foreign governments, legal persons and individuals, and funding by international organisations). This trend is continuing, as evidenced by recent draft legislation debated in certain EU countries and elsewhere.
- 3 While the common desire of such laws or other regulations is to control the funding that CSOs receive from abroad, states have adopted different approaches to this issue. In some countries, CSOs may only receive a certain amount of international funding per year, whereas in others, CSOs receiving international funding are required to register, and/or are subjected to extensive reporting and disclosure requirements of the international funds received. In other countries still, organisations need to notify the state about the receipt (or the intention to receive) international funds, or legislation or policies dictate that such funds need to be channelled through government bodies.

- 4 But is this approach, which largely targets civil society organisations operating in the areas of human rights, social services, and humanitarian sphere, the right way to go? Is it reasonable or even logical to limit the international funding of CSOs in a situation where state institutions themselves often receive much greater investments from abroad, but do not underlie similarly burdensome restrictions? More specifically - are the restrictions imposed on international funding for CSOs compatible with international human rights law, as set out in key international treaties that states have signed and ratified?
- 5 In response to requests from partners to identify arguments to counter international funding restrictions, ECNL Stichting undertook an analysis of 36 laws, by-laws, and practices from 26 countries.<sup>2</sup> This analysis will aim to illustrate new trends and provide guidance based on key aspects of the right to freedom of association, including the right for CSOs to seek and access resources. The paper will likewise consolidate existing analyses and reports from international and regional bodies and organisations. The analysis will likewise address other relevant aspects of international human rights law, such as the principle of non-discrimination, the right to privacy, and certain regional standards such as the free flow of capital in EU states.
- 6 Restrictions to CSOs' access to international funds greatly impact the work of the organisations concerned. In many of the countries where such restrictions exist, the respective governments do not offer much in terms of alternative means of support, while limiting other income sources, too. There can thus be no doubt about the fact that the current restrictions impose huge burdens on significant parts of the civil society sector; in some cases,

burdensome and costly logistical or reporting/disclosure requirements even call into question the ability of certain civil society organisations to operate at all. This situation endangers not only the organisations themselves, but also large parts of the population, within a given country or at times even in a particular region, that benefit from the work of these CSOs.

# 02

## OBJECTIVE AND SCOPE OF THE PAPER

- 7 The objective of this paper is to provide, via concrete country examples, an overview of different ways in which national legislation of various states around the globe restricts international funding for CSOs. It thereby focuses only on CSOs, not on other types of associations such as political parties or trade unions. The paper will likewise assess whether these types of restrictions are permissible under human rights standards as codified in international instruments ratified by these countries. It is hoped that this overview will help raise awareness among civil society and other actors as to the multi-faceted nature of this issue, and the arguments that they may use to address it in their own countries. In the long run, the contents of the paper may evolve into guidelines on the appropriate level of regulation on the funding of CSOs.
- 8 The paper focuses mainly and in detail on restrictions of international funding found in selected pieces of relevant legislation and how they affect the right to freedom of association of the respective entities.

Besides, it will also outline related human rights such as the right to non-discrimination and privacy rights of CSOs, their members, beneficiaries and their donors. The state laws selected for this paper were chosen to portray a wide array of approaches to this issue, while reflecting a variety of different regions and legal traditions. At the same time, the paper does not look at access to funding for CSOs in general, nor does it address the question of how lobbying legislation affects CSOs (this last issue will, however, be addressed in a separate ECNL Stichting paper).

- 9 Given its wide applicability and scope, the International Covenant on Civil and Political Rights (ICCPR) will constitute the main human rights benchmark in this paper, while regional instruments such as the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), the African Charter on Human and Peoples' Rights (AfCHPR), as well as other international instruments and documents will also be referred to where relevant.

# 03

## THE RIGHT TO RESOURCES UNDER INTERNATIONAL LAW

### 3.1. The Right to Freedom of Association and Other Relevant Human Rights

- 10 It has long been established that individuals have the right to associate, namely, to create associations with a common interest, whereby they may take part in public, but also in private life. This right is recognized in the vast majority of states across the world and is set out in Article 22 of the ICCPR, Article 11 of the ECHR, Article 16 of the ACHR, and Article 10 of the AfCHPR. As a consequence, states are required to create an enabling environment for associations and for civil society as a whole – meaning that they shall ensure that all CSOs are able to operate, and may not unduly hinder them in the exercise of their functions.<sup>3</sup>
- 11 The right to freedom of association is not only an individual right – it also applies to the CSOs themselves, and to their right to exist as such.<sup>4</sup>
- 12 As **CSOs need resources to be able to function properly**, the right to freedom

of association also involves the freedom to seek, secure and utilize resources.<sup>5</sup> This implies any form of resources, be they monetary, material or human.<sup>6</sup> As noted by the UN Special Rapporteur on freedoms of peaceful assembly and of association, **the term “resources” encompasses a broad concept that includes:**

- financial transfers (e.g., donations, grants, contracts, sponsorships, social investments, etc.);
- loan guarantees and other forms of financial assistance from natural and legal persons;
- in-kind donations (e.g., contributions of goods, services, software and other forms of intellectual property, real property, etc.);
- material resources (e.g. office supplies, IT equipment, etc.);
- human resources (e.g. paid staff, volunteers, etc.);
- access to international assistance,

solidarity;

- the ability to travel and communicate without undue interference and the right to benefit from the protection of the State.<sup>7</sup>

- 13 Funding may in principle be received from a variety of sources**, including natural and legal persons that are in the same country or located in another country, or from international intragovernmental or non-governmental organisations. The group of potential donors for CSOs thus includes individuals and associations; foundations; governments; corporations and international organisations.<sup>8</sup> In many states, associations may apply for state funding, but even in these cases, this may need to be complemented with private funding by individuals, associations, foundations, governments, or corporations (including natural or legal persons from other countries) or international organisations.
- 14 While the question of resources is primarily a question of freedom of association, other human rights of CSOs and their founders or members may also be affected. In some cases, certain CSOs (e.g. those receiving international funding) are subject to restrictions that other CSOs are not affected by – such regulations may then touch on these **CSOs' right to be free from any form of discrimination** in the exercise of their rights, found in Article 2 par 1 of the ICCPR and Article 14 of the ECHR (but see also the general non-discrimination principle in Protocol 12 to the ECHR). Similar rights can be found in Article 1 of the ACHR, and Article 2 of the AfCHPR.
- 15 Furthermore, if certain types of funding for associations are tied to obligations that involve disclosing detailed information on their activities, the beneficiaries of these activities and on

their (private) donors, then this may **also touch upon the privacy rights** of the associations, beneficiaries, and the respective donors. The right to privacy is set out in Article 17 of the ICCPR, as well as in Article 8 of the ECHR and Article 11 of the ACHR.

- 16 At the EU level, the above rights are reinforced by the principle of the free movement of capital**, which is one of the pillars of the EU treaties, as also set out in Article 63 of the 2012 Treaty on the Functioning of the European Union (TFEU), and European Council Directive 88/361. Article 63 of the TFEU establishes that restrictions to the movement of capital and payments between EU Member States, as well as between EU Member States and third countries are not allowed. Article 64 par 1 of TFEU contains an exception to this rule for restrictions on movement of capital and payments between EU Member States and third countries under national or EU law that involve „direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets“, if the respective rules were in place by certain specified dates<sup>9</sup>). Annex I of Directive 88/361 further clarifies that free movement of capital also extends to „gifts and endowments“.
- 17 Therefore, the ban on restrictions to free movement of capital applies not only to donations made by a natural or legal person in an EU Member State to a CSO based in another EU Member State – as acknowledged by ECJ jurisprudence as well<sup>10</sup> – but also to donations made from a third country to a CSO in a EU Member State (or vice versa). In addition to this, Article 65 of the TFEU emphasises that taxation provisions imposed by EU Member States *“shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement*



*of capital and payments as defined in Article 63*". This is also supported by relevant ECJ jurisprudence.<sup>11</sup>

- 18 For reasons of conciseness, and while important to mention this aspect of the issue as well, this paper will not provide an analysis of the respective country examples from EU countries and their compliance with Articles 63 and 64 of the TFEU.

### 3.2. Permissible Restrictions to the Right to Freedom of Association and Related Rights

- 19 As with most human rights, it is possible to restrict the exercise of the right to freedom of association if need be. However, there are strict criteria that need to be met when doing so.
- 20 First, **the restriction needs to be set out clearly in law**. The language of the law needs to be clear and understandable, so that persons and authorities applying the law will know what is allowed and what is not, and what kind of consequences breaches of the law will have.<sup>12</sup>
- 21 Second, **the restriction needs to have a legitimate aim**. Article 22 of the ICCPR, as well as Article 11 of the ECHR and Article 16 of the ACHR set out a conclusive list of what are considered to be legitimate aims under international law, namely the protection of national security or public safety, public order, the prevention of disorder or crime (only in the ECHR), the protection of public health and morals, and/or the protection of the rights and freedoms of others.<sup>13</sup> Similarly, Article 27 of the AfCHPR states 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, which may thus be considered legitimate aims to restrict rights such as the right to freedom of

association in certain circumstances.<sup>14</sup>

- 22 Third, **the chosen means to restrict need to be necessary and proportionate to the aim** – the state's measures must be driven by a clear and pressing social need to become active in the interests of achieving a legitimate aim. Additionally, the surrounding circumstances must reveal that the respective aim cannot be achieved by any other means, including those that have a less restrictive effect on the right to freedom of association of an organisation.<sup>15</sup>
- 23 With respect to the **right to be free from discrimination**, differences in treatment may be justified if the respective associations are not in the same or similar situations as others, or if there are other objective reasons for such differing treatment (for more details, see section 6.2 below).
- 24 The **right to privacy**, in this case of the associations themselves, and, as the case may be, their members, beneficiaries and donors, may be limited under Article 17 of the ICCPR as long as the interference is not arbitrary or unlawful; Article 11 par 2 of the ACHR states that such interference may not be arbitrary or abusive. Both the ICCPR and the ACHR state that everybody has the right to protection by the law against such arbitrary and unlawful/ abusive behaviour.
- 25 According to Article 8 par 2 of the ECHR, any interference with the right to private life will need to be in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The respective measures will also need to be proportionate to one of the mentioned aims.

# 04

## RESTRICTIONS RELATED TO INTERNATIONAL FUNDING IN DIFFERENT STATE LAWS

26 While the overall need and right of CSOs to access funds is well-recognized by now, states have regulated this accessibility in different ways. The majority of states in the world do not restrict the type of funds that CSOs may receive in any way. However, a number of states have started imposing burdensome requirements for the receipt of funding in general, or for the receipt of funding from certain sources, e.g. international sources. Restrictions may take on different forms and range from direct or indirect prohibitions linked to serious sanctions, to enhanced state oversight, to increasingly burdensome or invasive notification, registration, reporting, authorization and transparency obligations.

### 4.1. Defining International Funding

27 Primarily, it is important to clarify **what type of support falls under the term international funding**. This varies, depending on the respective legislation or regulation. While some laws (e.g. the law in Hungary) remain quite vague and simply limit funding "originating directly

or indirectly from abroad",<sup>16</sup> others go more into detail.

28 Generally, in laws that contain specific provisions on international funding, such as the Russian Law on Non-Commercial Organisations, 'foreign funding' implies funds received from foreign governments, officials, or government agencies.<sup>17</sup> The same Russian law, as well as, e.g., legislation from India, Jordan and Kazakhstan, extend this to also include funding from foreign individuals<sup>18</sup> (in some cases even stateless persons<sup>19</sup>). Other country legislation (e.g. in Azerbaijan or Bangladesh) also mentions foreign 'legal entities'<sup>20</sup> or organisations,<sup>21</sup> or, more specifically, non-governmental organisations (see relevant Russian and Algerian legislation;<sup>22</sup> Indian legislation specifies that this includes non-governmental organisations mainly funded by a foreign government).<sup>23</sup> The Indian Foreign Contributions (Regulation) Act also covers foreign companies,<sup>24</sup>

e.g. in Bangladesh and Egypt, even expatriate citizens or companies of the respective country may be considered sources of 'foreign funding'<sup>27</sup>

- 29 Some laws, e.g. the law in Egypt, explicitly cover both foreign sources from outside a country and foreign sources from inside the country.<sup>28</sup> Others, such as the Russian law, go into detail with respect to the types of companies that are considered 'foreign funders', by specifying that this shall also include multinational companies that are not foreign per se, but that are incorporated in a foreign country (and territory),<sup>29</sup> or companies receiving monetary or other assets from foreign sources.<sup>30</sup> Indian legislation specifies that a 'foreign source' includes companies where more than half of the nominal value is held, singly or in aggregate, by a foreign government, citizen or corporation (or corporation incorporated in a foreign country/territory<sup>31</sup>). Laws such as the ones in Russia, Kazakhstan and India also limit funding by international organisations<sup>32</sup> or agencies.<sup>33</sup>

- 30 Some of the legal texts referenced above contain quite vague formulations with respect to international funding, and what is permissible in that respect. In such cases, the implementing bodies (administrative offices, but also courts) tend to have a quite wide discretion in how they interpret the law, which may lead to differing interpretations and possibly arbitrary decisions, depending on who is in charge. In some states, this may then just mean that nearly all funding with any type of connection to people, organisations, companies or governments from outside the country will be limited in one way or the other (depending on what the respective law says).

## 4.2. Types of Restrictions

- 31 While this paper generally speaks about

laws, the basis for regulating permissible sources of funding of CSOs may not necessarily be set out in a law. In some countries, these **types of limitations may also be found in government decrees** (e.g. in Tunisia, or Bolivia)<sup>34</sup>, **or other government documents or policies** (see, e.g., Nepal or Sri Lanka)<sup>35</sup> **or rules of procedure.**<sup>36</sup>

- 32 Furthermore, even if funding sources for CSOs are restricted by law, **the types of laws also differ** – in many cases, these constraints are set out in general laws on CSOs, but a number of countries have also drafted specific legislation on international funding of CSOs. Tax legislation, or laws passed to fight terrorism, corruption or money laundering, may also have the effect of limiting the types of funding that CSOs may receive, the activities that they may use certain funds for, the manner in which such funds are transferred, or the notification/reporting requirements on funds sought, offered or received.

### 4.2.1. Obligations imposed on CSOs wishing to receive international funding

- 33 For many years, but especially over the last decade, there has been an increasing trend in a number of states globally to impose additional obligations on CSOs wishing to receive funding from abroad.
- 34 While it is uncommon for countries to ban international funding for CSOs outright (Bahrain is a rare exception),<sup>37</sup> many impose certain requirements on CSOs wishing to receive international funding in general, or, like Hungary, beyond a certain financial threshold.<sup>38</sup> In a number of states, laws require that only certain, pre-determined activities be supported with funds from international sources and ban such funding for others, e.g. advocacy related to elections, as in Ireland.<sup>39</sup> Similarly, some laws, e.g. the

Russian law, impose certain limitations and special obligations for CSOs receiving international funds if they engage in 'political activities'.<sup>40</sup> Others prohibit CSOs from receiving international funds from specific donors (e.g. in Russia),<sup>41</sup> or, as in Indonesia or Bolivia, ban international funding for certain types of activities.<sup>42</sup>

- 35 In some states, e.g. Egypt, Algeria, Jordan, Bahrain and Nepal, CSOs wishing to receive international funding need to inform the government authorities and/or obtain their consent before being permitted to use such funds (in certain cases, the state may then object to the receipt of such funds).<sup>43</sup> In a number of other countries, such as India and Bangladesh, CSOs need to be declared eligible to receive international funds via a special procedure before they may receive such funds.<sup>44</sup> In others yet, e.g. Turkey or Tunisia, the respective organisations simply need to inform the relevant state bodies about the receipt of international funds.<sup>45</sup> According to certain domestic laws, e.g. Bangladesh or India, CSOs need to place international funds received in special bank accounts that are at times open to special state supervision.<sup>46</sup> In some countries, CSOs may not receive the funds directly at all; rather, all international funds will need to be channelled via a centralized government fund or bank (as in Burundi),<sup>47</sup> or a state body (as in Nepal).<sup>48</sup>
- 36 In certain states, CSOs funded by international sources need to register in a special state registry, which will sometimes place them within a special category of CSOs that may have a specific denomination, e.g. foreign agents in the Russian Federation,<sup>49</sup> or 'organisations receiving support from abroad' in Hungary.<sup>50</sup> This will often be paired with the requirement to clearly state this denomination in all of the CSO's publications and reports.<sup>51</sup>
- 37 Additionally, **some state laws subject CSOs receiving funds from abroad to greater supervision and control by the state**: inspections may take place without prior warning, based on indications that, e.g., an internationally-funded CSO has not registered in the respective state registry- like in the case of Russia.<sup>52</sup>
- 38 Whether inscribed in a special registry or not, CSOs receiving international funding are at times subjected to more frequent (e.g. monthly), more detailed, or otherwise more burdensome reporting and disclosure obligations than other CSOs. In some cases, e.g. in India, Russia, Hungary and Tunisia, these reports and similar information will need to be published,<sup>53</sup> and will also need to disclose quite specific details on the respective donors.<sup>54</sup> The reporting obligations may apply to all international funding, or only to international funding beyond a certain amount, like in Hungary.<sup>55</sup> In some instances, CSOs receiving international funding are subjected to special audits or inspections (e.g. in Russia).<sup>56</sup>
- 39 Moreover, certain states, such as Kazakhstan, require CSOs receiving funding from outside the country to **pay special additional taxes** on the funds received, and to report on them separately to the respective tax authorities.<sup>57</sup>
- 40 For the most part, states seek to justify these laws or similar measures by the need to establish transparency in terms of how civil society is funded, and to limit international (usually associated with negative) influence in a given country. This is at times linked to the need to prevent large-scale corruption and money laundering,<sup>58</sup> terrorism<sup>59</sup> or other negatively perceived outside influence.<sup>60</sup> The need to ensure effective coordination of development aid has also been cited as a justification for imposing restrictions or additional obligations on CSOs.<sup>61</sup>

#### 4.2.2. Obligations imposed on foreign states, entities and individuals wishing to fund CSOs in certain countries

- 41 Instead of, or in addition to targeting domestic CSOs, a number of states also impose quite extensive obligations on the prospective donor states or organisations.
- 42 Thus, states wishing to fund a CSO in a particular country will at times need to have diplomatic relations with it (e.g. in Tunisia).<sup>62</sup> Foreign non-governmental organisations may likewise be obliged to register and/or open a representation or branch office in the host country of the organisations that they wish to support (e.g. in Azerbaijan).<sup>63</sup>
- 43 In some countries, e.g. in Bangladesh, funding may be limited to certain pre-determined activities.<sup>64</sup> In other cases, funds originating from international donors may not be transferred to the respective CSO directly, but rather via relevant government channels (see par 35 *supra*).

#### 4.3. Who/which types of organisations are affected?

- 44 Generally, the respective laws or policies target and affect the non-governmental sector, regardless of what the respective entities are called (association, non-governmental associations, non-commercial organisations, foundations, charities, not-for-profit organisations, etc).
- 45 Depending on the state, however, the law or policy regulating such matters may not affect all CSOs – namely, in some countries, e.g. Russia and Hungary, laws regulating international funding of CSOs do not cover religious organisations, sports associations, trade unions or national minority organisations<sup>65</sup> or certain associations or partnerships such as consumer cooperatives, gardening

or similar associations.<sup>66</sup> Also in Russia, state corporations, state companies, associations established by the state, state and municipal (including budgetary) institutions, political parties, employers' associations and chambers of commerce are likewise exempted from some or all of the restrictions imposed on other associations.<sup>67</sup> As stated above (see par 34 *supra*), the restrictions on international funding may be limited to CSOs engaged in certain issues.

#### 4.4. Sanctions for Failure to Comply

- 46 In most cases, the above-mentioned obligations for CSOs are linked to sanctions, meaning that in case a CSO does not comply, it will then be subjected to warnings, fines, or other forms of punishment.
- 47 In many countries, the first step in case of non-compliance (usually the failure to register as an organisation receiving international funds, or to notify about planned or received funds, etc) is the issuance of a warning by the competent administrative authority (see the laws of Algeria, Azerbaijan, Hungary and Russia).<sup>68</sup> If the breach of the law continues after the warning, the next step may be some sort of reprimand to adhere to the law within a certain timeline (as in Hungary),<sup>69</sup> or the competent state body may decide to move to suspend the CSO (as in Algeria and Azerbaijan).<sup>70</sup>
- 48 Eventually, if the breach persists despite warnings and suspensions, certain states respond to such non-compliance by adding to key legislation an administrative or court procedure aimed at dissolving the respective CSO (e.g. Hungary, Algeria and Russia);<sup>71</sup> in some cases, e.g. in Egypt, the suspension or dissolution takes place immediately, without prior warning.<sup>72</sup>

# 05

## EFFECTS OF INTERNATIONAL FUNDING RESTRICTIONS

- 49 The effects of the above regulations and restrictions are manifold and will depend on the types of restrictions. Generally, legislation or government action aiming to limit sources of funding for CSOs will impact these organisations' work, primarily as it will usually mean **less money** for the respective organisation. Moreover, as also pointed out by the UN Special Rapporteur on the rights to freedom of peaceful assembly and to association, for associations promoting human rights or engaging in service delivery (such as disaster relief, health-care provision or environmental protection), undue restrictions on resources not only impact the association itself, but also persons benefiting from the work of the association; such restrictions thus also undermine civil, cultural, economic, political and social rights as a whole.<sup>73</sup>
- 50 In states where CSOs funded by international sources need to register in a special state registry, such **registration may already constitute an additional burden for such entities**, depending on the registration procedure.
- 51 At the same time, these registration requirements may be accompanied by the obligation for the respective organisation to adopt a specific title that will define it in the public eye, e.g. 'foreign agent' in the Russian Federation, or 'organisations receiving support from abroad' in Hungary. The respective organisations are then usually obliged to name this type of support in all their documents and publications. In the case of negative denominations, such as 'foreign agent', the title itself may already imply that such CSOs are agents of foreign governments or other entities, and that foreign sources are using them to spy on fellow citizens or domestic institutions, or at least to unduly influence public policy. This has **a severe impact on the reputation of the respective organisations, which may cause them to lose other funds, partners, and beneficiaries.**<sup>74</sup> As an indirect effect of such foreign agent legislation and the accompanying smear campaigns, CSOs have also faced increasing difficulties in cooperating with state institutions as some governments further distance themselves from independent CSOs.<sup>75</sup>



Attempts to avoid the stigma by renouncing international funding have, on the other hand, not always proved successful, showing how difficult it can be to repair damaged reputation.<sup>76</sup> Financially, such attempts to forego international funding have also negatively impacted ongoing activities and projects, and at times threatened the very existence of CSOs.<sup>77</sup>

52 In other cases, the terminology used in laws is more neutral, but may be filled with negative meaning due to public statements given by state officials that imply these CSOs' dubious, if not illegitimate intentions (regardless of whether these can be proven or not). Negative state rhetoric in public may thus create, or at least enhance the impression that these organisations cannot be trusted and should be shunned. This will again have quite extensive negative effects for the reputation of the respective CSOs, and thus for their activities and beneficiaries, not to mention the willingness of domestic CSOs and individuals to support them. This is particularly worrying with respect to the 'watchdog function' that some CSOs have in their respective countries or in cases where beneficiaries reject humanitarian aid or social services provided by such organisations.

53 In cases where CSOs are obliged to obtain prior permission from states in order to receive international funding, this will **impose administrative burdens** on the respective CSO, and may, depending on how long the CSOs will need to wait

for government approval, greatly **delay and hinder proposed projects and activities**.<sup>78</sup> The latter problem also arises in cases where obtaining international funds is contingent on the signing of an agreement between the state and the respective foreign state or private donor.

54 In cases where government approval is considered granted by law if it is not provided within a certain deadline, CSOs may be less affected by delays, and will still be able to plan accordingly. Provisions that state the opposite (e.g. where CSOs are obliged to wait for permission to accept funds) are problematic on several counts. On the one hand, the CSO is forced to plan for something that may in the end not happen. On the other hand, certain planning decisions may need to wait for government approval; even if such approval is given in the end, it may nevertheless have caused delays that may have negative consequences for certain activities and events. Finally, such **mechanisms of prior approval may indirectly shape CSOs' policies and programmes and reduces their independence in that respect**; following denials of approval, CSOs may decide to limit their activities to projects and programmes that are more likely to be approved. This could have a **negative effect on the diversity of the CSO landscape** in certain countries and may lead to a situation where their work is based less on their own ideas of what needs to be done, and more on the priorities of the respective government. This is particularly notable in cases where governments insist on international funding being limited to certain pre-determined areas, often following detailed agreements between the donor and the state.

55 Where governments insist that international funding for CSOs be transferred via government channels,

**delays in relaying such funds to the recipient CSO may also create great problems** in the implementation of these CSOs' activities.<sup>79</sup> The speed with which the funds are then passed on to the respective organisation on a practical level will determine the impact of such provisions for the respective CSOs. If the payment is made in the form of a lump sum, CSOs may well need to delay their activities, or may otherwise be hampered by bureaucratic processes. If, on the other hand, payment takes place in installments, then it may, depending on how large these installments are, and how they are transferred, become near to impossible for the respective organisations to conduct their work, especially if each installment is preceded by detailed information about the intended activities. In cases where the transfer of the funds takes place via government bodies, which have the power to deny payment, CSOs may in the end have to cancel activities or projects at the very last stage, which will also affect the reputation of the CSO itself.

- 56 Regarding the effects of mere notification requirements, these will depend on the frequency of notification, and what such notification will entail. The requirement to notify the state each time a sum is received from abroad may constitute a substantial administrative burden for the CSOs and their staff, especially in cases when the notification has to be made before the funds may be used. Depending on the circumstances in a given country, notification may also lead to harassment of CSOs known to receive funds from certain (legitimate, but politically undesirable) sources.
- 57 As stated above, some country legislations require CSOs to place funds received from abroad in separate bank accounts. Whether or not this is burdensome will depend on the

procedure for opening a bank account in each given state – if this is relatively simple, and open to anyone, then creating a separate bank account for international funds should not pose a problem. If the financial threshold for opening an account is, on the other hand, quite high, or if the respective CSOs need to fulfil numerous other requirements, then this may pose a problem, both from a financial and from an administrative point of view. Similarly, if the costs of creating and running a bank account are quite high, then this may also dissuade CSOs from opening more than one account, which in some countries may mean that they may not ask for international funding.

- 58 Where **certain restrictions imposed on CSOs receiving international funding are coupled with special auditing or inspections**, this may have grave repercussions for the daily work of the CSO, especially if the law allows the state to conduct inspections without prior warning. CSOs will never know when state agents will come to their offices, interrogate their staff, or go through their books and other documentation, and are thus completely at the mercy of the state, without having been charged of any crime. This will **greatly disrupt the daily activities of the CSOs and may have negative consequences on the outcome of their work**.<sup>80</sup>
- 59 Additionally, CSOs receiving international funding and their leadership and/or members may also, next to vicious verbal attacks, be **subjected to intimidation, property damage, physical assaults and even criminal charges**. As stated by the UN Special Rapporteur on freedoms of peaceful assembly and of CSO, allowing or inciting public discredit on individuals' or organisations' honour and reputation or inciting nationalist and xenophobic sentiment is likely to cause CSOs to engage in self-censorship and, more



gravely, may incite hatred and fuel further human rights violations.<sup>81</sup>

- 60 Many laws in different countries require CSOs receiving funds from abroad to report and publish in detail the amount of funding that they have received, and the sources of such funding. Depending on how detailed the reports need to be, and how frequently they need to be submitted, such **additional reporting obligations could be quite burdensome for CSOs and will cost them time that they could otherwise have spent implementing activities and projects.**

In particular in the case of smaller CSOs with less funds and staff, it will be near to impossible to fulfil frequent and detailed reporting obligations. Often, if legislation requires the CSOs to submit information on all funding sources, this will not even be possible, e.g. where small donations are received via SMS or crowdfunding.

- 61 **Depending on the modalities of publication, the financial reports will also entail costs,** which will further impact the already quite modest budgets of many organisations. The same considerations apply in cases where funds received from abroad are subject to particular taxes or need to be reported to tax authorities via a separate procedure. In cases where special reporting requirements for CSOs are included in laws combatting terrorism or money laundering, this will additionally raise suspicion in the public that the affected CSOs are engaging in such illicit activities (even if the laws do not foresee individual risk assessments, and simply target a certain sector of the domestic civil society) and will greatly impact their reputation and their work.

- 62 In addition to the burdens imposed on CSOs by reporting obligations, laws requiring the disclosure of private sources of funding may impact the rights and behaviour of donors. In many instances,

**foreign funders, especially individuals, may be less willing to donate to a certain CSO** if this means that their names, the amounts that they provided, and possibly even additional information such as places of residence or other personal details, will be shared with the public. Reduced funding will severely impact CSOs and their activities, and in some cases even require them to shut down. Depending on the details required by the law, similar considerations apply with regard to the beneficiaries of CSOs' activities.

- 63 State laws or policies that require potential donors to establish prior agreements with the respective states, or to establish branches in the state will presumably **greatly impact and affect the amount and nature of international development aid and humanitarian assistance efforts** in the country. While it is important to coordinate the aid that comes into a given country, too much government control and burdensome procedures will in the end reduce the support received by the country and its population and aggravate the situation of those groups and persons most in need of aid.
- 64 If laws or policies are formulated using vague, and quite general language, this will seriously influence how they are implemented, as CSOs, their leadership and members, donors and often state authorities themselves will not know how to do so. This void will then be filled with differing interpretations, often varying from one administrative office to the next or one judge or court to the next. In the end,

**CSOs will be the victims of such unclear or ambiguous terminology leading to arbitrary and at times even**

abusive enforcement, as they will be accused of violations that they may not even be aware of having committed.

- 65 In some laws, the failure of CSOs to comply with the legislative requirements will lead to sanctions, ranging from warnings to fines, to possible suspension or dissolution. While fines, depending on how high they are, may impact negatively these CSOs' budgets, **suspension or dissolution, either following a court procedure or by administrative decision, are arguably the most serious threats that these CSOs face**, as both put an end to their plans, programmes and work in general, either temporarily or permanently.
- 66 Given these difficulties, one of the long-term effects of the legislation and policies described above may be that if obtaining international funds becomes too difficult, some CSOs may decide to dispense with it altogether, which may have serious consequences for their financial situation.
- 67 The above concerns would not be as great if the domestic countries issuing such restrictive legislation or policies would provide their civil society sector with funding commensurate to their needs and would thereby add their own contribution to creating an enabling environment for CSOs. Unfortunately, however, this often tends not to be the case – particularly in those countries that are most critical vis-à-vis international funding of civil society organisations, such **organisations receive little to no funding from their state governments, and there are no government incentives for private donations.**<sup>82</sup> In many of these countries, there is also no capacity for, or tradition of private domestic funding of CSOs. This places CSOs and similar organisations in a difficult position – if they do not

accept international funding, they will often not have the funds to implement their programmes and activities. If they do accept such funding, this may come with financial uncertainties, greater state control over their activities, and, in the worst case, blows to their reputation caused by stigmatization and harassment by the state. Often, this dilemma may force such CSOs to shut down, especially where they operate in poorer countries, where funding alternatives such as crowdfunding or the like will not yield great results.

- 68 Conversely, it is exactly in these countries where civil society activities and services are most needed; poorer states habitually lack the funds to provide certain social, health, human rights and humanitarian services, which have often been taken over by civil society organisations. Eventually, **excessive restrictions of international funding of CSOs may thus negatively affect the wider population of a country** as well, and, indirectly, the forces governing that country.
- 69 At the same time, **donors also need to bear in mind the political, social and economic context in which CSOs operate**, especially those working with grassroots communities, marginalized and vulnerable groups, or engaging in unpopular, controversial or cutting-edge issues. Moreover, donors need to respect the autonomy of civil society organisations and should not seek to impose their own priorities too much; CSOs and their activities should mainly be driven by the needs and concerns of societies. The UN Special Rapporteur on freedoms of peaceful assembly and of CSO has invited donors of CSOs to diversify funding beneficiaries, and when applicable, take appropriate action to support CSOs facing undue restrictions.<sup>83</sup>

# 06

## PERMISSIBILITY OF RESTRICTIONS ON INTERNATIONAL FUNDING UNDER INTERNATIONAL LAW AND LEGAL ARGUMENTS TO USE IN LAW REFORM

70 The following section will analyse some of the examples of legislation or policies restricting international funding for CSOs mentioned above for their compliance with key international human rights law, as set out in various articles of the ICCPR and the ECHR, ACHR and AfCHPR, primarily with those pertaining to the right to freedom of association. At the same time, compliance with relevant provisions encapsulating the right to private life, and the principle of non-discrimination will also be reviewed.

71 In this context, it is important to remember that human rights instruments such as the ICCPR and the ECHR, ACHR or AfCHPR are international treaties, which states have signed and ratified. Consequently, these states have entered into a contractual obligation to protect and refrain from violating the rights of people under their jurisdiction, and to conform their laws and actions to the requirements set out in these instruments.

Thus, if there is a violation of these human rights treaties, individuals, CSOs, but also other states and international organisations have a right, if not a duty to raise their voices in this respect, and demand that the respective state government stop such violation of rights, either by refraining from further action, or by actively preventing further breaches.

72 At this point in time, the vast majority of countries of the world have signed and ratified the ICCPR.<sup>84</sup> Similarly, most European countries have signed and ratified the ECHR.<sup>85</sup> The ACHR has also been signed and ratified by the majority of Central and South American States.<sup>86</sup> The AfCHPR has been signed and ratified by almost all African countries.<sup>87</sup>

### 6.1. Compliance with the Right to Freedom of Association

73 As already established under Section III above, the right to freedom of association

is protected under international law, primarily by Article 22 of the ICCPR, as well as by Article 11 of the ECHR, Article 16 of the ACHR and Article 10 of the AfCHPR. This right also encompasses the access to resources, including international funding.

- 74 Further, and as also outlined in Section III, it is possible to limit the exercise of the right to freedom of association but, given the importance of this right, only if the restrictions meet certain conditions that are listed in detail in Article 22 par 2 of the ICCPR, Article 11 par 2 of the ECHR and Article 16 par 2 of the ACHR. Thus, restrictions of the right to freedom of association are possible, but only if they:
- a) are set out in law;
  - b) follow a legitimate aim;
  - c) are necessary to achieve this aim and constitute a proportionate means to meet the respective aim.
- 75 States need to fulfil all these requirements cumulatively when limiting individuals' or groups of individuals' human rights – if one of them is not met, then the respective state will have violated the right to freedom of association of the respective individual or CSO, as the case may be.
- 76 Under the AfCHPR, Article 10 states that individuals have the right to freedom of association, provided that they abide by the law, which, according to the African Commission on Human and Peoples' Rights, means that they should abide by the principle of legality.<sup>88</sup> Additionally, Article 27 of the AfCHPR states 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. The African Commission on Human and Peoples' Rights has specified that these

are considered legitimate purposes that may restrict rights such as the right to freedom of association.<sup>89</sup>

### 6.1.1. Legal basis

- 77 The first requirement mentioned above is that any limitation of human rights, including the right to freedom of association, is prescribed by law, which means that it needs to have a basis in a law. This requirement is set out explicitly in Article 22 par 2 of the ICCPR and in Article 11 par 2 of the ECHR and Article 16 par 2 of the ACHR.
- 78 Generally, the term "prescribed by law", as set out in the ICCPR, has been seen as referring to laws of general application that are consistent with the ICCPR and in force at the time when the limitation is imposed.<sup>90</sup> The African Commission on Human and Peoples' Rights provides a similar interpretation with respect to the application of the AfCHPR, while adding that the respective law needs to have been based on a proper law-making procedure.<sup>91</sup>
- 79 At the European level, the ECtHR has adopted a more differentiated approach. While noting that the interference with a right must have some basis in domestic law,<sup>92</sup> the Court stipulated that the term "prescribed by law" implies not only statutory law, but also, among others, 'unwritten law',<sup>93</sup> by-laws that implement laws setting out restrictions,<sup>94</sup> and legal regimes regulating an area of activity, including rules made by a delegated rule-giving authority.<sup>95</sup>
- 80 Under Article 30 of the ACHR, on the other hand, human rights or fundamental freedoms may only be restricted in accordance with laws enacted for reasons of general interest. The Inter-American Court of Human Rights has noted that 'laws' in the above sense are general legal norms adopted for the general welfare

by the legislature and promulgated by the executive branch in accordance with the constitution and pursuant to the procedure set out in the domestic law of each state.<sup>96</sup>

81 Even where restrictions are set out in law, however, this by itself is not sufficient to avoid a violation of international human rights law. Rather, the relevant provisions will also need to be formulated in a clear and foreseeable manner,<sup>97</sup> and may not be arbitrary or unreasonable.<sup>98</sup> A law is “foreseeable” if it is formulated with sufficient precision to enable the person concerned – if necessary with appropriate legal advice – to regulate his/her conduct accordingly.<sup>99</sup> The law must be sufficiently clear and detailed in its terms to give individuals an adequate indication as to the circumstances and conditions in which public authorities are empowered to interfere with their human rights.<sup>100</sup> For example, a law regulating funding of CSOs needs to clarify precisely which obligations it imposes on which types of CSOs (and exceptions also need to be detailed clearly). Certain terms (e.g., “foreign funding” or “political activities”) need to be defined well and leave no room for ambiguous interpretation. Especially sanctions need to be tied to very specific behaviour (e.g. the failure to submit required reports, or the submission of incorrect information); laws stating that “any violations of the law will lead to sanctions” regularly do not meet the requirements of foreseeability.

82 When looking at funding restrictions in particular, the respective article of the law will need to clarify which type of funding is restricted in which manner, and which organisations will be affected by these restrictions. If the receipt of international funding is linked to certain obligations for CSOs, then these need to be outlined in detail, along with the consequences that follow in case certain obligations are not

met.

83 If laws are too vague, and do not clarify these points, then they may be open to various different interpretations, depending on which person or body is applying them, as the respective persons applying the laws may not know what those formulations mean or will not be certain how they should be interpreted. This will not only create uncertainty for those that apply the laws but will also considerably reduce the authority of these documents as ‘laws’, and as strict benchmarks that regulate everyday life

Instead, vague formulations that are not defined in the law or, even worse, which are coupled with equally vague definitions, will expand the discretion of key state authorities, and may lead to arbitrary application of the law.<sup>101</sup> Moreover, and equally importantly, such laws will provide little guidance to CSOs and their members as to which conduct is prohibited and which is not.<sup>102</sup>

**84 In such cases, the law may be found to be insufficiently precise. Restrictions will then not be considered to be ‘prescribed by law’ and may thus be found to be in violation of international human rights law.**

### *6.1.2. Legitimate aim*

85 Human rights of individuals or groups, including the right to freedom of association, may not be restricted without good, and objective reasons to do so.



More specifically, international human rights instruments such as the ICCPR and ECHR and ACHR state that human rights may only be restricted if the respective laws follow a legitimate aim.

86 Both Article 22 par 2 of the ICCPR and Article 16 par 2 of the ACHR on the one hand, and Article 11 par 2 of the ECHR on the other contain (largely identical) lists of what may be considered as legitimate aim when restricting the right to freedom of association. These are: the protection of national security or public safety, the protection of public health and morals, and/or the protection of the rights and freedoms of others. While the ICCPR also lists “public order (ordre public)” as a legitimate aim, the ECHR instead specifies “the prevention of disorder or crime” as a legitimate aim (which appears to be slightly narrower in scope than the term public order). Similarly, Article 27 of the AfCHPR states 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. As mentioned above, the African Commission on Human and Peoples’ Rights has specified that these are considered legitimate purposes that may restrict rights such as the right to freedom of association.<sup>103</sup>

87 It should be noted here that legitimate aims listed in the ICCPR, the ECHR and the ACHR are conclusive. States cannot refer to additional grounds, even in domestic legislation, and cannot loosely interpret international obligations to restrict key human rights such as the right to freedom of association.<sup>104</sup> This means that restrictions of the right to freedom of association based on other grounds than those listed in the above human rights instruments are not considered legitimate and may constitute violations of Article 22 of the ICCPR, Article 11 of the ECHR and Article 16 of the ACHR.

88 Thus, it may be legitimate to restrict activities of CSOs whose aims and statutes violate state law (e.g. if a CSO was created with the purpose of engaging in criminal activities, or if its statutes clearly call for the violent overthrow of the existing government, or for other violent actions). The European Court of Human Rights has stressed that states have a right to check and satisfy themselves that a CSO’s aim and activities are in conformity with the rules set out in legislation, if this is done in a manner that is compatible with their obligations under the ECHR.<sup>105</sup>

89 Depending on the individual circumstances of each case, states may thus investigate CSOs, and impose limitations on their activities in the interests of maintaining national security and the public order and protecting the rights and freedoms of others. Conceivably, such limitations could also involve restrictions on funding, such as reporting and transparency requirements, notably if there is a reasonable suspicion that a certain CSO has engaged in criminal activities such as corruption, activities endangering national security, or other examples of organised crime.

#### Is state sovereignty a legitimate aim?

90 In cases where states have asked CSOs to register as ‘foreign agents’, or under similar denominations that indicate undue foreign influence, it has usually been justified with the need to protect state sovereignty, or a state’s traditional values. **Generally, the protection of state sovereignty and traditional values is not included in the list of legitimate aims set out in the above-mentioned international instruments.**<sup>106</sup> **Restrictions based on this aim alone would thus not be compliant with the ICCPR, ECHR, ACHR or AfCHPR standards.** Allowing states to limit human rights based on such vague and

general concepts would also be highly problematic per se.

- 91 On the other hand, depending on the definition of terms such as 'state sovereignty', such a justification could in certain cases arguably be covered by the legitimate aim of national security, as provided in Article 22 par 2 of the ICCPR, Article 11 par 2 of the ECHR and Article 16 par 2 of the ACHR. **Assertions of national security will, however, only justify measures limiting rights such as the right to freedom of CSO if they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.<sup>107</sup> Also, national security may not serve to justify measures aimed at perpetrating repressive practices against a state's own population.<sup>10</sup>**

#### Is transparency a legitimate aim?

- 92 Recently, an increasing trend has been noted among states across the globe to limit international funding as part of their strategies to combat phenomena such as terrorism and money laundering. Examples of both anti-terrorism and anti-money laundering legislation have been recognized as following legitimate aims<sup>109</sup> (at the very least, they aim to protect national security and/or the public order and prevent disorder or crime).
- 93 At the same time, more and more states base restrictive legislation on the need to ensure transparency within the civil society sector. Openness and transparency are no doubt important to establish accountability and public trust in the civil society sector. However, while transparency may in some cases be a legitimate means to help protect national security or public order, or prevent disorder or crime, it is questionable whether it can be qualified as a legitimate aim in and of itself. In fact, states shall not

require, but shall encourage and facilitate associations to be accountable and transparent.<sup>110</sup>

- 94 Certainly, transparency is not listed as a legitimate aim in the relevant international instruments, e.g. in Article 22 par 2 of the ICCPR, Article 11 par 2 of the ECHR, Article 16 par 2 of the ACHR or Article 27 par 2 of the AfCHPR. Moreover, transparency, by itself, is a quite general term that is not as specific as the existing legitimate aims, e.g. protection of national security, public order, health, or the rights and freedoms of others.
- 95 With respect to transparency of the actions of individuals, or CSOs, transparency will always need to be balanced with their human rights, e.g. the right to association, or the right to private life. Bearing this in mind, it would be difficult to talk about transparency as a legitimate aim per se, especially due to the negative consequences that full disclosure may have on the affected individuals and their human rights. It is to be concluded, therefore, that **'transparency' is, by itself, not a legitimate aim under international human rights law,<sup>111</sup> and any legislation restricting international funding for CSOs that bases itself only on the need to ensure transparency, without linking it to existing legitimate aims that can be justified, will not be in line with Article 22 par 2 of the ICCPR, Article 11 par 2 of the ECHR, Article 16 par 2 of the ACHR or Article 27 par 2 of the AfCHPR.**

#### Is aid effectiveness a legitimate aim?

- 96 Another justification raised by states to limit the international funding of CSOs is the need to ensure aid effectiveness, harmonize donor initiatives and ensure accountability of development partners.<sup>112</sup> This approach stems from attempts in recent decades to adopt a more

collaborative and effective approach towards development aid, as evidenced in implementation frameworks such as the Aid Effectiveness Agenda of the Paris Declaration (2005),<sup>113</sup> the Accra Agenda for Action (2008)<sup>114</sup> and the Busan Partnership for Effective Development Cooperation (2011).<sup>115</sup> These frameworks have gradually required harmonization of donor initiatives and accountability of development partners, and have also required partner States to take ownership of aid initiatives.<sup>116</sup>

- 97 While there is a definite need in certain countries to harmonize the aid that they receive, to ensure that it is effective and sectorally balanced, such harmonization efforts are not covered by the legitimate aims set out in the ICCPR, the ECHR, the ACHR or the AfCHPR. Thus, while it is important that states harmonize the aid offers that their governments receive, this does not allow governments to interfere with the objectives and activities (and hence funding for these activities) of non-governmental organisations. Indeed, as indicated by the UN Special Rapporteur on freedoms of peaceful assembly and of association, requiring associations to align themselves with governments' priorities contradicts one of the most important aspects of freedom of association, namely that individuals can freely associate for any legal purpose.<sup>117</sup>

### 6.1.3. Necessity and proportionality

- 98 Even if restrictions on international funding are grounded in law, and follow a legitimate aim, they still need to be necessary and proportionate to meet the intended aim in order to be considered compliant with relevant international human rights instruments.<sup>118</sup>

#### Necessity

- 99 A measure interfering with or restricting

a human right is considered necessary if it responds to a 'pressing social need', meaning that the realization of the aim is contingent on the implementation of this measure. A "pressing social need" presupposes plausible evidence of a sufficiently imminent and real threat (and not of a purely hypothetical one) to the State or to a democratic society.<sup>119</sup>

- 100 Thus, when looking at a law or regulation limiting international funding of CSOs, the following questions need to be asked:

- Is there a real and imminent threat to the State or to democratic society?
- Are there any state measures (e.g. laws or policies) in place to counter this threat?
- Are the existing state measures adequate, and adequately implemented, to meet the threat?
- If no measures exist, or if they are not adequate, what indications are there that the proposed measures will be adequate, and appropriate to address the threat and resolve the issue?

- 101 Looking at the first question, **it would only appear necessary to restrict the activities of individual CSOs if there is a strong suspicion, based on objective evidence, that they have been engaging in illicit activities such as the crime of terrorism, which aims at the "destruction of human rights, fundamental freedoms and democracy, threaten[s] territorial integrity and security of States and destabilis[es] legitimately constituted Governments"**.<sup>120</sup>

- 102 In numerous cases involving legislation that restricts CSOs' access to international funding, relevant explanatory statements issued by legal drafters stress the need for the public to know how such CSOs are funded, given the important roles



that they play in public policy discourse, and in shaping people's opinions. Taking part in public discussions on issues that are of public interest is an important aspect of many CSOs' work, and also part of their right to freedom of expression. **It is not clear, however, why the mere fact of engaging in policy discourse should constitute a threat, leading to a pressing social need to impose restrictions on international funding or more burdensome reporting obligations and/or inspections. Especially in cases where political parties, with even greater involvement in public policy discussions, or business corporations, which often receive larger amounts of international money, and arguably may have a much greater influence on policy issues, do not underline such requirements.**<sup>121</sup>

**103 At the same time, and as indicated in the second question, even where strong and evidence-based suspicions of illicit activities or serious crimes exist (e.g. terrorism financing or money laundering), the proposed measures would only be necessary if there are no other existing provisions to address these issues, or if existing provisions have proved ineffective.**<sup>122</sup> **States generally already have criminal laws, banking legislation and financial surveillance techniques in place to meet the threat posed by financing of terrorism and money laundering.**

104 Thus, in numerous countries (including those where new and additionally restrictive legislation has been passed), civil society organisations are already obliged to submit to extensive reporting and review procedures to ensure that they spend their money accordingly, and that their own internal control mechanisms are working properly.<sup>123</sup> Also for this reason, it is debatable whether additional reporting mechanisms are truly necessary and

justified, and whether they really achieve much more than the already existing mechanisms.

**105 Overall, priority should always be given to applying, and if necessary enhancing existing laws and mechanisms, before adopting new, potentially cumbersome laws and regulations.**<sup>124</sup> **Also, under no condition should counter-terrorism or counter-extremism measures be used as a pretext to constrain dissenting views or an independent civil society.**<sup>125</sup>

106 In countries where no laws or policies exist to counter threats such as terrorism financing or money laundering, it may be necessary to introduce certain measures. Generally, CSOs may legitimately be subjected to reporting and disclosure requirements with respect to their funding, if these requirements are based on a legitimate aim.<sup>126</sup> However, such requirements shall not be unnecessarily burdensome<sup>127</sup> or invasive. In particular, in line with the right to access resources, as part of the right to freedom of association, any control exercised by the state over CSOs receiving international funding should not be 'unreasonable, overly intrusive or disruptive' to the CSOs' lawful activities.<sup>128</sup> Bearing this in mind, **it would appear to be unnecessary to require CSOs to always obtain prior authorization to receive international funds.**<sup>129</sup> At most, the state may require CSOs to notify it about the receipt of such funds; such system should come with an inherent approval mechanism and should not provide any administrative authority with the ultimate decision-making power as to whether CSOs may receive such funds or not (this power should only, following a proper procedure, be granted to courts).<sup>130</sup>

Similar considerations apply with respect to systems where funds need to be channelled through government funds or bodies; where CSOs receiving international funds are subjected to excessively burdensome reporting requirements; where CSOs are held to disclose the names, and at times even the places of residence of donors; where CSOs may not engage in human rights, advocacy or other activities; where such organisations' work is stigmatized or delegitimized due to their existence labelled in a negative way (e.g. as foreign agents); where they are harassed by special audit or inspection campaigns; or where criminal sanctions are imposed on CSOs that fail to comply with the above.<sup>131</sup>

107 It is important, in this context, to **distinguish reporting obligations from disclosure obligations** imposed by such laws.<sup>132</sup> Even if in some of the above cases, reporting obligations are considered necessary to achieve a legitimate legal aim, it is doubtful whether there is any case where disclosing the names, and possibly even the places of residence of private donors would be necessary in the same way. There is no indication that publishing the names and other private details of donors would greatly facilitate or expedite the achievement

of legitimate aims such as national security, preventing disorder or crime, or protecting the rights and freedoms of others, as the mere publication of sources of funding would not appear to be helpful in determining the nature and legality of an organisation's work.<sup>133</sup> Furthermore, the ECtHR has clarified in its case law that a legal requirement for an association to reveal the names of its members to a third party could constitute an unjustified interference with Article 11 of the ECHR;<sup>134</sup> these findings could also extend to donors, and the necessity of disclosing their private information.<sup>135</sup>

108 Branding CSOs receiving international funding as a separate category (e.g. 'foreign agents') would also not seem to be necessary to achieve the above-mentioned legitimate aims. Even if a state can reasonably argue that the intended aim is protected under international law (i.e. covered by the overall aim of protecting national security or public order, for example), stigmatising entire groups of CSOs and potentially ruining their reputations cannot be considered a necessary step towards combatting serious crimes and enforcing the rule of law. Moreover, **simply assuming undue foreign influence because a CSO receives funding from an international source does not reveal a fact-based approach.**<sup>136</sup>

109 Another question to be asked (and question number four in the list of questions outlined in par. 100 above) is whether the proposed new legislation is even able to achieve the respective aim, e.g. if a draft law introduces restrictions on international funding for civil society organisations with the intended aim of combating money laundering and terrorism financing, will this indeed solve these problems?

110 Statistics and research have not revealed any instances of terrorism financing

that have been detected as a result of special supervisory measures targeting civil society organisations.<sup>137</sup> This would indicate that in the vast majority of cases, the limitation of international funding for CSOs, and the often quite invasive side-effects of such laws would not appear to be necessary to achieve the above aim. The same considerations apply with respect to restrictive legislation using blanket bans to eradicate terrorism in general.<sup>138</sup>

- 111 Regarding aims such as combatting terrorism or money laundering, legislation that imposes special burdens on all CSOs receiving funding from international sources, as well as their members, beneficiaries, or donors, thus does not appear to be a more promising approach (or the best use of time or public money) than investigations of individual CSOs based on suspicions of wrongdoing, as in other areas of criminal law.

Indeed, the UN Special Rapporteur on freedoms of peaceful assembly and of association has declared that too general and broadly framed laws are not in line with the principle of necessity.<sup>139</sup>

- 112 Therefore, as also outlined in relevant international texts, attempts to combat terrorism financing and money laundering should adopt a more targeted approach, following risk-based assessments, which have proven to be more successful.<sup>140</sup>

### Proportionality

- 113 A measure restricting or interfering with a human right is proportionate to the intended aim if it is an adequate measure to achieve this aim, meaning that the interference with the respective right (in this case the right to freedom of association) is commensurate to the aim.<sup>141</sup> Determining which measures to adopt to fulfil a specified objective, state authorities will always need to choose the least invasive measure,<sup>142</sup> which will not unduly restrict relevant human rights and freedoms, while still achieving the intended aim.

- 114 In the country examples listed above, concerns with respect to proportionality arise in relation to a number of issues, including extensive and burdensome reporting requirements, serious consequences for human rights of individuals, high and far-reaching sanctions, invasive and frequent inspections and others.

- 115 **Generally, blanket prohibitions and limitations of rights**, as found in some of the laws described above, **will not be proportionate**,<sup>143</sup> even if they are found to be necessary. Limitations of rights need to be based on the individual circumstances of each situation, meaning that in each individual case, the rights of the individual need to be balanced versus the public interest. Blanket bans or restrictions cover a wide group of people, or in this case, CSOs and individuals, and do not foresee such individual assessments.

- 116 Moreover, certain measures mentioned above under par 106 *supra*, e.g. extensive notification requirements, limiting access to donations, or reporting and disclosure requirements, will greatly, and possibly negatively affect the work of the CSOs. **As stated by the OSCE/ODIHR and the Venice Commission, excessive state**

**monitoring over the activities of non-commercial organisations will hardly be conducive to the effective enjoyment of freedom of association.**<sup>144</sup>

Furthermore, labelling CSOs as being “supported from abroad” or ‘foreign agents’ implies that CSOs with international funding are engaged in untoward, possibly even illicit activities and that they are not to be trusted. This affects the way internationally-funded CSOs are perceived in society and may create a chilling effect which prevents possible beneficiaries or other partners from cooperating with such organisations and may well deter international, or other funders from making financial contributions.<sup>145</sup> Indeed, the UN Human Rights Committee has stressed that laws restricting access to foreign funding should not risk the effective operation of CSOs as a result of overly limited fundraising options.<sup>146</sup>

**117 Laws that limit the exercise of the right to freedom of association of certain pre-identified organisations by imposing burdensome reporting, disclosure, notification or other obligations only because these organisations are funded by foreign governments, organisations or individuals will thus regularly not be in line with international human rights instruments.**<sup>147</sup>

118 As stated in the 2015 Joint OSCE/ODIHR-Venice Commission Guidelines on Freedom of Association, international funding of CSOs, even where it raises legitimate concerns, should be addressed through means other than a blanket ban, or overly restrictive measures.<sup>148</sup> With respect to reporting obligations, the Guidelines also stress that reporting and transparency requirements, while permissible per se, “shall be proportionate to the size of the CSO and the scope of its activities, taking into consideration the value of its assets and income.”<sup>149</sup> Further,

relevant legislation should contain safeguards to ensure the respect of the right to privacy of the clients, members and founders of CSOs, as well as provide redress for any violation in this respect.<sup>150</sup> Generally, the Council of Europe’s Committee of Ministers has stressed that reporting and disclosure requirements should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality.<sup>151</sup>

119 Moreover, the UN Human Rights Council has called upon states to ensure that reporting requirements placed on individuals, groups and organs of society do not inhibit their functional autonomy.<sup>152</sup> Reporting requirements should also not place an excessive or costly burden on an organisation.<sup>153</sup> For example, in case of referring to restrictions in the name of countering terrorism, **the UN Special Rapporteur on Freedoms of Peaceful Assembly and Association has highlighted the important contributions that many civil society organisations make to society and the rule of law in a wide variety of sectors, including the fight against terrorism. Organisations do essential work in the areas of poverty reduction, peace-building, humanitarian assistance, human rights and social justice, often in politically complex environments.**<sup>154</sup> **Inhibiting such CSOs in their work thus may often prove counterproductive, by targeting the very organisations that are de facto allies in the fight against terrorism.**

**120 In cases where the failure to comply with certain obligations leads to enhanced inspections or sanctions, these measures also need to be proportionate to the respective wrongdoing** – this means that the gravity or invasiveness of the sanction needs to correspond to the gravity of

the breach of law. Increased inspections should only take place if there are suspicions of serious wrongdoing, and not for minor acts such as the failure to register, notify, or report on the receipt of international funding. This is also reflected in the Council of Europe's Committee of Ministers' Recommendation Rec(2007)14, which indicates that external interventions in the running of CSOs are not permissible unless there is a serious breach of legal requirements or where there are reasonable grounds to suspect that serious breaches have occurred or are about to occur.<sup>155</sup>

- 121 As far as sanctions are concerned, the principle of proportionality is only met if the imposed sanctions are the least intrusive means to achieve a desired objective.<sup>156</sup> The Council of Europe's Committee of Ministers' *Recommendation Rec(2007)14* notes that in most instances, the appropriate sanction against civil society organisations for breach of the legal requirements applicable to them "should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil or criminal penalty on them and/or any individuals directly responsible."<sup>157</sup> The European Court of Human Rights considers that the nature and severity of the sanction imposed are factors to be taken into account when assessing the proportionality of the interference.<sup>158</sup>

- 122 Suspensions of the work of CSOs are exceptional measures that need to be based on very grave violations of law, such as potential threats to the security of the state or of certain groups, or to fundamental democratic values, and should only be imposed following a court order.<sup>159</sup> The dissolution of CSOs in particular should only be imposed as a last resort, in serious cases where a CSO has engaged in conduct that creates an imminent threat of violence**

**or other grave violation of the law.<sup>160</sup>**

In addition, given the serious impact of such measures, the dissolution of a CSO must be preceded by a substantive and reasoned court decision following an appropriate proportionality assessment undertaken by the competent judges, and should never be the automatic outcome of administrative or court proceedings.<sup>161</sup>

**Minor infractions, on the other hand, such as the failure to submit or publish financial statements, or non-adherence to a required format, or similar formalities, should never lead to the suspension<sup>162</sup> or dissolution of a CSO.<sup>163</sup>** Rather, such cases should first be

met with a request to rectify the omission (within an adequate timeframe), and only later, if needed, to the imposition of fines,<sup>164</sup> which should then also be proportionate to the infraction.

- 123 Generally, penalties should be imposed along a gradual scale of sanctions, which should foresee the issuance of warnings and the imposition of fines before any decisions are taken on the dissolution of the CSO.<sup>165</sup> The respective sanctions need to be proportional to the gravity of the wrongdoing<sup>166</sup> and should offer the possibility to rectify the breach.<sup>167</sup> In any case, even before the issuance of a warning, the public CSO should be offered the possibility to seek clarifications about the alleged violation.<sup>168</sup> Moreover, the relevant CSOs/foundations should have the right to appeal, with suspensive effect.<sup>169</sup>

- 124 The UN Human Rights Council has also stated that generally, no law should criminalize or delegitimize activities in defence of human rights on account of the geographic origin of funding thereto.<sup>170</sup>**

- 125 In addition, **many of the above-mentioned laws have created considerable burdens not only for CSOs, but also for states.** If CSOs need



to report more frequently, and in greater depth about funding received, then these reports also need to be read by the relevant state bodies. The need to ask for permission to receive funds also means that relevant state agencies need to devote time and man-power to reviewing such requests and issuing decisions. This also means less time to deal with other equally important state matters. More frequent inspections translate into more inspectors, and less time for other types of work. More court procedures aimed at the dissolution of CSOs means less time for other court procedures. Thus, in terms of proportionality, it is also highly questionable whether the burdens that such restrictive measures impose on the state itself are really in proportion to the aim that is to be achieved.

## 6.2. Compliance with the Non-Discrimination Principle

126 Legal provisions that introduce limitations and obligations for certain groups of people or CSOs oftentimes raise concerns with respect to discrimination in the exercise of persons' rights and freedoms. In international instruments, the non-discrimination principle is set out in Article 2 of the ICCPR and in Article 14 of the ECHR. A more general non-discrimination principle can also be found in Protocol 12 to the ECHR.

127 Generally, as stated in the OSCE/ODIHR-Venice Commission Guidelines on Freedom of Association, freedom of association should be enjoyed by everyone equally, which means that relevant regulations may not discriminate against certain organisations on any grounds.<sup>171</sup> Moreover, the UN Human Rights Council has called upon states to ensure that **reporting requirements placed on individuals, groups and organs of society are not discriminatorily imposed on potential**

**sources of funding** aimed at supporting the work of human rights defenders (aside from those restrictions that also apply to other activity unrelated to human rights within the country to ensure transparency and accountability).<sup>172</sup> Generally, civil society organisations with legal personality should be subject to the same administrative, civil and criminal law obligations and sanctions that are generally applicable to other legal persons.<sup>173</sup>

128 Discrimination is any unjustified difference in treatment of certain people or groups of people who are in the same, or at least similar situations. **If CSOs receiving funds from abroad are subjected to particular obligations that other CSOs do not need to meet, then this is already a pertinent difference in treatment.** Such difference in treatment also exists between the affected CSOs and special types of CSOs that may not be included in the scope of the relevant legislation (e.g. religious organisations or trade unions).

129 The ECtHR has stated that any difference in treatment is discriminatory if it has "no objective and reasonable justification", meaning that it does not pursue a legitimate aim, and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised".<sup>174</sup>

130 Even if in some cases mentioned above the aims pursued by such legislation are legitimate, the blanket obligations imposed on certain CSOs merely due to the source of their funding is disproportionate. In its case law, the European Court for Human Rights has also been reluctant to accept the international origin of a CSO as a legitimate reason for differentiated treatment.<sup>175</sup> Similar considerations would appear to apply in cases where the difference in treatment is based on mere

international funding.<sup>176</sup>

- 131 There is thus no objective and reasonable justification for this difference in treatment vis-à-vis CSOs funded by domestic sources. It is also not clear why, if foreign funding of CSOs is really as dangerous as propagated by certain states, these considerations do not apply for certain types of organizations exempted by law from the imposed obligations, e.g. religious organizations or trade unions. Accordingly, the difference in treatment of organizations cannot be justified.
- 132 Similarly, legislation that targets only civil society organisations, and no other entities such as political parties and businesses with no clear and legitimate justification for such difference in treatment will also be discriminatory. Indeed, this is particularly relevant, as political parties play a large, and arguably even greater role in public life and public discourse, and businesses often receive significantly greater sums than civil society CSOs (also from abroad). Bearing this in mind, equality between sectors is important;

**CSOs should not be required to submit more extensive reports and information than other legal entities.<sup>177</sup>**

- 133 Therefore, it is not justifiable if laws single out CSOs that receive international funding and oblige them to report more frequently on international funding received, to disclose private details of their donors, or to notify the state in such cases.<sup>178</sup> Such laws therefore discriminate against this group of CSOs. Legal provisions that allow more invasive inspections of such CSOs or facilitate their dissolution will likewise be**

**discriminatory.**

### **6.3. Compliance with the Right to Private Life**

- 134 Legislation that requires CSOs receiving international funds to disclose detailed information on the funds that they receive, including the identity and possibly even places of residence of the donors and the amounts received; or that allows the state to otherwise interfere with CSOs' activities for this reason, will also affect the private lives of the respective CSOs, their members, beneficiaries and their donors. The right to private life is protected by Article 17 of the ICCPR, Article 8 of the ECHR and Article 11 of the ACHR.
- 135 According to Article 17 par 2 of the ICCPR, any interference with individuals' right to private life may not be arbitrary or unlawful; Article 11 par 2 of the ACHR similarly does not cover arbitrary or abusive interferences. Article 8 of the ECHR, on the other hand, is more specific, and states that such interference is only justified if it is set out in law, follows a legitimate aim, and is necessary and proportionate to this aim. The legitimate aims set out in Article 8 par 2 include national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.
- 136 The right to privacy applies to individuals, but also to CSOs.<sup>179</sup> The European Court for Human Rights has held that Article 8 also covers the right of a company to respect for its seat, office or professional premises and that any search of such premises of a private actor needed to have a clear legal basis and be proportionate to the legitimate aims pursued by the action.<sup>180</sup> Extraordinary

inspections of CSOs benefiting from international funding affect the right to privacy of these CSOs, their members and beneficiaries, and should not take place unless there is suspicion of a serious contravention of the legislation or any other serious misdemeanour. Inspections should only serve the purpose of confirming or discarding the suspicion and should never be aimed at molesting CSOs and preventing them from exercising activities consistent with the requirements of a democratic society.<sup>181</sup> Also, they should always be based on a court order.<sup>182</sup>

137 For these reasons, and also those already set out in Section IV 1 on the right to freedom of association, **the mere fact that a CSO receives funds from abroad would not appear to be sufficient justification by itself to warrant enhanced powers of the state to inspect and otherwise oversee the work of CSOs.** These types of interferences will similarly not be considered necessary or proportionate with the rights to privacy of the CSO,<sup>183</sup> its members, beneficiaries or donors.<sup>184</sup> Rather, such interferences will be considered especially grave in cases when members or beneficiaries are categories of persons that deserve special protection, such as children or disabled persons, or victims of crimes. Disclosure could also lead to violations of data protection regulations, depending on how the respective data ends up being used.<sup>185</sup>

138 Moreover, as indicated above, there is no conceivable situation where it would appear to be necessary or proportionate to publish the names and other details about individual donors. In relevant situations, states have so far not established how disclosing private information on donors would help them combat serious crimes such as money laundering and terrorism financing or assist in the achievement of

other legitimate aims. Such disclosure obligations are also not proportionate to the intended aims, as disclosing private details of individuals supporting certain associations could expose not only their names and places of residence, but also their affiliation, opinion and belief.<sup>186</sup> More specifically, the fight against crime, for example, is the sole responsibility of the state, and not of individual persons, whose rights should not be violated in this way.<sup>187</sup>

139 To prevent this, legislation should contain safeguards to ensure the respect of the right to privacy of the clients, members and founders of CSOs, as well as to provide redress for any violation in this respect.<sup>188</sup> Moreover, as noted in the Council of Europe Committee of Ministers' Recommendations (2007)14, *"[a]ll reporting should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality"*. Also, adequate safeguards should be in place to ensure that personal data that will be collected, processed and stored during that process are protected against misuse and abuse in line with international standards, particularly the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.<sup>189</sup>



# 07

## CONCLUSION

140 As noted above, this paper was undertaken in order to consolidate existing practices and arguments, and help partners to assess the compliance of existing laws and policies aiming to limit the access of CSOs to international funding with international human rights standards, in particular the right to freedom of association, the right to private life, and the right to be free from all forms of discrimination.

141 CSOs have a right to freedom of association, which also includes access to resources. States need to create and maintain an enabling environment for civil society, by ensuring that CSOs are able to operate freely and are not unduly hindered in the exercise of their functions.<sup>190</sup> This means that CSOs also need sufficient and diverse resources to support the implementation of their activities, including international funding.

142 CSOs' right to freedom of association, including access to such resources, may only be limited if such limitations are set out in law and follow a legitimate

aim. Such restrictions are further only permissible if they are necessary to achieve said aim, and if the measures chosen for this purpose are proportionate to the intended aim.

143 The first requirement (i.e. restrictions to the right to freedom of association need to be 'set out in law') means that the respective obligations or restrictions need to be set out in (written or unwritten) law. Moreover, legislation needs to be formulated with sufficient precision and foreseeability; it may not be formulated in a vague manner that renders it impossible for CSOs and their members to know how to follow the law properly (such legislation usually provides state administrations with wide discretion and furthers arbitrary application of relevant provisions).

144 Second, limitations of access to resources need to follow a legitimate aim. In this context, it is important to note that international human rights law only recognizes certain aims as legitimate, namely those that are set out in international human rights instruments

such as the ICCPR, the ECHR, the ACHR and the AfCHPR. These state that the right to freedom of association may only be limited to protect national security or public safety, in the interests of public order, to prevent disorder or crime (only in the ECHR), to protect public health and morals, and/or the rights and freedoms of others. Thus, any attempts to justify restrictions to international funding for CSOs by invoking other aims, such as state sovereignty, transparency of the civil society sector, or aid effectiveness, will not be in line with international human rights standards, as these are not part of the above list of legitimate aims. Even national security considerations will only be considered legitimate in the above sense if they aim to protect the existence of a nation or its territorial integrity or political independence against force, or the threat of force.<sup>191</sup> Transparency, on the other hand, may be a means to protect national security, prevent disorder or crime, or safeguard the rights and freedoms of others, but is never a legitimate aim in itself.<sup>192</sup>

145 Further, even if limitations to access international funding are set out in law and perceived to follow a legitimate aim, they will still need to be necessary in a democratic society to achieve the intended aim. Such restrictions are rarely supported by adequate fact-based research and it is generally difficult to see why it would be necessary to single out a particular sector of society to protect national security, prevent disorder or crime, or protect the rights and freedoms of others, among others. Often, CSOs are already under quite stringent reporting requirements; it is thus not clear why additional legislation should be needed, or why, e.g., disclosure of private information on donors would be necessary. Rather, in most cases when states decide to limit international funding for CSOs, there are no real indications

that requiring prior or post-factum reporting or registration in a separate register, disclosure of donor information, or labelling and thereby stigmatizing these types of CSOs are really necessary measures to fulfil a legitimate aim. Similar considerations apply with respect to additional inspection measures targeting only such CSOs, and to grave sanctions in cases of non-compliance. Instead, as also seen in practice, the risk-based approach also adopted for other potential crimes or misdemeanours would appear to be a more promising path to follow.

146 Finally, given the rights to freedom of association enjoyed by CSOs and their members, beneficiaries and donors, it is equally important that all restrictions to international funding are proportionate to the intended aim. Here, it is essential to remember that blanket bans or restrictions that automatically affect a certain sector or group will never be proportionate in the above sense, as this would require an individual assessment and weighing of the rights of the public on the one hand and the rights of the CSO on the other. Extensive and overly burdensome reporting requirements (existing on top of other reporting requirements), enhanced inspections of CSOs, the obligation to disclose private donor information, stigmatization and harassment of CSOs and harsh sanctions such as suspension and dissolution of CSOs will never be proportionate to any legitimate aim, given their serious and disruptive effects on the activities of such organisations, and on individual human rights.

147 In addition to the above-mentioned different types of potential violations of the right to freedom of association, extensive reporting requirements that oblige CSOs to report in detail on sources of funding and activities may, depending on the disclosure requirements, also

constitute breaches of the right to private life of donors and beneficiaries of such activities. Obligations that are vaguely formulated will also regularly not be based on law, and the arguments mentioned above in relation to the legitimacy of aims will apply here as well, as will the points made with respect to necessity and proportionality of the measures. In particular, it is difficult to imagine why it would be necessary to disclose (to the state or the public) extensive details of activities and provide specific information on individual donors to protect legitimate aims such as national security or the rights and freedoms of others. However, such additional requirements also mean greater effort on the side of the state to oversee implementation of the law, resulting in a considerable administrative burden. In this context, therefore, it is highly questionable whether the end justifies the means.

- 148 Generally, the difference in treatment between CSOs receiving international funding and other CSOs, or certain types of associations that may be excluded from the scope of relevant laws, is not to be justified. Legislation limiting these types of organisations in particular, will thus regularly also discriminate them, in addition to the other violations of international law mentioned above.
- 149 In sum, there is no justification under international law for legislation that prevents, or extensively regulates the receipt of international funding for CSOs. In particular where such regulation leads to oppressive administrative burdens, the destruction of CSOs' reputations, the invasion of donors' and other individuals' private lives, invasive and potentially arbitrary inspections, and extensive and disproportionate sanctions.
- 150 In countries that follow such restrictive legislation, the impact on the civil society

sector is huge. CSOs have had to shut down due to lack of funds, lost valuable partners, both donors and beneficiaries, due to targeted state stigmatization and harassment, and had to diminish or re-orient some of their activities in order not to violate key legal provisions.

- 151 What makes matters worse is that it does not look as if the proposed aims of legislation focusing on internationally-funded CSOs and ensuring greater transparency of this particular sector (e.g. through enhanced reporting and extreme disclosure requirements, but also through stringent other oversight mechanisms) have been met. More specifically – blanket provisions requiring all internationally-funded CSOs to report more frequently, disclose private details of their donors, notify about international funds received, allow more and irregular inspections, engage closely with state administration in all aspects relating to internationally-funded projects and programmes, have not led to less corruption, reduced the funding of terrorism, or prevented money laundering. Nor have the related laws in any way influenced the manner and extent of 'foreign influence' in a given country.
- 152 In a situation when laws restricting the access of CSOs to key resources are not only in violation of key international instruments that the states in question have signed and ratified, but in the end not even effective. It is time to take a new approach. Excessive state oversight should be replaced with greater cooperation between the state and civil society, involving CSOs in the drafting, implementation and assessment of legislation that affects them, at the same time encouraging them to self-regulate. Such approaches may be more apt to lead to the desired results and would constitute a better use of capacities and resources, both within the civil society

sector, and within state administration  
itself.

# ENDNOTES

1 Civil society organisations (CSOs) are voluntary self-governing bodies or organisations established to pursue the essentially non-profit-making objectives of their founders or members. They encompass bodies or organisations established both by individual persons (natural or legal) and by groups of such persons. They can be either membership or non-membership based. CSOs can be either informal bodies or organisations or ones which have legal personality. They may include, for example, voluntary groups, non-profit organisations, associations, foundations, charities or geographic or interest-based community and advocacy groups.

2 The paper was prepared by Alice Thomas, with the assistance of Eszter Hartay, Senior Legal Advisor with the European Center for Not-for-Profit Law Stichting. The author is grateful for the information and/or feedback provided by Jeremy McBride, Nick Robinson, Tamara Otiashvili, Ziya Çağa Tanyar, Natalia Bourjaily, Francesca Fanucci, Debbie Gild-Hayo, Dima Jweihan, Zach Lampell, Jocelyn Nieva, Elly Page, Irene Petras, Margaret Scotti and Olga Smolianko.

3 See the ECtHR case of *Ouranio Toxo and others v. Greece*, application no. 74989/01, judgment of 20 October 2005, par 37. See also Inter-American Court of Human Rights, cases of *Huilca-Tesce v. Peru*, 3 March 2005, Series C no. 121, par 77 and *Garcia y familiares v Guatemala*, 29 November 2012, Series C no. 258, pars 117-118. See also Joint Guidelines on Freedom of Association (Guidelines), issued by the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the European Commission for Democracy through Law (Venice Commission) in 2015, Principle 2 on the state's duty to respect, protect and facilitate the exercise of the right to freedom of association, par 27.

4 As implied in Council of Europe, Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, 10 October 2007, para 5, which states that "NGOs should enjoy the right to freedom of expression and all other universally and regionally guaranteed rights and freedoms applicable to them." See also Inter-American Court of Human Rights, *Huilca-Tesce v. Peru*, 3 March 2005, Series C no. 121, paras. 69-71, and Guidelines, par 16, and African Commission on Human and Peoples' Rights: Guidelines on Freedom of Association and Assembly in Africa, adopted at the Commission's 60th Ordinary Session held in Niamey, Niger, from 8 to 22 May 2017, par 8.

5 See Guidelines, par 102, which note that otherwise, the right to freedom of association would be deprived of all meaning. In this context, see ECtHR, *Ramazanov v. Azerbaijan*, application no. 44363/02, judgment of 1 February 2007, pars. 59-60, where the Court concluded

that the failure to register the applicant's association effectively restricted the association's ability to receive funding and thus function properly and found that this amounted to a violation of Article 11 of the Convention. See also the Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par 8. For non-governmental organisations specifically, which are one of the forms that CSOs may take (op cit footnote 1), see Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers' Deputies, par 50. For associations promoting human rights, see also the UN Declaration on the Right and Responsibility, including of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, adopted by the UN General Assembly on 8 March 1999, Article 13. See also and African Commission on Human and Peoples' Rights: Guidelines on Freedom of Association and Assembly in Africa, pars 37-38.

6 See Guidelines, principle 7 on the freedom to seek, receive and use resources, par 32. See also the Council of Europe's Recommendation CM/Rec (2007)145 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted on 10 October 2007, Article 50, stating that NGOs shall be free to solicit and receive funding in the form of cash or in-kind donations.

7 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 9.

8 Under Article 50 of the Council of Europe's Recommendation CM/Rec (2007)145 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted on 10 October 2007,

"NGOs should be free to solicit and receive funding [...] not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies". The Explanatory Memorandum to the Recommendation adds that "the only limitation on donations coming from outside the country should be the generally applicable law on customs, foreign exchange and money laundering, as well as those on the funding of elections and political parties. Such donations should not be subject to any other form of taxation or to any special reporting obligation" (par. 101). See also the Inter-American Commission on Human Rights' *Report on the Situation of Human Rights Defenders in the Americas*, of 7 March 2006, Recommendation 19: "states should

allow and facilitate human rights organisations' access to foreign funds in the context of international cooperation, in transparent conditions." See the Guidelines on Freedom of Association and Assembly in Africa, pars 37-39.

9 According to Article 64 of the TFEU, this refers to restrictions that were in place on 31 December 1993 (as regards Bulgaria, Estonia and Hungary, the relevant date is 31 December 1999).

10 See ECJ: Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*, Grand Chamber judgment of 27 January 2009, pars 23-30.

11 See ECJ: Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, judgment of 14 September 2006, par 31.

12 See Guidelines, pars 20, 22 and 109.

13 See Guidelines, par 110, stressing that any restrictions to the right to freedom of association may be based *only* on one of the legitimate aims recognized by international standards.

14 See African Commission on Human and Peoples' Rights: *Monim Elgak, Osman Hummeida & Amir Suliman* (represented by International Federation for Human Rights & World Organisation Against Torture) v. *Sudan*, Comm. No. 379/09 (2014), par 118. See also Guidelines on Freedom of Association and Assembly in Africa, par 24.

15 See Guidelines, pars 112 and 113, the latter of which stresses that states bear the burden of proving that any restrictions pursuing a legitimate aim cannot be fulfilled by any less intrusive actions.

16 See Article 1 par 2 of the 2017 Hungarian Law on the Transparency of Organisations Receiving Support from Abroad, which speaks of "money or other assets originating directly or indirectly from abroad" (but does exclude EU grants).

17 See, instead of others, Article 2 par 6 of the 1996 Russian Law on Non-Commercial Organisations, as last amended in 2016, which covers funding by, inter alia, any foreign state, state body or official, but also by foreign private persons or companies, or stateless persons, or anybody authorized by the afore-mentioned bodies or individuals. See also Article 14 of the Tax Code of Kazakhstan, following amendments that entered into effect on 11 October 2016 obliges taxpayers to file reports on the receipt and expenditure of funds and/or other assets received from foreign nations, international and foreign organisations, foreign persons and stateless persons. See further Section 5 of the Israeli Law Requiring Disclosure by NGOs Supported by Foreign Governmental Entities, as amended in 2016.

18 See Article 2 par 6 of the 1996 Russian Law on Non-Commercial Organisations, op cit footnote 17, Article 2 j) of the Indian 2010 Foreign Contribution (Regulation) Act and Article 17C of the Jordanian 2008 Law of Societies (last amended in 2009). See also Article 14 of the Tax Code of Kazakhstan, following amendments that entered into effect on 11 October 2016, which obliges taxpayers to file reports on the receipt and expenditure of funds and/or other assets received from foreign nations, international and foreign organisations, foreign persons and stateless persons.

19 See Article 2 par 6 of the 1996 Russian Law on Non-Commercial Organisations, op cit footnote 17 and Article 14 of the Tax Code of Kazakhstan (op cit footnote 17).

20 See Article 24-1 of the Azeri Law on Non-Governmental Organisations, last amended in 2018.

21 See Article 2 of the 2016 Foreign Donations (Voluntary Activities) Regulation Act of Bangladesh. See also Article 14 of the Tax Code of Kazakhstan, op cit footnote 17.

22 See Article 2 par 6 of the 1996 Russian Law on Non-Commercial Organisations, op cit footnote 17. See also Article 30 of the 2012 Law on Associations of Algeria.

23 See Article 2 j) of the Indian 2010 Foreign Contribution (Regulation) Act.

24 See Article 2 j) of the Indian 2010 Foreign Contribution (Regulation) Act.

25 See Article 2 j) of the Indian 2010 Foreign Contribution (Regulation) Act.

26 See Article 2 par 6 of the 1996 Russian Law on Non-Commercial Organisations, op cit footnote 17.

27 See Article 2 of the 2016 Foreign Donations (Voluntary Activities) Regulation Act of Bangladesh, and Article 28 of the 2019 Egyptian Law on Regulating the Exercise of Civil Work, which also mentions "Egyptian or foreign natural or legal persons outside the country".

28 See Article 28 of the 2019 Law on Regulating the Exercise of Civil Work of Egypt: "Egyptian or foreign natural or legal persons outside the country or foreign natural or legal persons inside the country".

29 See Article 2 j) of the Indian 2010 Foreign Contribution (Regulation) Act.

30 See Article 2 par 6 of the 1996 Russian Law on Non-Commercial Organisations, op cit footnote 17 (although public joint-stock companies with state participation and their branch companies are exempted from this provision).

31 See Article 2 j) of the Indian 2010 Foreign Contribution (Regulation) Act.

32 See Article 2 par 6 of the 1996 Russian Law on Non-Commercial Organisations, op cit footnote 17. See also Article 14 of the Tax Code of Kazakhstan (op cit footnote 17).

33 See Article 2 j) of the 2010 Foreign Contribution (Regulation) Act of India, which however explicitly exempts the UN, World Bank, IMF, or any other organisation as specified by the Central Government from the limitations set out in the Act.

34 See Tunisia, (Decree No. 88 of 2011 pertaining to the registration of associations, and societies, and Bolivia, Supreme Decree No. 29308 of 2007 (as amended in 2011).

35 See, e.g., the 2014 Development Cooperation Policy of Nepal. In July 2014, the Sri Lankan Department of External Resources of the Ministry of Finance and Planning disseminated a notice to the public, declaring that any organisation or individual undertaking a project with foreign aid must have approval from relevant government agencies (although there are indications that this is currently not being enforced). In the case of the United Kingdom, the Charities Commission, an independent body responsible for overseeing and providing guidance on the work of domestic charities, has altered the questionnaire for charities by adding specific questions regarding sources of income received from outside the United Kingdom when submitting their returns for 2019.

36 See the Regulation of the Indonesian Ministry of Home Affairs No. 38 of 2008 Regarding Acceptance and Granting of Social/Charity Organisation's Assistance from and to Foreign Parties.

37 See Article 20 of the Law of Associations, Social and Cultural Clubs, Special Committees Working in the Field of Youth and Sports and Private Institutions of Bahrain of 18 December 1989, which states that "No association may receive money from a foreigner or a foreign body."

38 See Section 1 of the Hungarian Law on the transparency of organisations receiving support from abroad, which sets the limit at "twice the amount specified in Section 6(1) b) of Act LIII of 2017 on the Prevention and Combating of Money Laundering and Terrorist Financing" (i.e. 7.2 million Hungarian Forint).

39 In Ireland, while there is no CSO law and no explicit limitation on CSOs being funded internationally, Sections 23A and 48A of the Electoral Act 1997 prohibits international funding (by foreign individuals not residing in Ireland or legal entities that do not have active/essential offices in Ireland) of not only political parties and candidates, but also of "third parties" (i.e.

any person who is not a political party or electoral candidate, who accepts a donation with a value of more than 100 EUR per year). This might affect NGOs when involved in political activity or political campaigns or election campaigns. See also Sudan - CSOs will only obtain prior approval to receive foreign funding from the Humanitarian Aid Commission if they engage in (narrowly defined) humanitarian services. In Zimbabwe, international funds for voter education projects conducted by CSOs may only be channelled through the Election Commission (Article 40C of the 2018 Electoral Act).

40 Article 2 of the 1996 Russian Law on Non-Commercial Organisations, op cit footnote 17, stating that the following shall not be deemed 'political activities': activities in the field of science, culture, arts, public health care, citizens' preventive treatment and health protection, citizens' social support and protection, protection of motherhood and childhood, social support to disabled people, promotion of healthy lifestyle, physical exercises and sports, protection of flora and fauna, charitable activities, as well as the activities aimed at assisting charitable and volunteers' activities. Venezuela's 2010 Law on Defense of Political Sovereignty and National Self-Determination prohibits organisations with "political objectives" or organisations for the defense of "political rights" from having assets or income other than "national" goods and resources.

41 See the 2012 Federal law of Russian Federation no. 272-FZ of 2012-12-28 "On Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation specifically targets U.S. donors after the U.S. enacted the so-called "Magnitsky Law." Among other provisions, Article 3 of this law states that the activities of CSOs that engage in vaguely defined political activities and receive funds and other assets from U.S. citizens or organisations, or implement US projects or programmes, or engage in any other activity on the territory of the Russian Federation that constitute threats to the interests of the Russian Federation, may be suspended. In Eritrea, all CSOs are effectively prohibited from receiving funding from the United Nations or its affiliates. In Tunisia, associations are prohibited from receiving funding or any other type of assistance from "countries not linked with Tunisia by diplomatic relations, or from organisations which defend the interests and policies of those countries" (Article 35 of Decree No. 88 of 2011 pertaining to the registration of associations).

42 These are at times worded in a vague fashion. E.g. in Indonesia, foreign assistance may not be used for activities which "disturb and/or disintegrate the national unity, integrity and harmony" or which "disturb public order and public tranquillity" (Article 6 of the 2008 Regulation). In Bolivia, Article 9 of Supreme Decree No. 29308 bans assistance that carries "implied political or ideological conditions."

43 Article 28, 2019 Egyptian Law on Regulating the Exercise of Civil Work. If consent to receive the respective foreign funding is not given within sixty days, this shall, however, be considered as approval (same provision, par 3). See also Article 30 of the Algerian Law on Associations, Article 17 of the Jordanian Law on Societies (which states that the donation or funding is deemed approved if a refusal has not been received after thirty days of notification), and Article 83 of the Law of Bahrain on Associations, Social and Cultural Clubs, Special Committees Working in the Field of Youth and Sports and Private Institutions. In Belarus, all foreign aid (except for international technical assistance) needs to be registered with the Department for Humanitarian Activities at the President's Administration (see Decree No 5 of the President of the Republic of Belarus on Foreign Gratuitous Aid of 31 August 2015). In Azerbaijan, CSOs may only receive foreign funding from foreign donors that have an office in Azerbaijan, have signed an agreement with the Ministry of Justice, and have obtained an opinion by the Ministry of Finance on the financial-economic expediency of a grant (see the Rules on obtaining the right to provide grants in the territory of the Republic of Azerbaijan by foreign donors, adopted by the Cabinet of Ministers on 22 October 2015 and amended on 25 January 2017. See also the Rules on registration of grant agreements (decisions) of 5 June 2015. In Nepal, under Article 16 of the Social Welfare Act of 2 November 1992, Article 16(1), social organisations and institutions (which include social welfare-oriented CSOs) need to ask the Social Welfare Council (an autonomous body) for permission if they wish to receive any kind of assistance from the Government of Nepal, foreign countries, international social organisations and institutions, missions, or individuals. There are, however, exceptions for projects involving smaller amounts of funding that will be finished quickly. The Nepalese Government's 2014 Development Cooperation Policy stated that grants below a certain amount would not be accepted.

44 In India, CSOs that meet certain requirements are eligible to register with the Central Government under Section 11 the Foreign Contribution (Regulation) Act (FCRA) of 27 September 2010. If FCRA registration is approved, the organisation is authorized to receive foreign contributions for up to five years. See also the Sri Lankan Voluntary Social Service Organizations Registration Act of 1980, in particular its Sections 3 and 18, stating that voluntary social service organisations (i.e. CSOs that are dependent on public or private funding, including foreign donations, and that engage in social and humanitarian activities) shall be registered with a specially appointed Registrar of Voluntary Social Organizations. In Bangladesh, under the Foreign Donations (Voluntary Activities) Regulation Act of 2016, a CSO seeking to receive or use foreign donations must be registered with the NGO Affairs Bureau, located within the Prime Minister's Office. Separate approval is required from the NGO Affairs Bureau for all projects, irrespective

of prior registration by any other authority.

45 In Turkey, under Article 21 of the Law on Associations of 4 November 2004, associations may receive foreign funding, but need to notify the competent local administrative authority about this beforehand. Associations must notify public authorities within one month of receiving international funding. Similar rules apply for foundations under Article 25 par 2 of the Foundations Law of Turkey of 20 February 2008. According to Article 41 of Tunisian Decree No. 88 of 2011 pertaining to the registration of associations, associations shall publish information about the foreign assistance, donations and grants they receive and record its source, value and purpose in one written media outlet and on the website of the association (if it has one). Under Article 18 of the Indian Foreign Contribution (Regulation) Act of 27 September 2010, CSOs that are registered or that are permitted to receive foreign funding need to inform Central Government (and any other authorities specified by Central Government) about the amount, source and manner of receipt of each foreign contribution, and the purpose and manner of its use.

46 See, e.g., Section 9 of the Foreign Donations (Voluntary Activities) Regulation Act of Bangladesh of 2016, stating that CSOs shall receive all foreign donations through a specific bank account maintained with any scheduled bank. However, no bank may debit such an account of foreign donation to the benefit of any NGO without the NGO Affairs Bureau approving the release of the funds. See also Section 17 of the Foreign Contribution (Regulation) Act (FCRA) of India of 27 September 2010, according to which foreign funds shall also be routed through the CSO's chosen bank account (no other funds may be received or deposited in this bank account). The respective bank shall report to the competent state authority the amount and manner of receipt, among others.

47 See Article 74 of Law No. 1/02 of Burundi of 2017 Establishing an Organic Network of Non-Profit Organizations, stating that all financial resources that CSOs receive from foreign sources need to be channelled via the Central Bank, and accompanied by a special document certifying their origins and what they have been allocated for. Copies of this document need to be provided to the responsible government ministries.

48 See e.g. Nepal, Section 3.9.10 of the 2014 Development Cooperation Policy, according to which all development cooperation must be channelled through the Ministry of Finance.

49 See Article 2 par 6 of the 1996 Russian Law on Non-Commercial Organisations, last amended in 2016.

50 See Section 1 of the Law of Hungary on the Transparency of Organisations Receiving Support from Abroad of 13 June 2017.



51 Under Article 24 of the Russian Law on Non-Commercial Organisations, last amended in 2016, any materials issued or distributed by CSOs considered to be “foreign agents”, including through mass media or the Internet, need to indicate that they are being issued/distributed by “a non-commercial organisation exercising the functions of a foreign agent”. Similarly, Section 2 par 5 of the Law of Hungary on the Transparency of Organisations Receiving Support from Abroad of 13 June 2017 requires the organisations in question to publish the fact that it receives support from abroad on its webpage, and indicate this fact in press products that it issues and in its other publications. The same requirement can be found in the Israeli Law Requiring Disclosure by NGOs Supported by Foreign Governmental Entities of 2016, which, in Section 5a states that organisations whose primary support comes from foreign governmental entities shall mention this fact in their quarterly reports, offline and online. This information shall also be on the website in general, and shall be mentioned in publications, reports and correspondence with public officials.

52 See Article 32 pars 4.2 and 4.3 of the 1996 Russian Law on Non-Commercial Organisations, last amended in 2016.

53 See Article 41 of the Tunisian Decree No. 88 of 2011 on Associations, which states that associations shall publish information about the foreign assistance, donations and grants they receive and record its source, value and purpose in one written media outlet and on the website of the association (if it has one).

54 In India, under Article 18 of the Indian Foreign Contribution (Regulation) Act of 27 September 2010, CSOs that are registered or that are permitted to receive foreign funding need to inform Central Government (and any other authorities specified by Central Government) about the amount, source and manner of receipt of each foreign contribution, and the purpose and manner of its use. Under Article 32 of the 1996 Russian Law on Non-Commercial Organisations, last amended in 2016, organisations considered to be foreign agents are obliged to submit and also publish online reports on their activities and on the personal composition of their governing bodies every six months and need to file quarterly reports on the purposes of spending foreign funds, as well as the actual spending and use. Such organisations are also obliged to file an audit statement on an annual basis. In Hungary, organisations receiving support from abroad shall indicate the total sum of foreign financial support received in one year and provide a list of concrete donors that donated equal or more than 500,000 Hungarian forint (1,530 Euro) in the subject year (with the name, country and city for natural persons and name and registered address for legal persons, together with the sum provided by the donor in both cases), which will also be made public (see Annex 1 to the Law of Hungary on the Transparency of

Organisations Receiving Support from Abroad of 13 June 2017.

55 See Section 1 par 2 of the Law of Hungary on the Transparency of Organisations Receiving Support from Abroad of 13 June 2017, which effectively sets the limit at 7.2 million Hungarian Forint.

56 See Article 4 of the 1996 Russian Law on Non-Commercial Organisations, last amended in 2016.

57 See Article 14 of the Tax Code of Kazakhstan, op cit footnote 17, which obliges taxpayers to file reports on the receipt and expenditure of funds and/or other assets received from foreign nations, international and foreign organisations, foreign persons and stateless persons. See the Russian Government Resolution No 485 Regarding the list of international organisations whose grants (free aid) obtained by Russian organisations shall be tax exempt and shall be accounted for as taxable income of taxpayers – recipients of such grants of 28 June 2008. Grants from foreign organisations not included on the List are considered taxable income for Russian recipients, unless they otherwise qualify as donations under Russian law. In Belarus, grants are tax free only if they are registered with the Department on Humanitarian Activity within the Presidential Administration and if they are used exclusively according to the designated purposes, as defined in the law and by the President’s special approvals/decisions. Any other foreign aid received, including grants, is considered taxable income for CSOs. See the Law of Belarus on Public Associations of 4 October 1994, last amended in 2013, as well as the Decree of the President of the Republic of Belarus # 537 On Approving regulation on Procedure for Conducting Control over Use of Foreign Gratuitous Assistance for Designated Purposes. (November 28, 2003) and Decree of the President of the Republic of Belarus #24 On Receipt and Use of Foreign Gratuitous Aid (November 28, 2003, with amendments as of January 16, 2013). See also the Belarus Tax Code.

58 In Azerbaijan, the Government imposed grant registration requirements to help “enforce international obligations of the Republic of Azerbaijan in the areas of combating money-laundering.” See Charity & Security Network, “How the FATF Is Used to Justify Laws That Harm Civil Society, Freedom of Association and Expression,” May 16, 2013: [http://www.charityandsecurity.org/analysis/Restrictive Laws How FATF Used to Justify Laws That Harm Civil Society](http://www.charityandsecurity.org/analysis/Restrictive%20Laws%20How%20FATF%20Used%20to%20Justify%20Laws%20That%20Harm%20Civil%20Society). In Kosovo, Article 24 of the Law on the Prevention of Money Laundering and Terrorist Financing states that CSOs shall not accept contributions that exceed 1,000 Euro from a single source in a single day. CSOs may request an exemption to this rule from the competent Financial Intelligence Unit of Kosovo.

59 For examples of different countries adopting restrictive legislation to counter terrorism, see Jeong-

Woo Koo and Amanda Murdie, *Liberty or Security: Do Civil Society Restrictions Limit Terrorism?*, 4 June 2018, International Consortium on Closing Civil Space, Center for Strategic and International Studies, at: <https://www.csis.org/blogs/international-consortium-closing-civil-space/liberty-or-security-do-civil-society-restrictions>.

60 For an overview of different justifications for laws and policies restricting foreign funding for associations, see Douglas Rutzen, *Aid Barriers and the Rise of Philanthropic Protectionism*, International Journal for Not-for-Profit Law, volume 7, no. 1, March 2015, pp. 20-30.

61 Douglas Rutzen, *Aid Barriers and the Rise of Philanthropic Protectionism*, International Journal for Not-for-Profit Law, volume 7, no. 1, March 2015, pp. 25-27. See also UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, pars 39-42.

62 Article 35 of Tunisian Decree No. 88 of 2011.

63 NGOs in Azerbaijan can receive foreign funding only from foreign donors that have an office in Azerbaijan, signed an agreement with the Ministry of Justice and have the Ministry of Finance's opinion on financial-economic expediency of a grant. See Articles 12.3 and 24-1 of the Law on Associations. See also Resolution No.339 of the Cabinet of Ministers of the Republic of Azerbaijan of 4 December 2015 and the Rules, approved thereby, on obtaining the right to provide grants in the territory of the Republic of Azerbaijan by foreign donors.

64 See, e.g., Article 6 of the 2016 Foreign Donations (Voluntary Activities) Regulation Act of Bangladesh, stating that foreign donations will only be accepted if they relate to a particular project that is approved by the state. The relevant activities funded by the foreign donations will be confined to the limits of the projects.

65 See Hungarian Law on the Transparency of Organisations receiving Funds from Abroad, Article 1 par 4. See also Article 1 par 4 of the 1996 Russian Law on Non-Commercial Organisations, op cit footnote 17.

66 See Article 1 par 3 of the 1996 Russian Law on Non-Commercial Organisations, op cit footnote 17, exempting consumer cooperatives, partnerships of apartment owners, fruit gardens, vegetable gardens and allotment garden non-profit associations of citizens.

67 See Article 1 pars 4.1, 4.2, 5-7 and Article 2 par 6 of the 1996 Russian Law on Non-Commercial Organisations, op cit footnote 17.

68 See Algeria, Law on Associations, Article 40, and also Article 31.2 of the Azeri Law on Associations. See also Section 3 of the Hungarian Law on the Transparency of Organisations receiving Funds from Abroad, and Article

32 par 6 of the 1996 Russian Law on Non-Commercial Organisations, op cit footnote 17.

69 See Section 3 of the Hungarian Law on the Transparency of Organisations receiving Funds from Abroad.

70 Under Article 40 of the Algerian Law on Associations, such suspension may last up to 6 months; following Article 31.3 of the Azeri Law on Associations, a court may order suspension for a year.

71 See Section 3 of the Hungarian Law on the Transparency of Organisations receiving Funds from Abroad. Similar provisions can be found in the Algerian Law on Associations (Article 43), and the 1996 Russian Law on Non-Commercial Organisations (Article 32 par 10), op cit footnote 17.

72 In Egypt, if an association or foundation fails to notify the state about the plan to obtain foreign funding, the competent court shall rule, based on the request of the responsible administrative body or whoever concerned, on the dissolution of an association or foundation or the dismissal of the Board of Directors or Trustees (Articles 28 and 49 of the 2019 Law on Regulating the Exercise of Civil Work).

73 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 9.

74 Council of Europe Commissioner for Human Rights, Third Party Intervention in the pending ECtHR case of *ECODEFENCE and Others v. Russia*, application no. 9988/13, submitted on 5 July 2017, pars 33-34.

75 2017 USAID CSO Sustainability Index. <https://www.fhi360.org/sites/default/files/media/documents/resource-civil-society-organization-2017-regional-report.PDF>, page 98

76 See Daria Skibo: *Five Years of Russia's Foreign Agent Law*, published on 14 August 2017 on the openDemocracy online media platform under <https://www.opendemocracy.net/od-russia/daria-skibo/five-years-of-russia-s-foreign-agent-law>.

77 See Daria Skibo: *Five Years of Russia's Foreign Agent Law*, published on 14 August 2017 on the openDemocracy online media platform under <https://www.opendemocracy.net/od-russia/daria-skibo/five-years-of-russia-s-foreign-agent-law>.

78 See Guidelines, par 222, where undue delays in receiving approval for implementing foreign-funded projects were considered to constitute very concerning state practices.

79 See Guidelines, par 222, where already the practice of requiring foreign funds to be channelled through centralised government funds raised serious concerns.

80 See Amnesty International: *Laws Designed to Silence: the Global Crackdown on Civil Society Organizations*, 2019, p. 23, describing the difficulties that Russian CSOs branded as “foreign agents” face due to inspections, heavy fines, threats and judicial proceedings initiated against them, which leave them with the difficult choice of whether to continue accepting overseas funds and be labelled as “foreign agents”, to close down, or to rely exclusively on Russian sources of funding, including presidential or local authority grants which – if awarded – may risk restricting these CSOs’ independence.

81 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 33.

82 See Freedom House, Godfrey Musila, *Freedoms under Threat: The Spread of Anti-NGO Measures in Africa*, May 2019, p. 6.

83 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 14.

84 Those countries that have not signed or ratified the ICCPR are: Bhutan, Brunei, Cook Islands, Kiribati, Malaysia, Micronesia, Niue, Myanmar, Oman, Saint Kitts and Nevis, Saudi Arabia, Singapore, Solomon Islands, South Sudan, Tonga, Tuvalu, United Arab Emirates, and Vatican City. China, Comoros, Cuba, Nauru, Palau and Saint Lucia, on the other hand, have signed but never ratified the Covenant.

85 Currently, with the exception of Belarus.

86 So far, the ACHR has not been ratified by North American States (Canada and the United States), although the United States did sign the Convention in 1977. Central and South American States that have not signed or ratified the Convention are Antigua and Barbuda, Bahamas, Belize, Guyana, St. Kitts and Nevis, Saint Lucia, and St. Vincent and the Grenadines.

87 Currently, the only African country that is not covered by the AfCHPR is Morocco, which initially ratified the Charter and later withdrew its ratification.

88 African Commission on Human and Peoples’ Rights: Guidelines on Freedom of Association and Assembly in Africa, par 24.

89 African Commission on Human and Peoples’ Rights: *Monim Elgak, Osman Hummeida & Amir Suliman* (represented by International Federation for Human

Rights & World Organisation Against Torture) *v. Sudan*, Comm. No. 379/09 (2014), par 118. See also African Commission on Human and Peoples’ Rights: ACHPR: Explanatory Note, pp. 5-6, with reference to case law. See further African Commission on Human and Peoples’ Rights: Guidelines on Freedom of Association and Assembly in Africa, par 24.

90 See the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (Siracusa Principles), adopted by a group of international law experts at a conference organised jointly by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights and the International Institute of Higher Studies in Criminal Sciences in April and May 1984, par 15

91 African Commission on Human and Peoples’ Rights: ACHPR: Explanatory Note, p. 4.

92 ECtHR: *Silver and Others v. the United Kingdom*, application nos. 5947/72 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; and 7136/75, judgment of 23 March 1983, par 86.

93 See ECtHR: *The Sunday Times v. the United Kingdom* (No. 1), application no. 6538/74, judgment of 26 April 1979, pars 47-49, where the Court notes that the two main requirements flowing from the term “prescribed by law” are the need for laws to be adequately accessible and to be formulated with sufficient precision to be foreseeable.

94 ECtHR: *Silver and Others v. the United Kingdom*, application nos. 5947/72 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; and 7136/75, judgment of 23 March 1983, pars 88-89, which also stated that a law conferring discretion must indicate the scope of such discretion (though the Court also noted that it is also impossible to attain absolute certainty in the framing of laws). See also *Malone v. the United Kingdom*, application no. 8691/79, judgment of 2 August 1984, pars 66-68.

95 ECtHR: *Barthold v. Germany*, application no. 8734/79, judgment of 25 March 1985, par 46.

96 Inter-Am Ct. H.R.: *The Word “Laws” in Article 30 of the American Convention on Human Rights*. Advisory Opinion AO-6/86 of 6 May 1986, pars 22, 27, 29 and 35.

97 See Guidelines, principle 9 on the legality and legitimacy of restrictions, par 34

98 See Siracusa Principles, par 16.

99 See ECtHR *Koretskyy v. Ukraine*, no. 40269/02, judgment of 3 April 2008, par 47; and *The Sunday Times v. the United Kingdom* (No. 1), no. 6538/74, judgment of

26 April 1979, par 49. See also African Commission on Human and Peoples' Rights: ACHPR: Explanatory Note, pp. 4-5, with reference to case law.

100 This was clarified in by the ECtHR in numerous cases, including some relating to wire-taps, see *Doerga v. The Netherlands*, no. 50210/99, judgment of 27 April 2004, pars 50-52 and *Copland v. the United Kingdom*, no. 62617/00, judgment of 3 April 2007, pars 45-46 and 48. See, in this context, *Airey v. Ireland*, no. 6289/73, judgment of 9 October 1979, par 24, where the Court reaffirms that "[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective". See further the more recent ECtHR judgment of *Namat Aliyev v. Azerbaijan*, no. 18705/06, judgment of 8 April 2010, par 72, reiterating this principle with respect to the manner in which provisions of the Convention shall be interpreted.

101 See the OSCE-ODIHR/Venice Commission Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organisations and Other Legislative Acts of the Kyrgyz Republic of 16 October 2013, pars 49, 51 and 53; see also the Venice Commission Opinion on Federal Law N. 121-FZ on Non-Commercial Organisations ("Law on Foreign Agents"), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on Making Amendments to the Criminal Code ("Law on Treason") of the Russian Federation, of 27 June 2014, pars 73-76 outlining how the vague formulation "political activities" has led to diverging and at times arbitrary imposition of restrictions and sanctions in practice, and pars 78-82 on the vagueness and lack of clarity of said term per se (the Russian Law imposes certain restrictions and obligations on associations engaged in political activities and benefiting from foreign funding). See, on this point, also Expert Council on NGO Law, of the Conference of INGOs of the Council of Europe, Opinion on the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Function of Foreign Agents of August 2013, pars 55 and 58, noting that activities are considered 'political' regardless of whether they are conducted in the interest of, or funded by a foreign donor or not, and stressing the wide discretionary powers of relevant state entities when determining whether individual CSOs engage in 'political activities' or not.

102 See Douglas Rutzen, *Aid Barriers and the Rise of Philanthropic Protectionism*, International Journal for Not-for-Profit Law, volume 7, no. 1, March 2015, p. 35. See also Expert Council on NGO Law, of the Conference of INGOs of the Council of Europe, Opinion on the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Function of Foreign Agents of August 2013, par 59.

103 African Commission on Human and Peoples' Rights:

*Monim Elgak, Osman Hummeida & Amir Suliman* (represented by International Federation for Human Rights & World Organisation Against Torture) v. *Sudan*, Comm. No. 379/09 (2014), par 118. See also African Commission on Human and Peoples' Rights: ACHPR: Explanatory Note, pp. 5-6, with reference to case law. See further African Commission on Human and Peoples' Rights: Guidelines on Freedom of Association and Assembly in Africa, par 24.

104 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 30.

105 ECtHR, *Sidiropoulos v. Greece*, no. 26695/95, judgment of 10 July 1998, par 40. This also means that authorities may not, even by imposing apparently neutral measures, hinder the freedom of association of groups disliked by the authorities or advocating ideas that the authorities would like to suppress. Indeed, the Court has stressed that Article 18 of the Convention provides that any restrictions permitted to the rights enshrined in it must not be applied for a purpose other than those for which they have been prescribed, see *United Macedonian Organisation Ilinden-Pirin and Others v. Bulgaria* (No. 2), nos. 41561/07 and 20972/08, judgment of 18 October 2011, par 18.

106 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, pars. 30-34.

107 United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1984)], I A iv, par 29, adopted in May 1984 by a group of international human rights experts convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Sciences. Though not legally binding, these principles provide an authoritative source of interpretation of the ICCPR with regard to limitations clauses and the matter of derogation from human rights in times of emergency. See also in this context the ECtHR case of *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, judgment of 2 October 2001, where the Court found that banning assemblies organised by the respective association had violated Article 11 of the ECHR, as the organisation's actions and statements had not constituted or called for violence or the use of force. See further the case of *İzmir Savaş Karşıtları Derneği v. Turkey*, no. 46257/99, judgment of 2 March 2006, par. 36,

a case involving Article 11, noting that states may not, in the name of protecting national security or public safety, adopt whatever measures they deem appropriate.

108 United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1985/4 (1984)], I A iv, par 32.

109 Guidelines, par 220.

110 Guidelines, par 224.

111 See the Joint Venice Commission-OSCE/ODIHR Opinion on Draft Law No. 140/2017 of Romania on amending Governmental Ordinance No. 26/2006 on Associations and Foundations of 16 March 2018, adopted by the Venice Commission at its 114<sup>th</sup> session, par 64, stressing that “the aim of ‘enhancing transparency’ of the NGO sector would by itself not appear to be a legitimate aim as described in the above international instruments; rather, transparency may be a means to achieve one of the above-mentioned aims set out in Article 11 (2) ECHR”. Note also Joint Venice Commission-ODIHR Opinion on Draft Law No. 6674 on Introducing Changes to some Legislative Acts to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of International Technical Assistance and on Draft Law No. 6675 on Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations, of 16 March 2018, adopted by the Venice Commission at its 114<sup>th</sup> session, pars 35-36. See further Venice Commission, Report on Funding of Associations, 18 March 2019, pars. 80 and 87, where this principle is reiterated, and Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, Opinion on the Romanian Draft Law 140/2017 on Associations and Foundations, 11 December 2017, par 59.

112 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 39. See also Douglas Rutzen, *Aid Barriers and the Rise of Philanthropic Protectionism*, International Journal for Not-for-Profit Law, volume 7, no. 1, March 2015, p. 35.

113 See the Paris Declaration on Aid Effectiveness, adopted on 2 March 2005 during a meeting of more than 100 developing and developed countries from around the globe in Paris, France.

114 See the Accra Agenda for Action, endorsed during a meeting of developed and developing countries in Accra, Ghana, on 4 September 2008.

115 See the Busan Partnership for Effective Development

Cooperation, endorsed by over 160 countries and around 50 organisations during the Fourth High-Level Forum on Aid Effectiveness, which took place in Busan, South Korea, on 29 November – 1 December 2011.

116 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 39.

117 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 41.

118 See Guidelines, principle 10 on the proportionality of restrictions, par 35. See also African Commission on Human and Peoples’ Rights: ACHPR: Explanatory Note, pp. 4 and 6.

119 See UN Human Rights Committee, *Mikhailovskaya and Volchek v. Belarus*, (Communication No. 1993/2010, 26 August 2014), par 7.3, stating that “[t]he mere existence of objective justifications for limiting the right to freedom of association is not sufficient. The State party must further demonstrate that the prohibition of an association is necessary to avert a real and not only hypothetical threat to national security or democratic order [...]”. See also UN Human Rights Committee, *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002(2005), par. 7.2., and Venice Commission, Report on Funding of Associations, 18 March 2019, par. 81.

120 UN Commission on Human Rights resolution 2005/80 on the Protection of human rights and fundamental freedoms while countering terrorism, adopted at the Commission’s 60<sup>th</sup> meeting on 21 April 2005, preambular par 11.

121 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 29.

122 See, in this context, UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par 13.

123 See the Joint Venice Commission-OSCE/ODIHR Opinion on Draft Law No. 140/2017 of Romania on amending Governmental Ordinance No. 26/2006 on Associations and Foundations of 16 March 2018, adopted by the Venice Commission at its 114<sup>th</sup> session, par 67, and Joint Venice Commission-OSCE/ODIHR Opinion on Draft Law No. 6674 on Introducing some Legislative to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of international

Technical Assistance and on Draft Law No. 6675 on Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance, of 16 March 2018, adopted by the Venice Commission at its 114<sup>th</sup> session, pars 37-38.

124 See Venice Commission, Report on Funding of Associations, 18 March 2019, par. 112.

125 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, pars. 23 and 25.

126 See also ECtHR, *Sidiropoulos v. Greece*, application no. 26695/95, judgment of 10 July 1998, par 40, noting that “States have a right to satisfy themselves that an association’s aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions”.

127 Guidelines, par 104.

128 See the OSCE-ODIHR/Venice Commission Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organizations and Other Legislative Acts of the Kyrgyz Republic of 16 October 2013, par 69.

129 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par 35. See also African Commission on Human and Peoples’ Rights: Guidelines on Freedom of Association and Assembly in Africa, adopted at the Commission’s 60th Ordinary Session held in Niamey, Niger, from 8 to 22 May 2017, par 38.

130 See Venice Commission Interim Opinion on the draft Law on Civic Work Organisations of Egypt, of 18 June 2013, par 43.

131 Guidelines, par 222.

132 Venice Commission, Report on Funding of Associations, 18 March 2019, par. 83.

133 Venice Commission, Report on Funding of Associations, 18 March 2019, par. 94.

134 ECtHR, *National Association of Teachers in Further and Higher Education v. the United Kingdom*, application no. 28910/95, Commission decision of 16 April 1998.

135 See Expert Council on NGO Law, of the Conference of INGOs of the Council of Europe, Opinion on the Hungarian Draft Act on the Transparency of Organisations Supported from Abroad of 24 April 2017,

par 74, and Venice Commission, Report on Funding of Associations, 18 March 2019, par. 13.

136 See, in this context, Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, Opinion on the Hungarian Draft Act on the Transparency of Organisations Supported from Abroad, 24 April 2017, par 27. See also Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), Anti-Money Laundering and Counter-Terrorist Financing Measures, Hungary, 1st Enhanced Follow-up Report & Technical Compliance Re-Rating, December 2017, pars 108-112, where it was noted that Hungary had conducted a risk assessment of the CSO sector, but that the Draft Act on the Transparency of Organisations Supported from Abroad had not been based on this risk assessment, or indeed on a risk-based approach.

137 See Emile van der Does de Willebois, *Nonprofit Organizations and the Combatting of Terrorism Financing: A Proportionate Response*, World Bank Working Paper No. 208 (Washington D.C., 2010), p. 13.

138 See FATF Recommendation 1 on adopting a risk-based approach ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified. See also Recommendation 8 relating to not-profit organisations, stating that “[c]ountries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse”.

139 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 23.

140 See also the Joint Venice Commission-ODIHR Opinion on Draft Law No. 140/2017 of Romania on amending Governmental Ordinance No. 26/2006 on Associations and Foundations of 16 March 2018, adopted by the Venice Commission at its 114<sup>th</sup> session, par 66, where the Venice Commission and ODIHR note that where there are indications of money laundering activities on the side of individual NGOs, the correct response to this would be criminal investigations against these particular associations, and not blanket reporting requirements that affect numerous other organisations engaging in entirely legitimate activities.

141 See, in this context, Inter-Am Ct. H.R.: *Kimel v. Argentina*, judgment of 2 May 2008, par 83, where the Court reiterated that a restriction is strictly proportionate if “the sacrifice inherent therein is not exaggerated or disproportionate in relation to the advantages obtained from the adoption of such limitation”.

142 Guidelines, pars 24, 113, 220 and 237.



143 See Guidelines, Principle 10 on the proportionality of restrictions, pars 35 and 115.

144 Joint Venice Commission-ODIHR Opinion on Draft Law No. 140/2017 of Romania on amending Governmental Ordinance No. 26/2006 on Associations and Foundations of 16 March 2018, adopted by the Venice Commission at its 114<sup>th</sup> session, par 70. See also Joint OSCE/ODIHR-Venice Commission Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organizations and Other Legislative Acts of the Kyrgyz Republic of 16 October 2013, adopted by the Venice Commission at its 96<sup>th</sup> plenary session, par 69.

145 See the Venice Commission Opinion on the Draft Law of Hungary on the Transparency of Organisations Receiving Support from Abroad of 20 June 2017, adopted by the Venice Commission at its 111<sup>th</sup> plenary session, par 41. See Venice Commission Opinion on Federal Law N. 121-FZ on Non-Commercial Organisations ("Law on Foreign Agents"), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on Making Amendments to the Criminal Code ("Law on Treason") of the Russian Federation, of 27 June 2014, par 55, stating that "being labelled as a "foreign agent" signifies that a NCO would not be able to function properly, since other people and - in particular - representatives of the state institutions will very likely be reluctant to co-operate with them, in particular in discussions on possible changes to legislation or public policy".

146 See UN Human Rights Committee, Concluding observations on the initial report of Bangladesh, 27 April 2017, pars 27 c) and 28 c), where the Committee recommends to repeal the Bangladeshi Foreign Donations (Voluntary Activities) Regulation Act. See also Concluding observations on the fourth periodic report of the Bolivarian Republic of Venezuela, 14 August 2015, par 20, and Concluding observations on the fourth periodic report of Israel, 21 November 2014, par 22, among others.

147 See, in this context, UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 23. See also Expert Council on NGO Law, of the Conference of INGOs of the Council of Europe, Opinion on the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Function of Foreign Agents of August 2013, par 75, stating that such provisions especially fall short of the proportionality requirement if they are triggered by any amount of foreign funding received.

148 Guidelines, par 219.

149 Guidelines, par 104

150 Guidelines, pars 228 and 231.

151 Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007 at the 1006<sup>th</sup> meeting of the Ministers' Deputies

152 UN Human Rights Council resolution 22/6, *Protecting human rights defenders*, adopted on 21 March 2013 at the Council's twenty-second session, par 9.

153 Guidelines, par 221.

154 UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 26.

155 Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007 at the 1006<sup>th</sup> meeting of the Ministers' Deputies, pars 69-70.

156 Guidelines, par 237.

157 Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007 at the 1006<sup>th</sup> meeting of the Ministers' Deputies, par 72. See also Expert Council on NGO Law of the Conference of INGOs of the Council of Europe: Third Annual Report, Sanctions and Liability in Respect of NGOs of January 2011, par 36, noting that legitimate concerns of states should first be addressed through direction (to perform or desist from an action), and that sanctions should only be imposed for non-compliance with such directions. States should also not immediately resort to administrative or criminal proceedings against the NGO concerned.

158 ECtHR, Case of *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, no. 37083/03, judgment of 8 October 2009, paragraph 82. See also Guidelines, par 239.

159 Guidelines, pars 244-245 and 255. See also Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007 at the 1006<sup>th</sup> meeting of the Ministers' Deputies, par 44, stating that the legal personality of non-governmental organisations may only be terminated of their own volition, or in cases of bankruptcy, prolonged inactivity or serious misconduct.

160 See Guidelines, Principle 10 on the proportionality of restrictions, pars 35 and 114. See also UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 38, and African Commission on Human and Peoples' Rights: Guidelines on Freedom of Association and Assembly in Africa, adopted at the Commission's 60th Ordinary Session held in Niamey, Niger, from 8 to 22 May 2017, par 92.

161 Joint Venice Commission-ODIHR Opinion on Draft Law No. 140/2017 of Romania on amending Governmental Ordinance No. 26/2006 on Associations and Foundations of 16 March 2018, adopted by the Venice Commission at its 114<sup>th</sup> session, par 81.

162 See, in this context, Expert Council on NGO Law, of the Conference of INGOs of the Council of Europe, Opinion on the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Function of Foreign Agents of August 2013, pars 92-97, noting the unclear wording and effects of temporary suspension of CSOs under the law, and potential other human rights violations that it entails.

163 See UN Human Rights Committee, *Korneenko et al v. Belarus* (Communication No. 1274/2004, 31 October 2006), pars 7.6-7.7. See also Guidelines, par 237 and Joint Venice Commission-ODIHR Opinion on Draft Law No. 140/2017 of Romania on amending Governmental Ordinance No. 26/2006 on Associations and Foundations of 16 March 2018, adopted by the Venice Commission at its 114<sup>th</sup> session, pars 75 and 81; and Venice Commission Opinion on the Draft Law of Hungary on the Transparency of Organisations Receiving Support from Abroad of 20 June 2017, adopted by the Venice Commission at its 111<sup>th</sup> plenary session, para. 62, noting that two different situations should be distinguished from each other: either a given civil society organisation is engaged in a criminal activity, for instance money laundering or terrorism financing, in which case its dissolution can be proportionally pronounced by courts on the basis of general provisions of law, or the only misconduct which can be reproached to this organisation is its failure to fulfil the obligations under the Draft Law on Transparency. For the Venice Commission, in this latter case, the dissolution of said organisation would appear to be a disproportionate measure.

164 Guidelines, pars 237-238

165 Joint Venice Commission-OSCE/ODIHR Opinion on Draft Law No. 140/2017 of Romania on amending Governmental Ordinance No. 26/2006 on Associations and Foundations of 16 March 2018, adopted by the Venice Commission at its 114<sup>th</sup> session, par 81.

166 See Venice Commission Opinion on Federal Law N. 121-FZ on Non-Commercial Organisations ("Law on Foreign Agents"), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on Making Amendments to the Criminal Code ("Law on Treason") of the Russian Federation, of 27 June 2014, adopted by the Venice Commission at its 99<sup>th</sup> plenary session, pars 101-104.

167 Guidelines, par 234.

168 Joint Venice Commission-ODIHR Opinion on Draft Law No. 140/2017 of Romania on amending Governmental Ordinance No. 26/2006 on Associations and Foundations of 16 March 2018, adopted by the Venice Commission at its 114<sup>th</sup> session, par 81.

169 Joint Guidelines, para. 120, states that "[a]ny appeal against or challenge to a decision to prohibit or dissolve an association or to suspend its activities should normally temporarily suspend the effect of the decision, meaning that the decision should not be enforced until the appeal or challenge is decided [except where] there exists exceptionally strong evidence of a crime having been committed by an association".

170 UN Human Rights Council resolution 22/6, *Protecting human rights defenders*, adopted on 21 March 2013 at the Council's twenty-second session, par 9.

171 See Guidelines, Principle 5, par 93 and pars 122-127.

172 UN Human Rights Council resolution 22/6, *Protecting human rights defenders*, adopted on 21 March 2013 at the Council's twenty-second session, par 9.

173 Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers' Deputies, par 7.

174 ECtHR, *Rasmussen v. Denmark*, application no. 8777/79, judgment of 28 November 1984, par. 38. See also *Marckx v. Belgium*, application no. 6833/74, judgment of 13 June 1979, par 33.

175 ECtHR, *Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, judgment of 5 October 2006, par 82.

176 See Venice Commission Opinion on Federal Law N. 121-FZ on Non-Commercial Organisations ("Law on Foreign Agents"), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on Making Amendments to the Criminal Code ("Law on Treason") of the Russian Federation, of 27 June 2014, adopted by the Venice Commission at its 99<sup>th</sup> plenary session, par 59; see also Joint OSCE/ODIHR-Venice Commission Interim

Opinion on the Draft Law Amending the Law on Non-Commercial Organizations and Other Legislative Acts of the Kyrgyz Republic of 16 October 2013, adopted by the Venice Commission at its 96th plenary session, par 54. See further par 63 of the same Opinion, where it was noted that “those who disagree with the decision-makers are more likely to be willing to try to influence their decisions. As a consequence, the Draft Law is more likely to impose a “foreign agent label” on those associations whose members do not share the political views of the ruling authorities. This would result in associations being penalized on account of their political convictions, which amounts to discrimination prohibited under international standards.”

177 See Guidelines pars 225 and 228. See also UN Special Rapporteur on freedoms of peaceful assembly and of association, Report (A/HRC/23/39) submitted to the Human Rights Council at its twenty-third session on 24 April 2013, par. 24, with respect to measures applied against the civil society sector only in the fight against terrorism.

178 See also, in this context, Venice Commission, Report on Funding of Associations, 18 March 2019, pars. 122-127.

179 Guidelines, par. 67

180 ECtHR, *Ernst and others v. Belgium*, no. 33400/96, judgment of 15 July 2003, par 109. See also ECtHR, *Stes Colas Est and Others v. France*, no. 37971/97, judgment of 16 April 2002, par 41. In its judgment in the case of *Niemetz v. Germany*, no. 13710/88, judgment of 16 December 1992, par 29, the Court held that “it would be too restrictive to limit the notion to an “inner circle” in which the individual may live his own personal life as he/she chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of “private life” should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.”

181 See Venice Commission Opinion on Federal Law N. 121-FZ on Non-Commercial Organisations (“Law on Foreign Agents”), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on Making Amendments to the Criminal Code (“Law on Treason”) of the Russian Federation, of 27 June 2014, adopted by the Venice Commission at its 99th plenary session, par 98; see also Joint OSCE/ODIHR-Venice Commission Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organizations and Other Legislative Acts of

the Kyrgyz Republic of 16 October 2013, adopted by the Venice Commission at its 96th plenary session, par 77.

182 Joint OSCE/ODIHR-Venice Commission Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organizations and Other Legislative Acts of the Kyrgyz Republic of 16 October 2013, adopted by the Venice Commission at its 96th plenary session, par 77.

183 See, in this context, Expert Council on NGO Law, of the Conference of INGOs of the Council of Europe, Opinion on the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Function of Foreign Agents of August 2013, par 83.

184 See Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, Opinion on the Hungarian Draft Act on the Transparency of Organisations Supported from Abroad, 24 April 2017, par 74, referring to the ECtHR decision in the case of *National Association of Teachers in Further and Higher Education v. United Kingdom*, application no. 28910/95, of 16 April 1998, stating that any general obligation of CSOs to disclose the names and addresses of their members would be incompatible with the rights to freedom of association and to private life. The Expert Council noted that similar reasoning could apply with respect to donors.

185 Expert Council on NGO Law, of the Conference of INGOs of the Council of Europe, Opinion on the Hungarian Draft Act on the Transparency of Organisations Supported from Abroad of 24 April 2017, par 74. See also Venice Commission, Report on Funding of Associations, 18 March 2019, par. 13.

186 See Venice Commission, Report on Funding of Associations, 18 March 2019, par. 13.

187 Venice Commission, Report on Funding of Associations, pars. 94-95.

188 Guidelines, par 231.

189 Joint Venice Commission-OSCE/ODIHR Opinion on Draft Law No. 6674 on Introducing some Legislative to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of international Technical Assistance and on Draft Law No. 6675 on Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance, of 16 March 2018, adopted by the Venice Commission at its 114th session, par 46. See also Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108), Strasbourg, 28 January 1981.

190 As also confirmed in the ECtHR case of *Ouranio Toxo*

*and others v. Greece*, application no. 74989/01, judgment of 20 October 2005, par 37. See also Inter-American Court of Human Rights, cases of *Huilca-Tesce v. Peru*, 3 March 2005, Series C no. 121, par 77 and *Garcia y familiares v Guatemala*, 29 November 2012, Series C no. 258, pars 117-118. See also Guidelines, Principle 2 on the state's duty to respect, protect and facilitate the exercise of the right to freedom of association, par 27.

191 United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1984)], I A iv, par 29, adopted in May 1984 by a group of international human rights experts convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Sciences. Though not legally binding, these principles provide an authoritative source of interpretation of the ICCPR with regard to limitations clauses and the matter of derogation from human rights in times of emergency.

192 Guidelines, par 224, note that the state shall not require, but shall encourage and facilitate associations to be accountable and transparent. See also the Joint Venice Commission-OSCE/ODIHR Opinion on Draft Law No. 140/2017 of Romania on amending Governmental Ordinance No. 26/2006 on Associations and Foundations of 16 March 2018, adopted by the Venice Commission at its 114<sup>th</sup> session, par 64, stressing that "the aim of 'enhancing transparency' of the NGO sector would by itself not appear to be a legitimate aim as described in the above international instruments; rather, transparency may be a means to achieve one of the above-mentioned aims set out in Article 11 (2) ECHR". Note also Joint Venice Commission-ODIHR Opinion on Draft Law No. 6674 on Introducing Changes to some Legislative Acts to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of International Technical Assistance and on Draft Law No. 6675 on Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations, of 16 March 2018, adopted by the Venice Commission at its 114<sup>th</sup> session, pars 35-36.