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## ***Letter from the Editor***

This issue of the *International Journal of Not-for-Profit Law* leads off with a comprehensive overview of the legal framework for global philanthropy. The report was commissioned by the Council on Foundations as a contribution to Global Philanthropy Leadership Initiative, a joint project of the Council on Foundations, the European Foundation Centre, and the Worldwide Initiative for Grantmaker Support. Prepared by **David Moore** and **Douglas Rutzen** of the International Center for Not-for-Profit Law, the report finds that although cross-border giving has reached impressive levels, restrictive laws have prevented it from achieving its full potential. The report examines laws in both donor countries and recipient countries that have constrained cross-border giving, featuring examples from the United States, Europe, and elsewhere. It proposes a wide array of options designed to reduce barriers to cross-border philanthropy, and considers the challenges they may face.

The issue also features a timely look at the laws governing NGOs in Cambodia, by **Ke Bunthoeurn**. The author summarizes and analyzes the pertinent rules and sets forth potential reforms that would bring Cambodian NGO law into line with the country's constitution as well as applicable international agreements. This analysis is presented at a moment in which controversial and restrictive legislation has been proposed by the Government of Cambodia, with only belated and so far largely disregarded consultation with civil society organizations, and without consideration of key recommendations in Mr. Bunthoeurn's thoughtful article.

Finally, **Myles McGregor-Lowndes** provides an update on an important Australian case. In *AID/Watch Inc. v. Commissioner of Taxation*, the High Court concluded that seeking to promote public debate qualifies as a charitable purpose.

We appreciate our authors' willingness to share their insights on current issues affecting freedom of association and civil society.

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*Global Philanthropy*

# Legal Framework for Global Philanthropy: Barriers and Opportunities

David Moore and Douglas Rutzen  
International Center for Not-for-Profit Law

## I. Introduction

Recent years have witnessed a growth in philanthropy around the world. In **Brazil**, the number of private foundations increased 300% in twenty years; by 2008, Brazilian foundations gave away more than \$5.5 billion.<sup>1</sup> In **India**, philanthropy exceeded \$5 billion in 2006.<sup>2</sup> In **Russia**, corporate philanthropy was virtually non-existent in 1991 and by 2008 exceeded \$2.5 billion.<sup>3</sup> In **China**, more than 800 private foundations were established during the past five years, an increase of 88%.<sup>4</sup> In **Europe**, there are now over 95,000 public benefit foundations.<sup>5</sup> In nine European countries (Belgium, Estonia, France, Italy, Luxembourg, Slovakia, Spain, and Sweden), 43% of foundations were established between 2003 and 2005.<sup>6</sup>

The growth of philanthropy has corresponded with a rise of private wealth in Brazil, India, Russia, China, and other countries. Revealingly, 16 of the top 50 billionaires in March 2010 are from India (6), Russia (4), China (3), Brazil (2) and Mexico (1).<sup>7</sup> **India** has registered the highest growth of donors anywhere in the world. The number of “high net worth individuals” in India has grown nearly 11% per year over the past decade and now totals more than 126,000 individuals.<sup>8</sup> **China** (including Hong Kong) currently has more than 100 billionaires.<sup>9</sup> **Singapore** has the highest concentration of millionaire households in the world, with 11.4% of families owning assets of \$1 million or more. Springing in part from this increase in personal wealth,

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<sup>1</sup> These figures are drawn from the article entitled *The New Face of Global Philanthropy*, which the Council on Foundations kindly provided to ICNL. We are unaware of the author, date, or copyright for this article, but would be happy to provide a more complete citation based on guidance from the Council. For the data on Brazil, reference is made to the Institute for the Development of Social Investment (IDIS).

<sup>2</sup> Arpan Sheth, *An Overview of Philanthropy in India*, (c) 2010 Bain & Company, Inc., page 2, available at [http://www.bain.com/bainweb/PDFs/cms/Public/India\\_Sheth\\_Speech.pdf](http://www.bain.com/bainweb/PDFs/cms/Public/India_Sheth_Speech.pdf).

<sup>3</sup> Olga Alexeeva, *Russia: historic growth in private giving*, Philanthropy/UK: newsletter, Issue 34, September 2008, <http://www.philanthropyuk.org/Newsletter/Sep2008Issue34/Russia>.

<sup>4</sup> *The New Face of Global Philanthropy*, with reference made to the China Foundation Center.

<sup>5</sup> *The New Face of Global Philanthropy*, with reference made to the Global Philanthropic Capital Project.

<sup>6</sup> *The New Face of Global Philanthropy*.

<sup>7</sup> Id.

<sup>8</sup> Sheth, *An Overview of Philanthropy in India*, page 4; see also *High net worth individuals in India up 51% in 2009*, The Financial Express, June 24, 2010, <http://www.financialexpress.com/news/high-net-worth-individuals-in-india-up-51-in-2009/637684/>.

<sup>9</sup> *The New Face of Global Philanthropy*.

donations to charitable organizations in Singapore grew from \$279 million in 2001 to \$504 million in 2009.<sup>10</sup>

Among other prominent features of current landscape of giving, philanthropy is increasingly cross-border.<sup>11</sup> International giving from the largest **U.S.** foundations rose from \$680 million in 1994 to \$6.2 billion in 2008.<sup>12</sup> More broadly, the flow of private philanthropy from **OECD** countries to developing countries grew from approximately \$5 billion in 1991 to \$53 billion in 2008.<sup>13</sup> International or cross-border philanthropy embraces giving by foundations, donor-advised funds, and corporations, as well as other private donors. Foundations may include corporate or community foundations.

#### *Barriers to Global Philanthropy*<sup>14</sup>

While the growth of cross-border philanthropy is impressive, the legal environment and other factors have limited global philanthropy from reaching its full potential. Indeed, “[philanthropic] institutions are not functioning optimally, constrained by policies, accepted practice, and legal and structural limitations.”<sup>15</sup> Legal barriers include constraints imposed by the “donor” country on the outflow of philanthropy, as well as constraints imposed by the “recipient” country on the inflow of philanthropy. Global philanthropy is also impeded because some countries constrain the development of civil society, including the development of foundations and potential grantee organizations.

Donor country, or “outflow,” constraints include:

- significant limitations on foreign grantmaking by tax-exempt entities;
- advance governmental approval for cross-border giving;
- limited, or no, tax incentives for international philanthropy;
- burdensome procedural requirements for foreign grants;
- counter-terrorism measures; and
- restrictions on financial transactions with sanctioned countries.

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<sup>10</sup> *Singapore gives more in philanthropy*, China Daily, August 16, 2010, available at [http://www.chinadaily.com.cn/world/2010-08/16/content\\_11157803.htm](http://www.chinadaily.com.cn/world/2010-08/16/content_11157803.htm).

<sup>11</sup> “Charitable giving increasingly needs to be understood in an international context. With populations migrating and the growth in public awareness of international issues and needs, more people globally are interested in making cross-border charitable donations to charity.” CAF briefing paper, *International comparisons of charitable giving* (November 2006), available at [www.efc.be/ftp/public/cpi/Newsletter\\_Jan07/InternationalGivinghighlights.pdf](http://www.efc.be/ftp/public/cpi/Newsletter_Jan07/InternationalGivinghighlights.pdf).

<sup>12</sup> The Foundation Center, *The Global Role of U.S. Foundations*, © 2010 by the Foundation Center, pg. 18.

<sup>13</sup> The Hudson Institute, *Index of Global Philanthropy*, 2010, pg. 14, fig. 4.

<sup>14</sup> “Philanthropy may be defined as voluntary and private initiative to support a public objective.” Ineke A. Koele, *International Taxation of Philanthropy*, IBFD © 2007 Ineke A. Koele, page 3. For purposes of the remainder of this paper, “global philanthropy” refers to cross-border giving – that is the making of grant, donation or voluntary contribution from a private donor in one country to a recipient in another, in order to pursue a public objective. The report will use the terms “global philanthropy” and “cross-border giving” and “philanthropic giving” interchangeably.

<sup>15</sup> Salzburg Global Seminar: <http://www.salzburgglobal.org/2009/phil.cfm>.

Recipient country, or “inflow,” constraints include:

- advance government approval to receive foreign funding;
- restrictions on the types of activities that can be supported with foreign funding;
- mandatory routing of foreign funding through government channels;
- post-receipt procedural burdens, such as burdensome notification and reporting requirements;
- the taxation of global philanthropy; and
- foreign exchange requirements.

Legal barriers to the formation and operation of eligible nonprofit beneficiaries include, among others:

- high minimum thresholds for members or assets;
- burdensome registration procedures;
- excessive government discretion in registration and termination decisions;
- prohibitions on areas of activity;
- invasive supervisory oversight; and
- barriers to cross-border communication.

To close out the discussion of legal barriers, we highlight two thematic issues of specific concern to global philanthropists: disaster relief and the Millennium Development Goals.

### *Scope of Research*

Increasingly, foundations and the philanthropic community are called upon to help engage on issues of global concern, such as disaster relief,<sup>16</sup> the Millennium Development Goals,<sup>17</sup> and other key development challenges.<sup>18</sup> Unfortunately, however, as noted above, the legal framework often impedes effective cross-border philanthropy to address global needs. While a comprehensive treatment of the impact of legal barriers on global philanthropy is beyond the scope of this paper, we note that legal constraints may deter global philanthropy in a number of ways. For example:

- some philanthropists choose not to engage in global philanthropy because the impediments are too daunting;

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<sup>16</sup> Council on Foundations, *We Were There: The Role of Foundations in National Disasters*, <http://classic.cof.org/files/Documents/Publications/WeWereThere.pdf>.

<sup>17</sup> United Nations Development Programme, Division for Foundation Affairs, <http://www.undp.org/partners/foundations/Foundations-and-UNDP.pdf>.

<sup>18</sup> The World Bank, *Foundations and the World Bank: Partners for Development Innovation*, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/FOUNDATIONSEXT/0..menuPK:60000436~pagePK:60000431~piPK:60000435~theSitePK:267976,00.html>.

- some philanthropists – such as corporate foundations with employee matching programs – have chosen to end, or substantially limit, the international component of their philanthropy programs;
- some philanthropists who do choose to engage in global philanthropy will, in the context of giving to some countries, only be able to accomplish philanthropic giving through complex tax planning; and
- in some circumstances, philanthropists seeking to fund local recipients default to funding international organizations.

Recognizing these challenges, the Council on Foundations commissioned the International Center for Not-for-Profit Law (ICNL) to conduct research on two issues: (a) the legal barriers to cross-border philanthropy, and (b) potential options to address these barriers. The goal of this paper is to support upcoming deliberations of the Global Philanthropy Leadership Initiative Task Force (“Task Force” or “GPLI”).

Section II of this report provides a summary of the legal constraints and draws on examples from the U.S., Europe, and other regions. The examples are illustrative only; no attempt has been made to comprehensively index all existing barriers or all countries with barriers. Moreover, the research is confined to *legal* impediments to cross-border giving; the social, economic, cultural, and other barriers that may bear upon cross-border giving are excluded from the scope of this report.

Section III of this report sets forth potentially available options or “next steps” for the consideration of the Council on Foundations and the Task Force. Specifically, we recognize that the Council on Foundations and the Task Force are in the best position to develop and implement strategic solutions. Accordingly, we do not present “recommendations” but rather discuss a few “options,” some of which are currently being developed by Task Force members, such as the Mercator Fund.

Illustrative options include:

- surveying philanthropists on legal barriers they confront;
- developing an index of barriers to cross-border philanthropy;
- expanding tools to help foundations navigate the legal environment for cross-border philanthropy;
- developing a more robust system to monitor and share information about legal developments affecting cross-border philanthropy;
- undertaking analytic work to help make the case to skeptical government officials that global philanthropy is in the interest of both donor and recipient countries;
- establishing principles for cross-border philanthropy;
- undertaking or supporting initiatives to reform of laws affecting cross-border philanthropy;
- developing a treaty on cross-border philanthropy; and
- “special initiatives” relating to disaster relief and the Millennium Development Goals.

We at ICNL welcome feedback on the report, and stand ready to address any concerns that the Council of Foundations or Task Force may have. We are honored to play a supportive role in this endeavor, and look forward to ongoing cooperation with the Council on Foundations and the Task Force.

## **II. Barriers to Cross-Border Philanthropy**

### **A. Donor Country Restrictions (Outflow of Philanthropy)**

This section will examine the legal barriers that donor countries place on the outflow of philanthropy – that is, the ability of philanthropic organizations to provide funding to recipients outside their home countries. Donor country constraints may prevent global philanthropy or otherwise burden the process of cross-border giving. Outflow barriers include (1) significant limitations on cross-border philanthropy by tax-exempt entities; (2) advance governmental approval to make foreign grants; (3) the limited availability of tax incentives for donations to foreign recipients; (4) burdensome procedural requirements to engage in global philanthropy; (5) counter-terrorism measures; and (6) restrictions on financial transactions with sanctioned countries.

#### (1) Significant Limitations on Cross-Border Philanthropy by Tax-Exempt Entities

Some countries limit the ability of tax-exempt and/or charitable organizations to engage in cross-border philanthropy. “It is striking that at the present time, the development of philanthropic organizations across borders is hampered to such extent by restrictions in tax regimes which can be summarized under the label of landlock.”<sup>19</sup> For example:

- In **India**, tax-exempt entities must apply their income within India. More specifically, if part of the income of the organizations is applied for a charitable purpose outside India, that income would be liable to tax. Trust income, however, may be spent outside India without being subject to income tax, if it is spent for a charitable purpose to promote international welfare “in which India is interested.”<sup>20</sup>
- In **Australia**, a tax-exempt organization must, in order to maintain the exempt status, meet the physical presence test, which requires that it pursue its objectives and incur its expenditure principally (i.e., mainly or chiefly) in Australia.<sup>21</sup>
- In **Brazil**, Article 14 of the National Tax Code stipulates that to obtain tax exemption, an educational or social assistance entity must, among other conditions, limit the use of its resources to the Brazilian territory.<sup>22</sup>

#### (2) Advance Governmental Approval

While some countries seek to prevent certain kinds of organizations from engaging in cross-border philanthropy, others require philanthropic organizations to receive governmental approval to engage in cross-border giving. Moreover, governments often have broad discretion in

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<sup>19</sup> Ineke A. Koele, *International Taxation of Philanthropy*, IBFD © 2007 Ineke A. Koele, page 4.

<sup>20</sup> Income Tax Act of 1961, § 11(1).

<sup>21</sup> Australian Taxation Office, *Income tax guide for non-profit organisations*, <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/34269.htm&page=15&H15>.

<sup>22</sup> Council on Foundations, United States International Grantmaking, Brazil country note, March 2010, <http://www.usig.org/countryinfo/brazil.asp>.

deciding whether or not to extend approval to entities seeking to engage in cross-border activities. Examples include:

- In **Egypt**, Article 17 of Law No. 84 (2002) prohibits domestic NGOs from sending funds or other materials (except for scientific and technical books, magazines, publications, and brochures) to foreign persons or organizations abroad without advance approval by the Minister of Social Solidarity.<sup>23</sup>
- In the **U.A.E.**, Article 43 of the Federal Law No. 2 (2008) prohibits the distribution of grants, gifts, donations, or other transfers to foreign entities without ministerial approval.
- In **Malaysia**, charitable organizations must conduct activities that “serve or benefit Malaysians” and may carry out charitable activities outside Malaysia only “with the prior consent of the Minister of Finance.”<sup>24</sup>
- In **Indonesia**, according to Regulation No. 38 of the Minister of Home Affairs (2008), social organizations wishing to give aid to foreign recipients must obtain approval from the Government. Aid can only be given to recipients in countries with diplomatic relations with Indonesia and only where it is “intended for humanitarian activities” and it does “not caus[e] negative impact on the domestic economy and social life.”<sup>25</sup>

### (3) Limited, or No, Tax Incentives for International Philanthropy

Tax incentives, in the form of tax deductions, credits, or other preferences, are often available to individuals and/or corporate entities that make donations to certain categories of CSOs. In most countries, however, such tax incentives are available only for donations to domestic recipients.<sup>26</sup>

This approach is another manifestation of “landlock” tax restrictions: “Where today international philanthropy is the area in international tax in which discrimination remains a common feature, the environment for cross-border philanthropy lags behind in this rapidly changing and increasingly internationalized society in which citizens move and trade, and investment has gone global.”<sup>27</sup> As but a few examples of this global phenomenon:

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<sup>23</sup> ICNL, NGO Law Monitor, Egypt country report, July 30, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/egypt.htm>.

<sup>24</sup> Inland Revenue Board of Malaysia, *Guidelines for Application of Approval under subsection 44(6) of the Income Tax Act 1967*, articles 3.3 and 3.11, available at: [http://www.hasil.org.my/lhdnv3e/documents/GarisPanduanTeknikal/GuidelinesSection44\(6\).pdf](http://www.hasil.org.my/lhdnv3e/documents/GarisPanduanTeknikal/GuidelinesSection44(6).pdf).

<sup>25</sup> Regulation of Minister of Home Affairs Number 38 of 2008 on *Receipt and Giving of Social Organization Aid from and to Foreign Parties*, Article 33. Regulation No. 38 springs from Government Regulation No. 18/1986 on the Implementation of Social Organization Law. Thus, while Regulation No. 38 is of recent origin, the obligations described here and elsewhere in this paper (relating to Regulation No. 38), have existed since 1986.

<sup>26</sup> Note, however, that international CSOs are often precluded from receiving tax-deductible donations even if they have met the legal requirements to operate in a foreign jurisdiction. For example, a Singaporean taxpayer cannot receive a tax deduction for a contribution to an international organization that carries out publicly beneficial activities in Singapore if the organization is based outside the country. Consider also the situation where a multinational corporation and an international CSO have operations in the same country. In some cases, the corporation would have to route a donation through a third country (such as the country where the international CSO is based) in order to be eligible for a tax deduction. This requires considerable tax planning and is a further impediment to global philanthropy.

<sup>27</sup> Koele, *International Taxation of Philanthropy*, pg. 5.

- In **Australia**, “deductible gift recipients” – that is, recipients eligible to receive gifts for which the donor may claim a deduction – must be in Australia. Recipients not in Australia cannot be deductible gift recipients. For example, a fund set up and operated in Australia that makes distributions for the construction of schools run by a religious institution in Europe cannot be endorsed as a deductible gift recipient, because the fund is not “in Australia.”<sup>28</sup>
- In **India**, in order to be eligible for a tax deduction, the donor must give to a recipient organization that has been created “for charitable purposes in India.”<sup>29</sup>
- In **Ireland**, donors are eligible for tax relief only when donations are made to charities with an Irish Charity number.<sup>30</sup> In other words, the Irish Revenue Commissioners will only grant tax relief to a charity that is registered in its list of bodies that are exempt from tax for charitable purposes.<sup>31</sup>

While tax codes often include donor incentives for domestic donations, few envision incentives for cross-border gifts. There are, however, important exceptions. Most recently, a decision by the European Court of Justice (“ECJ”) has led to an erosion of cross-border giving barriers within the European Union (“EU”). Specifically, in January 2009, the European Court of Justice issued its judgment in the case of *Hein Persche v Finanzamt Ludenscheid*.<sup>32</sup> The case was brought by Mr. Persche, a German national, who made a gift in kind, valued at about EUR 18,180, to the Centre Popular de Lagoa, in **Portugal** (a retirement home to which a children’s home is attached); claimed a tax deduction in his tax return; but was refused the deduction by the

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<sup>28</sup> Australia Taxation Office, *Deductible Gift Recipients*, <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/34516.htm&page=2&H2>. See also information on “Overseas Aid Gift Deduction Scheme,” available at <http://www.ausaid.gov.au/ngos/tax.cfm>. In brief, the Overseas Aid Gift Deduction Scheme (OAGDS) enables donations collected by organizations for their overseas aid activities to be tax deductible so donors can claim their contributions to the organization as a tax deduction. Tax deductibility is only allowable for gifts to aid activities in those countries declared as “developing” by the Minister for Foreign Affairs. There is a two-step process to achieve tax deductibility under the OAGDS. The first step is that an organization must be accepted as an “Approved Organisation” by the Minister for Foreign Affairs. To qualify, the organization must meet seven criteria, one of which is to be “clearly identifiable as Australian.” Second, the organization must put in place a developing country relief fund which is exclusively for the relief of persons in declared developing countries.

<sup>29</sup> Council on Foundations, United States International Grantmaking, India country note, May 2010, <http://www.usig.org/countryinfo/india.asp>.

<sup>30</sup> European Foundation Centre, Legal and Fiscal Comparative Charts, <http://www.efc.be/Legal/Documents/FoundationLawsEU.pdf>, section 24.

<sup>31</sup> In June 2010, the Revenue Commissioners introduced a procedure that allows certain foreign organizations to seek a Determination from the Revenue Commissioners that will allow them to receive tax relief in Ireland. To qualify, the body must be legally established in the EEA or EFTA state with its center of control and some operations therein. A majority of its trustees/directors must be resident within the EEA/EFTA state and its objects must conform to the definition of charity under Irish tax law and its governing instrument must bind the charity regarding the application of its income and/or property. In effect, the Revenue Commissioners will require the entity to meet its normal tests for charitable exempt status that it would expect of a domestic applicant charity with the exception of the residency requirement. However, this determination is narrow and is not available to non-EEA/EFTA charities.

<sup>32</sup> ECJ case number C-318/07. Full text of the judgment is available at <http://bit.ly/fzDXb3>.

Finanzamt (District Tax Office) on the ground that the beneficiary of the gift was not established in Germany.<sup>33</sup> The ECJ ruled in favor of Mr. Persche.

As explained by the European Foundation Centre: “The ECJ has ruled that tax laws which discriminate against donations to public-benefit organisations based in other EU Member States are against the EC Treaty, as long as the recipient organisations based in other Member States are to be considered ‘equivalent’ to resident public benefit foundations.”<sup>34</sup> In other words, where donor incentives are available for donations to domestic recipients, they must also be available for donations to foreign recipients based in EU Member States or the European Economic Area (EEA), provided they are equivalent to domestic public benefit organizations.

The ruling in the *Persche* case has triggered a wave of reform of tax legislation within the EU. Prior to the ruling, most national tax laws did not treat donations to domestic and foreign public benefit organizations on an equal footing. Subsequent to the ruling, most countries have now reformed tax laws to comply with the ECJ ruling<sup>35</sup> and recognize the ability of donors to claim deductions for gifts to qualifying foreign organizations resident in the EU or EEA.

While the Court’s judgment held clearly that tax deductions could not be restricted based on the nationality of the recipient alone, it also acknowledged that tax authorities may require taxpayers “to provide such proof as they may consider necessary to determine whether the conditions for deducting expenditure provided for in the legislation at issue have been met and, consequently, whether or not it is appropriate to allow the deduction claimed.”<sup>36</sup> As a result, in those countries that have reformed legislation to allow for tax relief for cross-border gifts (to recipients in the EU or countries in the EEA), procedural rules have also been established to help ensure that the foreign recipient is equivalent to resident public benefit organizations. For example:

- In **Austria**, in order to claim tax benefits for a donation to a foreign-based recipient, the recipient must be incorporated within the EU or EEA, must be comparable to an Austrian nonprofit corporation or public corporation, and must be registered on a list maintained by the fiscal authorities in Vienna. Foreign-based recipients must comply with the same criteria as Austrian organizations in order to be included on the list.
- In **Bulgaria**, in order to claim a tax deduction, the donor must prove that the foreign recipient is identical or similar to Bulgarian public benefit organizations, which can be accomplished by presenting to the National Revenue Agency an officially notarized document, issued and verified by the relevant foreign state authorities, which proves the status of the foreign recipient organization, alongside an official Bulgarian translation.
- In **France**, in order to benefit from tax relief, the foreign recipient must either be accredited by the French authorities or be comparable to a French tax-exempt

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<sup>33</sup> Curia, Judgment of the Court of Justice in Case C-318/07, *Hein Persche v Finanzamt Ludenscheid*, Press Release No. 05/09, January 27, 2009, <http://curia.europa.eu/en/actu/communiqués/cp09/aff/cp090005en.pdf>.

<sup>34</sup> European Foundation Centre, *ECJ rules in favour of cross-border giving*, EFC briefing, January 27, 2009, <http://www.efc.be/EUAdvocacy/EU%20Communiqués%20Briefings/befc0908.pdf>

<sup>35</sup> These countries include Austria, Bulgaria, Belgium, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Poland, Slovenia and the U.K.

<sup>36</sup> Curia, Judgment of the Court of Justice in Case C-318/07, *Hein Persche v Finanzamt Ludenscheid*, Press Release No. 05/09, January 27, 2009, <http://curia.europa.eu/en/actu/communiqués/cp09/aff/cp090005en.pdf>.

organization. In the latter case, the donor must file evidence that the foreign recipient organization is comparable to a French tax-exempt organization.

- In **Germany**, in order to deduct charitable donations to EU- or EEA-based public benefit organizations in cases where the recipient solely pursues public benefit activities outside of Germany, the activities “either have to support individuals which have their permanent residence in Germany or the activities could benefit Germany’s reputation.”
- In the **Netherlands**, donors may receive tax benefits for a donation to a foreign recipient, provided that the Ministry of Finance has qualified it as an institution with a general interest purpose (or “ANBI”).<sup>37</sup>

In addition, in North America, countries have concluded bilateral treaties, which address cross-border giving. The scope of support for cross-border giving is, however, limited:

- The U.S.-Canada tax treaty permits U.S. taxpayers to receive a tax deduction for contributions to Canadian charities if certain requirements are met. Most importantly, the deduction may not exceed the amount of the donor’s Canadian source income. Canadians may treat donations to U.S. 501(c)(3) organizations just as they treat contributions to Canadian registered charities, with the condition that gifts be limited to 70% of U.S. source income; the Canadian authorities interpret the tax treaty to place the same percentage limitation on gifts by Canadian registered charities to 501(c)(3) organizations.
- The U.S.-Mexico Double Taxation Treaty also envisions the possibility that contributions by a U.S. resident to a Mexican organization may constitute a charitable contribution and be tax deductible, “if the Contracting States agree that a provision of Mexican law provides standards for organizations authorized to receive deductible contributions that are essentially equivalent to the standards of United States law for public charities.”<sup>38</sup> Such contributions are deductible only for U.S. taxpayers with income from Mexican sources, and the extent of the deduction depends on the magnitude of the Mexican source income.<sup>39</sup> The Double Taxation Treaty provides similar rules with respect to income tax deductions under Mexican law for Mexican residents who make contributions to U.S. public charities.

#### (4) Procedural Requirements

In some countries, foundations must comply with various procedural requirements before making a foreign grant. For example, in the **United States**, private foundations (including company-sponsored private foundations) and donor-advised funds<sup>40</sup> utilize two basic approaches

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<sup>37</sup> Qualification is normally accomplished by registration at the Tax office. According to ICNL’s local partner, the European Commission in May 2010 objected to the registration requirement, and suggested that the only permissible requirement may be that the recipient would qualify as an ANBI; it is unclear how this determination will be made.

<sup>38</sup> Article 22 (2), US-Mexico Double Taxation Treaty.

<sup>39</sup> Council on Foundations, United States International Grantmaking, Mexico country note, May 2010, <http://www.usig.org/countryinfo/mexico.asp>

<sup>40</sup> For additional information on the legal issues relating to international grantmaking and donor-advised funds, please see the following article: *International Grantmaking from Donor-Advised Funds: New Requirements and Changing Practices after the Pension Protection Act of 2006*, available at <http://www.cof.org/files/Bamboo/programsandservices/legalinfo/images/International%20Grants%20from%20DAFs.pdf>.

when making grants to a foreign entity: “expenditure responsibility” and “equivalency determination.” Under “expenditure responsibility,” the donor must exert reasonable efforts and establish adequate procedures:

1. To see that the grant is spent only for the purpose for which it is made,
2. To obtain full and complete reports from the grantee organization on how the funds are spent, and
3. To make full and detailed reports on the expenditures to the IRS.<sup>41</sup>

“Equivalency determination” is a process designed to assess whether a potential non-U.S. grantee organization is the equivalent of a U.S. public charity. It typically involves the collection of extensive documentation, including the potential grantee’s governing documents, financial information, and other information in order to make the equivalency determination. If outside counsel is involved in the process, this process typically costs between \$5,000 and \$10,000.<sup>42</sup>

According to **Canada’s** Income Tax Act, a registered charity can only use its resources in two ways: on its own activities and on gifts to “qualified donees.”<sup>43</sup> The Income Tax Act specifies that “qualified donees” are organizations that can issue official donation receipts for gifts that individuals and corporations make to them. “Qualified donees” are almost exclusively Canadian, including, among others, a registered charity, a registered Canadian amateur athletic association, and a Canadian municipality.<sup>44</sup>

The Canadian Revenue Authority has just released new guidance called “Canadian Registered Charities Carrying out Activities Outside Canada.”<sup>45</sup> This guidance document deals with the relationship between a Canadian charity and any non-qualified donee, whether in Canada or abroad; almost all organizations outside of Canada are non-qualified donees. In order to transfer resources to non-qualified donees, a Canadian charity needs to maintain “direction and control” over those resources. The guidance document helps a Canadian charity understand

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<sup>41</sup> U.S. Internal Revenue Service, *Expenditure Responsibility*, <http://www.irs.gov/charities/foundations/article/0,,id=137613,00.html>.

<sup>42</sup> Techsoup Global, *What Is Equivalency Determination?*, <http://www.techsoupglobal.org/ngosource/ED>.

<sup>43</sup> Canada Revenue Agency, *Guidance: Canadian Registered Charities Carrying Out Activities Outside Canada*, July 8, 2010, section 1, [http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html#\\_ftn1](http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html#_ftn1). Indeed, both charitable organizations and charitable foundations are required to expend at least 80% of the income for which donation tax receipts were issued in the previous year, and may meet this disbursement quota by distributing money to “qualified donees” or by carrying out activities themselves.

<sup>44</sup> The full list of qualified donees includes: a registered charity; a registered Canadian amateur athletic association; a housing corporation resident in Canada constituted exclusively to provide low-cost housing for the aged; a Canadian municipality; the United Nations and its agencies; a university that is outside Canada that is prescribed to be a university the student body of which ordinarily includes students from Canada; a charitable organization outside Canada to which Her Majesty in right of Canada has made a gift during the fiscal period or in the 12 months immediately preceding the period and Her Majesty in right of Canada or a province. *See* <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/csp/csp-q01-eng.html>. In addition, Canadian tax law also allows Canadians who live “near the border” to make donations to U.S. 501(c)(3) organizations if they have business or employment income from the U.S.

<sup>45</sup> For more information, *see* [http://www.globalphilanthropy.ca/index.php/articles/new\\_guidance\\_for\\_canadian\\_registered\\_charities\\_carrying\\_out\\_foreign\\_activit/](http://www.globalphilanthropy.ca/index.php/articles/new_guidance_for_canadian_registered_charities_carrying_out_foreign_activit/).

what is required for direction and control. Failure to maintain direction and control can result in a 105% penalty of the amount transferred and/or revocation of charitable status. A sample contractor agreement for a Canadian registered charity conducting foreign activities is also available.<sup>46</sup>

#### (5) Counter-Terrorism Measures

As part of counter-terrorism efforts, countries and international bodies, such as the United Nations, have imposed rules and restrictions that, among other things, restrict giving – often in the form of outright prohibitions – to designated individuals and entities. Recent years have witnessed laws, regulations, and “voluntary” guidelines that impact cross-border giving. Indeed, it has been suggested that “philanthropic organizations are finding themselves in an era when the regulatory paradigm is shifting from a tax-based regulatory environment to a regulatory environment modeled on the fight against money laundering and terrorism.”<sup>47</sup> Recognizing that a tremendous amount of commentary and research has already been produced to identify, explain, and analyze counter-terrorism measures, we do not seek to provide comprehensive treatment of the topic in this brief section, but rather to highlight a few illustrative country examples:

- The **U.K.** Terrorism (United Nations Measures) Order 2006 prohibits any U.K. national or other person within the U.K. jurisdiction from knowingly “deal[ing] with funds or economic resources” belonging to listed persons without prior authorization by the Treasury. Such lists include individuals related to al-Qaida and the Taliban, as well as those related to a number of states, including Belarus, Myanmar (Burma), DRC, Eritrea, Iran, Iraq, Cote d’Ivoire, Liberia, Somalia, Sudan, and Zimbabwe.<sup>48</sup>
- In **Canada**, under the *Charities Registration (Security Information) Act* and the *Income Tax Act*, a charity’s status may be revoked if it operates in a way that makes its resources available, either directly or indirectly, to an entity that is a *listed entity* as defined in subsection 83.01(1) of the *Criminal Code*; or to any other entity (person, group, trust, partnership, or fund, or an unincorporated association or organization) that engages in terrorist activities or activities in support of them.<sup>49</sup>
- The **United States** has a complex web of counter-terrorism measures, including the Antiterrorism and Effective Death Penalty Act, which criminalizes “material support” to designated entities; the International Emergency Economic Powers Act, which prohibits transactions with designated entities; Executive Order 13224, which allows for the freezing of assets and other measures; and, the Patriot Act, which expanded the “material support” prohibition to further bar “expert advice or assistance” to terrorist organizations,

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<sup>46</sup> The sample contractor agreement is available at <http://ow.ly/29hM4>.

<sup>47</sup> Ineke A. Koele, *International Taxation of Philanthropy*, IBFD © 2007, page 373. Although beyond the scope of the research, there is evidence to suggest that international philanthropy “may be hampered by the threat of anti-terrorism measures.” For example, in a 2004 survey of international funders, the majority agreed that it was now more difficult to fund internationally, and 70% maintained that the war on terrorism complicates overseas funding due to increased security risks abroad. See Koele, page 11-12.

<sup>48</sup> The Terrorism (United Nations Measures) Order 2006, [http://www.hm-treasury.gov.uk/d/si\\_2657\\_terrorism\\_un\\_measures\\_order\\_2006\\_121006.pdf](http://www.hm-treasury.gov.uk/d/si_2657_terrorism_un_measures_order_2006_121006.pdf).

<sup>49</sup> Canada Revenue Agency, Guidance: Canadian Registered Charities Carrying Out Activities Outside Canada, July 8, 2010, section 4.3, [http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html#\\_Toc260732227](http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html#_Toc260732227).

a provision that has been extended to charities and was the subject of a recent Supreme Court case.<sup>50</sup>

- In addition, the **U.S. Treasury Department** issued the *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities* in late 2002. The Guidelines included suggested steps for charitable and philanthropic organizations to take when engaged in cross-border giving. These steps included the collection of considerably more information about grantees than is often available, the vetting of grantees, extensive donor review of financial operations, and other requirements in quite detailed terms. In response to criticism, the Treasury Department revised the Guidelines in December 2005, but significant issues remain.<sup>51</sup> As but one example, the Guidelines advise grantmakers to check federal terrorist lists; this vetting process could be deemed necessary even where a corporation is providing small amounts (e.g., \$20) as part of an employee matching gift program. In such case, the cost of administering the cross-border transfer could exceed the amount of the matching gift itself.

#### (6) Restrictions on Financial Transactions with Sanctioned Countries

In addition to restrictions emanating from counter-terrorism measures, countries and international bodies sometimes seek to prohibit financial transactions with, or exports to, designated countries. Philanthropic giving is often impacted by such restrictions. For example:

- Through the Office of Foreign Assets Control (OFAC) at the Department of Treasury, the **U.S. Government** imposes sanctions on several countries, from Belarus to Zimbabwe.<sup>52</sup> As part of any given sanctions regime, philanthropic donations may be subject to restrictions. For example, the U.S. permits donations of in-kind humanitarian articles (e.g., food, clothing, and medicine) and gifts valued only up to \$100 or less to Iran. The export of gift parcels and humanitarian goods to Cuba is subject to limitations and licensing requirement by the OFAC and Department of Commerce.
- **Canada's** *Export and Import Permits Act* allows the Government to control the export of any goods to countries included on the *Area Control List*, a list of countries that currently includes Belarus and Myanmar (Burma). Permits are required for exports to these two countries. "Permits for humanitarian goods, including food, clothing, medicines, medical supplies, information material, casual gifts and personal effects belonging to persons leaving Canada for Belarus, will generally be approved. Permits for other items will generally be denied."<sup>53</sup>
- The **United Nations**, on June 9, 2010, imposed additional sanctions against Iran through Security Council Resolution SC/9948. Among other provisions, the Resolution calls upon all States to "prevent the provision of financial services . . . or the transfer to, through, or from their territory, or to or by their nationals or entities organized under their laws (including branches abroad), or persons or financial institutions in their territory, of any

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<sup>50</sup> *Holder et al. v. Humanitarian Law Project et al.*, 561 U.S. \_\_\_\_ (2010).

<sup>51</sup> [http://www.icnl.org/knowledge/ijnl/vol10iss3/special\\_2.htm](http://www.icnl.org/knowledge/ijnl/vol10iss3/special_2.htm)

<sup>52</sup> U.S. Department of Treasury, Office of Foreign Assets Control, <http://www.ustreas.gov/offices/enforcement/ofac/>.

<sup>53</sup> Foreign Affairs and International Trade Canada, Export Controls to Belarus, <http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/148.aspx>.

financial or other assets or resources if they have information that provides reasonable grounds to believe that such services, assets or resources could contribute to Iran's proliferation-sensitive nuclear activities, or the development of nuclear weapon delivery systems ...<sup>54</sup>

- Sanctions or other related measures have been frequently imposed by the **European Union (EU)** in recent years, either on an autonomous EU basis or implementing binding Resolutions of the Security Council of the United Nations.<sup>55</sup> On July 27, 2010, the EU imposed sanctions on Iran that are considerably broader and more stringent than UN sanctions. Specifically, member states of the EU are required to exercise enhanced monitoring over activities of specific financial institutions within their jurisdiction, including banks domiciled in Iran, and their EU and non-EU based branches and subsidiaries. Funds being transferred to or from Iran are subject to new reporting requirements:
  - transfers of funds for foodstuffs, healthcare, or humanitarian purposes may be carried out without prior authorization, but transfers above €10,000 must be notified to the relevant competent authority of the member state;
  - any other transfer under €40,000 may be carried out without prior authorization, but must be notified to the relevant competent authority if above €10,000;
  - all transfers above €40,000 must be authorized prior to the transfer by the relevant competent authority. Member States are required to inform other Member States of any rejected authorizations;
  - all relevant transfers of funds in respect of Iranian interests must be notified to the relevant competent authority within five working days; and
  - all transactional records must be kept for five years.<sup>56</sup>

Having considered the legal constraints imposed by donor countries on the outflow of philanthropic giving, we now turn to the recipient country barriers on the inflow of philanthropy.

## **B. Recipient Country Restrictions (Inflow of Philanthropy)**

This section will examine the legal barriers that recipient countries place on the inflow of philanthropy – that is, the ability of CSOs to receive funding from outside their home countries. Recipient country constraints may prevent CSOs from receiving philanthropic contributions or otherwise burden the process of receiving philanthropic contributions. The most common inflow legal barriers include: (1) the requirement of advance government approval to receive funding from abroad; (2) restricted purposes and activities that can be supported through foreign funding; (3) mandatory routing of funding through government channels; (4) post-receipt procedural burdens, such as burdensome notification and reporting requirements; (5) onerous tax treatment of foreign funding received; and (6) foreign exchange requirements.

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<sup>54</sup> U.N. Security Council, SC/9948, Security Council Imposes Additional Sanctions on Iran, June 9, 2010, <http://www.un.org/News/Press/docs/2010/sc9948.doc.htm>.

<sup>55</sup> European Commission, Sanctions or restrictive measures, [http://ec.europa.eu/external\\_relations/cfsp/sanctions/index\\_en.htm](http://ec.europa.eu/external_relations/cfsp/sanctions/index_en.htm).

<sup>56</sup> Clyde & Co., *EU sanctions against Iran*, July 28, 2010, <http://www.ifw-net.com/freightpubs/ifw/features/eu-sanctions-against-iran/20017796472.htm>.

As a threshold matter, it is worth noting that the law or practice in some countries may prohibit the receipt of foreign funding altogether, but this is rare. In Afghanistan, for example, social organizations are legally banned from receiving foreign funds, although the legal prohibition is not, in practice, enforced; moreover, another organizational form, so-called “non-governmental organizations,” are permitted to receive foreign funding. The converse is true in Saudi Arabia, where there is no *de jure* barrier to the receipt of foreign funding, but *de facto*, most Saudi CSOs are prevented from receiving any foreign funding.

(1) Advance Government Approval

The law in several countries requires advance government approval for the inflow of philanthropic funding. In other words, organizations are prohibited from receiving funding from outside their home countries without their government’s prior approval. Such requirements open the door for the exercise of governmental discretion and may result in the denial of permission to receive funding from abroad.

a. Express approval required

An approval requirement is common in the Middle East/North Africa (MENA) region. **Egypt** is perhaps the most prominent example. Egyptian law prohibits any association from receiving foreign funds – whether from foreign individuals or from foreign authorities (including their representatives inside Egypt) – without advance approval from the Minister of Social Solidarity. Securing ministerial approval may require a two-month wait during which time the Ministry reviews the request for approval. And the failure to secure approval can lead to dissolution. For example, on April 27, 2009, the Egyptian Organization for Human Rights (EOHR) received a dissolution decree alleging that the EOHR received foreign funding without authorization; the dissolution order reportedly came soon after EOHR published its 2008 Annual Report, criticizing the Egyptian Government.<sup>57</sup>

Additional illustrative examples from the MENA region include:<sup>58</sup>

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<sup>57</sup> It should be noted, however, that an Egyptian administrative court found in a prior case involving another association that dissolution of an organization based on receipt of foreign funds without prior approval is unconstitutional. Cairo Institute for Human Rights Studies, *Human Rights in the Arab Region* (Annual Report 2008). (The Association of Human Rights Legal Aid (AHLA), a similar organization, was dissolved in September 2007 for alleged acceptance of foreign funding without the approval of the Administrative authorities. On 26 October 2008 a judicial ruling was issued to halt the dissolution of the NGO.)

<sup>58</sup> In addition to the examples listed here, recent legal initiatives in the Middle East have sought to increase the degree of government engagement in controlling the inflow of foreign funding generally, including philanthropic funding. For example, in March 2009 the **Iraqi** Government sent to the legislature a draft federal law that requires NGOs receiving donations, grants, or bequests “from within the Republic of Iraq or from abroad” to obtain prior approval from the Department of NGOs in the Secretariat of the Council of Ministers, and also requires individuals who wish to donate to NGOs to notify this Department ahead of time (Article 17 of draft law). The law does not specify how permission is obtained or on what grounds permission will be granted or denied. This would have placed a potentially severe burden in the way of NGO sustainability. Fortunately, the version of the federal law enacted in January 2010 did not include this restriction. In July 2009, the Republic of **Yemen**’s Ministry of Labor and Social Affairs proposed a package of twenty amendments to the *Law on Associations and Foundations* (Law 1 of 2001), which, among other proposed changes, would have required domestic associations and foundations to obtain permission from the Minister of Labor and Social Affairs before obtaining any “material or financial support from a foreign person or from foreign actors, either abroad or within the Republic” (Revised Article 23, proposed Article 30). The Ministry would have had significant discretion to deny funding to organizations, and certain types

- In **Algeria**, foreign donations must be pre-approved by the Ministry of the Interior. The criteria under which the Ministry of the Interior can deny approval are not specified, and an association that wishes to appeal an adverse decision has no recourse with the courts.<sup>59</sup>
- In **Jordan**, foreign funding to societies is subject to the approval of the Council of Ministers. The request for approval should include the source of funding, the amount of funding, the means of transfer, and the objectives for which the funding will be spent, in addition to any special conditions.<sup>60</sup>

At the same time, the issue is not limited to the MENA region. In **Eritrea**, foreign foundations may fund CSOs only if the Ministry of Labor and Human Welfare determines that it cannot provide the service in question, a determination that is rarely made. Otherwise, foreign foundations may only provide funding to the Government of Eritrea. In **Belarus**, in order to receive foreign funds, organizations must register the transfer agreement with a sub-department of the presidential administration, which grants such registrations only rarely.<sup>61</sup> In **Uzbekistan**, in order to receive a foreign grant, an NGO must secure a special opinion from the Commission under the Cabinet of Ministers that the project to be supported by the grant is indeed worthy of support.<sup>62</sup>

*b. Procedural requirements*

In other countries, the receipt of foreign funding is impeded by burdensome procedural requirements. For example, in **China**, the State Administration of Foreign Exchange recently issued *Notice 63 on Issues Concerning the Administration of Foreign Exchange Donated to or by Domestic Institutions* that, on paper, requires certain domestic nonprofit organizations to comply with new and more complex rules for receiving and using foreign donations. These requirements include an application attesting to the authority of the domestic organization and the foreign donor; the domestic group's business license; a notarized donation agreement between the domestic group and the foreign donor organization with the purpose of the donation prescribed; and a registration certificate for the foreign nonprofit group.

In **Azerbaijan**, the Law on Grants of 1998, as reinforced by Presidential Decree of 2004,<sup>63</sup> requires that non-commercial organizations ("NCOs") register grant agreements with the Ministry of Justice. The failure to register a grant makes NCOs vulnerable, as the fines for failure to register a grant agreement are so high that such penalties can result in severe hardship or even termination of the organization.<sup>64</sup> The Administrative Code provides financial penalties for the

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of organizations that may rely heavily on foreign funding could potentially be starved of resources, essentially extinguishing their rights to associate.

<sup>59</sup> ICNL, NGO Law Monitor, Algeria country report, April 26, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/algeria.htm>

<sup>60</sup> ICNL, NGO Law Monitor, Jordan country report, July 30, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/jordan.htm>

<sup>61</sup> Presidential Decree No. 8 of March 12, 2001, para. 1(2).

<sup>62</sup> ICNL, NGO Law Monitor, Uzbekistan country report, July 28, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/uzbekistan.htm>

<sup>63</sup> Decree # 27, Rules on registration of contracts (decisions) on receiving (giving) grants, of February 12, 2004.

<sup>64</sup> ICNL, *Memorandum on grant registration problem in Azerbaijan*, January 19, 2010.

failure to register a grant; in December 2008, fines were increased from 50 AZN (\$63) to an amount ranging from 1,000 AZN (\$1,250) to 2,500 AZN (\$3,125). Moreover, a presidential decree was issued in December 2009, which provides that no transactions may be made with funds provided under grant agreements unless the agreement is registered with the Ministry of Justice.

In addition, **Indonesia** requires social organizations<sup>65</sup> that seek to receive or provide donations to or from foreign entities to engage in a detailed approval and reporting process. Regulation No. 38 of 2008, issued by the Minister of Home Affairs, requires NGOs to register with the government and seek Ministry of Home Affairs' approval for foreign funding.<sup>66</sup> More specifically:

- social organizations must report “the aid receipt plan”<sup>67</sup> to the Minister of Home Affairs (or governor);
- the “aid receipt plan” must include information relating to the source, aim, nature, and amount of aid, as well as the “aid utilization plan” and “availability of match fund owned by social organizations and its use plan”<sup>68</sup>;
- the Minister of Home Affairs can approve the “aid receipt plan” after coordinating with related departments<sup>69</sup>; and
- the Ministry may take up to 14 days to provide approval.<sup>70</sup>

In **India**, the Foreign Contribution (Regulation) Act 1976<sup>71</sup> requires all nonprofit organizations wishing to accept foreign contributions to (a) register with the central government; (b) agree to accept contributions through designated banks; and (c) maintain separate books of accounts with regard to all receipts and disbursements of funds.<sup>72</sup>

## (2) Restricted Purposes and Activities

Other countries erect barriers to funding certain spheres of activity. For example, in **Zimbabwe** existing law prohibits the use of foreign funds for voter-education projects conducted

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<sup>65</sup> According to a local expert, the regulations should only apply to social organizations and not foundations and associations, although the Ministry of Internal Affairs continues to insist that all organizations are “social organizations” subject to this set of regulations. See Council on Foundations, United States International Grantmaking, Indonesia country note, April 2010, <http://www.usig.org/countryinfo/indonesia.asp>.

<sup>66</sup> 2008 Regulation on the *Receipt and Giving of Social Organization Aids From and To Foreign Parties* (Article 40(1)); see also John Aglionby, “Indonesian Funding Rule “Draconian,” *Financial Express* (20 December 2008), <http://www.thefinancialexpress-bd.com/2008/12/20/53598.html>.

<sup>67</sup> Regulation of Minister of Home Affairs Number 38 of 2008 on *Receipt and Giving of Social Organization Aid from and to Foreign Parties*, Article 10.

<sup>68</sup> *Id.*, Article 11.

<sup>69</sup> *Id.*, Article 12.

<sup>70</sup> *Id.*, Article 13.

<sup>71</sup> At the time of writing, a new Foreign Contributions Regulation Bill was pending in India.

<sup>72</sup> Council on Foundations, United States International Grantmaking, India country note, May 2010, <http://www.usig.org/countryinfo/india.asp>.

by independent NGOs; instead, such funds may be contributed directly to the Electoral Commission.<sup>73</sup> But it is Ethiopia that serves as the seminal example.

In **Ethiopia**, where the Parliament enacted the highly controversial *Proclamation to Provide for the Registration and Regulation of Charities and Societies* in February 2009, income from foreign sources may amount to no more than 10% of the total organizational income used by “Ethiopian” charities and societies. And it is only “Ethiopian” charities and societies that are legally allowed to advance human rights, the rights of children and the disabled, gender equality, nations and nationalities, good governance and conflict resolution, as well as the efficiency of the justice system. “Income from foreign sources” is defined as “a donation or delivery or transfer made from foreign source of any article, currency or security. Foreign sources include the government agency or company of any foreign country; international agency or any person in a foreign country.”<sup>74</sup>

“There is no substantial indigenous funding that can compensate for the loss of resources engendered by the restrictions. Consequently, the restrictions will likely create a severe financial crisis for CSOs, which might result in their being crippled.”<sup>75</sup> Consequently, the bottom line for many Ethiopian organizations is to choose between giving up almost all of their funding, or giving up their work on human rights, gender equality, disability rights, children’s rights, or other proscribed fields. “You are doomed either way,” says Kumlachew Dagne, a lawyer and executive member of the Ethiopian Bar Association.<sup>76</sup>

While the Ethiopian law is relatively specific in its purpose/activity restrictions, many other countries rely on vague statutory formulations to restrict purposes/activities that civil society can pursue with the support of foreign funding. For example, in **Indonesia**, the 2008 regulation on the *Receipt and Giving of Social Organization Aids from and to Foreign Parties* prohibits foreign assistance causing “social anxiety and disorder of national and regional economy.”<sup>77</sup> In **Bolivia**, Supreme Decree No. 29308 bans foreign assistance that carries “implied political or ideological conditions.” Without defining these terms, the law leaves enforcement of the restrictions to the full discretion of the state.

It should be noted that many other countries prohibit NGO participation in various legitimate spheres of activity, regardless of the source of funding. The examples in this section were more narrowly concerned with limits on what activities may be supported *with foreign funding*. The blanket prohibitions applicable more broadly to NGO activities also, of course, directly impede the ability of international grantmakers and donors to provide funding for such activities. Such activity restrictions are considered in section II.C below.

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<sup>73</sup> Zimbabwe Electoral Commission Act, § 16.

<sup>74</sup> Article 2(15) of the Proclamation to Provide for the Registration and Regulation of Charities and Societies, 2009.

<sup>75</sup> Debebe Hailegebriel, *Ethiopia: Restrictions on Foreign Funding of Civil Society*, The International Journal for Not-for-Profit Law, Vol. 12, Issue 3, May 2010, [http://www.icnl.org/knowledge/ijnl/vol12iss3/special\\_3.htm](http://www.icnl.org/knowledge/ijnl/vol12iss3/special_3.htm).

<sup>76</sup> <http://www.theglobeandmail.com:80/news/world/new-law-cripples-ngos/article1367330/>

<sup>77</sup> 2008 *Receipt and Giving of Social Organization Aids From and To Foreign Parties* (Article 6(2)(e)).

## (2) Mandatory Routing of Funding through Government Channels

In an effort to monitor and control the flow of foreign funding to a country's civic sector, some countries require that foreign funding be routed through a governmental body, ministry, or government-controlled bank. In this way, governments can more easily monitor and in some cases obstruct the flow of funding to CSOs. For example:

- **Eritrea's** Proclamation No. 145/2005 requires that international NGOs engage in activities only through "the Ministry or other concerned Government entity."<sup>78</sup> As noted above, this rule allows NGOs to receive grant support only if the Ministry of Labor and Human Welfare determines that it lacks capacity to address the area of concern directly.
- In **Sierra Leone**, assets transferred to build the capacity of local NGOs should be routed through the Sierra Leone Association of Non-Governmental Organizations and the Ministry of Finance and Economic Development. (It is unclear how this will be implemented in practice.)
- **Sri Lanka** appears to be prepared to follow the same model. In March 2009, Sri Lankan Defense Spokesman Minister Keheliya Rambukwella said, "The aid or grants coming from other foreign countries should not directly go to the INGOs or NGOs and should be channeled through the government's management and the administration."<sup>79</sup> The Social Services Ministry expects to get the "necessary" legislation approved soon for an NGO law under which all INGOs and NGOs would have to be registered with a central Agency.<sup>80</sup>
- In **Venezuela**, a draft Law on International Cooperation was introduced and passed its first reading within the National Assembly in 2006 and was then shelved until March 2009, when the National Assembly announced that it will renew consideration of the draft Law.<sup>81</sup> If enacted, the Law would give the President and Cabinet of Venezuela unprecedented authority to organize, control, direct, and coordinate all "activities of international cooperation," including transfers of assets, technology, and other forms of material support. Under the draft law, all foreign funds would have to be routed through a "Fund for International Cooperation and Assistance," allowing the government discretion to determine which local organizations could receive financing.

## (4) Burdensome Notification and Reporting Requirements

After the receipt of funding from abroad, recipients may be subject to additional requirements – such as the obligation to notify the government or comply with burdensome

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<sup>78</sup> *Proclamation No. 145/2005, A Proclamation to Determine the Administration of Non-governmental Organizations* [Eritrea], No. 145/2005, 11 May 2005, Article 9(1), available at: <http://www.unhcr.org/refworld/docid/493507c92.html>

<sup>79</sup> Sunil Jayasiri, "All foreign aid should go through Govt.: Minister Keheliya Rambukwella" (9 March 2009), <http://www.lankamission.org/content/view/1723/9/>; see also "Sri Lanka government expects transparency from NGOs" *ColomboPage* (6 March 2009), [http://www.colombopage.com/archive\\_09/March6160421RA.html](http://www.colombopage.com/archive_09/March6160421RA.html); although the Sri Lankan government has not taken any legislative action as of this writing, government spokespeople have been promising imminent action.

<sup>80</sup> Sandun A. Jayasekera, "Ministry accuses NGOs of fraud," *Daily Mirror* (27 March 2009), <http://www.dailymirror.lk/DM BLOG/Sections/frmNewsDetailView.aspx?ARTID=44613>.

<sup>81</sup> Asamblea Nacional anunció agenda legislativa de 2009 (10 March 2009), [http://www.asambleanacional.gob.ve/index.php?option=com\\_content&task=view&id=21299&Itemid=27](http://www.asambleanacional.gob.ve/index.php?option=com_content&task=view&id=21299&Itemid=27).

reporting rules – which, while less intrusive than securing advance governmental approval, may nonetheless act as deterrents to the receipt of philanthropic funding. Certainly, such procedural burdens impede the smooth flow of funding to potential recipient organizations. For example:

- On June 18, 2010, President Martinelli of **Panama** issued Executive Decree No. 57, which requires every Panamanian not-for-profit association to publish online extensive information about all donations received, including the donor's contact information and the size of the donation.
- In **Turkey**, the law imposes notification requirements relating to the receipt of foreign funding. Foundations must notify public authorities within one month after receiving the funding, while associations must notify the Government before *using* the funding.<sup>82</sup>
- In **Uzbekistan**, after receiving approval to receive grant funding, the NGO must provide several reports to a special government body operating under the Ministry of Finance. The reports can be divided into two groups: (a) monthly reports; and (b) transactional reports, which are required following each financial transaction relating to the use of the grant funding, no how matter how small the transaction. For example, if an NGO buys a pen or a desk with grant funding, then it needs to submit a report *on the next business day*.<sup>83</sup>
- In **India**, the Foreign Contribution (Regulation) Act 1976 requires that all nonprofit organizations must report to the central government all foreign contributions received within 30 days of the receipt of the contribution, and must file annual reports with the Home Ministry. The entity must report the amount of the foreign contribution, its source, the manner in which it was received, the purpose for which it was intended, and the manner in which it was used.<sup>84</sup>
- Following the receipt of grants (defined as “revenue ... in the form of money or in kind, including experts and trainings that do not need to be returned”), social organizations operating at the national level in **Indonesia** must submit a copy of the grant agreement to the Minister of Home Affairs, while those operating at the provincial and district levels must submit documentation to the governors and mayors, respectively.<sup>85</sup> In addition, recipients of foreign funding must publicize foreign-funded activities through the media, no later than 14 working days after the date of activity implementation.<sup>86</sup>

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<sup>82</sup> ICNL, NGO Law Monitor, Turkey country report, July 12, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/turkey.htm>

<sup>83</sup> ICNL, NGO Law Monitor, Uzbekistan country report, July 28, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/uzbekistan.htm>

<sup>84</sup> Council on Foundations, United States International Grantmaking, India country note, May 2010, <http://www.usig.org/countryinfo/india.asp>.

<sup>85</sup> Regulation of Minister of Home Affairs Number 38 of 2008 on *Receipt and Giving of Social Organization Aid from and to Foreign Parties*, Article 17(2).

<sup>86</sup> Regulation No. 38, Article 40(1-2).

(5) Onerous Tax Treatment of Recipient<sup>87</sup>

As a general rule, voluntary contributions to CSOs, including donations, gifts, and grants, are treated as tax-exempt income, if they are considered to be income at all. The source of the contribution is normally not a relevant consideration; in other words, the receipt of donations or grants will typically be tax-free, regardless of whether the donor or grantor is domestic or international. Only in exceptional cases are such categories of income subject to taxation for the recipient.

In several countries of the former Soviet Union, income from foreign grantmakers is subject to taxation unless the foreign grantmaker is included on a government-approved list. Such lists have been in place, at varying times, in Belarus, Kazakhstan, and Turkmenistan. In **Russia**, grants can be extended from foreign or international organizations to Russian citizens or CSOs on a tax-exempt basis *only if* the grant-giver is included on a list of organizations approved by the Russian Government and the grant is made for an approved public benefit purpose. The government list is tightly controlled and the number of approved organizations was reduced in 2008 by Decree #485 to an insignificant number. Prior to the issuance of Decree #485, approximately 100 organizations were on the list, including several private foundations. The decree reduced the number of approved organizations to a mere 12 and eliminated all private foundations. As a result, grants from private foundations are potentially liable to a 24% tax.<sup>88</sup>

(6) Foreign Exchange Restrictions

Foreign exchange rates, where the value of foreign currencies is set at official rates far below the parallel market rates, may serve as a legal barrier to cross-border giving, as recipients must exchange funding received at highly unfavorable rates. For example:

- Prior to the introduction of the multiple currency system in **Zimbabwe** in February 2009, all transactions within Zimbabwe had to be concluded in Zimbabwe dollars, and all foreign funds were pegged at official rates that were set far below the parallel market rates. This resulted in substantial losses for recipients receiving cross-border grants, as recipients had to convert the grants, according to official exchange rates, into Zimbabwe dollars in order to engage in programming activity.<sup>89</sup>
- In **Venezuela**, foreign exchange controls have been in place since 2003. Currently, only transactions through the Central Bank of Venezuela (BCV) are approved, and only at the official rate of 4.3 Venezuelan Bolivar (VEB) per 1 USD. This has a deleterious financial

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<sup>87</sup> While not relating directly to foreign grantmaking per se, local partners in **India** have raised concerns with the tax treatment of anonymous donations to charitable organizations. According to §115BBC of the Finance Act, 2006, anonymous donations to charitable organizations are subject to the maximum marginal rate of 30%. Subsequently, Finance (No. 2) Act, 2009, provided some relief, in that anonymous donations aggregating up to five years of the total income of an organization or a sum of Rs 100,000, whichever is higher, will not be taxed. Still, charitable organizations in India – and especially those organizations, like the Salvation Army India, which raise funds through donation collection boxes – find that §115BBC is a deterrent to mobilize funds for welfare and developmental work from the general public. Indeed, several such organizations have been compelled to remove these collection boxes.

<sup>88</sup> It is important to recognize that a “grant” and a “donation” are distinct concepts under Russian law. Foreign donors need not be on a government-approved list in order to make tax-exempt donations.

<sup>89</sup> Since the introduction of the multiple currency system, however, grant recipients are no longer affected by exchange rate problems.

impact on recipients of foreign funding, as the actual rate of exchange is closer to a rate of 8 VEB per 1 USD. Moreover, anyone receiving funds outside the BCV channel is subject to severe penalties, including imprisonment, according to the 2005 Law on Unlawful Exchanges.

### **C. Legal Barriers to the Nonprofit Beneficiaries of Philanthropy**

This section will explore legal barriers that impede the development of indigenous CSOs that might receive global philanthropy. Without a pool of eligible beneficiaries operating in any given country, the very basis for international philanthropic efforts is undermined. Indeed, one of the Task Force members supported ICNL engagement in Kosovo after the 1999 transition, specifically because there were so few CSOs active in the territory, which therefore limited local capacity to implement programs supported by private philanthropy.<sup>90</sup> Barriers have been comprehensively surveyed in other reports,<sup>91</sup> so this section addresses only three illustrative barriers, namely constraints on their formation and operational activity, as well as international contact and communication with these organizations.

#### **(1) Barriers to Formation of Organizations**

In some countries, the law is used to discourage, burden, and even prevent the formation of CSOs. Barriers include burdensome registration or incorporation requirements, vague grounds for denial, or limitations on permissible program activity. As but a few examples:<sup>92</sup>

- *Limited right to associate.* In **Saudi Arabia**, only organizations established by royal decree are allowed.
- *Restrictions on founders.* In **Turkmenistan**, national-level associations can only be established with a minimum of 500 founders.
- *High minimum capital requirements.* In **Eritrea**, Proclamation No. 145/2005 provides as follows: “Local NGOs may be authorized to engage in relief and/or rehabilitation work if ... they establish that they have at their disposal in Eritrea one million US dollars or its equivalent in convertible currency ....” (Article 8(1)).
- *Burdensome registration procedures.* In **China**, registration procedures are complex and cumbersome, with extensive documentation and approval requirements. Organizations are required to operate under a system of “dual management” in which they must generally first obtain the sponsorship of a “professional leading agency” such as a government ministry or provincial government agency, then seek registration and approval from the Ministry of Civil Affairs in Beijing or a local civil affairs bureau, and remain under the dual control of both agencies throughout their organizational life.

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<sup>90</sup> More recently, the Rockefeller Brothers Fund (RBF) launched a long-term project in six countries of the West Balkans to promote a legal-fiscal environment that encourages the creation and sustainability of indigenous private foundations so that they remain as funders of local NGOs after the withdrawal of international foundations.

<sup>91</sup> Defending Civil Society, A Report of the World Movement for Democracy, co-authored by ICNL and the World Movement for Democracy Secretariat at the National Endowment for Democracy, © World Movement for Democracy / ICNL 2008.

<sup>92</sup> For additional examples, please see *Defending Civil Society*.

- *Vague grounds for denial.* In **Bahrain**, the government can refuse registration of an application association if “society does not need its services or if there are other associations that fulfill society’s needs in the [same] field of activity.”

## (2) Barriers to Operational Activity

Once formed, CSOs may struggle to operate effectively. Legal burdens may come through direct prohibitions on certain areas of activity, invasive supervisory oversight, and arbitrary termination and dissolution, among other constraints. For example:

- *Direct prohibitions on spheres of activity.* **Eritrea** limits the activities of every NGO to “relief and/or rehabilitation works,” thereby preventing NGO engagement in human rights and other issues that may be of interest to the foundation community (Proclamation No. 145/2005). In **Afghanistan**, the Law on NGOs prohibits participation in construction projects and contracts (Law on Non-Governmental Organizations, Article 8).
- *Advance notification and approval.* In **Cambodia**, local NGOs that wish to conduct activities in a province other than where they are registered must inform the local authority five days in advance according to Ministry of Interior guidelines; in some provinces the guidelines are interpreted as directives that require approval by provincial authorities.
- *Invasive supervisory oversight.* In **Russia**, the law allows governmental representatives to attend all of the organization’s events, without restriction, including internal strategy sessions. A more commonly used supervisory tool is the power to conduct audits and demand documents dealing with the details of an organization’s governance, including day-to-day policy decisions, supervision of the organization’s management, and oversight of its finances.<sup>93</sup> In **Senegal**, the Law on Foundations (Law No. 95-11 of 1995) authorizes the State to designate representatives who sit on the foundation councils (internal governing bodies) with a deliberative vote. These representatives are accountable to the administrative authority that named them.
- *Termination and dissolution.* In **Argentina**, the law permits the termination of an NGO when it is “necessary” or “in the best interests of the public.” In **Paraguay**, the Civil Code grants similarly broad discretion to dissolve and liquidate foundations in cases where the objectives of the organization become impossible, or where the organization’s activities would (negatively) impact the public interest. In **Palestine**, since the split between Hamas and Fatah in 2006, government authorities have been routinely ignoring the provisions of the law governing charitable associations and community organizations. Hamas has reportedly shut down most independent CSOs in the Gaza Strip, while Fatah has unilaterally dissolved more than 100 CSOs.<sup>94</sup>

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<sup>93</sup> Indeed, from September 13-16, 2010, prosecutor’s offices in Moscow and in a number of other cities carried out a series of coordinated inspections of about 40 Russian NGOs working in the areas of human rights, public interest, and social and economic issues. Several Russian NGOs issued a joint statement, demanding an end to what they describe as a “campaign of intimidation.” See <http://www.rightsinrussia.info/home/hro-org-in-english-1/ngos/statement>.

<sup>94</sup> Hadeel Qazzaz, *Palestine: West Bank and Gaza Strip*, in Barbara Ibrahim et. al., *From Charity to Social Change: Trends in Arab Philanthropy* (American University in Cairo: 2008), p. 96.

### (3) Barriers to International Contact and Communication

Closely related to the cross-border flow of philanthropic funding is the flow of ideas and network building that takes place both through in-person meetings, workshops, and conferences, and through virtual communication, including through new media.

- *Barriers to international contact.* **Egypt's** Law 84/2002 restricts the right of NGO to join with non-Egyptian NGOs and “to communicate with non-governmental or inter-governmental organizations.” Moreover the law threatens NGOs that interact with foreign organizations with dissolution. In **Kenya**, the NGO Coordination Act Regulations provide that no NGO can become a branch of or affiliated to or connected with any organization or group of a political nature established outside Kenya, except with the prior consent in writing of the NGO Coordination Board, obtained upon written application addressed to the Director and signed by three officers of the NGO.
- *Barriers to communication.* In **Uzbekistan**, NGOs seeking to conduct a conference and to invite international participants to the conference must secure advance approval from the Ministry of Justice. In practice, NGOs submit a letter to the Ministry of Justice, describing a proposed conference (goals, date, participants, etc.). If the Ministry grants permission for the conference, the NGO can move forward with planning; if the Ministry refuses permission, then there will be no conference.

We focus here on the pool of eligible beneficiaries, since this issue has been raised as an issue of concern by members of the Task Force. We are also aware, however, that many of these restrictions also apply to the formation and operation of grantmaking organizations. For example, in **Eritrea** the US \$1 million capitalization requirement applies to NGOs, presumably including grantmaking organizations – a nearly impossible threshold in that country. In addition, legal constraints on the establishment of foreign NGOs may impede international philanthropy. For example, in **Rwanda**, foreign organizations are required to submit a long list of documentation and information, including the implementation schedule and its various stages of planning, detailed costs estimates with data, the contemplated successors for the launched activities, and “all information relating to its geographical establishment throughout the world.”<sup>95</sup>

### **D. Legal Barriers Affecting Disaster Relief and Millennium Development Goals**

In this section, we illustrate how the barriers discussed above affect two areas of concern prioritized by the Council on Foundations: (1) disaster relief and (2) the Millennium Development Goals.

#### (1) Disaster Relief

Cross-border philanthropy in the aftermath of a disaster is affected by donor country constraints, recipient country constraints, and restrictions on the development of domestic nonprofit organizations.

As discussed in Section II(A), donor country constraints include:

- advance governmental approval for cross-border giving;
- limited, or no, tax incentives for international philanthropy;

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<sup>95</sup> ICNL, NGO Law Monitor, Rwanda country report, July 30, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/rwanda.htm>.

- burdensome procedural requirements for foreign grants; and
- counter-terrorism measures.

Making this concrete, CSOs in the **United Arab Emirates** (UAE) are not allowed to collect money and send it abroad for foreign disaster relief. Instead, CSOs in the UAE that wish to send money abroad must collect and send the money through the only authorized institution, which is the Red Crescent Society of the UAE.

In addition, as discussed above, few countries offer incentives for international philanthropy. Accordingly, foreigner taxpayers generally received no tax benefits for direction contributions to Haitian, Chilean, Chinese, or Pakistani organizations engaged in local disaster relief efforts.

Rules and procedures also impede disaster relief. As discussed in Section II(A)(4), U.S. private foundations (as well as donor-advised funds) must comply with “equivalency determination” or “expenditure responsibility” requirements in order to make an international grant. The equivalency determination process often takes time,<sup>96</sup> thus impeding swift assistance when disaster strikes. Of course, a private foundation could undertake expenditure responsibility, but this requires the foundation to comply with complex rules, including detailed reporting requirements on how a grant is spent. These rules impede private foundations interested in supporting disaster relief efforts.

In the **United States**, complexities also arise for companies seeking to provide assistance to employees affected by a disaster. Company-sponsored private foundations are generally prohibited from making grants to employees. Of course, the company could also give an employee money to cover emergency food and shelter, but this could constitute taxable income for the employee. The rules change, however, if a “qualified disaster” is declared. In this situation, a company is allowed to make qualified disaster relief payments to employees, and these payments are generally exempt from tax. In addition, company-sponsored private foundations are allowed to make grants to employees, provided specific requirements are met. For example:

- the class of beneficiaries must be large or indefinite,
- the recipients must be selected based on objective determinations of need, and
- the selection must be made using either an independent selection committee or adequate substitute procedures to ensure that any benefit to the employer is incidental and tenuous.<sup>97</sup>

These are but a few of the complexities that arise under U.S. law when a corporation seeks to provide assistance to employees affected by a disaster. There are also special rules on scholarships given to employees and complex rules on the cost basis of inventory that a corporation may deduct on in-kind contributions.

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<sup>96</sup> The Central Repository project championed by The Council on Foundations will expedite the process for some grantees, but challenges will remain for grantees that are not included in the Central Repository.

<sup>97</sup> U.S. Internal Revenue Service, *Disaster Relief: Assistance by Employer-Sponsored Private Foundation*, <http://www.irs.gov/charities/charitable/article/0,,id=149929,00.html>.

Counter-terrorism measures, discussed in Section II(A)(5) of this report, may also impede disaster relief. Specifically, a number of grantmakers engage in “list checking” and other counter-terrorism measures. The burden is magnified when a donor is making a large number of relatively small grants – for example, subsistence funds to a large number of people in a community affected by a natural disaster. Counter-terrorism concerns have also posed challenges for private foundations seeking to support flood relief efforts in Pakistan.

At the same time, recipient country restrictions can be similarly problematic. As discussed in Section III(B) of this report, some countries require advance government approval before a grantee can receive a foreign grant, even for disaster relief. This is true in **Egypt**, for example. Foreign funding requirements also caused concern immediately after the tsunami in **India**, leading the Ministry of Home Affairs to waive elements of the Foreign Contribution (Regulation) Act on December 30, 2004.<sup>98</sup>

Disaster relief is also impeded by restrictions impeding the development of domestic CSOs. As illustrated by the challenges confronting the United States after Hurricane Katrina and the Chinese government after the Sichuan earthquake, disasters often exceed the capacity of even large, well-resourced governments. Domestic CSOs therefore have a vital role in supplementing other disaster relief efforts and in providing absorptive capacity for funding by the international community. But in countries such as **Burma**, donors have been reluctant to provide funding for disaster relief because of governmental control over the process and constraints imposed on independent CSOs.<sup>99</sup>

In summary, the three types of barriers presented above – donor country constraints, recipient country constraints, and impediments to the development of domestic CSOs – affect the ability of the international grantmaking community to engage in disaster relief.

At the same time, some countries have taken measures to promote global philanthropy after a disaster. The Canadian Government created donor country incentives when it recently earmarked C\$50 million to match donations to Canadian charities aiding relief efforts in Haiti.<sup>100</sup> Over the years, the U.S. Government has also created donor country incentives. For example, after the earthquakes in Haiti and Chile in 2010, the U.S. Congress passed legislation enabling taxpayers to claim certain donations made in 2010 on their 2009 tax returns.

The foregoing is only a brief survey of issues relating to disaster response. For a more complete discussion of this topic, please see the Council on Foundation’s *Legal Guidelines for Corporate Grantmakers Providing Disaster Relief*, which is accessible at:

<http://www.cof.org/files/Bamboo/programsandservices/legalinfo/documents/Corporate-Grantmakers-Disaster-Relief-2010.pdf>.

## (2) Millennium Development Goals (MDGs)

Progress toward achieving the MDGs is frustrated by donor country impediments, recipient country impediments, and constraints affecting domestic nonprofit organizations.

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<sup>98</sup> Association for India’s Development, FCRA waiver for Tsunami relief, <http://survivors.aidindia.org/site/content/view/132/146/>.

<sup>99</sup> See, e.g., *Cyclone Relief - Distrust of Junta Deters Donors*, <http://ipsnews.net/news.asp?idnews=44410>.

<sup>100</sup> CBC News, *Ottawa matching Canadians’ Haiti donations*, <http://www.cbc.ca/canada/story/2010/01/14/haiti-canada-aid.html>.

Donor country impediments to philanthropic giving in support of the MDGs could, potentially, include all of the constraints listed above. For example, an NGO in **Egypt** must secure advance governmental approval in order to send funds abroad, even where those funds are intended to further progress toward the MDGs. Charitable organizations in **Malaysia** and social organizations in **Indonesia** are similarly restricted from sending funds abroad, without governmental approval, to address issues such as poverty alleviation, primary education, and environmental sustainability.

Donors making direct cross-border contributions to CSOs working toward the MDGs receive, in many countries, no tax relief for those donations. The lack of tax incentives in many countries may deter more substantial grantmaking by corporate foundations, in particular.

As in the case of disaster relief, counter-terrorism measures often impede international grantmaking, even where funding is intended for causes supported by the MDGs.<sup>101</sup> Specifically, in **Kenya**, the Kibera Community Self Help Programme was unable to receive an anticipated grant from the U.S.-based Islamic American Relief Agency (IARA) to help fund a home for children, including orphans living with HIV/AIDS, due to the U.S. Treasury seizing IARA's assets. The regulatory procedures of the Treasury's Office of Foreign Assets Control (OFAC) and the Department of Commerce create delays of six to nine months for groups wanting to become licensed to provide psychosocial training to public school teachers in **Gaza**; during that time teachers are unable to identify, counsel, or direct children devastated by the violence to the necessary medical or psychosocial services that they may require. According to a 2008 survey, nearly three-fifths of U.S. grantmakers agreed that "the more demanding post-9/11 regulatory environment discourages giving to non-U.S.-based organizations."<sup>102</sup>

Recipient country impediments relating to advance governmental approval to receive foreign funding, mandatory routing of foreign funding through government channels, and post-receipt procedural burdens may all serve to deter foreign funding to address MDG-related issues in relevant countries.

Notably, restrictions on the types of activities that can be supported with foreign funding make progress toward certain MDGs particularly challenging in **Ethiopia**, in light of the 2009 *Ethiopian Proclamation to Provide for the Registration and Regulation of Charities and Societies*. The Proclamation effectively prevents foreign funding from flowing to an Ethiopian charity promoting gender equality or seeking to reduce child mortality (i.e., a local charity pursuing these causes can receive no more than 10% of its income from foreign sources). Moreover, the Ethiopian Government has shown itself willing to terminate NGOs. In 2009, 42 community-based organizations (CBOs) were shut down and banks instructed to freeze their assets; among other reasons provided for the closure, the NGOs were alleged to have been

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<sup>101</sup> Examples in this paragraph are drawn from the following source:  
[http://www.charityandsecurity.org/background/The\\_Impact\\_of\\_Counterterrorism\\_Measures\\_on\\_Charities\\_and\\_Donors\\_After\\_9/11#\\_edn19](http://www.charityandsecurity.org/background/The_Impact_of_Counterterrorism_Measures_on_Charities_and_Donors_After_9/11#_edn19).

<sup>102</sup> *International Grantmaking IV Highlights*, (Foundation Center: 2008). Available at [http://foundationcenter.org/gainknowledge/research/pdf/intlgmiv\\_highlights.pdf](http://foundationcenter.org/gainknowledge/research/pdf/intlgmiv_highlights.pdf).

engaged in promoting harmful traditional practices and in mobilizing communities against the use of fertilizers<sup>103</sup> – that is, seeking to ensure environmental sustainability.

Restrictions affecting the pool of nonprofit beneficiaries also undermine philanthropic giving to address the MDGs. For example, in a move that undermines efforts to eradicate extreme poverty and hunger, the Government of **Zimbabwe**, in February 2010, banned all food handouts by NGOs, despite forecasts that more than 2 million people require food aid.<sup>104</sup> In addition, in March 2010, the Ministry of Health and Child Welfare in Zimbabwe reportedly announced the Government's intention to promulgate a legal instrument to regulate all organizations that are involved in combating HIV/AIDs in order to effectively coordinate the national response to the epidemic through a legally binding obligation on all such CSOs to report to the National Aids Council (a state entity).<sup>105</sup>

In summary, the three types of barriers presented above – donor country constraints, recipient country constraints, and impediments to the development of domestic CSOs – affect the ability of the international grantmaking community to effectively address the MDGs.

### **III. Next Steps**

This section will present and consider a range of options or “next steps” for reducing legal barriers to global philanthropy. The ideas outlined below are potential options to advance the Task Force's deliberations and are not intended to be recommendations. The focus of this section is on collective action by Task Force members versus individual actions by members in their home countries. We are cognizant that important work relating to some of these “next steps” is already under way; the Ease of Global Giving Project, led by the Mercator Fund is but one example. An illustrative list of related initiatives follows each proposed initiative.

#### *A. Initiatives Focused on Existing Law*

*First we consider initiatives addressing the existing state of law affecting global philanthropy. Listed below are four illustrative initiatives. They include a survey of philanthropists; an indexing of existing barriers to cross-border philanthropy; expanding tools to help philanthropists navigate the existing legal environment for cross-border philanthropy; and monitoring legal developments affecting cross-border philanthropy.*

##### (1) Survey of Philanthropists

*An initial option is to survey foundations and other philanthropists on legal barriers to cross-border philanthropy.*

*Description of Concept:* This initiative would collect data on the problems global philanthropists confront while engaged in cross-border giving and would assess priorities for response.

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<sup>103</sup> Debebe Hailegebriel, *Ethiopia: Restrictions on Foreign Funding of Civil Society*, The International Journal for Not-for-Profit Law, Vol. 12, Issue 3, May 2010, [http://www.icnl.org/knowledge/ijnl/vol12iss3/special\\_3.htm](http://www.icnl.org/knowledge/ijnl/vol12iss3/special_3.htm).

<sup>104</sup> *Zimbabwe govt. bans food aid*, Feb. 14, 2010, <http://greatindaba.com/issue/february-2010-vol-34/article/zim-govt-bans-food-aid>.

<sup>105</sup> The Herald, *Government to Regulate HIV/Aids Organisations*, March 23, 2010, <http://allafrica.com/stories/201003230065.html>.

There are a number of existing reports and publications that examine general legal barriers to philanthropy and civil society. USAID annually publishes the NGO Sustainability Index, which examines a range of factors including the legal framework and financial viability of nongovernmental organizations. Another annual publication is Freedom House's Freedom in the World, which examines restrictions on fundamental freedoms, including the freedom of association. ICNL makes country reports available through its NGO Law Monitor project, with a focus on barriers to civil society. And of course, this paper categorizes barriers to the outflow and inflow of global philanthropy.

To supplement these legal analyses, it would seem useful to survey international grantmakers to collect data on the actual problems they confront. This sort of survey would provide valuable information not only on existing legal barriers, but also on the geographic and thematic priorities of the global philanthropic community.

*Potential Challenges:* Careful thought would need to be given target audience and the disaggregation of data. For example, a small family foundation with only occasional foreign grants would likely face different challenges than a large foundation with in-house legal counsel skilled at international grantmaking. Similarly, U.S. foundations face procedural requirements that do not exist in many other countries. Accordingly, the survey would have to be carefully designed to enable appropriate collection and disaggregation of data, but this challenge could likely be overcome.

In addition, ensuring an adequate response rate is often a challenge. To help address this issue, it would seem useful to have the Council on Foundations, the European Foundation Centre (EFC), and Worldwide Initiatives for Grantmaker Support (WINGS) directly associated with the administration of the survey in order to promote responses from their members.

## (2) Indexing of Existing Barriers to Cross-Border Philanthropy

*A related option is an index of existing legal barriers to cross-border philanthropy.*

*Description of Concept:* This option seeks to build upon the initial work of the Mercator Fund in advancing the "Ease of Global Giving Index." As part of its commitment to the GPLI, Mercator has handed over this index through the EFC for use in GPLI work. We are encouraging the Task Force to consider building upon this index of existing legal barriers to cross-border philanthropy. The index would be made available online and updated on a regular basis, serving as an informational resource for the philanthropic community, government policy makers, civil society practitioners, lawyers, and academics.

*Potential Challenges:* A key issue is that the ease of giving often depends on the nature of the grantmaker and the activities it seeks to support. For example, a foundation seeking to support human rights work would face nearly insurmountable barriers in Ethiopia, while a donor seeking to work with the government on food aid would likely encounter more manageable challenges. Similarly, in China, a large foreign foundation with offices in Beijing and close relations with the Chinese government would likely face fewer challenges than a small grantmaker without connections to the Chinese Government and seeking to support grassroots advocacy organizations in the countryside. As another example, U.S. grantmakers seeking to fund organizations in Venezuela confront challenges that do not arise for grantmakers located in, for example, Brazil. While not insurmountable, careful thought is required on if/how these sorts of variations would be reflected in an Index. We note that ICNL has been involved in discussions

about the creation of a civil society index akin to the World Bank's "Doing Business" Index, and the disaggregation issue remains a perplexing challenge.

Finally, one must consider the likely impact that such an indexing system would have. As an informational resource for those predominantly engaged in cross-border giving, it could be tremendously valuable. As a reform tool, however, the impact would likely be substantially more uncertain, particularly among the countries least friendly to philanthropic inflows. Transparency International's Corruptions Perceptions Index<sup>106</sup> has a "name and shame" value, as no country relishes being labeled corrupt. The low-ranking countries in an "ease of giving" index, by contrast, would likely not be disturbed by a low ranking. As stated recently by the Minister for Regional Integration and International Cooperation in Zimbabwe, donors must coordinate with the host government and follow their national development plans and cannot be allowed to "run around and do their own thing."<sup>107</sup> Even more developed democratic countries may not find great shame in receiving a low ranking on an index measuring the ease of giving "aid" to their country.

*Related Initiatives:*

- Mercator Fund: [http://www.mercatorfund.net/modules/innovative\\_philanthropy](http://www.mercatorfund.net/modules/innovative_philanthropy)
- CIVICUS Civil Society Index: <http://www.civicus.org/csi>
- USAID NGO Sustainability Index: [http://www.usaid.gov/locations/europe\\_eurasia/dem\\_gov/ngoindex/](http://www.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/)
- Freedom House: Freedom in the World: <http://www.freedomhouse.org/template.cfm?page=15>
- ICNL NGO Law Monitor (funded by the MacArthur Foundation): <http://www.icnl.org/knowledge/ngolawmonitor/index.htm>
- Salzburg Global Seminar: <http://www.salzburgglobal.org/2009/phil.cfm>
- John D. Gerhart Center for Philanthropy and Civic Engagement, American University in Cairo: <http://www.aucegypt.edu/research/gerhart/Pages/default.aspx>

(3) Expanding Tools to Help Foundations Navigate the Legal Environment for Cross-Border Philanthropy

*A third option is to help foundations navigate existing legal requirements relating to global philanthropy.*

*Description of Concept:* The purpose of this initiative would be to help philanthropists better understand the legal rules affecting global philanthropy. With the appropriate navigational tool in hand, global philanthropists would be better able to determine whether, where, and how to pursue cross-border giving.

Some information on the requirements of cross-border philanthropy is already available. For example, the Council of Foundations has established the United States International Grantmaking Project ([www.usig.org](http://www.usig.org)). Resources on the website help U.S. private foundations

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<sup>106</sup> See [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009](http://www.transparency.org/policy_research/surveys_indices/cpi/2009).

<sup>107</sup> Faith Zaba, *Decision on NGOs threatens Western aid*, Zimbabwe Independent, July 29, 2010, <http://www.theindependent.co.zw/local/27501-decision-on-ngos-threatens-western-aid.html>.

better understand IRS rules and procedures governing foreign grantmaking. Similarly, the King Baudouin Foundation (KBF) maintains a web-based resource called “Giving in Europe,”<sup>108</sup> a cross-border giving database that provides information, best practices, and solutions concerning cross-border giving, with focus on EU member states. In addition, the King Baudouin Foundation has a special section on its website dedicated to transatlantic giving.

While these are significant initiatives, they have limited scope. It might be interesting, for example, to expand the “Giving in Europe” model to other regions, such as Asia, Africa, Latin America, or elsewhere. A complementary approach would be to facilitate learning networks that focus on recipient countries. For example, donors to activities in places such as China, India, or Russia could form *ad hoc* information sharing networks. Through such learning networks, donors could share information about navigating through the legal landscape of recipient countries. It is conceivable that a centralized Outreach Coordinator (discussed below) could serve as the focal point for such information sharing.

In addition, corporations are sometimes unfamiliar with legal requirements for international grantmaking. The Task Force might consider developing tools and training opportunities to help corporations navigate the legal framework for global philanthropy.

*Potential Challenges:* As we know from the USIG project and other initiatives, it is labor-intensive to keep this sort of information accurate and up-to-date. Also, for legal reasons, it would be important that this initiative be presented as providing general background information and not legal advice. Finally, some groups may be reluctant to share information on how they navigate through complex legal environments in various countries.

*Related Initiatives:*

- United States International Grantmaking: <http://www.usig.org/>
- Giving in Europe: <http://www.givingineurope.org/site/index.cfm?tid=1&mid=1&homep=1&bid=1&sid=1&lg=2>
- Mercator Fund: [http://www.mercatorfund.net/modules/innovative\\_philanthropy](http://www.mercatorfund.net/modules/innovative_philanthropy)

(4) Monitoring Legal Developments Affecting Cross-Border Philanthropy

*While monitoring may be implicit in some of the prior activities, we make it an explicit activity here to emphasize its potential as a standalone activity or as a natural complement to other initiatives.*

*Description of Concept:* This initiative would seek to monitor legal challenges to cross-border philanthropy on a routine basis through a global network of organizations, philanthropists, and lawyers. When newly emerging challenges are identified, alerts can be issued to the task force (or some other predefined list of philanthropic organizations, donor organizations, and governments). Initially, the reach of the initiative could be limited to a select group of countries and subsequently expanded to embrace other countries, depending on interest and resources.

*Potential Challenges:* It is challenging to keep this information timely and accurate. It can also be burdensome to identify appropriate contacts and to maintain up-to-date contact lists.

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<sup>108</sup> See <http://www.givingineurope.org/site/index.cfm?tid=1&mid=1&homep=1&bid=1&sid=1&lg=2>.

*Related Initiatives:*

- ICNL NGO Law Monitor: <http://www.icnl.org/knowledge/ngolawmonitor/index.htm>.
- Civil Society Law Alert System (in development; by ICNL)
- CIVICUS Civil Society Watch: <http://www.civicus.org/csw>
- Mercator Fund: [http://www.mercatorfund.net/modules/innovative\\_philanthropy](http://www.mercatorfund.net/modules/innovative_philanthropy)

*B. Initiatives Intended to Advance Law Reform*

*While some of the prior initiatives could, arguably, influence reform – for example, the index has potential “name and shame” value – the primary goal of each is instead to map out, understand, and provide information about the existing legal frameworks and their impact on global philanthropy. A complementary option is to undertake activities that will lead to reform of the restrictive legal provisions, such as those presented in the “barriers” section of this paper.*

*Listed below are four illustrative initiatives. They include efforts to engage in research to strengthen the chances for long-term reform; to reform law and policy affecting global philanthropy; to develop good principles to support global philanthropy; and to seek a treaty or other international agreement on cross-border philanthropy.*

**(5) Expanding the Analytic Base for Reform**

*An important prerequisite to reform is developing the intellectual base necessary to support reform and persuade skeptics of its importance.*

*Description of Concept:* This initiative would seek to expand, through research, the intellectual basis for the reform of laws affecting cross-border philanthropy.

For example, one particularly complex issue impeding cross-border giving is the desire of many governments to control the flow of all foreign funding into their respective countries – and to ensure that the foreign funding is used solely to finance governmental priorities. Philanthropy is welcome, the argument goes, provided that donors follow the government’s rules and finance activities that are consistent with the government’s development plan. In some countries, such as Bolivia, Nicaragua, and Sierra Leone, governments have justified mandatory coordination of foreign financial flows and civil society activity through reliance on the Paris Declaration on Aid Effectiveness and the Accra Agenda for Action.<sup>109</sup>

In light of this, the challenge is to make the case for pluralistic philanthropy. Are there persuasive reasons for governments to allow private donors to fund initiatives and organizations within a country but outside of the governmental development plan? The question is controversial not only among governmental leaders, but also among some civil society leaders. A clear articulation of how pluralism in cross-border giving can actually strengthen the recipient country would be an important contribution to the field.

Similarly, it would be useful to present compelling reasons relating to why donor governments should welcome the export of global philanthropy. While many support the importance of giving beyond one’s borders, others may tend toward isolationist thinking and the

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<sup>109</sup> For more information, see [http://www.oecd.org/document/18/0,3343,en\\_2649\\_3236398\\_35401554\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,3343,en_2649_3236398_35401554_1_1_1_1,00.html).

argument that “charity begins at home,” especially in times of economic downturn. Research supporting global philanthropy could help challenge such positions.

*Potential Challenges:* It will likely prove complex to present a cogent “case for global philanthropy,” so serious thought would have to go into the design and implementation of this initiative. In addition, in some countries the goal is the preservation of power, so even well-reasoned positions may go unheeded.

#### (6) Good Principles/Protocol for Cross-Border Philanthropy

*Another option is to support the development of principles relating to cross-border philanthropy.*

*Description of Concept:* This option would seek to develop and promulgate principles for a country’s treatment of philanthropic organizations and cross-border philanthropy. Properly drafted, the principles could serve as an important guide or measuring stick for law drafters and policy makers seeking to improve the legal environment for global philanthropy. We understand that the Mercator Fund is considering a similar initiative, although we are not privy to current details.

*Potential Challenges:* The two most significant challenges in relation to developing principles on global philanthropy relate to substance and impact. First, developing a consensus on the substance of the principles themselves is likely to be a significant obstacle. This arises in part because the legal impediments to global philanthropy do not spring from one law, but rather are rooted in multiple sources, including laws governing civil society organizations, tax laws, counter-terrorism measures, etc. While it is conceivable that donors could agree on some principles, it would seem quite complex to move beyond rhetoric and reach consensus on meaningful, actionable principles on counter-terrorism, for example.

Second, even if grantmakers could reach consensus on the content of good principles for cross-border philanthropy, it may prove quite challenging to get a broad range of governments to support these principles.

#### *Related Initiatives:*

- Council of Europe, Recommendation CM/Rec(2007)14 of the Committee of Ministers on the legal status of non-governmental organizations in Europe: [http://www.coe.int/t/ngo/Legal\\_standards\\_en.asp](http://www.coe.int/t/ngo/Legal_standards_en.asp).
- European Foundation Centre, Fundamental Legal and Fiscal Principles for Public Benefit Foundations: [http://www.efc.be/Legal/Pages/principles\\_model\\_law.aspx](http://www.efc.be/Legal/Pages/principles_model_law.aspx).
- European Foundation Statute: <http://www.efc.be/EuropeanFoundationStatute/Pages/LatestnewsabouttheEuropeanFoundationStatute.aspx>
- Mercator Fund: [http://www.mercatorfund.net/modules/innovative\\_philanthropy](http://www.mercatorfund.net/modules/innovative_philanthropy)
- Salzburg Global Seminar: <http://www.salzburgglobal.org/2009/phil.cfm>
- Defending Civil Society (which contains principles relating to the legal framework for civil society *writ large*, including foreign funding issues): <http://www.icnl.org/knowledge/news/2008/3-21.htm>

(7) Reform of Laws and Policies Affecting Cross-Border Philanthropy

*To address the barriers impeding philanthropy, efforts to reform the laws and policies of the donor country and/or recipient country may be necessary. Recognizing, however, that some foundations may be reluctant to pursue reform directly, consideration might be given to working through umbrella groups or connecting with other initiatives already engaged in ancillary initiatives.*

*Description of Concept:* This option would seek to determine if there is a role for the Task Force, or a subset of Task Force members, to address some of the barriers identified in the first part of this paper. Depending on Task Force interest, a standalone initiative might be possible, but at a minimum, it might make sense to appoint an Outreach Coordinator to make contact with other groups that are already working on related issues.<sup>110</sup>

For example, the OECD/DAC<sup>111</sup> is active in facilitating an ongoing discussion around aid effectiveness and coordination; this discussion has clear and direct relevance to the legal and policy framework for foreign funding (and therefore philanthropic giving). As another example, the International Committee of the Red Cross (ICRC) has launched an initiative to develop a model law for disaster relief, which is of major concern to a number of international donors. Active outreach to such initiatives could be critical to help monitor developments and to ensure that concerns of international grantmakers are addressed appropriately. In addition, ICNL is currently working on civil society legal reform in every region.

Furthermore, the Working Group on Enabling and Protecting Civil Society was established under the auspices of the Community of Democracies. Chaired by the Canadian Government, a number of other governments, including from the U.S. and Europe, are members of this group – as are ICNL, CIVICUS, the World Movement for Democracy, the United Nations Development Programme (UNDP), and others. There may be benefits in liaising with the Working Group in order to ensure that issues of concern specific to global philanthropy are not lost in the broader discussion on civil society and law. Furthermore, the UN Special Rapporteur (SR) on Human Rights Defenders<sup>112</sup> addresses issues of foreign funding in the context of human rights work. Outreach to the SR could provide an important opportunity to communicate the concerns of the global philanthropic community and could help ensure greater attention to these issues by the SR.

Strategic outreach to other pivotal players could be instrumental in influencing law and policy at the national level in various countries. For example:

- *Trade officials.* A recent study indicated that bilateral investment treaties often apply to the cross-border flow of capital not only within the for-profit sector, but also within the not-for-profit sector.<sup>113</sup> It could be useful, therefore, to reach out to trade officials and

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<sup>110</sup> We recognize that the Council on Foundations and other Task Force members are already engaged in reform efforts in their home countries. We defer to these groups on whether there is a role for other Task Force members to support these ongoing domestic initiatives.

<sup>111</sup> OECD/DAC stands for the Development Assistance Committee of the Organisation for Economic Cooperation and Development. See [www.oecd.org/dac/](http://www.oecd.org/dac/).

<sup>112</sup> See <http://www2.ohchr.org/english/issues/defenders/index.htm>.

<sup>113</sup> ICNL, *International Investment Treaty Protection of Not-for-Profit Organizations*, May 2008, available at:

support their continuing attention to this issue in order to protect global philanthropy within the realm of trade agreements.

- *The UN Development Programme.* UNDP has recognized the importance of civil society and, in many countries, has supported law reform initiatives. Moreover, UNDP is able to play more of a neutral, convening role than many private organizations. Recognizing UNDP's particular position, the Outreach Coordinator could seek to leverage UNDP's influence and encourage UNDP to include information on cross-border philanthropy into development materials.
- *International financial institutions.* Similarly, outreach to the International Monetary Fund (IMF) and/or the World Bank could be useful in supporting initiatives to promote global philanthropy.

*Potential Challenges:* Key issues include the willingness of countries to undertake reform to promote global philanthropy. In addition, we recognize that some foundations are reluctant to support advocacy efforts for a variety of legal and mission-related reasons. Nonetheless, some foundations have played a leadership role in this field, as have groups such as the Council on Foundations and the European Foundation Centre. As with all initiatives, there is also a question of resources, but linking with existing initiatives (versus creating a new standalone initiative) could help ameliorate this issue.

*Related Initiatives:*

- ICNL: [www.icnl.org](http://www.icnl.org)
- European Foundation Centre: [www.efc.be](http://www.efc.be)
- The World Movement for Democracy: [www.wmd.org](http://www.wmd.org)
- Council on Foundations (on U.S. laws and policies): [www.cof.org](http://www.cof.org)
- ICRC: <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JR62>
- The Arab Foundations Forum: <http://www.arabfoundationsforum.org/en/node/158>

(8) Treaty on Cross-Border Philanthropy

*Another option is the preparation of a treaty – be it global, regional, or sub-regional – to help promote global philanthropy.*

*Description of Concept:* This initiative would seek to prepare a global treaty on cross-border philanthropy. Possibilities include a “status treaty” to facilitate the international operations of the foundation community or a tax treaty to extend tax incentives to foreign philanthropy.

A status treaty might follow the model of the European Convention on the Recognition of the Legal Personality of International NGOs<sup>114</sup> or the Model Law for Public Benefit Foundations in Europe.<sup>115</sup> The goal would be to facilitate the ability of foundations to work internationally.

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[http://www.pdfdownload.org/pdf2html/view\\_online.php?url=http%3A%2F%2Fwww.icnl.org%2Fknowledge%2Fpubs%2FBITNPOProtection2.pdf](http://www.pdfdownload.org/pdf2html/view_online.php?url=http%3A%2F%2Fwww.icnl.org%2Fknowledge%2Fpubs%2FBITNPOProtection2.pdf).

<sup>114</sup> See <http://conventions.coe.int/treaty/en/Treaties/Html/124.htm>.

<sup>115</sup> See [http://www.efc.be/Legal/Pages/principles\\_model\\_law.aspx](http://www.efc.be/Legal/Pages/principles_model_law.aspx).

The goal of the tax treaty would be to extend tax benefits for contributions to entities resident in another country.

Recognizing the obvious challenge of securing political will for such a treaty, it may be prudent to aim for a regional treaty as an initial step. For example, in the European Union, we are seeing a wave of reform in the wake of the ECJ's *Persche* judgment. Similarly, it may be possible to generate interest in promoting cross-border philanthropy in other regions or sub-regions, such as within the Caribbean Community (CARICOM) or other regional bodies. A less ambitious but potentially viable approach would be to promote the adoption of bilateral treaties to ease cross-border giving between two countries (perhaps two donor countries to reduce concerns about revenue loss).

*Potential Challenges:* Securing political will for such an initiative would be a formidable challenge. Among other reasons, a "status treaty" would be difficult because of the different legal regimes governing foundations across countries (consider, for example, the different systems governing foundations in the United States and Mexico, or the United States and France). In terms of a tax treaty, officials will likely be concerned about losses to the tax base, particularly considering the current economic climate. In addition, concerns about counter-terrorism, national security, and foreign interference may limit political will for such a treaty.

Numerous studies have focused on the issue of nondiscrimination in the tax treatment of philanthropic contributions to foreign recipients.<sup>116</sup> And several initiatives have emerged seeking to break the "landlock" or discriminatory approach in providing tax relief. Notably, however:

During nearly 60 years of history, several attempts have been made for progress in this area. Although an important number of international institutions have supported these calls for solutions, all initiatives in this direction came to naught. One explanation for this lack of success has been the assertion that the initiatives were too ambitious and too idealistic.<sup>117</sup>

*Related Initiatives:* A brief review of some past and present initiatives relating to the issue of nondiscrimination in tax benefits is instructive:

- The International Standing Conference on Philanthropy (INTERPHIL) was formed in 1969 and developed a Draft European Convention on the Tax Treatment in respect of certain Nonprofit Organizations (1971). The Draft Convention sought to allow states to extend tax relief to foreign organizations, to domestic organizations operating abroad, and to foreign residents contributing to domestic organizations. The Convention was ultimately not enforced, however, due in part to the fact that registration with the Council of Europe was envisioned to trigger the nondiscrimination principles.<sup>118</sup>

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<sup>116</sup> Research into the question of discrimination includes (1) the Nebolsine Report (1963) ("New efforts in the direction of fiscal assistance to donors and the extension of fiscal privileges to international charitable organizations are urgently needed."); and (2) the 1969 International Fiscal Associations (IFA) Report ("... a critical examination of the criteria and arguments used for a restrictive application of tax concessions seems to provide a sufficient reason to state that there is hardly an objection to a removal of such obstacles. It is necessary, however, to establish several rules to make a removal of the obstacles possible in practice."). Ineke A. Koele, *International Taxation of Philanthropy*, IBFD © 2007, pages 12-14.

<sup>117</sup> Ineke A. Koele, *International Taxation of Philanthropy*, IBFD © 2007, page 9.

<sup>118</sup> Id., page 15. See also <http://www.non-gov.org/profile/interphil>.

- The European Foundation Centre issued the “Fundamental Legal and Fiscal Principles for Public Benefit Foundations” in 2003, and subsequently developed a Draft European Statute for Foundations, which remains an active initiative. Part of the rationale for the European Statute is to facilitate the giving and receiving of gifts across borders.<sup>119</sup>
- The OECD Model Tax Convention, in Article 24(1), establishes that for tax purposes, discrimination on the grounds of nationality is forbidden and that, subject to reciprocity, the nationals of one contracting state may not be less favorably treated in another contracting state than the nationals of the latter state in the same circumstances. That said, the OECD Commentary on Article 24(1) states that these provisions do not oblige a state that extends tax benefits to not-for-profit organizations for public benefit purposes to extend the same benefits to similar organizations whose activities are not for its benefit. In short, the presumption of the Tax Convention is that not-for-profits are designed for the public benefit of their state of origin.<sup>120</sup>

### *C. Special Initiatives*

*In this final section, we offer standalone “special initiatives” for the consideration of the Task Force, relating to disaster relief and the Millennium Development Goals.<sup>121</sup>*

#### (1) Enabling Global Philanthropy for Improved Disaster Relief

Interest in the legal framework for global philanthropy surges immediately following natural disasters, such as the 2004 tsunami and the 2010 earthquake in Haiti. The importance of an enabling legal framework to allow quick and effective flows of philanthropic giving in the wake of disaster is inarguable. In recognition of the interest in disaster relief and the crucial support that law provides to disaster relief, the Task Force could consider launching a comprehensive project in this field, examining both constraints and good practices relating to global philanthropy and disaster response; raising awareness of the need to anticipate disasters and confront legal barriers now; and support legal reform in willing countries.

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<sup>119</sup> Id., pages 17-18. (*See also* <http://www.efc.be/EuropeanFoundationStatute/Pages/EuropeanFoundationStatute.aspx>.)

<sup>120</sup> Id., pages 6-8. The Model Tax Convention was first issued in 1958 and remains in use today; see <http://www.oecdobserver.org/news/fullstory.php/aid/2742/>.

<sup>121</sup> In the interest of brainstorming, we offer an additional idea for an initiative that would focus on creating “carrots” to encourage reform. Often the focus of international attention is on “naming and shaming.” This initiative, by contrast, would adopt a “naming and faming” approach and seek to reward those that are opening their borders to the outflow and/or inflow of philanthropic giving. More specifically, the initiative would seek to encourage the removal of legal barriers and the introduction of incentives to the legal environment by creating a contest or sense of competition among countries in a designated region or sub-region. Following the announcement of the contest, each country would be given a year (or more) to demonstrate progress in improved legislation and/or improved implementation. At the conclusion of the contest period, candidates would be nominated for consideration, and then measured based on objective, predetermined criteria. The winner (or winners) of the competition would then receive a large philanthropic award, which could be a one-time award or the commitment of increased philanthropic giving during the upcoming year(s). While we recognize issues relating to this approach, the key point is that we think it would useful to consider the development of new “carrots” to encourage countries to reform their legal framework for global philanthropy.

(2) Enabling Global Philanthropy for the Millennium Development Goals

In September 2010, the UN reviewed progress on the MDGs. In the words of UN Secretary General Ban Ki-moon, “Time is short. We must seize this historic moment to act responsibly and decisively for the common good.”<sup>122</sup> In light of the interest and concern among public donors and the foundation community in addressing the MDGs, it may be strategically opportune to implement a comprehensive initiative built around the MDGs, with the goal of eliminating barriers to global philanthropy targeting the eight MDGs (at a minimum). Concrete objectives might include examining the current constraints and good practices relating to global philanthropy and the MDGs; raising awareness of the connection between an enabling legal framework and achieving the MDGs; and supporting legal reform in willing countries. Using achievement of the MDGs as the leverage point, the Task Force would likely be able to collaborate more broadly with stakeholders from diverse fields and sectors. Consideration could be given to a private-public partnership involving the philanthropic community as well as a range of governments (including governments from the Global South, where the distance to achieving the MDGs is greatest).

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<sup>122</sup> [http://www.un.org/millenniumgoals/sept\\_2010\\_more.shtml](http://www.un.org/millenniumgoals/sept_2010_more.shtml)

*Article*

## **Legal Framework of NGOs in Cambodia**

**Ke Bunthoern\***

### **Introduction**

Cambodian civil society is a new phenomenon, a result of the Paris Peace Accord of 1991 and the arrival of international peacekeeping forces. During the Transitional Authority in Cambodia (UNTAC) period between 1992 and 1993, many local groups, including political parties, Non-Governmental Organizations (NGOs), and single-interest groups were established, most of them concentrating on human rights, democracy, gender equality, election, and relief work. Since then the Cambodian civil society has proliferated and consolidated, creating a new political sector. Whereas the main civil society “actors” are the Cambodian NGOs, there are also other important civil society contributors, including labor unions, community-based organizations (CBOs), professional associations, and student groups. They aim to represent through strengthening and channeling the voice of the people or advocating for the people’s demands and needs.

The important contribution of NGOs in the rehabilitation, reconstruction, and development efforts of Cambodia in the past two decades is well recognized by the Royal Government of Cambodia (RGC) and International Donor Agencies. NGOs continue to play a major role in supporting the provision of basic social services, often in remote areas and communities, and are present in every province in Cambodia. More importantly, NGOs bring alternative models and approaches to development, emphasizing participation, equity, gender sensitivity, and environmental sustainability. NGOs have been instrumental in advocating for national reforms that pave the way for improvements in health, education, human rights, the legal system, social services, the environment, and women and children’s rights.

The number of International NGOs in Cambodia has remained at around 200 over the past few years, up from 25 in the early 1980s. The number of local NGOs and associations, however, continues to rise. In 2002, there were almost 400 local NGOs and nearly 600 associations registered with the Royal Government of Cambodia, which is a dramatic increase from 1991 when the first local NGO was established. An estimated 13,000 Cambodians were working for and with the NGO sector throughout Cambodia. In addition, more than 40 NGO sectoral and issue working groups, both formal and informal in nature, come together on issues of common interest in support of the development of Cambodia. Informal NGO networks exist in almost every province and play an increasingly important role in contributing to an informed dialogue on development processes and policies.<sup>1</sup> Currently registered with the Ministry of Interior are approximately 2,465 local NGOs and associations, and around 300 international NGOs.

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\* Ke Bunthoern was a Legal Enabling Environment Research Fellow at the International Center for Not-for-Profit Law (ICNL).

<sup>1</sup> Please see the website: [http://www.ngoforum.org.kh/Development/Docs/ngo\\_2002/38.htm](http://www.ngoforum.org.kh/Development/Docs/ngo_2002/38.htm).

NGOs have been popular in Cambodia because they help and support people without discriminating. Some NGOs, particularly human rights NGOs, give recommendations and may criticize government officials who abuse the human rights by violating the constitution or international treaties. This criticism has caused the government to suggest that the NGOs are simply supporting an opposition party. The relationship also creates tensions when the RGC grants lands to business people without following the existing regulations and thereby affects people's living conditions without paying appropriate compensation. Sometimes the RGC evicts and moves poor people from one place to another without providing adequate support.<sup>2</sup> These kinds of illegal activities have been criticized by NGOs.

In 2008, the Prime Minister said that NGOs are out of control and that they insult the government just to ensure their financial survival. In order to control NGO activities and track the funding sources of NGOs, under the expressed concern that terrorists might settle in the kingdom under the guise of NGOs, he announced that the government would legally limit the ways in which NGOs can work.<sup>3</sup> He also said the law is one of three high-priority pieces of legislation for the government's current five-year term, along with a new penal code and a much-anticipated anti-corruption law delayed since the 1990s.

However, a criminal code was adopted in 2008 which covered punishment against NGOs as well. The anti-corruption law treated NGO directors as public servants, requiring them to report owned property every two years (Articles 17 and 18 of the anti-corruption law).<sup>4</sup>

## **Executive Summary**

### *Background*

NGOs are playing an important role for Cambodian society. They are working directly with people in remote areas to provide legal services, capacity building, and other important activities. RGC recognized NGOs' development role in Cambodia and also put its strategy to work with NGOs as a partnership. However, the relationship between RGC and NGOs (particularly human rights NGOs) started bitterly when the Cambodian People Party (CCP) won an election majority in 2008. Because of the stated fear that those NGOs could obtain funds or donations from terrorist groups during his term, the Prime Minister sought enactment of a draft NGO Law by the National Assembly in order to control or manage NGO activities. Currently, the draft is under consideration at the Ministry of Interior (MoI) and the Ministry of Foreign Affairs. On August 10, 2010, MoI issued a letter seeking funding for public consultations, but the Ministry did not publicly disclose the contents of the draft. Most NGOs, including development and human right NGOs, do not favor this law because they perceive it as a tool to control their activities.

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<sup>2</sup> <http://www.licadho-cambodia.org/pressrelease.php?perm=157>.

<sup>3</sup> <http://www.phnompenhpost.com/index.php/2010043038445/Special-Supplements/questions-remain-over-scope-and-timing-of-new-draft-ngo-legislation.html>.

<sup>4</sup> Article 17: "Upon taking and leaving offices, the following persons shall, in writing or electronic form, declare their assets and liabilities, regardless of whether those assets are inside or outside the country, and shall submit, in person, to Anti-corruption Unit: 1-Member of Senate.....8-Leader of Civil Society." For article 18, see footnote 73, page 21.

### Scope of Research

This limited research focuses on:

- Analyzing the legal framework that covers NGO activities in USA and in Cambodia.
  - Regulation in the USA is complicated, and it may not be a suitable model for Cambodia to follow in its entirety. Therefore we cite only principles that represent good practice and are consistent with the Cambodia context.
  - The legal framework for Cambodia sectors: We focus on the existing legal norms in Cambodia, especially those provided in the constitution, international covenants, and other specifically applicable laws such as the civil and criminal code, anti-corruption law, and taxation law. We also describe the transitional period in Cambodian practice that deals with registration, functioning, and dissolution of NGOs.
- The draft NGO law should conform to international principles such as those contained in the ICCPR, ICESCR, and UN Declaration on the Rights to Development.

## **Chapter 1: Legal Framework of Nonprofit Organizations**

### **1. Nonprofit Organizations in United States of America (USA)**

The United States has a federal system of government, with power divided between the national government and the individual states that together form the country. As a general matter, the creation and operation of nonprofits and other legal entities (corporations, partnerships, trusts, etc.) is governed by the individual states. States may also have their own rules for exemption from state taxes. While state laws governing nonprofits have broad similarities, they vary considerably in their details (although a growing number of states are adopting model nonprofit corporation acts, thus increasing uniformity across states). Differences among state nonprofit regimes not only increase the overall complexity of the system but also allow nonprofits a certain degree of flexibility by allowing them to incorporate in a state with laws that fit their needs. When a charity is organized in one state but operates in another, conflict-of-law puzzles as to which state's law applies to a particular question may create complications that a unitary system would not face (although other countries may face parallel difficulties when foreign organizations operate within their borders).

The federal government also exerts substantial influence over nonprofits through its control of federal income tax and the related exemption for charitable nonprofits. Certain kinds of purposes (generally listed in the US Internal Revenue Code Sec. 501(c)(3)) qualify for establishing tax-exempt status for the organization. This means, in effect, that most nonprofits must act with an eye to both federal and state laws, which sometimes impose overlapping but not identical requirements. For instance, a charitable organization selling real estate to a director must make sure not to breach state rules against self-dealing and also federal tax rules, which impose various penalties if the transaction confers an excess benefit on the director.

Despite the complications of its federal regime, the United States benefits from a long history of experience with charitable (tax-exempt) organizations. It is thus common to find detailed regulations or well-developed bodies of case law governing many questions that arise in the course of operating a nonprofit.

Some state constitutions guarantee that certain charitable entities will be tax-free. Others merely permit the legislature to enact such exemptions. For historical reasons, state constitutions also commonly prohibit state legislatures from passing special acts to incorporate particular organizations.

### **1.1 Types of Nonprofit Organizations**

A nonprofit organization is a special type of corporation formed for charitable and other purposes that are not profit seeking. It has many of the features of standard corporations with the major exception being its tax status.

Nonprofit corporations do not issue stock. Tax-exempt status can provide desirable tax advantages to nonprofit corporations that may qualify for government grants to do research, educational experiments, or other qualifying activities.

*Since personal contributions to many nonprofit corporations are tax deductible, many tax-exempt corporations utilize this incentive to obtain substantial funds, often running into the millions of dollars for their qualifying operations. There are many fundraising firms that have organized to help nonprofit corporations.<sup>5</sup>*

Owners of a nonprofit corporation should contact an Internal Revenue Service (IRS) office and obtain forms to qualify for tax-exempt status.

In the USA, there two basic types of nonprofit organization with legal identity:

#### **a) Nonprofit corporation**

The most common legal vehicle for charitable activities in the United States is the nonprofit corporation. Generally, nonprofit corporations, like their for-profit counterparts, provide legal-entity status, limited liability, and perpetual duration.<sup>6</sup> They are governed by a board of directors, which usually has broad discretion to decide how best to pursue their charitable objectives. The chief difference from for-profit corporations is that nonprofit corporations abide by what has been termed the “non-distribution constraint”: they do not distribute profits to members, shareholders, or other insiders.

#### **b) Trusts**

The chief alternative to the nonprofit corporation is the trust. While corporations are created pursuant to statute, the law of trusts is largely a creation of the common law (though many states have, to varying extents, passed statutes codifying trust law). Fundamentally, a trust is a device by which one or more legal persons hold legal title to property, but do so for the benefit of some other person, class, or purpose. Thus, the conceptual focus of trust law is not on the trust as a separate legal entity, but rather on the duty of the trustees to use the property as the settler (creator) of the trust wished, and not for their own private purposes.<sup>7</sup> Because a trust is not technically a legal person, historically trustees were sometimes held personally liable for contracts and torts associated with the trust. However, the modern trend has been to distinguish between a trustee acting in his personal capacity and a trustee acting in his capacity as trustee, allowing an action directly against the trust for damages to third parties resulting from the

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<sup>5</sup> Ted Nicholas, *How to Form Your Own Corporation Without a Lawyer for Under \$50* (1972), p. 61.

<sup>6</sup> [http://www.knowledgerush.com/kr/encyclopedia/Non-profit\\_organization/](http://www.knowledgerush.com/kr/encyclopedia/Non-profit_organization/).

<sup>7</sup> <http://www.knowledgerush.com/kr/encyclopedia/Trust/>.

trustee's actions on its behalf. Thus, at least the contractual obligations of the trust do not normally run to the trustee (although if the trustee commits a tort on behalf of the trust, both may be liable). Similarly, the trustee's personal creditors cannot seek to recover his personal debt from trust property. Thus, in practice trust law provides at least some of the advantages of separate legal personhood.

## **1.2 Unincorporated Associations**

Besides the nonprofit corporation and the trust, one other form of organization deserves mention. Groups of individuals can form unincorporated associations governed only by their mutual agreement, and requiring no registration with the state. These membership associations are extremely flexible but possess the drawback of having no legal personality. Thus, unincorporated associations have traditionally been able neither to sue nor be sued in their own name nor to own property (any property they hold is actually owned collectively by their members). In addition, because of the ease and familiarity of forming nonprofit corporations and trusts, the law governing unincorporated associations is relatively undeveloped and uncertain.

## **1.3 Registration Regimes**

Regulation of NGOs in the USA differs from one state to another. For this paper, research was limited to a state which has easy requirements for registration, Maryland. Other states, such as New York and California, provide more complex regulation of nonprofits.

In Maryland the primary method to register to acquire legal entity is online. Many, if not all, states have their own websites which provide model registration forms. In Maryland a person may simply complete the model form and then file it together with required documentation electronically. For certification as a "tax-exempt non-stock corporation," the nonprofit organization must complete articles of incorporation designed especially for such a corporation. The official responsible for NGO registration responds within 30 days with a determination of whether the application qualifies or not. In the event an applicant has failed to file sufficient documentation, its representative must respond and provide the needed information within 30 days after receiving the government's notice. If the NGO's representative fails to respond within the set date, all the documents that s/he has filed will not be considered and the representative must resubmit the application.

**Tax-exempt status:** If the founders of an NGO believe that their organization qualifies, they may apply to the federal Internal Revenue Service for certification as "tax-exempt," demonstrating their qualifications for this status. This certification applies to most Federal as well as state and local taxes, when it has been presented to the state and local governments.

In conclusion, in order to form a nonprofit organization, the applicant goes through nine phases:

Phase 1 - Organize: The applicant shall create a mission statement about the organization; develop a fundraising plan; draft bylaws (Maryland does not require a copy of an organization's bylaws, but they must be attached to the federal tax-exemption application); select a board of directors and elect officers; file articles of incorporation with the State Department of Assessment and Taxation (SDAT); file a trade name registration form with SDAT (if the organization is using a name other than the one contained in the article of incorporation); obtain a federal Employer Identification Number (EIN) from the IRS; and hold an organizational meeting.

Phase 2 - Obtain Federal Tax-Exemption Determination: The applicant must complete and file form 1023 if seeking 501(c)(3) status.

Phase 3 - Registration for Charitable Solicitation: The applicant files the charitable solicitation form (COR-92).

Phase 4 - State Filing After Organization Receives 501(c)(3) Determination: The applicant submits a combined registration application (this is required to obtain a sale tax exemption).

Phase 5 - Maintain status: The organization files MD form No. 1, personal property return; form 990-N, form 990-EZ, or form 990 to the IRS based on annual gross receipts; and MD Form COR-85 if not filing IRS Form 990.

Phase 6 - State Tax Exemption: The organization applies for property tax exemptions.

Phase 7 - For Employees or Independent Contractors: The organization pays state employment and unemployment taxes, federal employment taxes, and workers' compensation insurance, and displays required posters.

Phase 8 - Obtain Proper Insurance for Organization, Board Members, and Officers: The organization assesses property and liability insurance needs for the organization; Maryland Nonprofits can help an organization determine its insurance needs.

Phase 9 - Final IRS Determination: The organization responds to the IRS letter five years after obtaining the advance ruling by filing form 8734 (support schedule for advanced ruling period for publicly supported entities).

## **2- Regulations That Affect NGO Activities in Cambodia**

### **2.1 Domestic Laws**

#### **2.1.1 The Constitution**

The constitution is the supreme law of the land. It may be amended only by a designated process involving legislative approval, a popular referendum, or both. All executive, legislative, and judicial structures are created by the terms of the constitution. Since it was first written in 1993, the constitution has been amended several times by politicians who considered amendments to be in the nation's interest. However, despite all amendments, the constitution must not alter the liberal and pluralistic democracy and regime of the Cambodian constitutional monarchy (article 134).

Chapter three of the constitution contains a declaration of fundamental rights, including the rights to life, personal liberty, security, freedom of movement, freedom of religion, assembly and association (including political parties and trade unions), due process and equality before the law, protection from arbitrary deprivation of property without just compensation, and freedom from racial, ethnic, religious, or sexual discrimination. It prohibits the retroactive application of criminal law. The provisions are consistent with the Universal Declaration of Human Rights and other relevant international instruments. An aggrieved individual is entitled to have the courts adjudicate and enforce these rights.

The freedom of association is addressed in article 42, which states that Khmer Citizens shall have the right to establish associations and political parties, and Khmer citizens *may take part in mass organizations for mutual benefit to protect national achievement and social order.*

The word “achievement” refers to national heritage or properties such as Angkor Wat, a national museum which remains from ancient times.

Freedom of expression, including freedom of the press, is addressed in Article 41. The word “expression” includes both speech as well as peaceful and silent demonstrations. The freedom, however, is not absolute. It is subject to restrictions, such as not infringing on the rights of others. If the expression by way of speech or writing or any media publication amounts to slander or defamation of any person, such conduct becomes actionable. The restrictions also apply to public order, national security, and the good traditions of the society.

In other words, Parliament may enact legislation that restricts the freedom of speech and expression on the basis of public order, national security, and morality, though the law must be reasonable and just.

International Human Rights Treaties guaranteed under the constitution:

The Paris Accords included a commitment to ratify international rights treaties. Accordingly, Cambodia has become party to the following treaties:<sup>8</sup>

- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocols.
- Convention on the Rights of the Child and its two Optional Protocols

The Cambodian Constitutional Council is the body established under the Constitution to safeguard respect for the Constitution. In its decision of 10 July 2007, the Constitution Council reaffirmed the application of the international human rights treaties in Cambodian law and reminded judges that, in deciding cases, they are obligated to consider all Cambodian

Law, “including the Constitution, which is the supreme law, and other applicable laws as well as the international convention that Cambodia has recognized....” As a result, the human rights of everyone in Cambodia should be fully protected under the Constitution in accordance with the rule of law.<sup>9</sup>

However, despite the constitutional imperative, in practice judges rarely take international instruments into account in adjudicating cases.

### **2.1.2 Civil Code (CC):**

Articles 46 – 118 of Chapter II of CC stipulate about juridical persons.

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<sup>8</sup> United Nations Office of the High Commissioner for Human Rights (hereinafter OHCHR), Cambodia country office, (2008), *Cambodian Human Rights Law*, p. X.

<sup>9</sup> OHCHR, *Cambodia Human Rights Law* (2008), p. 306.

## **A) Definition**

*A “juridical person” is a non-natural person specially endowed with a personality in law.<sup>10</sup> It is an entity, such as corporation, created by law and given certain legal rights and duties of a human being; i.e., a being, real or imaginary, that for the purpose of legal reasoning is treated more or less as a human being.<sup>11</sup>*

In Article 46 of the Cambodian Civil Code, paragraph 1 provides that a juridical person is the subject of rights and obligations, and therefore can own property or do business with other persons, under protection of law.

## **B) Types of Juridical Persons**

In the field of private law, “juridical person” refers to two categories: an “incorporated association” and an “incorporated foundation.”

- *Incorporated associations<sup>12</sup>* are organizations granted the status of being the subject of rights and obligation independent of the members that compose the organization.
- *Incorporated foundations<sup>13</sup>* are composed of contributed assets and are granted the status of being subject of rights and obligations independent of the contributors of such assets.

Juridical persons that do not have profit among their objects are referred to as “non-profit juridical persons,” and juridical persons that do have profit among their objects as “for-profit juridical persons.” Incorporated associations for which the members are liable for the debts of the juridical person up to the amount of property contributed are referred to as “limited-liability incorporated associations,” and those for which the members are liable for the debts of the juridical person with all their property are referred to as “unlimited liability incorporated associations.”<sup>14</sup>

Article 46-5 of CC provides that *a non-profit juridical person may be incorporated under this law or another law.*

The code also contains specific requirements for the formation of both local and foreign nonprofit juridical persons, including provisions governing residence, management and dissolution, and liquidation.

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<sup>10</sup>J.E De Becker, “The Principles and Practice of The Civil Code of Japan,” hereinafter “J.E De Becker” (1921), p. 21.

<sup>11</sup> Bryan A. Garner, *Black’s Law Dictionary* (1999).

<sup>12</sup> Article 46(1) of CC.

<sup>13</sup> Article 46(1) of CC.

<sup>14</sup> Article 46(2-3) of CC.

### **C. Requirements for Establishment**

Articles of association or a “constitution” embodying fundamental rules concerning the make-up and operations of the projected juridical person must contain the following information:<sup>15</sup>

#### **C.1 Local Juridical Person – Required Information**

- Purposes of the organization: A description of the mission of organization, such as to enable the Cambodian people to secure their rights as provided in the Cambodian constitution and consistent with international norms. However, the purpose of organization must not include carrying out unlawful activities, impairing national security, or serving a foreign state.<sup>16</sup>
- The name: Nonprofit organizations should not be named as “limited” or “unlimited corporation associations.”<sup>17</sup>
- Addresses of the principal office and secondary office(s): The place of a corporation’s chief executive office, which is typically viewed as the “nerve center.”
- If grounds for dissolution have been provided in the articles of incorporation, the constitution should include a clear description of permissible grounds for dissolution – for example, when the juridical person has achieved its mission or all members want to dissolve the organization.
- The names and addresses of the directors and supervisor(s); in the case of an *unlimited liability incorporated association*, the names and addresses of the members shall be stated.
- If any directors are not empowered to represent the juridical person, the name(s) of the director(s) who are so empowered.
- If there is a provision for more than one director jointly to represent the juridical person, such provision must be included.

#### **C.2 Changing the Address of a Juridical Person**

If there is a change in any particular listed in Paragraph (1) of article 50 of CC, such change shall be registered within two weeks following its occurrence at the registry having jurisdiction over the principal office and within three weeks at the registry having jurisdiction over any other office.

Notwithstanding Paragraph (1) of article 52, where an office has been relocated within the area of jurisdiction of a single registry, only such relocation need be registered.

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<sup>15</sup> Article 50 of CC.

<sup>16</sup> Article 7(4) of Cambodian Counter terrorism Law, 2007.

<sup>17</sup> Article 47 of CC, name of nonprofit juristic person: “*No entity other than an incorporated association or incorporated foundation may use the words ‘incorporated association’ or ‘incorporated foundation’ in their name. Limited liability incorporated associations and unlimited liability incorporated associations shall include in their name a statement that they are limited liability incorporated associations or unlimited liability incorporated associations as the case may be.*”

### **C.3 Provisional Disposition<sup>18</sup>**

If there is provisional disposition to suspend the performance of duties by, or to appoint a substitute for, a registered director, supervisor, liquidator, or member, or a change or cancellation of such provisional disposition, registration thereof shall be effected at the registry having jurisdiction over the principal office and at the registry having jurisdiction over any other office. In such cases the second sentence of Paragraph (2) of article 50<sup>19</sup> shall apply *mutatis mutandis*.

The civil code does not identify the “competent authorities” who are authorized to register nonprofit organizations.

### **C.2 Foreign Juridical Persons**

The requirements of article 50 also apply to foreign juridical persons.<sup>20</sup> An international nonprofit organization shall be formed in accordance with the laws of its country of residence.<sup>21</sup> However, *foreign juridical persons are not recognized as juridical persons except in the cases of states, administrative divisions of states, and foreign trading companies, provided that juridical persons may be recognized as such by Cambodian laws or treaties.*<sup>22</sup> If a nonprofit international organization wants to locate in Cambodia, it shall comply with a special law adopted by Parliament, or enter into a memorandum of understanding (MOU) with government of Cambodia. This provision provides only a narrow space for foreign juridical persons that intend to support the Cambodian people, but this provision does not restrict foreign juridical persons that wish to donate to Cambodian nonprofit organizations. If this provision is implemented, all foreign nonprofit organizations in Cambodia will be required to enter into memoranda of understanding with the government. However, because government officials are often suspicious of the intentions of foreign organizations, registration or entering into an MOU may be difficult or even impossible.<sup>23</sup>

### **D. Change of Residence of Juridical Persons**

Article 51 to Article 53 of CC provide as follows:

The address of a juridical person must *be registered within two weeks following any relocation at the registry having jurisdiction over the principal office and within three weeks at the registry having jurisdiction over any other office.*<sup>24</sup> In practice, when a juridical person

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<sup>18</sup> Provisional disposition is stated in the code of civil procedure (CCP). The purpose of provisional disposition is defined in article 530 of CCP: “*If there is an apprehension that execution will become impossible or extremely difficult by reason of alteration of the state of the property of the debtor in execution, or that significant damage or imminent risk will arise affecting the status of one of the parties in respect of the right in issue, a person wishing to preserve his or her rights may apply for preservative relief pursuant to the provisions of this Book 7.*” And article 531(3): “*Disposition establishing a provisional condition until a judgment becomes final and conclusive, where this is necessary in order to avoid significant damage or imminent risk [to the creditor] in relation to the right in dispute.*”

<sup>19</sup> Article 50(3) of CC.

<sup>20</sup> Article 54(1) CC and see point C.1 above.

<sup>21</sup> Article 48(1) of CC.

<sup>22</sup> Article 48(2) of CC.

<sup>23</sup> Ministry of Justice, Note of Articles of Civil Code (book1-3), Cambodia (2009), p. 43.

<sup>24</sup> Article 50 (2) of CC.

changes its principal office, its director may simply submit a notification letter to the Ministry of Interior and relevant authorities where its residence is based.

### **E. Management and Administration of Juridical Persons**

In order to secure its business and for transparency, a juridical person must prepare an inventory of assets at the time of its establishment and subsequently not later than the third month of each fiscal year, and also maintain an up-to-date membership list at its office.<sup>25</sup> The Civil Code is silent regarding moves of employees of a juridical person. However, in the event of such a move, labor law requires notification of the Ministry of Labor.<sup>26</sup>

#### **E.1 Director**

An association must appoint one or more directors to serve as its “executive organ.” For incorporation, a foundation shall have at least three directors. Internally, the directors have the power and are bound to manage and conduct all affairs within the scope of the objects of the association and subject to the decisions of the general assembly. If it is necessary to hire staff to achieve the organization’s purposes, the directors have authority to appoint and dismiss them and supervise them. If there are several directors, and they cannot agree on issues that arise in the management of the association, these matters will be decided by a majority vote unless the Articles of Association provide otherwise.<sup>27</sup> Externally, the directors represent the association. They are in the position of legal representatives as regards all juridical acts relating to the affairs of the association. Liability for an action taken by the directors vis-à-vis third persons will be assumed by the association – such action is not deemed to be an act of the directors themselves, but instead constitutes an act of the association.

#### **E.2 Temporary Director (Special Representative)**

The manner in which directors are appointed or dismissed must be specified in the Articles of Association. If, however, a vacancy occurs among the directors, and damage might be caused to the juridical person by a delay to comport with the specified method for appointing a new director, the court shall, on the application of any interested person or a Public Prosecutor, appoint a temporary director.<sup>28</sup> A director has no power to represent the association in regard to a matter in which his interests conflicts with those of the association. In such a case also, if there is no other director free to act on the application of any person or a Public Prosecutor, the court shall appoint a special representative and empower him to represent the juridical person regarding such matters.<sup>29</sup>

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<sup>25</sup> Article 55 of CC.

<sup>26</sup> Article 21 of labor law in 1997: “Every employer must make the declaration to the Ministry in Charge of Labor each time when hiring or dismissing a worker. This declaration must be made in writing within fifteen days at the latest after the date of hiring or dismissal. This period is extended to thirty days for agricultural enterprises. The declaration of hiring and dismissal is not applied to: Casual employment with a duration of less than thirty continuous days. Intermittent employment for which the actual length of employment does not exceed three months within twelve consecutive months.”

<sup>27</sup> Article 56(3) of CC.

<sup>28</sup> Article 60 of CC.

<sup>29</sup> Article 61 of CC.

## **F. Dissolution of Association**

### **F.1 Cause of Dissolution**

Unlike natural persons, juridical persons may permanently continue in existence. However, an association is dissolved (Article 64 of CC) under the following circumstances:

#### **F.1.1 Internal Matters**

- the occurrence of a ground of dissolution prescribed in the articles of incorporation
- the conclusion of the undertaking that is the object of the juridical person, or the impossibility thereof

The juridical person may simply dissolve itself in accordance with procedures contained in its Articles of Incorporation, or if carrying out the organization's primary purposes becomes impossible. For example, consider hypothetically a Khmer Help Khmer Association (KHKA), whose constitution provides that when it builds housing for 10,000 families, its mission is accomplished and it may be dissolved. Or to take another example, KHKA was given an ancient jug and promised the donor that it would receive fees from tourists who wish to see the jug. Income raised from viewings of the jug would be donated to the poor and pay for construction of 10,000 houses for them over a two-year period. However, one year later, the jug was broken in a typhoon. The objective of KHKA became impossible to achieve, so KHKA could dissolve itself.

#### **F.1.2 External Matters**

- **Bankruptcy:** If an association is no longer able to fulfill its obligations, the directors must forthwith make an application for an adjudication of bankruptcy. A creditor or ex officio member may also make the application. Thereafter, the association is adjudicated in bankruptcy.

- **Judgment ordering dissolution:** In principle, only a court order can force the dissolution of a juridical person. The government does not have the legal power to dissolve an organization. The Minister of Justice has authority to issue a written warning to a juridical person to suspend its activities if in his judgment it has abused its powers as prescribed by law, regulation, or the Articles of Incorporation, or if it has violated any penal law or regulation.<sup>30</sup> However, the Minister's decision is not final, and the juridical person may continue its activities until the court has issued its judgment.

#### **F.1.3 Reasons for a Court to Dissolve a Juridical Person**

After a court receives a complaint from a competent person<sup>31</sup> who seeks to dissolve the juridical person, the court may order the juridical person dissolved if and only if one of the following circumstances applies and the reasons are compelling:<sup>32</sup>

- (a) *The juridical person is faced with extreme hardship in accomplishing the object of its undertaking and has suffered or is likely to suffer irrecoverable damage; or*

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<sup>30</sup> Article 65(3-c) of CC.

<sup>31</sup> Please see article 65(1) of CC.

<sup>32</sup> Article 65(2) of CC.

*(b) The management or disposition of the juridical person's property is extremely improper, to the extent of imperiling the continued existence of the juridical person.*

Notwithstanding Paragraphs (2) and (3) of Article 65, the court may order the juridical person dissolved if the court determines, upon application by the Minister of Justice or by any member, creditor, or other interested person, that the public interest requires termination of the juridical person for any of the grounds listed below:

- (a) The juridical person was incorporated for an illegal object.
- (b) Without legitimate reason, the juridical person has not commenced business within one year after incorporation, or has ceased to do business for one year or more.
- (c) Despite a written warning from the Minister of Justice, duly received by a person executing the juridical person's business, there has been continuation or repetition of conduct that deviates from or abuses the powers of the juridical person as prescribed by law or regulation or the articles of incorporation, or conduct that violates any penal law or regulation.

## **F.2 Liquidation**

Involving as it does various complicated legal relations, the dissolution of an association provides opportunities for substantial abuse. Accordingly, the affairs of an association are placed under the supervision of the competent authority, the dissolution supervision of the Court, who may at any time make necessary inspections. In addition, "liquidators" are authorized to attend faithfully and promptly to all matters relating to the settlement and disposition of activities in which the dissolved association is involved.

## **F.3 Reversion of Surplus Assets**

Article 67 of CC states that "the reversion of any surplus assets after full payment of the debts of the juridical person shall be governed by the articles of incorporation. In the case of an incorporated association, if reversion is not determined in accordance with Paragraph (1), it shall be determined by resolution of the general meeting of members in the case of a limited liability incorporated association and by decision of all the members in the case of an unlimited liability incorporated association. Surplus assets of which the reversion is not determined by Paragraphs (1) or (2) shall revert to the National Treasury." In principle, a nonprofit organization that has received funds from a donor must transfer those properties in accordance with the expressed wishes of the donor.

## **G. Responsibility of Juridical Person**

### **G.1 Civil Responsibility (Tort)**

A juridical person, like a natural person, is capable of acting. A person who intentionally or negligently infringes on the rights or benefits of another in violation of law is liable for the payment of damages for any harm occurring as a result.<sup>33</sup> Where a director or other legal representative of a juridical person harms another in violation of law in the exercise of such

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<sup>33</sup> Article 743-1 of CC.

person's duties, the juridical person itself is liable for the payment of damages. A juridical person that pays damages may demand compensation from the representative who committed the tortious act.<sup>34</sup>

## **G.2 Criminal Responsibility**

In the event the directors, supervisors, or liquidators act in contravention of the above provisions, their acts may be void, or they may be required to pay damages to the juridical person or to a third person. However, to the extent that the activities of a juridical person affect the public interest, a further penalty is provided in the form of a fine. The fine seeks to induce the organization's officials to attend to their duties faithfully, though it is to be doubted whether the amount of the punishment is altogether adequate for the purpose of effecting the this goal.<sup>35</sup>

The juridical person can be punished in two ways: fines, as the principal penalty; and additional penalties set out in Article 168 (additional penalties applicable to legal entities).<sup>36</sup> The penalties applicable to legal persons stated in Articles 167-182 apply, as well as other articles of the Criminal Code.

### **G.2.1 Principal Penalty**

Article 42 of criminal code provides with respect to the responsibility of a juridical person as follows: "In case it is precisely provided for by a law and legal instruments, legal entities, to the exclusion of the State, may be declared as being criminally responsible for the offenses committed, on their behalf, by their organs or their representatives. The criminal responsibility of the legal entity does not exclude the criminal responsibility of the natural person for the same acts." Accordingly, when the court finds a juridical person guilty of a crime, the responsible natural person may be punished as well. This article does not clearly determine whether all members of a legal entity may be punished or not. However, in principle, each person should be individually responsible for his/her act only.<sup>37</sup>

The provisions of titles 1 through 3 of book 1 of the Criminal Code relating to natural persons are applicable to legal entities to the extent that the provisions are compatible with the provisions of the Title.<sup>38</sup>

### **G.2.2 Additional Penalty**

The additional penalties applicable to legal entities are the following:<sup>39</sup>

1. **Dissolution:** *The decision that orders the dissolution of a legal entity brings the legal entity to appear before the competent court for liquidation.*<sup>40</sup> In the event the court has found the juridical person guilty of a crime, under Articles 64 and 65 of the Civil

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<sup>34</sup> Article 748 of CC.

<sup>35</sup> J. E De Becker (1921), p. 37.

<sup>36</sup> Article 167 of criminal code.

<sup>37</sup> Article 24 of criminal code.

<sup>38</sup> Article 182 of criminal code.

<sup>39</sup> Article 168 of criminal code.

<sup>40</sup> Article 169 of criminal code .

Code,<sup>41</sup> the juridical person may be closed, because use of the premises for illegal activities is prohibited.<sup>42</sup>

2. Placement under judicial surveillance:<sup>43</sup> *The placement under the court surveillance may not exceed 5 (five) years. The decision of placement under the court surveillance entails the designation of a legally authorized agent for whom the court specifies the mission. At least every 6 (six) months, the legally authorized agent informs the prosecutor of the conduct of his/her mission. After having seen the reports of the legally authorized agent, the prosecutor may refer the matter to the court which has pronounced the placement under judicial surveillance. The court may then pronounce a new penalty. The court makes its decision during public hearing after listening to comments of the prosecutor representative, legally authorized agent, and eventually the lawyer of the legal entity.*

3. Banning from pursuing one or several activities (article 172): *The court has authority to prohibit an activity. It may be either definitive or temporary for a period of 5 (five) years at the most.*

4. Expulsion from public market places (article 173).<sup>44</sup>

5. Prohibition against a public campaign for saving funds (article 174).<sup>45</sup>

6. Prohibition against issuing exchangeable instruments other than those instruments certified by a bank (article 175).<sup>46</sup>

7. Prohibition against using payable cards.<sup>47</sup>

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<sup>41</sup> Please read point F.1 above.

<sup>42</sup> Article 176(1) of criminal code.

<sup>43</sup> Article 171 of criminal code.

<sup>44</sup> *The penalty of expulsion from the public market places entails the banning from direct or indirect participating in all public transactions proposed by:*

1. *the State;*
2. *a territorial decentralized collectivity;*
3. *a public establishment;*
4. *an enterprise franchised or controlled by the State or by a territorial decentralized collectivity.*

*The penalty of expulsion may be either definitive or temporary for period of not more than 5 (five) years.*

<sup>45</sup> The prohibition against a public campaign for saving funds means that when the court has found a juridical person guilty of committing fraud through its business, the court may prohibit its activity. *Article 174 of the Criminal Code: "The prohibition from a public campaign for saving funds may be either definitive or temporary for a period of not more than 5 (five) years. The prohibition entails the banning for a legal entity from carrying out a campaign to place its exchangeable instruments at credit, financial institutions or stock exchange companies. It entails also the banning from any publicity."*

See also the Criminal Code of France, article 131-47: "Prohibition to make a public appeal for funds entails prohibition, for the sale of any type of security, to resort any banking institutions, financial establishments or stock market companies, or to any form of advertising." <http://www.legislationline.org/documents/section/criminal-codes>.

<sup>46</sup> *The prohibition against issuing exchangeable instruments may be either definitive or temporary for a period of not more than 5 (five) years. The same provision is applied to the issuance of checks.*

<sup>47</sup> Please see note 46 above.

8. Closure of an establishment having served to prepare or to commit the offense (article 176).<sup>48</sup>
9. Prohibition against operating an establishment opened to the public or utilized by the public (article 177).<sup>49</sup>
10. Confiscation of instruments, materials, or any objects used to commit the offense or intended to be used to commit the offense (article 178).<sup>50</sup>
11. Confiscation of objects or funds with which the offense was carried out (article 179).<sup>51</sup>
12. Confiscation of incomes or the properties earned by the offense (article 179).
13. Confiscation of utensils, materials, and movable objects at the place where the offense was committed (article 179).
14. Publication of the decisions on the conviction in newspapers or broadcasting by all means of audiovisual communications (articles 180 and 181).<sup>52</sup> The publications of these court decisions are necessary to inform the public that the juridical person was dissolved or prohibited from conducting its activities. In Cambodia, the final and binding judgment may be published in the Supreme Court Bulletin quarterly. However, because publication in the Supreme Court Bulletin is delayed, the court may order publication of its decision through newspaper or TV as well.

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<sup>48</sup>*The penalty of closing down an establishment entails the prohibition of operating in the premises where the offense was committed. The penalty may be either definitive or temporary for a period of not more than 5 (five) years.*

<sup>49</sup>*The prohibition against operating an establishment opened to the public or utilized by the public may be either definitive or temporary for a period of not more than 5 (five) years.*

<sup>50</sup>*At the time when the confiscation is definitive, the confiscated objects became the property of the State unless the specific provisions provide for different allocation. The State can proceed with selling or destroying the confiscated objects according to prescribed terms and conditions of selling of the property of the State.*

*The law can also provide for the destruction of certain objects. When the confiscated objects were not seized and thereby cannot be handed over, the convicted person must pay the value of that object. This value is determined by the court. As to the collection measure, it is carried out in the same manner as the physical imprisonment.*

<sup>51</sup> The following objects may be subject of confiscation: any instruments, materials, or objects which have been used to commit the offense or have been intended to commit the offense; objects or funds with which the offense was carried out; incomes or properties earned by the offense; and utensils, materials, and movable objects at the place where offense was committed. However, the confiscation cannot be declared if such confiscation affects the rights of any third party.

<sup>52</sup> *The penalty of posting the decision is carried out in the designated areas by the court for a period of time set by the court. The posting may not exceed 2 (two) months. The posting may be in full, by means of excerpt, or simply by making references thereto. The fees for the posting are the burdens of the convicted legal entity. In case of removal, concealment, or ripping up of the affixed posting, a new posting is conducted. The cost of re-posting is paid by the person who had carried out the act of removal, concealment, or ripping up. The penalty of broadcasting the decision by all means of audiovisual communications is carried out according to the modalities set out by the court. The broadcasting may not exceed 8 (eight) days. The broadcasting may be in full, by means of excerpt, or simply by making references thereto. The fees for the broadcasting are the burdens of the convicted legal entity.*

A juridical person may also be charged with the offense of breach of trust<sup>53</sup> committed by misappropriating, at the expense of another, funds, assets, or any other property by a person who has been entrusted with and who has accepted with a duty to return them, to demonstrate<sup>54</sup> them, or to make a specific use of them. The juridical person will face a fine and even dissolution<sup>55</sup> if the court finds guilt. The officer or supervisor may also be fined and imprisoned.<sup>56</sup>

Legal entities may be also found criminally responsible according to provisions of Article 42 (Criminal Responsibilities of Legal Entities) for offenses proscribed in Article 404 (Definition of Money Laundering).<sup>57</sup>

In the event that a juridical person gives either directly or indirectly, any donation, present, promise, or any interest to a judge to fulfill any act in his/her responsibility, or not fulfill any act in his/her responsibility with respect to the juridical person, such juridical person shall be fined and punished by additional penalties as provided in Article 519. An offense committed by a legal entity as a felony, misdemeanor, or petty crime is determined by the penalty imposed on a natural person.<sup>58</sup> When a natural person acted outside of his/her duty to carry out the purposes of the juridical person, the act of the natural person and that of the juridical person are differentiated. Moreover, when an obligation or prohibition is pronounced on a legal entity, the violation by a natural person of this obligation or prohibition is punishable by an imprisonment from 1 (one) year to 2 (two) years and a fine from 2,000,000 (two million) Riels to 4,000,000 (four million) Riels.<sup>59</sup> Legal entities may be found criminally responsible according to conditions of Article 42 (Criminal Responsibilities of Legal Entities) for offenses proscribed in Article 605 (Delivering of Bribes), Article 606 (Active Influential Deal<sup>60</sup>), and Article 607 (Intimidation) of

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<sup>53</sup> Article 391 (Definition of Breach of Trust) of Criminal Code.

<sup>54</sup> For example: KHKA was loaned a car by another company without charge, but the company put in condition of its contract that every 31 December the KHKA shall present the car at the company office. The due date arrives, the KHKA fails to present the car to the company, and therefore the company may file a complaint against KHKA on breach of trust.

<sup>55</sup> Article 167 (Penalties Imposed on Legal Entities ) and Article 168 (Additional Penalties Applicable to Legal Entities) of the criminal code.

<sup>56</sup> *Article 393 (Breach of Special Trust by a Governor or other Persons): All governors or supervisors of legal entities of corporation with limited responsibilities or funding legal entities or persons who are assigned by a court to act on its behalf, or employees who are authorized by a legal entity who breach the trust for their own benefit or the benefit of the third party or with the purpose of damaging the legal entity and resulting in damage of property of the legal entity, are punishable by an imprisonment from 2 (two) years to 5 (five) years and a fine from 4,000,000 (four million) Riels to 10,000,000 (ten million) Riels. Provisions of Paragraph 1 above are also applicable to the cases where liquidators of legal entities of a corporation with limited responsibilities for funding legal entities or persons who are assigned by a court to act on behalf of the liquidators commit an act as mentioned in Paragraph 1 above and damage the properties of the legal entities. The attempt to commit offenses as mentioned Paragraphs 1 and 2 above is punished by the same penalties.*

<sup>57</sup> *See also Article 409; Article 404: Money laundering is an act of providing, by any means, the false justifications to conceal the direct or indirect benefits of a felony or a misdemeanor. The act of lending support to further its operational transaction for investing, concealing, or converting the direct or indirect benefits of a felony or a misdemeanor is also considered as money laundering.*

<sup>58</sup> Article 18 of criminal code.

<sup>59</sup> Article 584 of criminal code.

<sup>60</sup> *Active Influential Deal: an unauthorised person who directly or indirectly delivers present or gift, makes promise or give interests to a civil servant or a citizen entrusted with public mandates through an election in order*

the Criminal Code. Legal entities are subject to monetary fines and other additional penalties<sup>61</sup> and a juridical person also may be charged with bribery (article 644), if it meets the conditions of

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*to obtain from a State institution due to real or assumed influence a job, a contract, a distinction or other preferences.*

<sup>61</sup> Article 625: *Legal entities are punished by a monetary fine from 10,000,000 (ten million) Riels to 50,000,000 (fifty million) Riels and one or more additional penalties as follows:*

- 1. dissolution according to formalities determined in Article 170 (Dissolution and Liquidation of a Legal Entity);*
- 2. placement under the court surveillance according to modalities determined by Article 171 (Placement Under the Court Surveillance);*
- 3. prohibition against operating one or more activities according to modalities determined by Article 172 (Prohibition from Operating Activities);*
- 4. expulsion from public market places according to modalities determined in Article 173 (Expulsion from Public Market Places);*
- 5. prohibition against conducting public campaign for fund saving according to modalities determined in Article 174 (Prohibition Against Public Campaign for Fund Saving);*
- 6. confiscation of objects or funds which were the subjects of offenses according to modalities determined in Article 178 (Confiscation of Ownership, Sale and Destruction of Confiscated Objects) and Article 179 (Confiscation and Rights of the Third Parties);*
- 7. confiscation of incomes and properties earned from offenses according to formalities determined in Article 178 (Confiscation of Ownership, Sale and Destruction of Confiscated Objects) and Article 179 (Confiscation and Rights of the Third Party);*
- 8. posting decision on punishment according to modalities determined by Article 180 (Posting Decision);*
- 9. publication of decision on punishment in newspapers or broadcasting on all means of audiovisual communications according to modalities determined by Article 181 (Broadcasting Decision by All Means of Audiovisual Communications).*

*Article 605 (Delivering of Bribes): It is punishable by an imprisonment from 5 (five) years to 10 (ten) years for an unauthorized person who directly or indirectly delivers a present or gift, makes a promise or gives interests to a civil servant or a citizen entrusted with public mandates through an election so that the latter:*

- 1. perform any act of his/her functions or facilitate any thing using his/her functions;*
- 2. does not perform any act of his/her functions or facilitate any thing using his/her functions;*

*Article 606 (Active Influential Deal): It is punishable by an imprisonment from 2 (two) years to 5 (five) years and a fine from 4,000,000 (four million) Riels to 10,000,000 (ten million) Riels for an unauthorized person who directly or indirectly delivers a present or gift, makes a promise, or gives interests to a civil servant or a citizen entrusted with public mandates through an election in order to obtain from a State institution due to real or assumed influence a job, a contract, a distinction, or other preferences.*

*Article 607 (Intimidation): It is punishable by an imprisonment from 2 (two) years to 5 (five) years and a fine from 4,000,000 (four million) Riels to 10,000,000 (ten million) Riels any intimidation against a civil servant or a citizen entrusted with public mandates through an election so that:*

- 1. the public servant or elected citizen performs any act of his/her function;*
- 2. the public servant or elected citizen does not perform any act of his/her function;*
- 3. the public servant or elected citizen abuses his/her real or assumed influence, in order to obtain employment, a contract, a distinction, or any other preferences.*

a bribe paid either to an Authorized Person to Issue Forged Document<sup>62</sup> or to a member of a Health Organization to Issue a Forged Certificate.<sup>63</sup>

### **2.1.3 Anti-Corruption Law**

The purpose of this law is to promote effectiveness of all forms of service and strengthen good governance and the rule of law in leadership and state governance as well as to maintain integrity and justice which is fundamental for social development and poverty reduction in Cambodia.<sup>64</sup> The national assembly passed the anti-corruption law in May 2010 by treating juridical persons like public civil servants. This is a new context for civil society, and NGOs will face legal and criminal challenges if they fail to comply.

In a survey of 200 students and 300 other citizens in Phnom Penh and provinces, respondents expressed their view that the anti-corruption law should be applied to a director or supervisor of NGOs as well, because NGOs receive funding from donors and some NGO leaders become rich through appropriating these funds and then leave the NGO community.<sup>65</sup>

A foreigner who works in the transparency context also expresses his opinion that Cambodia is facing severe corruption problems, and the NGO sector itself is also perceived as corrupt. Some employees of NGOs earn more than people in the government; consequently, the NGO community should also take part in the anti-corruption efforts by meeting high performance and transparency standards. However, the anti-corruption law is contradicted by international norms, especially the UN convention against corruption.<sup>66</sup> Anti-corruption law in Cambodia treats NGO directors as public civil servants, even though they lack any public power to issue binding orders or to punish those who disobey them.

The anti-corruption law is applied not only to public civil servants and leaders of civil society, but also to foreign public officials or officials of public international organizations (who, however, are not required to report their own property). Cambodian courts have jurisdiction over

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<sup>62</sup> Article 638 (*Bribes Given to an Authorized Person to Issue Forged Document*): It is punishable by an imprisonment from 1 (one) year to 3 (three) years and a fine from 2,000,000 (two million) Riels to 6,000,000 (six million) Riels for any act of giving any donation, gift, present, promise, or any interest to any person to issue an attestation or a certificate describing a state of affairs which is actually not true.

<sup>63</sup> Article 640 (*Bribes Given to a Member of a Health Organization to Issue a Forged Certificate*): It is punishable by an imprisonment from 1 (one) year to 3 (three) years and a fine from 2,000,000 (two million) Riels to 6,000,000 (six million) Riels for an act of giving a donation, gift, present, promise, or any interest to any medical staff or a person who is a member of a health committee in order to issue an attestation or a certificate describing a state of affairs which is actually not true.

<sup>64</sup> Article 1 of anti-corruption law

<sup>65</sup> Result of my survey related to how to collaborate between NGOs and governments, made in 2010.

<sup>66</sup> "For the purposes of this Convention: (a) "Public official" shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a 'public official' in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, 'public official' may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party. For more information, please visit the website:

[http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)

actions within Cambodia's territory only, but in cases raised by the Anti-Corruption Unit (ACU) concerning suspicion of a foreign public official's engaging in corrupt activities in Cambodia, the chairman of ACU may request assistance from international institutions in conducting forensic examinations related to its investigation work.<sup>67</sup>

Foreign public officials or officials of public international organizations shall be sentenced from 7 years to 15 years for wrongfully asking for, demanding, or accepting, directly or indirectly, any gift, donation, promise, or other benefit in order to: (1) either perform his/her duty or be facilitated by his/her function; or (2) refrain from performing his/her duty or being facilitated by his/her function.<sup>68</sup>

A legal entity is found to commit a corrupt act if it has taken steps to conceal, keep, or transport any kinds of goods with knowledge that those are the proceeds of corruption as described in this law. Acts that can also be treated as unlawfully handling the proceeds of corruption are as follows: (1) acting as intermediary for transporting items with the knowledge that they are proceeds of corruption; or (2) an act that benefits from corruption proceeds with clear knowledge. The legal entity shall be subject to a fine of ten million Riel (10,000,000) to one hundred million Riel (100,000,000) and face accessory penalties as follows:<sup>69</sup>

1. Dissolution.
2. Placement under court oversight.
3. Barring of operation of an activity or activities.
4. Expulsion from public procurement.
5. Prohibition on public saving appeals.<sup>70</sup>
6. Prohibition on issuing checks other than checks certified by a bank.
7. Prohibition on issuing payment vouchers.
8. Closure of the institution being used to organize or commit offenses.
9. Prohibition of the business establishment open to the public or used by the public.
10. Confiscation of instruments, materials, or any objects used to commit the offense or aimed to commit offense.
11. Confiscation of objects or funds which are the subject of committing the offense.
12. Confiscation of capital or property that derives from the offense.
13. Confiscation of proceeds, material, and furniture in building where an offense is committed.
14. Posting of the conviction judgment.

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<sup>67</sup> Please read article 29 (2) of anti-corruption law.

<sup>68</sup> Article 33 of anti-corruption law.

<sup>69</sup> Article 46 of anti-corruption law (accessory penalty applicable to certain legal entities).

<sup>70</sup> See\_note number 46 above.

15. Publication of the conviction judgment in print media or the announcement in non-print media outlets.

The anti-corruption law also requires that all leaders<sup>71</sup> of civil society<sup>72</sup> declare their assets and liabilities every two years.<sup>73</sup> If someone fails to declare his/her assets and liabilities, such person shall be sentenced from one month to one year in prison and fined from one hundred thousand Riels (100,000) to two million (2,000,000) Riel, as well as be forced to make an asset declaration to the Anti-Corruption Unit.<sup>74</sup> This law provides that if any juridical person issues a

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<sup>71</sup> Please read article 17-7 of anti-corruption law.

<sup>72</sup> Civil society was defined in article 4 point 8 of the anti-corruption law: *community or group of persons created for the sake of protecting the economic, socio-economic, political, science, cultural, and religious benefits, namely association, NGOs and political party.*

<sup>73</sup> Article 18 (Regime of Declaration of Assets and Liabilities): *Officials listed in Article 17 (Persons required to declare assets and liabilities) shall declare their assets and liabilities every two years, in early January and no later than the thirty-first of January. The declaration of assets and liabilities shall be done within 30 days after taking office. The second declaration shall be made in January of the third year and the last declaration of assets and liabilities shall be made within 30 days before leaving the office. In case the declaration cannot be made before leaving the office due to removal from office, declaration shall be made within 30 days after leaving the office. Officials listed in Article 17 (Persons required to declare assets and liabilities), who are in office, shall declare their assets and liabilities first within 60 days after the anti-corruption institution is established as stipulated in Article 54 (The organization and functioning of National Council Against Corruption and Anti-Corruption Unit ) of this law. The formalities and procedures for declaration of assets and liabilities shall be determined by the decision of the Anti-Corruption Unit.*

<sup>74</sup> Article 38 (punishment for not declaring assets and liabilities): *Any person who does not declare their assets and liabilities or who improperly declares his or her assets in accordance with provisions stated in article 17 (people required to declare assets and debt), article 18 (regime of assets and debt declaration), and article 19 (other people required to declare assets and debt) of this law, shall be sentenced from one (1) month to one (1) year in prison and fined from one hundred thousand Riel (100,000) to two million Riel (2,000,000), and be forced to make an asset declaration to the Anti-Corruption Unit. In case of resisting the declaration, double punishment shall be applied. The Chairman of the Anti-Corruption Unit shall inform leaders of the civil society organization in writing before this article is enforced.*

*Article 13 (Duties of the Anti-Corruption Unit): The Anti-Corruption Unit shall perform the following duties:*

- *Implement law, orders and regulations (which are in force) related to corruption.*
- *Develop an anti-corruption action plan in accordance with the strategies and policy of the National Council Against Corruption.*
- *Direct the work of preventing and combating corruption.*
- *Monitor, investigate, check, and do research as well as propose measures related to corrupt practices in ministries, institutions, and public and private units, in conformity with the procedures in force.*
- *Receive and review all complaints on corruption and take action accordingly.*
- *Search, review, and compile the documents and information related to corruption.*
- *Keep absolute confidentiality of corruption-related information sources.*
- *Take necessary measures to keep corruption whistleblowers secure.*
- *Manage the system of assets and debt declaration as stipulated in this law.*
- *Conduct mass education and awareness with regard to the negative impact of corruption and encourage public participation in preventing and combating corruption.*

statement or lodges a complaint to authority or judges which leads to a futile inquiry, such juridical person will be liable for defamation and disinformation.<sup>75</sup>

Article 283 (criminal responsibility by legal entity), article 409 (Criminal responsibility by legal entity), article 519 (Criminal responsibility by legal entity), article 559 (criminal responsibility by legal entity), article 625 (criminal responsibility by legal entity), and article 644 (criminal responsibility by legal entity) of the Criminal Code all set forth corruption offenses to be implemented as part of anti-corruption law.<sup>76</sup>

## **2.2 International Legal Instruments**

The 1991 Paris Peace Accords, which formally ended the Cambodia conflict, established international human rights norms as a basis for lasting peace in Cambodia. Article 15 of the agreement on a comprehensive political settlement of the Cambodia conflict states:

*All persons in Cambodia and all Cambodian refugees and displaced persons shall enjoy the rights and freedoms embodied in the Universal Declaration of Human Rights and other relevant international human rights instrument.*

The signatories made a specific commitment to ensure respect for human rights in Cambodia, support the rights of Cambodians to promote and protect human rights, and take effective measures “to ensure that the policies and practices of the past shall never be allowed to return.”

The agreement provided for the incorporation of a declaration of human rights in the Cambodian Constitution. Annex 5 of the Agreement states:

*Cambodia’s tragic recent history requires special measures to assure protection of human rights. Therefore the constitution will contain a declaration of fundamental rights, including the rights to life, liberty, security, freedom of movement, freedom of religion, assembly and association including political parties and trade unions, due process and equality before the law, protection from arbitrary deprivation of property or deprivation of private property without just compensation, and freedom from racial, ethnic, religious*

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- *Prepare and propose an annual budget for the National Council Against Corruption and for the Anti-Corruption Unit.*
  - *Answer verbally or in writing the questions raised by members of National Council Against Corruption or members of National Assembly.*
  - *Provide work services to the National Council Against Corruption.*
  - *Appoint, transfer, supervise, or propose the appointment or transfer of officials under the Anti-Corruption Unit.*
  - *Cooperate with national, regional, and international organizations in order to combat cross-border corruption.*
  - *Report all activities of the Anti-Corruption Unit to the National Council Against Corruption.*
  - *Be empowered to warn suspects who initially fail to obey the laws and regulations in force in order to prevent corruption.*

<sup>75</sup> Article 41(Defamation and disinformation): *Defamation or disinformation complaints on corruption lodged with the Anti-Corruption Unit or judges, which lead to useless inquiry, shall be punishable by imprisonment from one (1) month to six (6) months and fine from one million Riel (1,000,000) to ten million Riel (10,000,000).*

<sup>76</sup> *Please read article 32 of anti-corruption law.*

*or sexual discrimination. It will prohibit the retroactive application of criminal law. The declaration will be consistent with the Universal Declaration of Human Rights and other relevant instrument. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights.*

In accordance with this provision, the 1993 Constitution of Kingdom of Cambodia includes a declaration of fundamental rights in Chapter III: The rights and obligation of Citizens of Cambodia. Certain other provisions of the Constitution are also relevant to the protection of human rights.<sup>77</sup>

It is emphasized that Article 31 of Cambodian Constitution stipulates that the Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, and women's and children's rights. Every Khmer citizen shall be equal before the law, enjoying the same rights and freedoms and fulfilling the same obligations regardless of race, color, sex, language, religious belief, political tendency, birth origin, social status, wealth, or other status. The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedoms of others. The exercise of such rights and freedoms shall be in accordance with the law.

Khmer citizens shall have freedom of expression, press, publication, and assembly,<sup>78</sup> along with the right to establish associations and political parties. Khmer citizens may take part in mass organizations for mutual benefit to protect national achievement and social order.<sup>79</sup>

Cambodia ratified and became a member of many international legal instruments. Those relevant to this topic include the Universal Declaration of Human Rights (UDHR), ILO Declaration on Fundamental Principles, Rights at Work and United Nations Millennium Declaration.

UDHR<sup>80</sup> was adopted by the United Nations General Assembly in 1948 after the end of the Second World War as a common standard of achievement for all peoples and all nations. Apart from core civil society rights to express, associate, and assemble, the UDHR assures fundamental human rights to all people, both civil and political, as well as economic, social, and cultural. The UDHR is the source from which various human rights treaties and instruments have been developed. Although conceived as a Declaration as opposed to a treaty, today the UDHR is widely regarded as a part of international customary law.

*Right to form and join association: Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association.<sup>81</sup>*

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<sup>77</sup> OHCHR, Cambodia country office, (2008), *Cambodian Human Rights Law*, p. IV.

<sup>78</sup> Article 41 of Cambodian constitution.

<sup>79</sup> Article 42 of Cambodian constitution.

<sup>80</sup> See Office of the High Commissioner for Human Rights, United Nations Staff College Project, *Human Rights*:

A basic handbook for UN staff, United Nations (2000), p. 11. Available at <http://www.unhcr.ch/html/menu6/handbook.pdf>.

<sup>81</sup> Article 19 of UDHR.

*Everyone has the right to form and to join trade unions for the protection of his interests.*<sup>82</sup>

ICESCR:<sup>83</sup> States are required to take positive steps to implement these rights, to the maximum of their resources, in order to achieve the progressive realization of the rights recognized in the Covenant, particularly through the adoption of domestic legislation.

The Economic and Social Council is responsible for monitoring the implementation of the Covenant by the state parties. The Committee on Economic, Social, and Cultural Rights is the delegated body to fulfill this task. States are required to report to the Committee within two years of becoming a party to the Covenant and thereafter every five years.

*Article 8 (Freedom of Association and the Right to Organize):*

*The States Parties to the Present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations; (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country. (Emphasis supplied)*

ICCPR<sup>84</sup> is the key international treaty enshrining civil and political rights. It addresses the State's traditional responsibilities for administering justice and maintaining the rule of law. The Human Rights Committee monitors how state parties comply with this treaty. States are required to submit reports to the Human Rights Committee within one year of becoming a party to the Covenant and whenever the Committee requests (usually every four years). The ICCPR has two Optional Protocols. The first Protocol recognizes the competence of the Human Rights Committee to receive and consider communications (human rights violations complaints) from individuals. The Second Protocol aims to abolish the death penalty. Applicable provisions are (emphasis supplied):<sup>85</sup>

*Article 19 (Freedom of Expression):*

*1. Everyone shall have the right to hold opinions without interference.*

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<sup>82</sup> Article 23-4 of UDHR.

<sup>83</sup> Office of the High Commissioner for Human Rights: <http://www2.ohchr.org/english/law/cescr.htm>.

<sup>84</sup> <http://www2.ohchr.org/english/law/ccpr.htm>.

<sup>85</sup> Civil Society Watch Program, CIVICUS, *Compendium of International Legal Instruments and Other Intergovernmental Commitments Concerning Core Civil Society Rights*, edited by Mandeep Tiwana and Michael Rubin, and compiled by Robertto Wohlgenmuth J. (hereinafter Robertto Wohlgenmuth J.) (2010), p. 13; [http://www.civicus.org/content/Compendium\\_Jan2010.pdf](http://www.civicus.org/content/Compendium_Jan2010.pdf).

2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) *For respect of the rights or reputations of others;*

(b) *For the protection of national security or of public order (ordre public), or of public health or morals.*

*Article 22 (Freedom of Assembly):*

*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

*Article 22 (Freedom of Association):*

1. *Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

2. *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*

*Article 25 (Citizen Participation): Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

(a) *To take part in the conduct of public affairs, directly or through freely chosen representatives;*

(b) *To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*

(c) *To have access, on general terms of equality, to public service in his country.*

*International Convention on the Elimination of All Forms of Racial Discrimination (ICERD):<sup>86</sup> The United Nations General Assembly resolved to adopt ICERD to eliminate racial discrimination in all its forms and manifestations in the enjoyment of fundamental freedoms in*

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<sup>86</sup> <http://www2.ohchr.org/english/law/cerd.htm>.

all fields of civil, economic, political, social and cultural life.<sup>87</sup> The Committee on the Elimination of Racial Discrimination is the body responsible for monitoring the implementation of the Convention by the states parties.

*Article 5 (Enjoyment of Human Rights): In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:*

..... (d) *Other civil rights, in particular:*

(viii) *The right to freedom of opinion and expression;*

(ix) *The right to freedom of peaceful assembly and association;*

(e) *Economic, social and cultural rights, in particular:*

(i) *The rights to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration;*

(ii) *The right to form and join trade unions;*

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):<sup>88</sup>

The CEDAW provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life as well as education, health, and employment. States parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms. The Committee on the Elimination of Discrimination Against Women is the body responsible for monitoring the implementation of the Convention by the States parties.

*Article 7 (Participation of Women): States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:*

.....

(c) *To participate in non-governmental organizations and associations concerned with the public and political life of the country.*

Convention on the Rights of the Child (CRC):<sup>89</sup> The CRC comprises principles for the implementation of the rights of the child. The Convention includes the principle of non-discrimination and ensuring equal opportunity. In addition, decisions taken by the States must

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<sup>87</sup> Robertto Wohlgenmuth J. (2010), p. 18; <http://www2.ohchr.org/english/law/>; [http://www.civicus.org/content/Compendium\\_Jan2010.pdf](http://www.civicus.org/content/Compendium_Jan2010.pdf).

<sup>88</sup> <http://www2.ohchr.org/english/law/cedaw.htm>.

<sup>89</sup> <http://www2.ohchr.org/english/law/crc.htm>.

give prime consideration to the best interests of children. It also covers the right to life, survival, and development, and the right to freedom of expression and opinion. The Committee on the Rights of the Child is responsible for monitoring the implementation of the Convention by the States Parties.<sup>90</sup>

*Article 15 (Freedom of Association and Assembly)*

*1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.*

*2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

ILO Declaration on Fundamental Principles and Rights at Work:<sup>91</sup> The ILO Declaration commits Member States to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions. These categories are freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor, and the elimination of discrimination in respect of employment and occupation.

*Article 2 (Freedom of Association): [The International Labor Conference] Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:*

*(a) freedom of association and the effective recognition of the right to collective bargaining;*

*(b) the elimination of all forms of forced or compulsory labor;*

*(c) the effective abolition of child labor; and*

*(d) the elimination of discrimination in respect of employment and occupation.*

### **3. Current Practices to Control NGO Activities in Cambodia**

Notification No. 474 issued by the Ministry of Interior on July 6, 1994, related to “the Installation of Name Board, Registration of Head Office, and Implementation of Activities of Associations.”

However, the MoI has one office that is responsible for the administration of NGOs/Associations. Both NGOs and Associations must complete the same application form and both are subject to Notification No. 474. But international NGOs/Associations do not register at the MoI; the Ministry of Foreign Affairs and International Cooperation handles their registration.

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<sup>90</sup> Robertto Wohlgenmuth J. (2010), p. 22; [http://www.civicus.org/content/Compendium\\_Jan2010.pdf](http://www.civicus.org/content/Compendium_Jan2010.pdf).

<sup>91</sup> International Labor Organization: [www.ilo.org](http://www.ilo.org). Standards and Fundamental Principles and Rights at Work: <http://www.ilo.org/public/english/standards/index.htm>.

So far, some NGOs/Associations have faced challenges related to the registration process and activities implementation because some of them were established before Notification No. 474 of 1994 (for example, KID, ADHOC, and LICADHO were established in 1991 and 1992). These NGOs have generally been required to re-register at the MoI in accordance with the requirements fixed by MoI.

On the other hand, even NGOs/Associations that have been registered, both at the Council of Ministers and at the Ministry of Interior, need to ask for permission from the local authorities prior to their project implementation. This means that permission from the Governors of Province, District and the Chief of Commune are a precondition for starting every activity, including public forums, meetings, trainings, and so on, within the respective territory or the village, without any legally enacted written regulatory requirement for such prior approval.

### **3.1 Registration of Local NGOs**

Although no specific legislation currently governs the activities of NGOs/CSOs in Cambodia, the MoI has introduced regulatory requirements governing registration that organizations are expected to comply with.

Under the notification of MoI No. 474, all NGOs must have the following documents in order to register at MoI office:

- 1- Completed Packet of Forms purchased from MoI (*Application Form, CV attached with 4x6 cm photos [2 copies per person] and supporting documents such as Copy of ID Card or Birth Certificate, and other administrative documents*).
- 2- Organizational Statute [2 original copies]: the juridical person's "constitution" which states its mission and vision, as well as its management structure.
- 3- Organizational Chart [2 copies]: Organizational structure determines the manner and extent to which roles, power, and responsibilities are delegated, controlled, and coordinated, and how information flows between levels of management. *This structure depends entirely on the organization's objectives and the strategy chosen to achieve them. In a centralized structure, the decision making power is concentrated in the top layer of the management and tight control is exercised over departments and divisions. In a decentralized structure, the decision making power is distributed and the departments and divisions have varying degrees of autonomy. An organization chart illustrates the organizational structure.*<sup>92</sup>
- 4- Office (as demonstrated by *Location Map; Photo of Head Office; Photo of Five Members; Lease Agreement attached with Family Books, Receipts of Electricity, Water, Gas...; Permission Letter from the House Owner Related to the Provision of House to be Used as the Working Office*)
- 5- Approval Letters :  
*Commune/Sangkat→District/Khan/Municipality→Capital/Province*

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<sup>92</sup> Read more at <http://www.businessdictionary.com/definition/organizational-structure.html#ixzz10Ko1aHlo>.

To form an NGO/Association, the founders shall process their registration at the Office for NGO/Association Administration, which is part of the Department of Political Affairs of the General Department of Local Administration within the Ministry of Interior.

**a) Compulsory Requirements Determined by the MoI**

The Office for NGO/Association Administration within the MoI requires any persons who would like to process the establishment and registration to buy a folder of forms (discussed below). Those documents prescribe some further supporting documents to be submitted with a request for registration, such as Copy of ID card or Birth Certificate, original statute of NGO/Association, and Organizational Chart.

**a)1 MoI's Form**

The MoI provides the representative of an NGO/Association one set of forms which is composed of the following:

❶ Application Form: The application form has two pages, and it must be completed by the founder of the NGO/Association. The Application Form is sealed by a postage stamp and Political Affairs Department's stamp. It can be inferred from this that the form will not be valid if the applicant makes a photocopy and does not use the blue-sealed form. Usually the applicant needs to make five photocopies of all documents submitted as part of the application process in order to process<sup>93</sup> them with local authorities in three levels (Commune/Sangkat, District/Khan/Municipality, and Province/Capital).

❷ MoI's Notification Letter related to "the Installation of Name Board, Registration of Head Office, and Implementation of Activities of Associations" issued on July 6, 1994, needs to be filed along with other documents. The main purpose appears to be to enable the applicants to pledge that they will respect the provisions set forth by the Notification before requesting registration. This Notification is only one page in Khmer.

❸ CV forms of the Director of NGO/Association and other leaders, all of whom must be more than 18 years old. The MoI provides four pages of CV format stamped on each page, which at least two<sup>94</sup> people must fill out (one person needs to fill out two copies of CV formats). The CV forms need to have a current 4 x 6 centimeter photograph attached.

❹ Copy of ID card or Birth Certificate of applicants who submit their CV.

❺ Other administrative documents: In fact, the form fails to indicate what kind of specific documents needs to be attached with the forms. It is just required that the documents that will be attached with the MoI's forms, if available.

The above documents must be signed by the Director of the NGO/Association.

In addition to the documents included in the MoI's set of forms, the applicants must also submit the following documents:

**a)2 Statute of NGO/Association:**

There is not any standard format for the statute for an NGO or Association.

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<sup>93</sup> Ask them to give the visa on the forms and sign them.

<sup>94</sup> A guideline received on 3/25/2009 requires at least three people.

The statute of an NGO/Association<sup>95</sup> needs to provide:

- 1- The name (full name and acronym) and logo of the NGO/Association. The name shall have meaning in Khmer language and shall not overlap with the names of other NGOs/Associations or political parties.
- 2- Goal and objective of the NGO/Association.
- 3- Rules related to hiring, terminating, and firing of members or personnel.
- 4- Rights and duties of members or personnel.
- 5- Structure, roles, duties, organization, and functioning of management bodies.
- 6- Mandate, roles, and duties of the Director and other officers.
- 7- Rules related to hiring, ending, firing, moving, and demoting the Director and other officers.
- 8- Sources of funding and properties.
- 9- Ordinary and extraordinary meetings of management bodies.
- 10- Rules related to dissolution and division of the properties of the NGO/Association.

In addition, it is also required that the Statute prescribe further information related to the following:

- 1- Quorum required for leadership meetings and juridical status of the decision adopted after the meeting.
- 2- Rules related to administering and dividing funds and properties.
- 3- Rules related to coalition, revision, and amendment of the Statute.

### **a)3 Organizational Chart of NGO/Association**

It is understood by applicants that the applicant must submit the structure or organizational chart of the NGO/Association, which should show at least three members who currently work for the concerned organization, and that the three members should reflect the organization's Presidency, Administration Section, and Finance Section.

The MoI requires two original copies of the organizational chart to be attached to the forms.

### **a) 3.1 Head Office and Other Relevant Requirements**

The existence of a head office is a precondition for the registration process of every NGO/Association. Authentic documents related to the office of the NGO/Association are required before MoI will grant permission for registration and project implementation.

The specification letter<sup>96</sup> from local authorities (i.e., Chief of Commune/Sangkat, then Governor of District/Khan/Municipality, and Governor of Capital/Province) is also important. As

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<sup>95</sup> This statute must also be signed by the President of the NGO/Association.

<sup>96</sup> "Specification letter" refers to documents signed by the local authority to specify that the NGO is based at its address, and states that the NGO is helping and develop community.

set forth in the application form, this specification letter must be confirmed on documents related to the head office of the NGO/Association.

In practice, before requesting a specification from local authorities, the founders of the NGO/Association must provide a clear address of the organization according to the location map (authenticated by Commune/Sangkat), two photographs of the head office, and two photographs of the founders (at least five members). In addition, if the NGO/Association is located in the Capital, it must submit the Family Book of the house owner. If a house is rented for use as the head office of NGO/Association, the following documents are required:

- Lease Agreement
- Permission Letter from the house owner granting his/her permission that the house is used as the head office.
- Other documents such as Family Book of the house owner, receipts of electricity, water, gas, etc.

In reality, both the application form and other supporting documents must be submitted to local authorities to be reviewed from the lower level up to the capital/provincial level.

### **a)3.2 Optional Items**

Neither the Internal Regulations nor the Stamp of the NGO/Association is a compulsory requirement for registry with MoI. However, internal rules need to be developed in accordance with the Labor Law of the Kingdom of Cambodia, and the stamp needs to be 34 millimeters in size with blue ink as set forth in the MoI's letter No. 068 dated February 4, 1994.

### **b) The Functioning and Dissolution of NGO/Association**

If any registered NGO/Association wishes to change its name, activities, office, or director, or to amend its statute, a written notification needs to be addressed to the MoI with new revised documents.

To expand its branch offices or to implement project activities within a new territory of capital/province/municipality in Cambodia, a written notification must be prepared by the NGO/Association and addressed to the Governor of that area according to the Prakas of Registration, Statute, and Working Schedule of Projects/Programs.

During its mandate, a registered NGO/Association will have the same status as other private institutions with the authority to implement its project activities, sign contracts, recruit personnel, maintain a bank account, and so on.

## **3.2 Registration of International Organization**

Since 1979, all international NGOs have applied for registration at the NGOs Bureau of the Department of International Organization at Ministry of Foreign Affairs (MFA). International NGOs were required to write letters requesting approval to operate in the country to a relevant ministry, attaching documents with the following information:

- Organization philosophy
- Program of activities
- Location of operation project

- Duration of program
- Number of international and local staff
- Source and amount of funding
- Personal history of the founder

With these documents, the organization could apply to MFA for registration. MFA's department of international organizations then submitted the application to Council of Ministers (COM) for its approval. After COM approval, the department of international organizations prepared an agreement document to be signed by country representative of the NGO and by the Under-Secretary of State.

The main terms of this agreement were the following:

- The government will authorize the international NGO to employ Cambodians and foreign personnel.
- The government will facilitate work permits or visas for foreign personnel or visitors.
- MFA will act as the administrative counterpart of the NGO on behalf of the government.
- The NGO will report its plans and activities.

After signing the agreement, the International NGO must present it to the relevant ministry before commencing activities.

## **Part II- Provisions That Future Cambodian NGOs Law Should Include**

The Cambodian NGOs Law shall be in accordance with the constitution and international principles which Cambodia ratified and is a member state of. Chapter One discussed some existing regulations applicable to juridical persons. As pointed out there, the majority of regulations are contained in the civil and criminal codes that cover substantive matters and also punish juridical persons that act unlawfully.

Governing principles contained in international instruments that Cambodia has ratified as a member state also play an important role in the regulation and protection of activities of juridical persons' activity. Since existing laws and transitional rules cover NGOs' activities, it appears unnecessary for the government to proceed to enact a new law to control juridical persons, especially nongovernment organizations. In interviews, some directors of local NGOs in four provinces said that it is not the time to enact a comprehensive NGO law, because the judicial system in Cambodia is so weak and is biased toward the powerful and the rich. They suggested that Cambodia already has laws that affect NGOs and protect the public. The government should simply implement those laws fairly and not enact a new law in the absence of a sound judicial system to deal with appeals.

However, the fact remains that the legal framework governing NGOs should be more protective of NGO activities and should follow the concepts of the Cambodian constitution and international norms.

## **1 Definition of NGOs**

In practice, an NGO or Association is considered a kind of charitable institution with specific visions, goals, and objectives related to acting in the social interest and not intended to generate and distribute profits.

The World Bank defines NGOs<sup>97</sup> as “private organizations that pursue activities to relieve suffering, promote the interests of the poor, protect the environment, provide basic social services, or undertake community development.” (Operational Directive 14.70) In wider usage, the term NGO can be applied to any nonprofit organization which is independent from government. NGOs are typically value-based organizations which depend, in whole or in part, on charitable donations and voluntary service. It also uses the term civil society to refer to the wide array of nongovernmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious, or philanthropic considerations.

The Asia Development Bank<sup>98</sup> defined “nongovernment organization” as an organization (i) not based in government; and (ii) not created to earn profit. While this broad definition of an NGO is correct semantically, it presents a problem in that it embraces a large number and wide range of organizations that structurally and functionally are unrelated. This broad definition of NGO refers more to what an organization is not rather than to what it is, and can be applied to many organizations.

The European Union definition of NGO is based on the characteristics below:<sup>99</sup>

- *NGOs are not created to generate personal profit. Although they may have paid employees and engage in revenue-generating activities they do not distribute profits or surpluses to members or management;*
- *NGOs are voluntary. This means that they are formed voluntarily and that there is usually an element of voluntary participation in the organization;*
- *NGOs are distinguished from informal or ad hoc groups by having some degree of formal or institutional existence. Usually, NGOs have formal statutes or other governing document setting out their mission, objectives and scope. They are accountable to their members and donors;*
- *NGOs are independent, in particular of government and other public authorities and of political parties or commercial organizations;*

NGOs are not self-serving in aims and related values. Their aim is to act in the public arena at large, on concerns and issues related to the well-being of people, specific groups of people, or society as a whole. They are not pursuing the commercial or professional interests of their members.

Community-Based Organizations (CBOs)<sup>100</sup> *are also referred to as grassroots organizations or peoples' organizations, as distinct in nature and purpose from other NGOs.*

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<sup>97</sup> [http://library.duke.edu/research/subject/guides/ngo\\_guide/igo\\_ngo\\_coop/ngo\\_wb.html](http://library.duke.edu/research/subject/guides/ngo_guide/igo_ngo_coop/ngo_wb.html).

<sup>98</sup> [http://www.adb.org/Documents/Policies/Cooperation\\_with\\_NGOs/ngo\\_sector.asp?p=coopngos](http://www.adb.org/Documents/Policies/Cooperation_with_NGOs/ngo_sector.asp?p=coopngos).

<sup>99</sup> The Commission and Non-Governmental Organizations: Building a Stronger Partnership [http://ec.europa.eu/civil\\_society/ngo/en/communication.pdf](http://ec.europa.eu/civil_society/ngo/en/communication.pdf).

*While national and international organizations are “intermediary” NGOs which are formed to serve others, CBOs are normally “membership” organizations made up of a group of individuals who have joined together to further their own interests (e.g.: women’s groups, credit circles, youth clubs, cooperatives, and farmer associations). In the context of Bank-financed activities, national or international NGOs are normally contracted to deliver services, design projects, or conduct research. CBOs are more likely to be the recipients of project goods and services. In projects which promote participatory development, grassroots organizations play the key function of providing an institutional framework for beneficiary participation. CBOs might, for example be consulted during design to ensure that project goals reflect beneficiary interests, undertake the implementation of community-level project components, or receive funds to design and implement sub-projects. Many national and international NGOs work in partnership with CBOs, either channeling development resources to them or providing them with services or technical assistance.*

In the Cambodia context, CBOs are formed by villagers or community members who want to protect their own interest. Sometimes, they have no specific management team or structure, but rather, members distribute their own money to support activity in their community. There are many types of CBOs, such as youth or women’s groups, saving groups, forest or fisheries communities, associations to restore irrigation and water used, and the like. If the government requires those CBOs to register, they will face overwhelming problems of management, governance, and organizational form to comply with laws and regulations, because in practice their level of consolidation is weak.

CBOs should be excluded from any comprehensive NGO law because these groups can be formed unexpectedly, to meet and deal with immediate community problems or to advocate on behalf of the community. If registration is needed, then their activities are likely to become illegal, because they will be unable to comply fully with legal requirements and will lead the community members to rely solely on their leader and therefore not strengthen and consolidate the community itself.

## **2 Registrations**

The purpose of registration is for an organization to gain “legal entity” status from which it acquires benefits, including legal protection and certain waivers, and for which it must fulfill certain obligations. Registration must not be an impediment to the exercise of freedom of association and rights to participate in political, economic, social, and cultural life as enshrined in the Constitution of Cambodia.

It is widely recognized that the freedom of association includes the right to associate informally, that is, as a group lacking legal personality. Freedom of association cannot be made dependent on registration or legal person status. That NGOs may be formed as legal entities does not mean they are *required* to form legal entities in order to exercise their freedom of association. On the contrary, freedom of association guarantees are implicated when a gathering has been formed with the object of pursuing certain aims and has a degree of stability and thus some kind of institutional (though not formal) structure. National law can in no way result in banning informal associations on the sole ground of their not having legal personality.

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<sup>100</sup> [http://library.duke.edu/research/subject/guides/ngo\\_guide/igo\\_ngo\\_coop/ngo\\_wb.html](http://library.duke.edu/research/subject/guides/ngo_guide/igo_ngo_coop/ngo_wb.html).

## **2.1 Right to Seek and Obtain Legal Status**

In order to meet its mission goals most effectively, individuals may seek legal personality (or legal entity status) for organizations they form. It is through legal personality that, in many countries, NGOs are able to act not merely as an individual or group of individuals, but with the advantages that legal personality may afford (e.g., ability to enter contracts, to conclude transactions for goods and services, to hire staff, to open a bank account, etc.). It is well accepted under international law that the state should enable NGOs to obtain legal entity status. Article 22 of the ICCPR would have little meaning if individuals were unable to form NGOs and also obtain legal entity status.

In terms of the available procedures for legal recognition, some countries have adopted systems of “declaration” or “notification” whereby an organization is considered a legal entity as soon as it has notified the relevant administration of its existence by providing basic information. Where states employ a registration system, it is their responsibility to ensure that the registration process is truly accessible, with clear, speedy, apolitical, and inexpensive procedures in place. The designated registration authority should be guided by objective standards and restricted from arbitrary decision-making.<sup>101</sup>

## **2.2 Duration of Registration**

Some countries impose specific time limits on the government approval process. The processes of NGO registration in *China* and *Taiwan* specify a thirty-day limit, and *Korea* holds to a twenty-day limit. In the *Philippines*, a twenty-four-hour “express lane” is available for swift NGO registration with the Securities and Exchange Commission, one part of a required two-step procedure.<sup>102</sup> Such time limits prevent officials from effectively denying registration through delay. In *Indonesia*, foundations obtain legal status by filing a brief notarized document. Social organizations, however, must register with the government and are subject to general supervision by the Ministry of Home Affairs, with technical supervision by the relevant line agency. *Japan* and *Korea* follow a single-step registration system. In those countries (Japan and Korea) if, NGOs want to register, they must obtain approval from the ministry of other government any that has jurisdiction over the proposed purposes and activities of the NGO.<sup>103</sup> Registration in *Australia* never requires more than one step. Whether registration is required at all, and with what government agency, depends on the NGO’s legal form. The unincorporated association, which is not a legal entity, is not required to register; the charitable trust, an equitable relationship rather than a legal entity, is also not obligated to register.<sup>104</sup>

The draft law should specify clearly a period in which a registration application may be considered for approval, and also should provide for penalties for government officials who intentionally delay the registration process.

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<sup>101</sup> According to International Center for Not for Profit Law (ICNL) and World Movement for Democracy (WMD), *Defending Civil Society* (February 2008), p. 29.

<sup>102</sup> Thomas Silk, *Philanthropy and Law in Asia* (hereinafter Thomas Silk) (1999), p. 23.

<sup>103</sup> Thomas Silk (1999), p. 18.

<sup>104</sup> Thomas Silk (1999), p. 19.

### **2.3 Registration Should Be Voluntary**

A number of new framework laws and drafts require informal groups of persons to register as formal legal entities and prohibit them from conducting activities unless they do. By prohibiting any associational activities – even informal activities, such as a group of neighbors meeting weekly to discuss political events – without prior registration, these laws clearly infringe upon the right to free association protected by the *International Covenant on Civil and Political Rights* and other conventions. Furthermore, mandatory registration is often used by repressive governments as a tool to crack down on individuals and organizations speaking out against government policies – as in *Belarus*, where the government used a requirement prohibiting activities by unregistered associations to fine or arrest dozens of civic activists in 2004.<sup>105</sup>

If the Cambodian draft NGO law makes registration mandatory for NGOs, it thereby violates international legal norms and Cambodia's own Constitution. It is well recognized under international law that freedom of association includes the right to associate informally—that is, as a group lacking legal personality. Freedom of association cannot be made dependent on registration or legal person status.

### **2.4 NGOs Should Not Be Required to Re-Register**

Comparing requirements for NGOs with those applicable to private companies, in principle there is no good reason to require to re-registration of an NGO. For example, as a practical matter, re-registration may be difficult for NGOs that criticize the government. The previous license constitutes a discretionary probation period if the NGO fails to comply with government's direction, preventing ultimate registration. Moreover, it is said that the government requires local NGOs to re-register every five years and international NGOs every three years.

Provisions like this, which impose potentially time-consuming bureaucratic hurdles, can discourage groups from ever applying to register in the first place – preventing the emergence or consolidation of a strong and independent civil society. An instructive example comes from a study of thirty NGOs attempting to register in *Egypt*, where the *Law on Non-Governmental Organizations* creates a difficult and highly bureaucratic registration system. Of the thirty, only seven had successfully registered. Five were fighting rejections in court, and the remaining eighteen had simply given up, choosing to form using alternative legal structures or simply to disband. Finally, some framework laws include provisions that require registered NGOs to re-register once a year or once every two years, giving government officials repeated opportunities to deny disfavored groups the right to operate.

## **3 Membership**

Two kinds of restrictions are encountered in practice in some states: firstly, on establishment by foreign nationals, and, secondly, on establishment by legal entities. There are no grounds for these restrictions. The question of the minimum number of people needed to establish an NGO was discussed at length during the *travaux préparatoires*,<sup>106</sup> since this number varies under national law. In some states one person is enough, whereas in others the law sets a higher threshold, which may be two, three, or five people, or even more. In the end, the

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<sup>105</sup> Global trends in NGOs law: <http://www.icnl.org/globaltrends/>.

<sup>106</sup> Anonymous, *International Law on Freedom of Association*: [http://www.pili.org/dmdocuments/enabling\\_one.pdf](http://www.pili.org/dmdocuments/enabling_one.pdf)

participants decided to draw a distinction between informal organizations and those wishing to acquire legal personality. In the first case, two people should suffice to establish a membership-based NGO, whereas a greater minimum number of members may be required before legal personality can be granted. In that event, the figure should not be so large as to discourage the actual establishment.

In principle, any person or group of persons should be free to establish an NGO.<sup>107</sup> Membership of an NGO, where this is possible, must be voluntary and no person should therefore be required to join any NGO other than in the case of bodies established by law to regulate a profession in states which treat them as NGOs. The law should not unjustifiably restrict the ability of any person, natural or legal, to join membership-based NGOs. The ability of someone to join a particular NGO should be determined primarily by its statutes, and should not be influenced by any unjustified discrimination.

The Cambodian NGO Law should not require a large number of members in order to establish an NGO, because, in common international practice a juridical person can be formed by as few as two people, exercising their freedom of association.

#### **4 Activities**

The Universal Declaration of Human Rights, which Cambodia has incorporated in its constitution, guarantees the right to freedom of association. The International Covenant on Civil and Political Rights, to which Cambodia is a party, also guarantees this right and elaborates on it further: “1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”

NGO law should not in any way curtail the Cambodian people’s “right to participate actively in the political, economic, social and cultural life of the nation,” a right that is guaranteed and protected under Article 35 of Constitution.

#### **5 Dissolution of NGOs (Should Comply with the Provisions of the Civil Code)**

There are two types of dissolution of NGOs:

##### **5.1 Voluntary Dissolution**

The ground for voluntary dissolution is often not specified by law. The emphasis is instead on the dissolution procedure provided by the NGO’s internal rules. In most countries in the region, the charter or other governing document of the NGO must set forth the procedure for voluntary dissolution, addressing assets, the authorizing vote by membership or governing body, and the filing of required papers with the appropriate government agency.

##### **5.2 Involuntary Dissolution**

The grounds are explicit and include engaging in activities outside the purposes of the NGO, a change of the organizational purpose, the expiration of the initial term of existence,

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<sup>107</sup>[http://www.coe.int/t/e/legal\\_affairs/legal\\_cooperation/civil\\_society/basic\\_texts/Fundamental%20Principles%20E.asp](http://www.coe.int/t/e/legal_affairs/legal_cooperation/civil_society/basic_texts/Fundamental%20Principles%20E.asp)

misuse or nonuse of the corporation franchise, inability to pay debts, and violation of the terms and conditions of registration.

The pronouncement of an NGO as illegal must be exercised by the court, as a constitutional matter, not by the administration (Ministry of Interior or other government agency).

The dissolution or postponement of NGOs' activities should not occur until the court judgment is final. The Court may issue an injunction against certain activities that are suspected to be illegal but cannot dissolve it when legal recourse is still available.

If the draft insists on having the Ministry of Interior make the decision on the "legality," this decision must be subject to judicial review and the dissolution cannot take effect until judicial recourse is exhausted. The government must provide specific reasons to dissolve an NGO institution, based on specific provisions of the Civil Code, as discussed in point F.1.2 above.

## **6 Funding**

Funding arrangements should be a matter solely between donors and recipients, subject only to the criminal and civil sanctions applied to anyone else. However, government and the public are entitled to a yearly financial statement from NGOs, particularly when they have received any financial support from the government (grants, contracts, tax benefits) or from the public, through public donations.

If the governments require *prior* approval for an NGO to receive foreign funds, it may limit the independence of civil society. This type of restriction raises concerns that the government will exercise its discretion over the approval process to limit funding to classes of NGOs disfavored by government, a burden that often falls most heavily on advocacy or human rights groups. Prior approval requirements can be used to starve certain NGOs of resources, forcing their closures or suspension of activities. Alternately, they may chill NGO expression, as groups avoid controversial positions that may cause government officials to terminate their funding sources.<sup>108</sup>

*Within broad parameters, NGOs should have the right to seek and secure funding from any and all legal sources.* Closely linked with free contact and communication is the right to seek and secure funding from legal sources. Legal sources should include individuals and businesses, other civil society actors and international organizations, as well as local, national, and foreign governments. Just as cutting off contact and communication for NGOs is to strike at their existence, so restrictions on resources pose a direct threat to their ability to operate. Restrictions on the receipt of funding, and especially on the receipt of foreign funding, have grown increasingly common, but as this section will demonstrate, such impediments violate the spirit and the developing trends within international law.

Regardless of the justification for these restrictions on foreign funding, the effect on the operations of NGOs of all kinds can be detrimental. Particularly in countries where local philanthropy is underdeveloped and government funding is not substantial, many groups could be forced to cease operations if denied access to funding sources from beyond their borders.

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<sup>108</sup> ICNL and WMD (February 2008) p. 35.

The legal framework governing the civil society sector should not place any impediments on the flow of funding between donor and donee. On the contrary, the government should undertake the obligation to protect nonprofit organizations in order to develop Cambodia.

### **7 Tax Exemptions**

Income shall be exempted from taxation—including business income—so long as the income is used to further the purpose of nonprofit organization. Gifts and contributions to nonprofit organizations are generally exempt from tax. Business income should not be taxed at all if it is used to further the purposes of the nonprofit organization. In order for nonprofit organizations to exist and support people for a long time, they may do business but not distribute profits to individual officers, directors, or personnel (aside from payment of reasonable salaries for employees). For instance, *Singapore* is the only country in the region with an unrelated business income tax law—that is, a law that exempts business income from taxation only if it is generated by an activity related to the purpose of nonprofit organization.<sup>109</sup>

Cambodia shall retain concept of tax exemption for nonprofit organization contained in the Tax Code since 1993.

### **8 Bylaws**

As the fundamental document for the operation of a particular NGO, NGO bylaws (also sometimes referred to as “statutes”) must be determined by the NGO. Bylaws are an internal document, a set of rules that enables each organization to conduct its affairs. It is important that they be written clearly and in language that is easily understood by all organization stakeholders. This document is frequently necessary for the registration of an NGO with national and public authorities.

If the Law includes provisions governing bylaws, it must set only minimum requirements to ensure sufficiency of organizational governance. It must leave flexibility for each organization to adapt to its particular conditions. NGOs must have bylaws that set basic rules with respect to the organization’s objectives, governance, and use of assets. Clear basic rules help to ensure that the organization’s highest governing body can provide effective oversight of the organization’s affairs.

### **9 Reporting**

Reporting requirements have a twofold purpose. On the one hand, they enable the government to ensure that charities continue to merit the various advantages that they have received because of their publicly beneficial activities. But on the other, they help to guarantee an effective market for contributions, one in which potential contributors have ready access to key facts about potential donees.<sup>110</sup> A primary purpose of this sort of public disclosure is to encourage self-regulation by charities. For example, given the reality that many other charities will be competing for the same donations, charities must think twice about how much they spend on officers’ salaries and other administrative expenses; even if these are not so egregious as to justify legal sanctions, they may make a charity an unattractive vehicle for philanthropy relative to one that directs resources toward its charitable purposes more efficiently.

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<sup>109</sup> Thomas Silk (1999), p. 25.

<sup>110</sup> W. Cole Durham, Jr., Brett G. Scharffs, and Michael W. Durham, *An Introduction to the Law and Regulation of Non-Profit Organizations in the United States* (Beijing, China, October 2004), p. 50.

In the United States, the reports are quite detailed, describing such aspects of the charity's finances as its net asset position, sources of funding, revenue, and expenses. Among the other information to be disclosed is the compensation received by officers and directors, as well as by the organization's five highest-paid employees and five highest-paid independent contractors; information about any political, lobbying, or unrelated business activities; a summary of the organization's activities for the year; any unreported changes in the organization's governing documents; and information about other affiliated taxable or tax-exempt entities.<sup>111</sup>

The draft law of NGOs requires all NGOs to report their activities to the Ministry of Interior every quarter. If an NGO has failed to submit two consecutive times, its activities may be suspended for a year. This requirement does not replace the NGO's obligation to report to its donors directly on the use of funds they have provided. Moreover, an enforcement decision by the government should be appealable to court.

### **10 Obligation of the State to Permit Implementation of NGO Activities<sup>112</sup>**

The state must guarantee that activities of NGOs are not impeded by national or local authorities without legal justification. For example, local authorities cannot, without good and proper cause as defined in the constitution and international covenants to which Cambodia is a signatory member, intervene in or prohibit a seminar or public forum organized by NGOs.

As noted above, international law has placed on states the obligation to ensure that the rights enshrined in international law (the Universal Declaration, ICCPR, etc.) are protected:

- *United Nations Charter, Article 56: All Members pledge themselves to take joint and separate action in co-operation with the Organizations for the achievement of the purposes set forth in Article 55*
- *ICCPR, Article 2: (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind ... (2) ... each State Party ... undertakes to take the necessary steps ... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*
- *ICESCR, Article 2: (1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*
- *U.N. Declaration on the Right to Development, Article 6: All states should cooperate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all...*

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<sup>111</sup> W. Cole Durham, Jr., Brett G. Scharffs, and Michael W. Durham (October 2004), p. 51.

<sup>112</sup> ICNL and WMD (February 2008), p. 38.

- *Vienna Declaration and Program of Action 89: Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of government.*
- *U.N. Defenders Declaration, Article 2: Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.*

In light of this body of international law, the government is not only bound to refrain from interference with human rights and fundamental freedoms, but also has a positive duty to ensure respect for human rights and fundamental freedoms, including the freedoms of association and expression, among others. This duty includes an accompanying obligation to ensure that the legislative framework for civil society is appropriately enabling and that the necessary institutional mechanisms are in place to “ensure to all individuals” the recognized rights. An enabling legal framework will help create an appropriate environment for an NGO throughout its life-cycle. Necessary institutional mechanisms could include, among others, a police force to protect people against violations of their rights by state or non-state actors and an independent judiciary able to provide remedies.

### **11 Judicial Protection**

In a state governed by the rule of law it is essential that NGOs should be entitled, in the same way as other legal entities, to challenge decisions affecting them in an independent court which has the capacity to review all aspects of their legality, to quash such decisions where appropriate, and to provide any consequential relief that might be required. Any act or decision affecting an NGO must be subject to the same administrative and judicial supervision as is generally applicable in the case of other legal entities. There should be no need for special provisions to this effect in legislation on NGOs.

When the government rejects the application for registration, NGOs must have the right to appeal to an independent adjudicatory body, in accordance with the Constitution. This means that the government decision is not final; the court has authority to review the administrative institution, and either uphold the government’s determination or to overturn it.

### **Conclusion**

As discussed above, the Royal Government of Cambodia should respect and be consistent with the norms contained in international covenants and declarations upholding the freedom of association and individual rights to which Cambodia is a signatory and a member. Cambodia has existing laws which cover many NGOs activities; discussed in chapter 1 point 2, above. If the government genuinely intends to build a development partnership with the sector, any new legislation should be designed to strengthen and empower the sector, protect NGOs’ interests, and provide support to sustain the sector.

A few simple suggestions for improving the present regulatory regime:

- The registration application should be directly filed with the Ministry of Interior, without going through the hierarchy of local authorities. Only a single registration should be required.
- Dissolution: Unauthorized illegal actions on the part of NGO staff should be adjudicated by the courts as *ultra vires*, not undertaken by the organizations itself, and, barring a finding of impropriety, wrongdoing, or lack of proper supervision on the part of the organization, should not serve as grounds for dissolution.
- The government could not limit the area or region for NGOs to work. Such restrictions constitute a breach of freedom of association provided in both the constitution and also the international treaties that Cambodia has ratified. It is expressly in the public interest for NGOs to freely carry out lawful activities within the territory of Cambodia.

Finally, any law affecting civil society drafted for Parliament's consideration should be released for public scrutiny and consultation on its content.

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*Article*

## **Case Note: AID/WATCH Inc. v. Commissioner of Taxation**

**Myles McGregor-Lowndes<sup>1</sup>**

In *AID/WATCH Inc. v. Commissioner of Taxation*, [2010] HCA 42 (High Court of Australia, 1 December 2010),<sup>2</sup> the High Court determined that AID/WATCH was not disqualified from charitable status by virtue of its main purposes, which included to generate public debate about the effectiveness of foreign aid. Moreover, there is no general doctrine in Australia to exclude political objects from charitable purposes.

AID/WATCH is an incorporated association which researches, monitors, and campaigns about the delivery of overseas aid. It is an organization concerned with promoting the effectiveness of Australian and multinational aid, including investment programs, projects, and policies. It does not deliver any aid directly to any person, but produces research reports about Australian aid effectiveness as well as performing publicity events (such as sending derisory 60th birthday gifts to the World Bank suggesting it was time for the bank to retire).

AID/WATCH had been endorsed as a charitable institution (exempt from income tax liability under Income Tax Assessment Act 1997) from 14 July 2000; and endorsed as exempt from FBT and GST from 1 July 2005. But the Commissioner revoked these endorsements in October 2006. AID/WATCH lodged an objection, but the Commissioner disallowed the objection. AID/WATCH applied for review of the decision to the Administrative Appeals Tribunal (AAT).

The Commissioner's objection was that first it was an institution which did not itself distribute aid and thus was not charitable, and second, it achieved its objects through campaigning which amounted to a political purpose.

### **The AAT decision**

The AAT reviewed the Commissioner's decision (see case note [Aid/Watch Inc v Commissioner of Taxation](https://wiki.qut.edu.au/display/CPNS/AID-WATCH+Incorporated+v+Commissioner+of+Taxation)<sup>2</sup>, <https://wiki.qut.edu.au/display/CPNS/AID-WATCH+Incorporated+v+Commissioner+of+Taxation>) and found that the organization was entitled to status as a charitable institution, whose major objective was the relief of poverty; and that the organization's activities included the advancement of education which was also charitable. In addition, as AID/WATCH did not have changes to the law as a main object, the AAT determined that it was not disqualified from charitable status; although it could be disqualified if its objects and activities concentrated too much on trying to influence government. In such a case, "The argument against charitable status may be enhanced because of its activist approaches and confrontational methods."

The Commissioner appealed to the Federal Court.

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<sup>2</sup> <http://www.austlii.edu.au/au/cases/cth/HCA/2010/42.html>

### **The Full Court of the Federal Court decision**

On appeal, the Full Court of the Federal Court found that AID/WATCH's purposes were not charitable as relief of poverty and education were not its primary purpose (see the case note at [Commissioner of Taxation v Aid/Watch](https://wiki.qut.edu.au/display/CPNS/Commissioner+of+Taxation+v+AID-WATCH+Incorporated)<sup>2</sup>, <https://wiki.qut.edu.au/display/CPNS/Commissioner+of+Taxation+v+AID-WATCH+Incorporated>). The Court did find that research and publications produced by AID/WATCH had the necessary educational element and that its activities were directed towards purposes which would fall within relief from poverty, so that the purposes should be characterized as charitable in the legal sense unless disqualified because of their political nature.

However the Full Federal Court found (para 37) that behind its political activities was a political purpose, and that this was its main purpose. Because the political purpose was its main purpose and not ancillary to its charitable purposes, it was disqualified from charitable status.

AID/WATCH appealed to the High Court.

### **The High Court decision**

The High Court examined the history of the law on this point drawing on the UK cases (in particular *Bowman v Secular Society* [1917] AC 406; and *McGovern v Attorney-General* [1982] Ch 321 at 340) and their consideration in Australia (e.g. *Royal North Shore Hospital of Sydney v Attorney-General (NSW)* (1938) 60 CLR 396). The Court also discussed the position in the United States.

The majority of the Court (5 to 2) accepted AID/WATCH's submissions that its generation of public debate was a charitable purpose because its activities contributed to public welfare and were therefore charitable within the fourth head of Pemsel; and that, whatever the scope of exclusion for political purposes is in Australian law, AID/WATCH's "purposes and activities ... do not fall within any area of disqualification for reasons of contrariety between the established system of government and the general public welfare" (para 46).

The majority of the Court stated (para 47):

By notice of contention the Commissioner submitted that the Full Court should have decided the appeal in his favour on the ground that the main or predominant or dominant objects of Aid/Watch itself were too remote from the relief of poverty or advancement of education to attract the first or second heads in Pemsel. It is unnecessary to rule upon these submissions by the Commissioner. This is because the generation by lawful means of public debate, in the sense described earlier in these reasons, concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head in Pemsel.

The court decided that the English case of *McGovern v Attorney-General* [1982] Ch 321 does not apply in Australia and thus there is no general doctrine which excludes "political objects" from charitable purposes (para 48).

The majority decision did issue a note of warning that disqualification of charitable purpose may still occur where a purpose does not contribute to the public welfare, probably by reason of the particular ends and means involved (para 49).

The two dissenting judgments took a more orthodox approach finding the organization did not fall within any of the heads of charity.