

AID BARRIERS AND THE RISE OF PHILANTHROPIC PROTECTIONISM

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A Russian bird group was deemed a “foreign agent.”² Ethiopian human rights organizations were forced to curtail their activities because of a government-imposed cap on foreign funding.³ In India, the Sierra Club was barred from receiving funding from abroad.⁴

Around the world, countries are burdening the ability of civil society organizations to receive cross-border philanthropy. This article presents the macro-political context underlying these restrictions. It then categorizes constraints, summarizes governmental justifications, and analyzes restrictions under international law. The final section summarizes conclusions and areas for further scholarship.

Background

Twenty years ago, the world was in the midst of an “associational revolution.”⁵ Internationally, civil society organizations (CSOs)⁶ had a generally positive aura, recognized for their important contributions to health, education, culture, economic development, and a host of other publicly beneficial objectives. In addition, political theorists associated civil society with

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² “Russian Bird Support Group Branded ‘Foreign Agent,’” *RIA Novosti*, March 5, 2013, accessed September 25, 2014, <http://en.ria.ru/russia/20130503/180967677/Russian-Bird-Support-Group-Branded-Foreign-Agent.html>.

³ Amnesty International, “Ethiopia: The 2009 Charities and Securities Proclamation as a serious obstacle to the promotion and protection of human rights in Ethiopia,” Amnesty International’s written statement to the 20th Session of the UN Human Rights Council, June 11, 2012, <http://www.amnesty.org/fr/library/asset/AFR25/007/2012/en/5b3d4e94-56c5-4044-9b73-93b55cd13e61/afr250072012en.pdf>.

⁴ “RBI Imposes Curbs on 4 American NGOs,” *India West*, January 6, 2015, accessed January 12, 2015, http://www.indiawest.com/news/india/rbi-imposes-curbs-on-american-ngos/article_520532b6-9599-11e4-84b9-33473a4b2e33.html.

⁵ Lester Salamon, “The Rise of the Nonprofit Sector,” *Foreign Affairs* 74(109) (July – August 1994), <http://www.foreignaffairs.com/articles/50105/lester-m-salamon/the-rise-of-the-nonprofit-sector>.

⁶ For purposes of this article, the term “civil society organization” or “CSO” encompasses not-for-profit, nongovernmental organizations, whether or not they are eligible for tax benefits in a particular country.

social justice, such as the civil rights movement in the United States, the dissident movement in Central Europe, and the anti-apartheid movement in South Africa.

As the 20th century closed, commentators noted the fall of the Berlin Wall, the rise of the Internet, and the renaissance of civil society. Political, technological, and social developments were weaving themselves together into an era of civic empowerment. Reflecting this era, in September 2000, the United Nations General Assembly adopted the *Millennium Declaration*. Among other provisions, the Declaration trumpeted the importance of human rights and the value of “non-governmental organizations and civil society, in general.”⁷

One year later, the zeitgeist changed. After the terrorist attacks of September 11, 2001, discourse shifted away from human rights and the positive contributions of civil society. President Bush launched the War on Terror, and CSOs became an immediate target:

Just to show you how insidious these terrorists are, they oftentimes use nice-sounding, non-governmental organizations as fronts for their activities.... We intend to deal with them, just like we intend to deal with others who aid and abet terrorist organizations.⁸

President Bush then launched a “Freedom Agenda” to advance democratic transitions in the Middle East.⁹ In many circles, the Freedom Agenda was greeted with skepticism because of the increased militarization of U.S. foreign policy, concerns about U.S. unilateralism, and the decline of U.S. “soft power” after the human rights abuses at Abu Ghraib.

On the one hand, the sector was targeted under the War on Terror. On the other, the Bush Administration embedded support for civil society into the Freedom Agenda. For both reasons—the association of civil society with terrorism and the association of civil society with Bush’s Freedom Agenda—governments around the world became increasingly concerned about civil society, particularly CSOs that received international support.

Concern heightened after the so-called “color revolutions” that occurred shortly after the Freedom Agenda was announced. The 2003 Rose Revolution in Georgia roused Russia, but the turning point was the 2004 Orange Revolution in Ukraine. President Putin viewed Ukraine as a battleground state in the contest for geopolitical influence between Russia and the West. President Putin also seemed to have an exaggerated sense that the Orange Revolution was the result of Western funding of Ukrainian civil society, rather than an authentic, indigenous response to electoral fraud.¹⁰

The Orange Revolution caught the attention of other world leaders. While protesters were on the streets of Kiev, President Lukashenka of Belarus famously warned, “There will not be any rose, orange, or banana revolutions in our country.” During the same period, Zimbabwe’s

⁷ United Nations General Assembly, *United Nations Millennium Declaration*, para. 30, UN Doc. A/55/L.2 (September 8, 2000), <http://www.un.org/millennium/declaration/ares552e.htm>.

⁸ President Bush, “President Freezes Terrorists’ Assets,” Remarks on Executive Order, U.S. Department of State Archive, September 24, 2001, <http://2001-2009.state.gov/s/ct/rls/rm/2001/5041.htm>.

⁹ Sarah E. Yerkes & Tamara Cofman Wittes, “What Price Freedom? Assessing the Bush Administration’s Freedom Agenda,” Center for Middle East Policy Analysis Papers, Number 10 of 34, *Brookings*, September 2006, <http://www.brookings.edu/research/papers/2006/09/middleeast-wittes>.

¹⁰ William Schneider, “Ukraine’s ‘Orange Revolution,’” *Atlantic*, December 2004, accessed September 16, 2014, <http://www.theatlantic.com/magazine/archive/2004/12/ukraines-orange-revolution/305157/>.

Parliament adopted a law restricting CSOs. Soon thereafter, Belarus enacted legislation restricting the freedoms of association and assembly. If there was a global “associational revolution” in 1994, by 2004 the global “associational counterrevolution”¹¹ had begun.

In 2005, the counterrevolution gained prominence when Russia adopted a high-profile law restricting civil society. The same year, Eritrea, Uzbekistan, and other countries followed suit.

The zeitgeist also changed because there was less appetite for civil society support in countries that had undergone political transformations after the fall of the Berlin Wall. Years had passed, and governments no longer considered themselves to be in “transition.” Rather, they had transitioned as far as they were inclined to go, and they were now focused on the consolidation of governmental institutions and state power. This was particularly true in so-called “semi-authoritarian” or “hybrid” governments that held elections but had little attraction to the rule of law, human rights, and other aspects of pluralistic democracy.¹²

Governments were also able to coat restrictions with a veneer of political theory. Governments with autocratic tendencies touted variants of Vladimir Putin’s theory of “Managed Democracy,” which seamlessly morphed into notions of “Managed Civil Society.” Essentially two models emerged in these countries. In some countries, CSOs were given latitude to operate, provided they stayed away from politics. In others, the government sought to co-opt CSOs and to shut down groups that resisted, particularly those that received international funding.

Restrictions also gained momentum from efforts to promote the effectiveness of foreign aid. In March 2005, ninety countries endorsed the Paris Declaration on Aid Effectiveness, which incorporated the concepts of host country ownership (which was soon co-opted into “host government ownership”) and the “alignment of aid with partner countries’ priorities.”¹³ Soon thereafter, a number of governments introduced restrictive measures to regulate international funding, covering not only bilateral aid but also cross-border philanthropy.

Buffeted by these and other factors, civic space quickly contracted. According to data from the International Center for Not-for-Profit Law (ICNL), between 2004 and 2010, more than fifty countries considered or enacted measures restricting civil society.¹⁴

A second wave of legislative constraints then emerged after the so-called “Arab Awakening,” which began in late 2010. Once again, countries around the world took notice and initiated measures to restrict civil society. Since 2012, more than ninety laws constraining the freedoms of association or assembly have been proposed or enacted. This trend is consistent with a continuing decline in democracy worldwide. *Freedom in the World 2015* reveals that 2014 was the ninth consecutive year of decline in freedom globally, with sixty-one countries showing

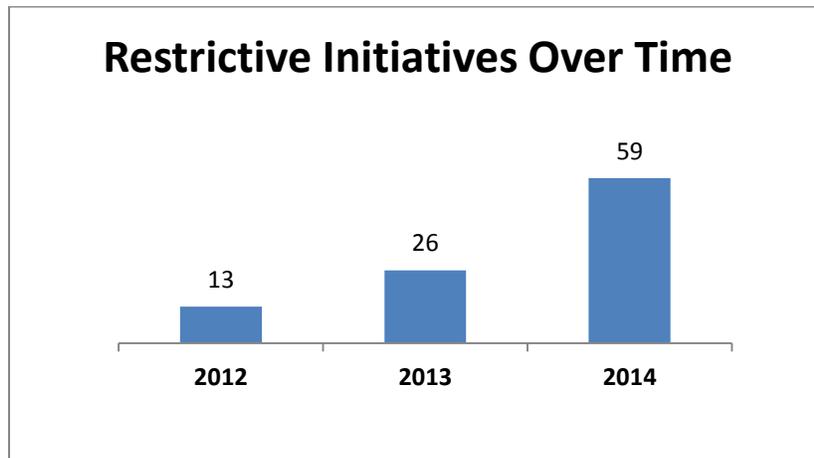
¹¹ Douglas Rutzen & Cathy Shea, “The Associational Counter-Revolution,” *Alliance*, September 2006, <http://www.alliancemagazine.org/en/content/associational-counter-revolution>.

¹² Thomas Carothers & Saskia Brechenmacher, *Democracy and Human Rights Support Under Fire* (Carnegie Endowment for International Peace, 2014).

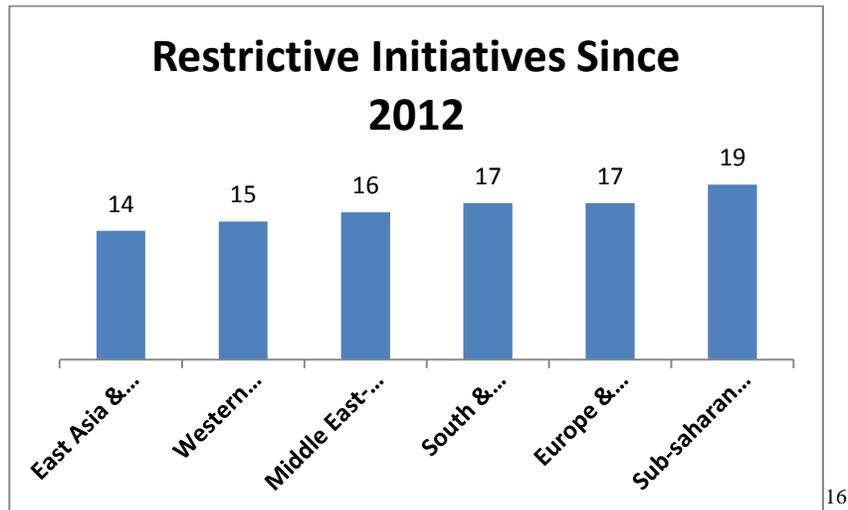
¹³ The Organisation for Economic Co-operation and Development (OECD), “The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action,” OECD, 2005/2008, 1, <http://www.oecd.org/dac/effectiveness/34428351.pdf>.

¹⁴ A trend analysis only tells part of the story, for many countries (such as Syria, Eritrea, Saudi Arabia, Cuba, Laos, etc.) remained “stably restrictive” throughout this period.

overall declines.¹⁵ As demonstrated in the chart below based on ICNL’s tracking data, there was a spike in activity between 2012 and 2014, with the number of restrictive initiatives doubling each year:



Restrictions on association and assembly are more common in certain regions, but this a global phenomenon, as shown by the chart below also based on ICNL’s tracking data:



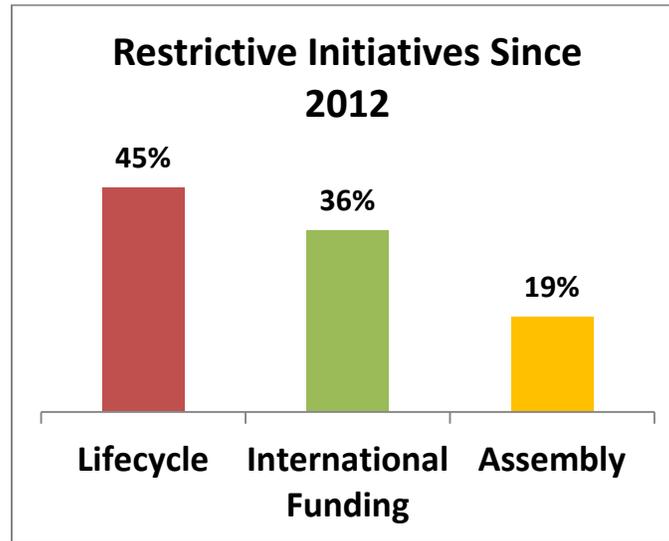
Among these restrictive initiatives, approximately half constrain the incorporation/registration,¹⁷ operation, and general lifecycle of CSOs (so-called “framework” legislation).¹⁸ Approximately

¹⁵ Please see Freedom House, *Freedom in the World 2014*, <http://www.freedomhouse.org/report/freedom-world/freedom-world-2014#UxEVs4Xnmf0>.

¹⁶ Regions are defined based on State Department Bureau classifications. It is interesting to note how regional trends change based on classification. For example, if the states of the former Soviet Union were to be classified as their own regional category, they would lead all other regions with 21 restrictive initiatives.

¹⁷ In many civil law countries, “registration” is the process by which an organization incorporates and becomes a legal entity.

one-third constrain international funding of CSOs, including cross-border philanthropy. The remaining initiatives restrict the freedom of assembly.



Parameters of This Article

This article focuses on legal restrictions impeding the inflow of international funding to CSOs, including cross-border philanthropy. Part I categorizes and surveys constraints. Part II summarizes arguments frequently presented by governments to justify constraints. Part III analyzes constraints and justifications under international law. Part IV summarizes conclusions and suggests areas for further research. Part IV also references the engagement of the U.S. Government, the Community of Democracies, and other members of the international community on this issue, but a mapping of these initiatives is provided elsewhere.¹⁹

Though this article references fifty-five countries, it is intended to present an illustrative rather than exhaustive list of country examples. For conciseness, this article presents top-line summaries; details are available elsewhere.²⁰ In addition, this article focuses primarily on constraints impeding the inflow of philanthropy, rather than constraints on the outflow of philanthropy, which also exist in many countries.²¹ Finally, while this article focuses on legal

¹⁸ In recent years, however, there has been an uptick in the percentage of legislative initiative seeking to constrain the international funding of civil society. This may be due to the fact that many countries have already enacted restrictive framework legislation, or the fact that many countries are now focused on international funding.

¹⁹ ICNL, "Mapping Initiatives to Address Legal Constraints on Foreign Funding," August 20, 2014, <http://www.icnl.org/news/2014/20-Aug.html>.

²⁰ For more detailed information about specific country environments, please see ICNL's NGO Law Monitor at <http://www.icnl.org/research/monitor/index.html> and ICNL's Online Library at <http://www.icnl.org/research/library/ol/online/search/en>, which as of January 2015 contains 3,400 documents from 205 countries and territories.

²¹ For more information about outflow constraints, please see: David Moore & Douglas Rutzen, "Legal Framework for Global Philanthropy: Barriers and Opportunities," *International Journal for Not-for-Profit Law* 13 (1-2) (April 2011), http://www.icnl.org/research/journal/vol13iss1/special_1.htm.

impediments, it is important to note that cross-border philanthropy is still possible in most contexts.

Restrictions Impeding the Inflow of Philanthropy

An increasing number of countries constrain the ability of CSOs to receive international funding, including cross-border philanthropy. Common constraints include:

- (1) requiring prior government approval to receive international funding;
- (2) enacting “foreign agents” legislation to stigmatize foreign funded CSOs;
- (3) capping the amount of international funding that a CSO is allowed to receive;
- (4) requiring that international funding be routed through government-controlled entities;
- (5) restricting activities that can be undertaken with international funding;
- (6) prohibiting CSOs from receiving international funding from specific donors;
- (7) constraining international funding through the overly broad application of counterterrorism and anti-money laundering measures;
- (8) taxing the receipt of international funding, including cross-border philanthropy;
- (9) imposing onerous reporting requirements on the receipt of international funding; and
- (10) using defamation laws, treason laws, and other laws to bring criminal charges against recipients of international funding.

Illustrative examples of each constraint are presented below.

1. Prior Government Approval

A number of countries require advance governmental approval before a CSO may receive international funding, including cross-border philanthropy. Two common variants of this approach are: (a) prior approval of every foreign *contribution*,²² and (b) prior approval of every *organization* permitted to receive foreign contributions.

A. Prior Approval of Every Foreign Contribution

This approach is common in the Middle East/North Africa (MENA), and **Egypt** is perhaps the most well-known example. Under Egyptian law, a CSO must obtain the approval of the Ministry of Social Solidarity before receiving funds from any foreign source, including foreign foundations.²³ In 2013, an Egyptian court imposed jail sentences²⁴ on forty-three CSO

²² In this article, the terms “foreign contribution,” “cross-border philanthropy,” and “global philanthropy” encompass donations, contributions, grants, social investments, and other forms of financial support provided by a philanthropist in one country to a civil society organization in another country. In addition, the terms “international funding” and “foreign funding” are used interchangeably, with a preference for the term “international funding” since certain governments have used the word “foreign” to stigmatize and delegitimize resources coming from other countries.

²³ A draft CSO law issued in late June 2014 retains a similar requirement, stipulating that advance approval from a government committee is required before an organization may receive international funding.

²⁴ Alastair Beach, “US anger as 43 NGO workers are jailed in Egypt crackdown,” *The Independent*, June 4, 2013, accessed September 9, 2014, <http://www.independent.co.uk/news/world/africa/us-anger-as-43-ngo-workers-are-jailed-in-egyptian-crackdown-8644660.html>.

representatives for failing to comply with foreign funding requirements and other provisions of Egyptian law.²⁵

Other MENA countries requiring contribution-by-contribution approval include **Algeria**,²⁶ **Jordan**,²⁷ and **Bahrain**.²⁸

This constraint also appears in countries outside of MENA: For example:

- In **Uzbekistan**, before a CSO may receive a foreign grant, a Commission under the Cabinet of Ministers must decide that the project to be supported by the grant is indeed worthy of support.²⁹
- In **Turkmenistan**, a foreign organization interested in funding a CSO must send a request to the Ministry of Foreign Affairs. Relevant government agencies then decide if the proposed international funding is necessary. If government agencies support the request, the Turkmen CSO must then submit an application to a State Commission, which makes the final decision.³⁰
- In **Belarus** and **Azerbaijan**, CSOs must register grant agreements.³¹ In both countries, the process is complex and subjects the receipt of international funding to political vetting.
- In **Bangladesh** and **Nepal**, CSOs must obtain the prior approval of government ministries to receive international funding.³²
- In **Eritrea**, international CSOs may fund or otherwise engage in relief or rehabilitation work only if the Ministry of Labor and Human Welfare determines that the government cannot undertake the specific task.³³

²⁵ Illustrating the breadth of discretion vested in government officials, in 2011 the Egyptian government blocked the New Woman Foundation from receiving a \$5,000 “Nelson Mandela- Graça Machel Innovation Award” from CIVICUS, citing unspecified “security concerns.” See Kareem Elbayar, “Egypt’s restrictions on NGOs violate international law,” *Washington Post* Letter to the Editor, March 13, 2012, accessed September 9, 2014 http://www.washingtonpost.com/opinions/egypts-restrictions-on-ngos-violate-international-law/2012/03/12/gIQA1hHDAS_story.html.

²⁶ ICNL, NGO Law Monitor: Algeria, last modified April 26, 2014, <http://www.icnl.org/research/monitor/algeria.html>

²⁷ ICNL, NGO Law Monitor: Jordan, last modified January 29, 2014, <http://www.icnl.org/research/monitor/jordan.html>

²⁸ Government of Bahrain, Law 21 on Associations, Social and Cultural Clubs, Special Committees Working in the Field of Youth and Sports, and Private Foundations, Article 20.

²⁹ ICNL, NGO Law Monitor: Uzbekistan, last modified February 8, 2014, <http://www.icnl.org/research/monitor/uzbekistan.html>

³⁰ ICNL, NGO Law Monitor: Turkmenistan, last modified May 5, 2014, <http://www.icnl.org/research/monitor/turkmenistan.html>.

³¹ ICNL, NGO Law Monitor: Belarus, last modified September 7, 2014, <http://www.icnl.org/research/monitor/belarus.html> and ICNL, NGO Law Monitor: Azerbaijan, last modified December 2, 2014, <http://www.icnl.org/research/monitor/azerbaijan.html>

³² ICNL, NGO Law Monitor: Bangladesh, last modified October 29, 2014, <http://www.icnl.org/research/monitor/bangladesh.html> and ICNL, NGO Law Monitor: Nepal, last modified August 26, 2014, <http://www.icnl.org/research/monitor/nepal.html>

B. Prior Approval of Organizations Permitted to Receive Foreign Contributions

Some countries take a slightly different approach: they require the approval of organizations entitled to receive foreign contributions. **India** is perhaps the most well-known example of this approach. CSOs that meet certain requirements for three years are eligible to register under the Foreign Contribution (Regulation) Act (FCRA) 2010.³⁴ If FCRA registration is approved, the organization is authorized to receive foreign contributions for up to five years.³⁵

Other countries in South Asia have considered similar registration requirements for CSOs seeking to receive international funding. For example:

- In February 2014, the government of **Pakistan** prepared a bill on foreign funded CSOs. Among other provisions, domestic CSOs seeking to use at least 50 million rupees (approximately \$476,000) in foreign contributions per year would have to apply for a certificate from the Securities and Exchange Commission of Pakistan. International CSOs seeking to use any amount of foreign contributions would have to register with the Economic Affairs Division. Under the bill, applications for registration would undergo vetting by the Ministry of Interior, local and provincial governments, and “other concerned government authorities.”³⁶
- In July 2014, the government of **Sri Lanka** announced that it was drafting a law requiring all CSOs to register with the Ministry of Defence; organizations failing to comply with this requirement would be ineligible to receive international funding.³⁷

2. Stigmatization of International Funding Through “Foreign Agents” Legislation

Other countries do not require prior government approval to receive international funding, but they have stigmatized the receipt of such funding. At present, the former Soviet Union is the geographic locus of new legislation in this area. Specifically, several countries in

³³ Government of Eritrea, *Proclamation No. 145/2005, A Proclamation to Determine the Administration of Non-governmental Organizations*, No. 145/2005, May 11, 2005, Article 9(1), available at: <http://www.unhcr.org/refworld/docid/493507c92.html>

³⁴ According to the Centre for the Advancement of Philanthropy, new CSOs must apply for “FCRA Prior Permission to receive a specific sum of money from a specific foreign source.” After meeting certain spending requirements over three fiscal years, the CSO may apply for FCRA registration to “receive unlimited sums of funds from unlimited foreign sources for a period of 5 years.” Organizations “of a political nature”—and associations engaged in the production or broadcast of news or current affairs programming—are prohibited from accepting foreign contributions. For more information on the FCRA, please see CAP India’s website, http://www.capindia.in/resource_bank.htm.

³⁵ The FCRA also contains restrictions on the utilization of foreign contributions and vests the Central Government with broad powers to regulate foreign contributions. In addition, the FCRA provides the government with the power to cancel an organization’s FCRA registration. For example, in one month in mid-2012, the government revoked permission to receive foreign funding of 4,139 CSOs due to FCRA violations, amounting to 9.5 percent of all registered CSOs in India. See Shyamlal Yadav, “4,139 NGOs lose FCRA license, most in TN,” *Indian Express*, August 10, 2012, accessed September 10, 2014, <http://archive.indianexpress.com/news/4139-ngos-lose-fcra-licence-most-in-tn/986398/>.

³⁶ Government of Pakistan, *Draft Foreign Contributions Act, 2014*, Article 3.

³⁷ Tamil Guardian, “Government to Close Bank Accounts of NGOs not Registered with MoD,” *Tamil Guardian*, July 10, 2014, accessed September 8, 2014, <http://www.tamilguardian.com/article.asp?articleid=11504>.

this region have enacted or proposed laws roughly modeled³⁸ on the 1938 **United States** Foreign Agents Registration Act. For example:

- In July 2012, President Putin of **Russia** signed a law requiring³⁹ all non-commercial organizations that receive funds from abroad and engage in “political activities” to register with the Ministry of Justice as “foreign agents.” Under the law, “political activities” are broadly defined as “attempts to influence official decision-making or to shape public opinion for this objective.”⁴⁰ Moreover, the “foreign agents” label attaches even if the international funding is used for purposes entirely unrelated to the “political activities” of the organization. This label is particularly problematic for Russian CSOs because, in Russian, the term “foreign agent” is synonymous with “foreign spy.”⁴¹
- In 2013, the Parliament of **Kyrgyzstan** introduced a draft law nearly identical to the Russian “foreign agents” law. The bill, if enacted, would require CSOs receiving foreign funding and engaging in “political activity” to register as “foreign agents.”⁴²
- In January 2014, the Yanukovich Government in **Ukraine** enacted a legislative package of so-called “dictatorship laws,”⁴³ which included a “foreign agents” law similar to Russian legislation.⁴⁴

Countries outside of the former Soviet Union have also considered this approach. For example, a bill in **Israel** would require certain foreign funded CSOs to state on their website and official documents that they are foreign agents.⁴⁵ In addition, the vice chairman of the China Research Institute of China-Russia Relations has argued that **China** should enact a law similar to Russia’s foreign agents law.⁴⁶ In the **United States**, some lawyers have called for a review of

³⁸ For example, the U.S. Foreign Agents Registration Act applies to all “persons” and contains an exemption for organizations engaged in “religious, scholastic, academic, or scientific pursuits or of the fine arts.” The Russian law solely targets CSOs. In addition, US law requires a connection between the international funding and the organization’s political activities. Russian legislation does not. For additional differences, see, e.g., Vladimir Kara-Murza, “FARA and Putin’s NGO Law: Myths and Reality,” *Institute of Modern Russia*, May 9, 2013, accessed September 8, 2014, <http://imrussia.org/en/politics/455-fara-and-putins-ngo-law-myths-and-reality> and <http://www.fara.gov/indx-act.html>.

³⁹ In June 2014, President Putin signed into law amendments allowing the Ministry of Justice to register non-commercial organizations as foreign agents without their consent.

⁴⁰ United Nations Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, para. 28, UN Doc. A/HRC/23/39 (April 24, 2013) at http://freeassembly.net/wp-content/uploads/2013/04/A.HRC_23.39_EN-funding-report-April-2013.pdf.

⁴¹ ICNL, NGO Law Monitor: Russia, last modified May 7, 2014, <http://www.icnl.org/research/monitor/russia.html>.

⁴² “Kyrgyzstan: Reject ‘Foreign Agents’ Law,” Human Rights Watch, Dec. 5, 2013, accessed September 8, 2014, <http://www.hrw.org/news/2013/12/05/kyrgyzstan-reject-foreign-agents-law>.

⁴³ Andrew E. Kramer, “Ukrainian Prime Minister Resigns as Parliament Repeals Restrictive Laws,” *New York Times*, January 28, 2014, accessed September 8, 2014, http://www.nytimes.com/2014/01/29/world/europe/ukraine-prime-minister-resign.html?_r=2.

⁴⁴ This law never went into force because of the political changes in Ukraine.

⁴⁵ Gril Ronen, “New Version of ‘NGO Bill’ Headed for Knesset,” *Arutz Sheva*, May 25, 2014, accessed September 8, 2014, http://www.israelnationalnews.com/News/News.aspx/181022#.U_O4RvldWbM.

⁴⁶ Simon Denyer, “China taking the Putin approach to democracy,” *Washington Post*, October 1, 2014, A7.

whether think tanks receiving funding from foreign governments should register as “foreign agents” under the 1938 Foreign Agent Registration Act.⁴⁷

3. Caps on International Funding

Ethiopia serves as the seminal example of caps on international funding. Under the 2009 *Proclamation to Provide for the Registration and Regulation of Charities and Societies*, “Ethiopian” charities and societies may not receive more than 10 percent of their total income from foreign sources. In addition, only “Ethiopian” charities and societies are legally allowed to work on disability rights, children’s rights, gender equality, conflict resolution, the efficiency of the justice system, and certain other objectives.

“Income from foreign sources” is broadly 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.”⁴⁸

The Proclamation has had a significant impact on civil society in Ethiopia. Between 2009 and 2011, the number of registered CSOs in Ethiopia decreased by 45 percent.⁴⁹ In addition, most local human rights groups have been forced to close or scale back their operations.⁵⁰ As but one example, the Human Rights Council, Ethiopia’s first independent CSO that monitored human rights, was forced to close nine of its twelve offices in 2009 due to lack of funding.⁵¹

Other countries have also considered caps on international funding. For example, in October 2013, the **Kenyan** Parliament considered an omnibus bill, which—among other provisions—would have presumptively⁵² limited CSOs from receiving more than 15 percent of their budgets from a foreign source, regardless of the activities undertaken by the CSO. Based on international advocacy efforts and other provisions of the omnibus bill unrelated to CSOs, Parliament declined to pass the bill in December. It is currently being reconsidered, and the outcome remains uncertain.

4. Mandatory Routing of Funding through Government-Controlled Channels

In an effort to monitor and control the flow of international funding to CSOs, some countries require that funding be routed through a governmental body, ministry, or government-

⁴⁷ See, for example, Eric Lipton, Brooke Williams, & Nicholas Confessore, “Foreign Powers Buy Influence at Think Tanks,” *New York Times*, September 6, 2014, accessed September 17, 2014, <http://www.nytimes.com/2014/09/07/us/politics/foreign-powers-buy-influence-at-think-tanks.html>.

⁴⁸ Government of Ethiopia, *Proclamation to Provide for the Registration and Regulation of Charities and Societies*, 2009, Article 2(15).

⁴⁹ Kendra Dupuy, James Ron, & Assem Prakash, “Who Survived? Ethiopia’s Regulatory Crackdown on Foreign-Funded NGOs,” (March 10, 2014). Review International Political Economy, Forthcoming: 19. Available at SSRN: <http://ssrn.com/abstract=2407001>.

⁵⁰ *Ibid.*, 14.

⁵¹ African Union, “African Commission on Human and Peoples’ Rights Study Group on Freedom of Association: Freedom of Association and Freedom of Assembly in Law and Practice in Africa,” April 2014.

⁵² CSOs would only be able to receive more than the 15 percent of their budget from foreign sources if they demonstrate that they require the funds due to “legitimate and compelling reasons.”

controlled bank. In practice, this allows the government greater ability to constrain the inflow of funding to CSOs. For example:

- In July 2014, **Nepal** released a new Development Cooperation Policy⁵³ requiring development partners to channel all development cooperation through the Ministry of Finance, essentially terminating all direct funding of CSOs. CSOs seeking to use development assistance must be registered with the Social Welfare Council (SWC) and seek prior approval from the SWC on the programs for which they seek funding.
- CSOs in **Uzbekistan** must route any foreign grant funding through one of two state-owned banks which then determine if the money will be released to the CSO, often resulting in blocked disbursements.⁵⁴
- **Eritrea**'s Proclamation No. 145/2005 requires that international CSOs engage in activities only through "the Ministry or other concerned Government entity."⁵⁵
- In **Sierra Leone**, "assets transferred to build the capacity of local NGOs should be done through" the government-controlled Sierra Leone Association of Non-Governmental Organizations and the Ministry of Finance and Economic Development.⁵⁶
- In **Uganda**, CSOs receiving foreign funding must receive and disburse funds through an account with the government-controlled Bank of Uganda. According to a recent study, this requirement has been used by the government to constrain the flow of international funding to a think tank involved in governance and extractive industry work.⁵⁷ Far from an isolated incident, Human Rights Watch reports that this obstruction of funds is symptomatic of increasing government constraints on CSOs in Uganda "whose focus includes oil revenue transparency, land acquisition compensation, legal and governance reform, and protection of human rights."⁵⁸

⁵³ Government of Nepal Ministry of Finance, "Development Cooperation Policy, 2014," unofficial translation, accessed September 9, 2014, http://www.mof.gov.np/uploads/document/file/DCP_English_20140707120230_20140721083326.pdf.

⁵⁴ ICNL, NGO Law Monitor: Uzbekistan, last modified February 8, 2014, <http://www.icnl.org/research/monitor/uzbekistan.html>.

⁵⁵ Government of Eritrea, *Proclamation No. 145/2005, A Proclamation to Determine the Administration of Non-governmental Organizations*, No. 145/2005, 11 May 2005, Article 9(1), available at: <http://www.unhcr.org/refworld/docid/493507c92.html>

⁵⁶ ICNL, NGO Law Monitor: Sierra Leone, last modified June 29, 2014, <http://www.icnl.org/research/monitor/uzbekistan.html>.

⁵⁷ Darin Christensen & Jeremy M. Weinstein, "Defunding Dissent: Restrictions on Aid to NGOs," *Journal of Democracy* 24(2) (April 2013): 83.

⁵⁸ Human Rights Watch, "Uganda: Growing Intimidation, Threats to Civil Society," August 21, 2012, accessed September 10, 2014, <http://www.hrw.org/news/2012/08/21/uganda-growing-intimidation-threats-civil-society>.

- **Kenya** recently rejected amendments to the Public Benefit Organisations (PBO) Act that would have required all funding to PBOs to be routed through one central federation comprising all PBOs operating in Kenya.⁵⁹
- A draft bill pending in **Nigeria** would require “assets transferred to build the capacity of an organization” to pass through the regulatory agency “which will identify the operation criteria.”⁶⁰

5. Burdensome 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 reporting rules—which, while less severe than the requirement to secure advance governmental approval, may nonetheless impose administrative and other burdens on the receipt of international philanthropy. For example:

- In **Uzbekistan**, after obtaining approval to receive grant funding, CSOs must provide monthly and transactional reports to the Ministry of Finance. Transactional reports must be submitted by the next business day following each financial transaction with grant funding. This requirement applies to each transaction, no matter how small, even including the purchase of pens.⁶¹
- On June 18, 2010, President Martinelli of **Panama** issued Executive Decree No. 57,⁶² which requires every Panamanian not-for-profit association to publish online extensive information about all donations received on a monthly basis.
- In **Turkey**, the law imposes notification requirements relating to the receipt of international funding. Foundations must notify public authorities within one month of receiving international funding, and associations must provide notification before using the funds.⁶³
- In **India**, the Foreign Contribution (Regulation) Act 2010 requires CSOs to report to the Central Government all foreign contributions received within thirty days of receipt. CSOs must also file annual reports with the Home Ministry that include information on the amount, source, and intended purpose of the contribution, as well as the ways in which it was received and used.⁶⁴

⁵⁹ ICNL, NGO Law Monitor: Kenya, last modified December 16, 2014, <http://www.icnl.org/research/monitor/kenya.html>.

⁶⁰ Nigeria, NGO Regulatory Agency Bill, 2014, Article 28(3).

⁶¹ ICNL, NGO Law Monitor: Uzbekistan, last modified October 4, 2014, <http://www.icnl.org/research/monitor/uzbekistan.html>

⁶² Executive Decree No. 57, accessed January 12, 2015, : http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDAQFjAC&url=http%3A%2F%2Fwww.impuestospanama.com%2Fleyes_fiscales%2FImpuestosPanama_2010_Ley_033.docx&ei=yzu0VInRK4KgW5C5IKYDw&usq=AFQjCNFTKANRImo6RUFwtLQtjIHdzk2Q&bvm=bv.83339334.d.eXY

⁶³ ICNL, NGO Law Monitor: Turkey, last modified July 3, 2014, <http://www.icnl.org/research/monitor/turkey.html>.

⁶⁴ Council on Foundations, Global Grantmaking: India, last modified April 2014, <http://www.cof.org/content/india>.

- Associations in **Tunisia** must not only notify the government of all international funding sources but must also inform the media about the receipt of international funding.⁶⁵

6. Restrictions on Activities Supported by International Funding

Some countries explicitly prohibit certain activities from being supported by international funding. In **Sudan**, CSOs must seek approval from the Humanitarian Aid Commission (HAC) before receiving international funding, and the HAC will only grant approval for CSOs that provide narrowly defined “humanitarian services,” excluding other types of activities of interest to the international philanthropic community.⁶⁶ In **Zimbabwe**, existing law prohibits the use of international funding for voter-education projects conducted by independent CSOs; instead, such funds may be contributed directly to the Electoral Commission.⁶⁷ Notably, this provision was enforced before the July 2013 presidential election, when the government raided the offices and arrested the staff of ten CSOs involved in nonpartisan voter education activities.⁶⁸

Other countries have vague statutory formulations that give the government broad discretion to prohibit activities that can be supported through international funding. For example, in **Indonesia**, a 2008 regulation prohibits foreign assistance causing “social anxiety.”⁶⁹ In **Bolivia**, Supreme Decree No. 29308 bans foreign assistance that carries “implied political or ideological conditions.” Similarly, **Venezuela’s** 2010 Law on Defense of Political Sovereignty and National Self-Determination prohibits organizations with “political objectives” or organizations for the defense of “political rights” from having assets or income other than “national” goods and resources.⁷⁰ These undefined terms vest broad discretion in government officials to restrict certain activities from being supported by international funding.

7. Restrictions on Funding from Certain Countries or Donors

Certain countries impose outright bans on funds from specific countries or donors. For example:

- In 2012, **Russia** enacted a law specifically targeting U.S. donors after the U.S. enacted the so-called “Magnitsky Law.”⁷¹ Among other provisions, the Russian law calls for the

⁶⁵ Government of Tunisia, *Decree Number 88 of 2011 Pertaining to Regulation of Associations*, September 24, 2011, Article 41, <http://www.icnl.org/research/library/files/Tunisia/88-2011-Eng.pdf>.

⁶⁶ ICNL, NGO Law Monitor: Sudan, last modified December 12, 2014, <http://www.icnl.org/research/monitor/sudan.html>

⁶⁷ Government of Zimbabwe, *Electoral Commission Act*, Article 40F, <http://www.icnl.org/research/library/files/Zimbabwe/consolidatedelectoralact.pdf>.

⁶⁸ ICNL, NGO Law Monitor: Zimbabwe, last modified August 8, 2014, <http://www.icnl.org/research/monitor/zimbabwe.html>.

⁶⁹ Government of Indonesia, *Regulation of the Ministry of Home Affairs Number 38 of 2008 Regarding Acceptance and Granting of Social/Charity Organization’s Assistance from and to Foreign Parties*, Article 6(2)(e), <http://www.icnl.org/research/library/files/Indonesia/indonesia01.pdf>.

⁷⁰ Government of Venezuela, *Law on Defense of Political Sovereignty and National Self-Determination*, Article 4, <http://www.icnl.org/research/library/files/Venezuela/Leysober.pdf>.

⁷¹ The Sergei Magnitsky Rule of Law Accountability Act, passed by the U.S. Congress in December 2012, allows the U.S. to deny visas and freeze the assets of Russian officials involved in the murder of lawyer Sergei Magnitsky and in other human rights violations. See David Kramer & Lilia Shevtsova, “What the Magnitsky Act

suspension of CSOs that engage in vaguely defined political activities and receive funds and other assets from U.S. citizens or organizations.⁷²

- In **Eritrea**, all CSOs are effectively prohibited from receiving funding from the United Nations or its affiliates.⁷³
- In **Tunisia**, associations are prohibited from receiving funding or any other type of assistance from “countries not linked with Tunisia by diplomatic relations, or from organizations which defend the interests and policies of those countries.”⁷⁴ In practice, this would prevent Israeli philanthropists and organizations from providing funds to Tunisian civil society.

8. Taxation of International Funding

In several countries, income from foreign grantmakers is subject to taxation unless the foreign grantmaker is included on a government-approved list. For example, in **Russia**, grants can be extended from foreign or international organizations to Russian citizens or CSOs on a tax-exempt basis only if the grantmaker 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. Before the issuance of Decree #485, approximately one hundred organizations were on the list, including several private foundations. The decree was subsequently amended to eliminate all private foundations. As a result, grants from private foundations are potentially liable to a 24 percent tax.⁷⁵

Similar rules have been in place, at varying times, in **Belarus, Kazakhstan, and Turkmenistan**.⁷⁶ In addition, in December 2014, **Nicaragua** enacted legislation subjecting CSOs to income tax on international funding unless the international donor has a formal agreement with the government.⁷⁷

Means,” *Freedom House*, December 12, 2012, accessed September 8, 2014, <http://www.freedomhouse.org/article/what-magnitsky-act-means>.

⁷² International Center for Not-for-Profit Law, “Overview of Restrictions on Non-Commercial Organizations Imposed by the ‘Dima Yakovlev’ Law,” January 27, 2013.

⁷³ Rebecca B. Vernon, “Closing the Door on Aid,” *International Journal of Not-for-Profit Law* 11(4) (August 2009), http://www.icnl.org/research/journal/vol11iss4/special_1.htm.

⁷⁴ Government of Tunisia, *Decree Number 88 of 2011 Pertaining to Regulation of Associations*, September 24, 2011, Article 25, <http://www.icnl.org/research/library/files/Tunisia/88-2011-Eng.pdf>.

⁷⁵ A “grant” and a “donation” are distinct concepts under Russian law, and this rule applies to foreign “grants.” Among other differences, grants can be provided only for the purposes enumerated in Article 251(1)(14) of the Tax Code. In addition, unlike a donor, a grantor is obligated to require reports from the recipient on the use of the grant. For further information on the difference between “grants” and “donations” under Russian law, please see <http://www.cof.org/content/russia>.

⁷⁶ Correspondence on file with the author.

⁷⁷ Article 77, Ley No. 891: Ley de Reformas y Adiciones a la Ley No. 822, “Ley de Concertación Tributaria.”

9. Counterterrorism/Anti-Money Laundering

In a number of countries, the inflow of cross-border philanthropy is constrained as a result of counterterrorism and anti-money laundering measures. Governments have an obligation to address legitimate concerns relating to terrorism and money laundering, but many of these measures are overly broad, burdening lawful cross-border philanthropy. For example:

- In **Bangladesh**, the government recently approved a draft “Foreign Contributions (Voluntary Activities) Regulation Act 2014, which seeks to eliminate militant and terror financing and ensure a terrorism-free Bangladesh by 2021.”⁷⁸ This law would reinforce and codify a number of restrictions on international funding, including prior approval of organizations allowed to receive cross-border philanthropy.
- In **Azerbaijan**, the government imposed grant registration requirements to help “enforce international obligations of the Republic of Azerbaijan in the areas of combating money-laundering.”⁷⁹
- In **Kosovo**, an anti-money laundering measure prevents CSOs from receiving more than 1,000 Euro from a single source in a single day without governmental permission.⁸⁰

10. Other Laws and Measures Used to Restrict the Inflow of Philanthropy

Certain governments have also used other laws to target internationally funded civil society organizations and activists. For example, in July 2014, authorities in **Azerbaijan** charged human rights defender Leyla Yunus with illegal entrepreneurship, tax evasion, falsifying documents, fraud, and treason—which three UN Special Rapporteurs concluded were “trumped up charges,” part of a “wave of politically-motivated repression of activists in reprisal for their legitimate work in documenting and reporting human rights violations.”⁸¹ In other countries, defamation laws, treason laws, tax laws, and national security laws—among other legislation—have also been used to bring criminal charges against recipients of international funding.⁸² For

⁷⁸ “Cabinet Approves Foreign Donation Regulation Act,” *The Independent*, June 3, 2014, accessed September 8, 2014, http://www.theindependentbd.com/index.php?option=com_content&view=article&id=217526:cabinet-approves-foreign-donation-regulation-act&catid=132:backpage&Itemid=122.

⁷⁹ Charity & Security Network, “How the FATF Is Used to Justify Laws That Harm Civil Society, Freedom of Association and Expression,” May 16, 2013, http://www.charityandsecurity.org/analysis/Restrictive_Laws_How_FATF_Used_to_Justify_Laws_That_Harm_Civil_Society.

⁸⁰ See USIG Country Note for Kosovo, accessed January 12, 2015, <http://www.cof.org/content/kosovo>.

⁸¹ United Nations Human Rights, “Persecution of Rights Activists Must Stop—UN Experts Call on the Government of Azerbaijan,” Office of the High Commissioner for Human Rights, August 19, 2014, accessed September 8, 2014, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14952&LangID=E#sthash.bg1H8K65.dpuf>. In August 2014, at least three other activists were detained on criminal charges: Arif Yunus, Rasul Jafarov, and Intigam Aliyev. See RFE/RL’s Azerbaijani Service, “Azerbaijani Rights Activist jailed for Three Months,” *Radio Free Europe Radio Library*, August 8, 2014, accessed September 10, 2014, <http://www.rferl.org/content/azerbaijan-rights-activist-detain-intigam-aliyev/26520249.html>.

⁸² A prominent example is Egypt, where 43 CSO employees faced prosecution, criminal conviction, and prison sentences for illegal receipt of foreign funding in Egypt in 2013. Additionally, in Belarus, human rights activist Ales Belyatski was sentenced to four and a half years in prison on charges of tax evasion in 2013 (see “Belarus Activist Ales Belyatski Jailed for Tax Evasion,” BBC, November 24, 2011, accessed September 8, 2014,

example, in September 2014, **Egypt** amended its Penal Code to punish with life imprisonment and a fine anyone who receives funding or other support from a foreign source with the intent to “harm the national interest,” “compromise national sovereignty,” or “breach security or public peace.” The amended law likewise imposes the penalty of life imprisonment on anyone who gives or offers such funds, or “facilitates” their receipt.⁸³ In many countries, we are witnessing an uptick in the criminalization of international funding accompanying a more general uptick in the criminalization of dissent.

Laws Impeding the Formation and Operation of Recipient CSOs

An analysis of legal barriers to the inflow of philanthropy would be incomplete without a discussion of laws that impede the formation and operation of CSOs. If a country bans or severely restricts the formation or operation of local CSOs, foundations have fewer choices when seeking to express their philanthropic intent. Taken together, cross-border philanthropy is impeded by laws regulating the cross-border flow of funding as well as by laws affecting the ability of host country CSOs to form, operate, and engage internationally.

Because other reports have comprehensively surveyed restrictions on CSOs,⁸⁴ this section addresses only three illustrative barriers, namely: (1) barriers to the formation of CSOs, (2) barriers to the operation of CSOs, and (3) restrictions on the ability of CSOs to have international contact.

1. Barriers to Formation of CSOs.

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, and limitations on permissible program activity. As but a few examples:

- *Limited right to associate.* In **Saudi Arabia**, the only CSOs that exist were established by royal decree.⁸⁵
- *Restrictions on founders.* In **Turkmenistan**, national-level associations can only be established with a minimum of 400 founders.⁸⁶
- *High minimum capital requirements.* In **Eritrea**, Proclamation No. 145/2005 requires that local CSOs engaged in relief and/or rehabilitation work must have “at their disposal

<http://www.bbc.com/news/world-europe-15871582>). In August 2014, the Thai army brought a criminal defamation suit against human rights activist Pornpen Khongkachonkiet (see “Thai Activists Say Army’s Legal Actions Aim to Silence Rights Workers,” Reuters Africa, August 28, 2014, accessed September 8, 2014, <http://af.reuters.com/article/worldNews/idAFKBN0GS1HB20140828>).

⁸³ Government of Egypt, 2014 Amended Penal Code, Article 78, unofficial translation.

⁸⁴ International Center for Not-for-Profit Law & World Movement for Democracy Secretariat, “Defending Civil Society Report, Second Edition,” June 2012, http://www.icnl.org/research/resources/dcs/DCS_Report_Second_Edition_English.pdf.

⁸⁵ Kareem Elbayar, “NGO Laws in Selected Arab States,” *International Journal of Not-for-Profit Law* 7(4) (September 2005), http://www.icnl.org/research/journal/vol7iss4/special_1.htm.

⁸⁶ ICNL, NGO Law Monitor: Turkmenistan, last modified June 13, 2014, <http://www.icnl.org/research/monitor/turkmenistan.html>.

in Eritrea one million US dollars or its equivalent in convertible currency.” This amount is approximately 15,000 average monthly per capita GDP in Eritrea.⁸⁷

- *Geographic registration requirements.* Associations in **Burundi** must register in the capital city, Bujumbura. However, the cost of travel prevents many groups from registering.⁸⁸ Similarly, organizations in **Panama** must travel to Panama City to apply for Legal Personality, for recognition in the Public Registry, and for registration in the Registry of Organizations maintained by the relevant ministry.⁸⁹
- *Burdensome registration procedures.* In **China**, registration procedures are complex and cumbersome for many kinds of CSOs, with extensive documentation and approval requirements. Recent reforms have piloted more streamlined registration for some social services groups in some regions, particularly in southern China. For advocacy and other kinds of organizations, however, registration remains difficult and long. In many cases organizations are required to operate under a system of “dual management,” in which they must generally first obtain the sponsorship of a specialized government ministry or provincial government agency in their line of work. They must 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.⁹⁰
- *Vague grounds for denial.* In **Bahrain**, the government can refuse registration of an 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.” This provision has been used to deny registration of human rights groups and other groups disfavored by the government, and then to arrest activists who continue to carry out activities without registration.⁹¹ In **Venezuela**, officials routinely deny registration requests of CSOs with terms such as “democracy” or “human rights” in their names. For example, in 2010, officials denied the registration request of *Asociación Civil Civilis* “on the grounds that the document could not make reference to terms like democracy and politicians.”⁹²

⁸⁷ Lindsay Coates & Douglas Rutzen, “Policy Brief: Safeguarding Civil Society,” InterAction, January 2013, accessed September 8, 2014, http://www.interaction.org/files/FABB%202013_Sec5_CivilSociety.pdf.

⁸⁸ ICNL, “NGO Laws in Sub-Saharan Africa,” *Global Trends in NGO Law* 3(3) (June 2011): 5, <http://www.icnl.org/research/trends/trends3-3.pdf>.

⁸⁹ Alianza Ciudadana Pro Justicia, Entorno Legal de las Organizaciones de Sociedad Civil en Panamá, 2011, 14-15.

⁹⁰ ICNL, NGO Law Monitor: China, last modified July 1, 2014, <http://www.icnl.org/research/monitor/turkmenistan.html>.

⁹¹ On August 30, Bahraini authorities arrested Maryam al-Khawaja, a prominent human rights activist. Among others, she faces charges relating to her involvement with the rights campaign “Wanted for Justice,” which was organized by the Bahrain Center for Human Rights. Her father, Abdulhadi al-Khawaja, is the co-founder of the Bahrain Center for Human Rights and is currently serving a life sentence in prison. See Samia Errazzouki, “Maryam al-Khawaja, the Inconvenient Activist,” *Foreign Policy*, September 4, 2014, accessed September 10, 2014, http://www.foreignpolicy.com/articles/2014/09/04/maryam_al_khawaja_the_inconvenient_activist.

⁹² Annual Report of the Inter-American Commission on Human Rights 2010, Chapter IV Venezuela, 534, <http://www.cidh.org/annualrep/2010eng/Chap.IV.VENEZUELA.doc>.

2. Barriers to Operational Activity

If CSOs are able to form, legislation may also limit the space in which CSOs can operate. Legal restrictions include direct prohibitions on certain areas of activity, invasive supervisory oversight, and arbitrary termination and dissolution. For example:

- *Direct prohibitions on spheres of activity.* In **Nigeria**, the registration of any “gay club, society, organization” is banned. Any founder or member of a gay club may be jailed for up to 10 years.⁹³ In **Eritrea**, CSOs are limited to “relief and/or rehabilitation works,” thereby preventing CSOs from engaging in other issues that may be of interest to the philanthropic community.⁹⁴
- *Advance notification and approval.* In **Cambodia**, local CSOs 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.⁹⁵ CSOs in **Uganda** must provide the local government with seven days’ advance written notice before making any direct contact with people in rural areas.⁹⁶ A draft law in **Nigeria** would require approval before the implementation of a project or any variation from the project estimate. The bill imposes additional pre-approval requirements for projects addressing the needs of “targeted groups,” an undefined term.⁹⁷
- *Invasive supervisory oversight.* 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. In **Ecuador**, the government may request any document related to the operations of CSOs.⁹⁸ In **Rwanda**, the government may intervene when there is a dispute among a CSO’s board members.⁹⁹ The government exercised this authority, most notably, in replacing the leadership of a prominent human rights organization, LIPRODHOR, in July 2013. In **Russia**, the law allows governmental representatives to attend all of the organization’s events, without restriction, including internal strategy sessions. The government also has the power to conduct audits and demand documents dealing with the details of an organization’s

⁹³ ICNL, NGO Law Monitor: Nigeria, last modified August 8, 2014, <http://www.icnl.org/research/monitor/nigeria.html>.

⁹⁴ Government of Eritrea, *Proclamation No. 145/2005, A Proclamation to Determine the Administration of Non-governmental Organizations*, No. 145/2005, May 11, 2005, available at: <http://www.unhcr.org/refworld/docid/493507c92.html>

⁹⁵ ICNL, NGO Law Monitor: Cambodia, last modified August 1, 2014, <http://www.icnl.org/research/monitor/cambodia.html>.

⁹⁶ Republic of Uganda, NGO Registration Regulations 2009, Regulation 13(a), <http://www.icnl.org/research/library/files/Uganda/NGOReg2009.pdf>.

⁹⁷ Nigeria, NGO Regulatory Agency Bill, 2014, Article 24(1).

⁹⁸ Government of Ecuador, Presidential Decree No. 16, Article 7.2-7.3.

⁹⁹ Government of Rwanda, Law No. 4/2012 Article 27.

governance, including day-to-day policy decisions, supervision of the organization's management, and oversight of its finances.¹⁰⁰

- *Termination and dissolution.* According to **Bolivia**'s 2013 Law on Granting Legal Personality and its implementing regulation, the government may dissolve a CSO if the Legislature passes a law stating that termination is necessary or in the public interest, vague terms that can be used to close down CSOs disfavored by the government.¹⁰¹

3. Barriers to International Engagement

Global philanthropists and the international community are not just a source of financial resources. They are also a source of information and ideas. In some countries, governments have supplemented restrictions on international funding with restrictions on international engagement. As but a few examples:

- In the **United Arab Emirates**, the Federal Law on Civil Associations and Foundations of Public Benefit restricts CSO members from participating in events outside of the country without the prior authorization of the Ministry of Social Affairs.¹⁰²
- In **Uzbekistan**, CSOs seeking to invite international participants to a conference must secure advance approval from the Ministry of Justice.¹⁰³ Governmental approval is also required for CSOs to organize certain international conferences in **Vietnam**.
- **Egypt**'s Law 84/2002 restricts the right of CSOs to join with non-Egyptian CSOs and "to communicate with non-governmental or inter-governmental organizations." Under the law, CSOs that interact with foreign organizations without prior approval face dissolution.¹⁰⁴
- A 2010 Ministry Decree in **Libya** requires international organizations to go through a complicated registration process to train, provide technical advice, or implement joint activities with local CSOs.¹⁰⁵
- In July 2014, the Prime Minister of **Swaziland** threatened civil society representatives who attended the recent African Leaders Summit in Washington, DC. The Prime Minister

¹⁰⁰ ICNL, NGO Law Monitor: Russia, last modified November 24, 2014, <http://www.icnl.org/research/monitor/russia.html>

¹⁰¹ Supreme Decree No. 1597 implementing Bolivian Law No. 351 of 2013 on Awarding Legal Personalities, Article 19b.

¹⁰² International Center for Not-for-Profit Law & World Movement for Democracy Secretariat, "Defending Civil Society Report, Second Edition," June 2012, http://www.icnl.org/research/resources/dcs/DCS_Report_Second_Edition_English.pdf.

¹⁰³ ICNL, NGO Law Monitor: Uzbekistan, last modified February 8, 2014, <http://www.icnl.org/research/monitor/uzbekistan.html>.

¹⁰⁴ See Government of Egypt, Law No. 84 of the Year 2002 on Non-Governmental Organizations, <http://www.icnl.org/research/library/files/Egypt/law84-2002-En.pdf>.

¹⁰⁵ Ministry of Culture and Civil Society, Controls on the Activities of International Organizations Supporting Civil Society in Libya, June 1, 2010 (on file with author).

told lawmakers, “You must strangle them” when they return to Swaziland.¹⁰⁶ In response, the United States Department of State expressed deep concern about these “threatening remarks” and that stated that “such remarks have a chilling effect on labor and civil rights in the Kingdom of Swaziland.”¹⁰⁷

In sum, cross-border philanthropy is impeded by laws directly regulating the flow of funding as well as by laws affecting the underlying ability of CSOs to form, operate, and engage internationally.

Government Justifications

This section examines common justifications offered by governments to defend restrictions placed on international funding. These justifications fall into four broad categories: (1) state sovereignty; (2) transparency and accountability in the civil society sector; (3) aid effectiveness and coordination; and (4) national security, counterterrorism, and anti-money laundering concerns.

This section draws heavily upon an April 2013 report by the UN Special Rapporteur (UNSR) on the freedoms of peaceful assembly and of association, where the UNSR articulated international norms protecting the ability of CSOs to access resources from international and foreign sources (hereinafter the “UNSR’s Resource Report”).¹⁰⁸

1. State Sovereignty

Some governments invoke state sovereignty as a justification to restrict cross-border philanthropy. The most blunt form of the argument is that sovereignty entitles a government to enact whatever law it deems appropriate. This seems to be the position advanced by UN Human Rights Council representatives from **Gabon, Botswana, Burkina Faso, Namibia** and seven other African countries in response to the UNSR’s Resource Report. These governments appeared before the UN Human Rights Council and argued that “it is for each state in a sovereign and legitimate manner to define what constitutes a violation of its legislation with respect to human rights.”¹⁰⁹ Similarly, in response to a “civil society space” resolution introduced by the Irish Government at the September 2014 session of the UN Human Rights Council, the representative from **India** asserted:

Civil society must operate within national laws. To treat national laws with condescension is not the best way to protect human rights, even by civil society with the

¹⁰⁶ Christopher Torchia, “Swazi PM Reportedly Threatens Activists,” Yahoo News, August 12, 2014, accessed September 8, 2014, <http://news.yahoo.com/swazi-pm-reportedly-threatens-activists-111618589.html>.

¹⁰⁷ Marie Harf, “Threatening Remarks by Swazi Prime Minister Cause for Concern,” U.S. Department of State, Press Statement, August 9, 2014, accessed September 8, 2014, <http://www.state.gov/r/pa/prs/ps/2014/230455.htm>.

¹⁰⁸ For more information, please see United Nations Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, UN Doc. A/HRC/23/39 (April 24, 2013) at http://freeassembly.net/wp-content/uploads/2013/04/A.HRC_23.39_EN-funding-report-April-2013.pdf.

¹⁰⁹ UN Office of the High Commissioner for Human Rights, “Oral Statement—Gabon on behalf of the African Group,” May 30, 2013, accessed September 9, 2014, https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/23rdSession/OralStatements/Gabon%20on%20behalf%20ofAG_10_1.pdf.

best of intentions. We wish that caution should be exercised in advocacy of the causes of civil society. The Resolution is unduly prescriptive on what domestic legislation should do and should not do. This is the prerogative of the citizens of those countries.¹¹⁰

Other officials have presented a related but narrower argument that restrictions are necessary to protect the sovereignty of their states from foreign interference in domestic political affairs.¹¹¹ For example:

- In justifying the **Russian** “foreign agents” law, President Putin said, “The only purpose of this law after all was to ensure that foreign organisations representing outside interests, not those of the Russian state, would not intervene in our domestic affairs. This is something that no self-respecting country can accept.”¹¹²
- In July 2014, **Hungarian** Prime Minister Viktor Orban lauded the establishment of a parliamentary committee to monitor civil society organizations: “We’re not dealing with civil society members but paid political activists who are trying to help foreign interests here.... It’s good that a parliamentary committee has been set up to monitor, document, and publish foreign influence” by CSOs.¹¹³
- In **Egypt**, forty-three CSO staff members were “charged with ‘establishing unlicensed chapters of international organisations and accepting foreign funding to finance these groups in a manner that breached the Egyptian state’s sovereignty.’”¹¹⁴ Egyptian officials claimed that the CSOs were contributing to international interference in Egypt’s domestic political affairs.¹¹⁵
- One of the sponsors of a 2011 draft “foreign agents” law in **Israel** defended the bill, claiming it represented a “major hurdle en route to cleansing Israel’s policies from foreign influence, of the kind that do not wish Israel’s favour.... It is the right and duty of the State of Israel to conduct itself according to the will of the Israeli public, as opposed to succumbing to foreign attempts to buy influence within Israel.”¹¹⁶

¹¹⁰ Permanent Mission of India, Geneva, “Statement by India in Explanation of Vote before the Vote,” September 26, 2014 (on file with the author). In the same statement, India also challenged first principles, asserting, “the resolution fallaciously seeks to make civil society a subject of law.”

¹¹¹ Ibid.

¹¹² President of Russia, “Remarks at Meeting of Council for Civil Society and Human Rights,” November 12, 2012, accessed September 8, 2014 <http://eng.kremlin.ru/news/4613>.

¹¹³ Zoltan Simon, “Orban Says He Seeks to End Liberal Democracy in Hungary,” *Bloomberg News*, July 28, 2014, accessed September 8, 2014, <http://www.bloomberg.com/news/2014-07-28/orban-says-he-seeks-to-end-liberal-democracy-in-hungary.html>.

¹¹⁴ Agence France Press, “Egypt Says Working to End NGO Row: McCain,” AlterNet, accessed September 8, 2014, http://www.alternet.org/rss/breaking_news/804643/egypt_says_working_to_end_ngo_row%3A_mccain.

¹¹⁵ Josh Levs & Saad Abedine, “Egypt sentences American NGO workers to jail,” CNN, June 4, 2013, accessed September 8, 2014, <http://www.cnn.com/2013/06/04/world/africa/egypt-ngos/index.html>.

¹¹⁶ Paul Vale, “Israel Moves to Limit Foreign Funding of ‘Liberal’ NGOs,” *Huffington Post UK*, January 13, 2012, accessed September 8, 2014, http://www.huffingtonpost.co.uk/2011/11/13/netanyahu-limits-ngo-funding_n_1091047.html.

- A member of the **Israeli** Knesset sponsoring a similar bill in 2014 justified the restrictions, arguing that “[t]here are dozens of organizations active in Israel that receive funding from foreign government entities in exchange for the organization’s promise to promote the interests of these entities, or of those who are not Israeli citizens.... As of today, these organizations have no obligation of proper disclosure, in which they have to present themselves as clearly representing foreign interests that do not accord with Israeli interests.”¹¹⁷
- In August 2014, a presidential official in **Azerbaijan** justified the crackdown on civil society, asserting, “some NGOs under the guise of ‘people’s diplomacy,’ established cooperation with local organizations controlled by special services of aggressive Armenia, and became spokesmen for the enemy country’s interests.”¹¹⁸
- In December 2013, **Bolivia** expelled IBIS, a Danish education CSO, for meddling in domestic affairs. Announcing the expulsion at a news conference, Minister of the Presidency Juan Ramon Quintana said, “[w]e are tired of tolerating IBIS’ political interference in Bolivia.”¹¹⁹
- A September 2014 article in the *New York Times* asserted that foreign “money is increasingly transforming the once-staid think-tank world into a muscular arm of foreign governments’ lobbying in Washington.”¹²⁰ The following week, **United States** Representative Frank Wolf wrote a letter to the Brookings Institution, in which he urged them to “end this practice of accepting money from ... foreign governments” so that its work is not “compromised by the influence, whether real or perceived, of foreign governments.”¹²¹

Some governments assert that foreigners are not only seeking to meddle in domestic political affairs, but also seeking to destabilize the country or otherwise engage in “regime change.” Accordingly, they argue that foreign funding restrictions are necessary to thwart efforts to destabilize or overthrow the government currently in power.

- In 2013 in **Sri Lanka**, the government justified a recent registration requirement for all CSOs on the grounds that it was necessary to “thwart certain NGOs from hatching

¹¹⁷ Jonathan Lis, “Draft bill: NGOs with foreign funding to be defined ‘foreign agents,’” *Haaretz*, May 26, 2013, accessed September 8, 2014, <http://www.haaretz.com/news/national/.premium-1.592754>.

¹¹⁸ “Some Azerbaijani NGOs Cooperated with Armenian Special Services Under ‘People’s Diplomacy,’” *Trend*, August 15, 2014, accessed September 8, 2014, <http://en.trend.az/news/politics/2303147.html>.

¹¹⁹ Agence France-Presse, “Bolivia expels Danish NGO for meddling,” *Global Post*, December 20, 2013, accessed September 16, 2014, <http://www.globalpost.com/dispatch/news/afp/131220/bolivia-expels-danish-ngo-meddling-1>.

¹²⁰ Eric Lipton, Brooke Williams, & Nicholas Confessore, “Foreign Powers Buy Influence at Think Tanks,” *New York Times*, September 6, 2014, accessed September 17, 2014, http://www.nytimes.com/2014/09/07/us/politics/foreign-powers-buy-influence-at-think-tanks.html?_r=0.

¹²¹ Letter from Representative Frank Wolf to Strobe Talbott of the Brookings Institution, September 9, 2014, accessed September 17, 2014, <https://s3.amazonaws.com/s3.documentcloud.org/documents/1301186/rep-frank-wolfs-letter-to-strobe-talbott-at.pdf>.

conspiracies to effect regime change by engaging in politics in the guise of doing social work.”¹²²

- A drafter of the **Russian** “foreign agents” law justified the initiative when it was pending in parliament, stating, “There is so much evidence about regime change in Yugoslavia, now in Libya, Egypt, Tunisia, in Kosovo—that’s what happens in the world, some governments are working to change regimes in other countries. Russian democracy needs to be protected from outside influences.”¹²³
- In 2005, the Prime Minister of **Ethiopia** expelled civil society organizations, explaining, “there is not going to be a ‘Rose Revolution’ or a ‘Green Revolution’ in Ethiopia after the election”¹²⁴—a reference to the so-called “color revolutions” that had recently occurred in Georgia and elsewhere.
- In June 2012, **Uganda’s** Minister for Internal Affairs justified the government’s threats to deregister certain CSOs, stating that CSOs “want to destabilize the country because that is what they are paid to do.... They are busy stabbing the government in its back yet they are supposed to do humanitarian work.”¹²⁵
- In the process of driving civil society organizations out of **Zimbabwe**, President Mugabe justified his policies by claiming that the CSOs were fronts for Western “colonial masters” to undermine the Zimbabwean government.¹²⁶ Similarly, the central committee of Mugabe’s party claimed, “Some of these NGOs are working day and night to remove President Mugabe and ZANU PF from power. They are being funded by Britain and some European Union countries, the United States, Australia, Canada and New Zealand.”¹²⁷
- In a March 2014 interview justifying a draft “foreign agents” law, **Kyrgyzstan’s** President Atembaev argued, “Activities conducted by CSOs are obviously aimed at destabilization of the situation in the Kyrgyz Republic.... Some CSOs do not care about how they get income, whose orders to fulfill, which kind of work to execute.... There are

¹²² Xinhua, “Sri Lanka to Investigate NGOs Operating in Country,” *Herald*, June 13, 2013, accessed September 8, 2014, <http://www.herald.co.zw/sri-lanka-to-investigate-ngos-operating-in-country/>.

¹²³ “Russian parliament gives first approval to NGO bill,” *BBC*, July 6, 2012, accessed September 8, 2014, <http://www.bbc.com/news/world-europe-18732949>.

¹²⁴ Darin Christensen & Jeremy M. Weinstein, “Defunding Dissent,” *Journal of Democracy* 24(2) (April 2013): 80.

¹²⁵ Pascal Kwesiga, “Govt gets tough on NGOs,” *New Vision*, June 19, 2012, accessed September 9, 2014, <http://www.newvision.co.ug/news/632123-govt-gets-tough-on-ngos.html>.

¹²⁶ Thomas Carothers, “The Backlash Against Democracy Promotion,” *Foreign Affairs*, March/April 2006, accessed September 9, 2014, <http://www.foreignaffairs.com/articles/61509/thomas-carothers/the-backlash-against-democracy-promotion>.

¹²⁷ “29 NGOs banned in crackdown,” *New Zimbabwe*, February 14, 2012, accessed September 9, 2014, <http://www.newzimbabwe.com/news-7189-29+NGOs+banned+in+crackdown/news.aspx>.

forces interested in destabilizing the situation in Kyrgyzstan and spreading chaos across Central Asia and parts of China.”¹²⁸

- In July 2014, the vice chairman of the China Research Institute of China-Russia Relations argued that **China** should “learn from Russia” and enact a foreign agents law “so as to block the way for the infiltration of external forces and eliminate the possibilities of a Color Revolution.”¹²⁹

2. Transparency and Accountability

Another justification commonly invoked by governments to regulate and restrict the flow of foreign funds is the importance of upholding the integrity of CSOs by promoting transparency and accountability through government regulation. Consider, for example, the following responses by government delegations to the UNSR’s Resource Report:

- **Egypt:** “We agree with the principles of accountability, transparency, and integrity of the activities of civil society organisations and NGOs. However, this should not be limited to accountability to donors. National mechanisms to follow-up on activities of such entities, while respecting their independence have to be established and respected.”¹³⁰
- **Maldives:** “While civil societies should have access to financing for effective operation within the human rights framework, it is of equal importance that the organizations must also ensure that they work with utmost integrity and in an ethical and responsible manner.”¹³¹
- **Azerbaijan:** “The changes and amendments to the national legislation on NGOs have been made with a view of increasing transparency in this field.... In that regard, these amendments should only disturb the associations operating in our country on a non-transparent basis.”¹³²

Similarly, in response to a United Nations Human Rights Council panel on the promotion and protection of civil society space in March 2014, the following government delegations responded with justifications invoking transparency and accountability:

¹²⁸ “Алмазбек Атамбаев: “Хочу максимально успеть,” *Slovo.kg*, March 23, 2014, accessed September 9, 2014, translated by Aida Rustemova, <http://slovo.kg/?p=35019>.

¹²⁹ Simon Denyer, “China taking the Putin approach to democracy,” *Washington Post*, October 1, 2014, A7.

¹³⁰ UN Office of the High Commissioner for Human Rights, “Clustered ID with the WG on HR and Transnational Corporations and the SR on The Rights to Freedom of Assembly and Association: Intervention delivered by the Permanent Delegation of Egypt,” May 30, 2013, accessed September 9, 2014, https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/23rdSession/OralStatements/Egypt_10_1.pdf.

¹³¹ UN Office of the High Commissioner for Human Rights, “Interactive Dialogue with the Special Rapporteur on the Rights to Peaceful Assembly and of Association, Maldives Oral Statement,” May 31, 2013, accessed September 9, 2014, https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/23rdSession/OralStatements/Maldives_12.pdf.

¹³² UN Office of the High Commissioner for Human Rights, “Remarks by Azerbaijan,” May 31, 2013, accessed September 9, 2014, https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/23rdSession/OralStatements/Azerbaijan_12.pdf.

- **Ethiopia**, on behalf of the African Group: “Domestic law regulation consistent with the international obligations of States should be put in place to ensure that the exercise of the right to freedom of expression, assembly and association fully respects the rights of others and ensures the independence, accountability and transparency of civil society.”¹³³
- **India**, on behalf of the “Like Minded Group”: “The advocacy for civil society should be tempered by the need for responsibility, openness and transparency and accountability of civil society organizations.”¹³⁴
- **Pakistan**, on behalf of the Organisation of Islamic Cooperation members: “It may be underscored that securing funding for its crucial work is the right of civil society, maintaining transparency and necessary regulation of funding is the responsibility of states.”¹³⁵

Kyrgyzstan has also employed this argument to justify a draft “foreign agents” law. The explanatory note to the draft law claims that it “has been developed for purposes of ensuring openness, publicity, transparency for non-profit organizations, including units of foreign non-profit organizations, as well as non-profit organizations acting as foreign agents and receiving their funds from foreign sources, such as foreign countries, their government agencies, international and foreign organizations, foreign citizens, stateless persons or their authorized representatives, receiving monetary funds or other assets from the said sources.”

3. Aid Effectiveness and Coordination

A global movement has increasingly advocated for greater aid effectiveness, including through concepts of “host country ownership” and the harmonization of development assistance.¹³⁶ However, some states have interpreted “host country ownership” to be synonymous with “host government ownership” and have otherwise co-opted the aid effectiveness debate to justify constraints on international funding. For example:

¹³³ UN Office of the High Commissioner for Human Rights, “Statement by Ethiopia on behalf of the African Group at the 25th session of the Human Rights Council On the Panel Discussion on the Importance of the Promotion and Protection of Civil Society Space,” March 11, 2014, accessed September 9, 2014, https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/25thSession/OralStatements/Ethiopia%20on%20behalf%20of%20African%20Group_PD_21.pdf.

¹³⁴ UN Office of the High Commissioner for Human Rights, “Joint Statement: India on behalf of like-minded countries,” March 11, 2014, accessed September 9, 2014, https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/25thSession/OralStatements/India_on%20behalf%20of%20LMG_PD_21.pdf. The “Like Minded Group” consists of **Algeria, Bahrain, Bangladesh, Belarus, China, Cuba, Egypt, India, Indonesia, Malaysia, Pakistan, Russia, Saudi Arabia, Singapore, South Africa, Sri Lanka, Sudan, Uganda, United Arab Emirates, Vietnam, and Zimbabwe**.

¹³⁵ UN Office of the High Commissioner for Human Rights, “Statement by Pakistan on behalf of OIC: Panel Discussion on Civil Society Space,” March 11, 2014, accessed September 9, 2014, https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/25thSession/OralStatements/Pakistan%20on%20behalf%20of%20OIC_PD_21.pdf.

¹³⁶ See the Aid Effectiveness Agenda of the Paris Declaration (2005), the Accra Agenda for Action (2008), and the Busan Partnership for Effective Development Cooperation (2011).

- In July 2014, **Nepal**'s government released a new Development Cooperation Policy¹³⁷ that will require development partners to channel all development cooperation through the Ministry of Finance, rather than directly to CSOs. The government argued that this policy is necessary for aid effectiveness and coordination: "Both the Government and the development partners are aware of the fact that the effectiveness can only be enhanced if the ownership of aid funded projects lies with the recipient government."¹³⁸
- **Sri Lanka**'s Finance and Planning Ministry issued a public notice in July 2014 requiring CSOs to receive government approval of international funding. Justifying the requirement, the Ministry claimed that projects financed with international funding were "outside the government budget undermining the national development programmes."¹³⁹
- In response to the UNSR's Resource Report, the representative of **Egypt** stated, "The diversification of the venues of international cooperation and assistance to States towards the funding of civil society partners fragments and diverts the already limited resources available for international assistance. Hence, aid coordination is crucial for aid effectiveness."¹⁴⁰
- At the recent Africa Leaders Summit, the Foreign Minister of **Benin** spoke at a workshop on closing space for civil society. He asserted that CSOs "don't think they are accountable to government but only to development partners. This is a problem." He said Benin needs "a regulation to create transparency on resources coming from abroad and the management of resources," stating that the space for civil society is "too wide."¹⁴¹
- The Intelligence Bureau of **India** released a report in June 2014 claiming that foreign-funded CSOs stall economic development and negatively impact India's GDP growth by 2 to 3 percent.¹⁴² The report stated, "a significant number of Indian NGOs, funded by some donors based in the US, the UK, Germany, the Netherlands and Scandinavian

¹³⁷ Government of Nepal Ministry of Finance, "Development Cooperation Policy, 2014," unofficial translation, accessed September 9, 2014, http://www.mof.gov.np/uploads/document/file/DCP_English_20140707120230_20140721083326.pdf.

¹³⁸ Government of Nepal Ministry of Finance, "Development Cooperation Policy, 2014," unofficial translation, Article 2.2, accessed September 9, 2014, http://www.mof.gov.np/uploads/document/file/DCP_English_20140707120230_20140721083326.pdf.

¹³⁹ "No foreign funds without approval: Ministry," *Daily Mirror*, July 22, 2014, accessed September 9, 2014, <http://www.dailymirror.lk/news/50038-no-foreign-funds-without-approval-ministry.html>.

¹⁴⁰ UN Office of the High Commissioner for Human Rights, "Clustered ID with the WG on HR and Transnational Corporations and the SR on The Rights to Freedom of Assembly and Association: Intervention delivered by the Permanent Delegation of Egypt," May 30, 2013, accessed September 9, 2014, https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/23rdSession/OralStatements/Egypt_10_1.pdf.

¹⁴¹ Personal notes of author.

¹⁴² "Foreign-funded NGOs stalling development: IB report," *Times of India*, June 12, 2014, accessed September 9, 2014, <http://timesofindia.indiatimes.com/india/Foreign-funded-NGOs-stalling-development-IB-report/articleshow/36411169.cms>.

countries, have been noticed to be using people centric issues to create an environment which lends itself to stalling development projects.”¹⁴³

4. National Security, Counterterrorism, and Anti-Money Laundering

As discussed above, governments also invoke national security, counterterrorism, and anti-money laundering policies to justify restrictions on international funding, including cross-border philanthropy. For example, the Financial Action Task Force (FATF), an intergovernmental body that seeks to combat money laundering and terrorist financing, stated:

The ongoing international campaign against terrorist financing has unfortunately demonstrated however that terrorists and terrorist organisations exploit the NPO sector to raise and move funds, provide logistical support, encourage terrorist recruitment or otherwise support terrorist organisations and operations. This misuse not only facilitates terrorist activity but also undermines donor confidence and jeopardises the very integrity of NPOs. Therefore, protecting the NPO sector from terrorist abuse is both a critical component of the global fight against terrorism and a necessary step to preserve the integrity of NPOs.¹⁴⁴

Governments have leveraged concerns about counterterrorism and money laundering to justify restricting both the inflow and outflow of philanthropy. For example:¹⁴⁵

- The government of **Azerbaijan** justified amendments relating to the registration of foreign grants, stating that the purpose of the amendments was, in part, “to enforce international obligations of the Republic of Azerbaijan in the area of combating money-laundering.”¹⁴⁶

¹⁴³ Rakesh Krishnan Simha, “Why India Should Follow Vladimir Putin’s Lead on NGOs,” *Russia & India Report*, June 15, 2014, accessed September 9, 2014, http://in.rbth.com/blogs/2014/06/15/why_india_should_follow_vladimir_putins_lead_on_ngos_35945.html.

¹⁴⁴ Financial Action Task Force, “International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations,” Financial Action Task Force Report, 2013, 54, accessed September 9, 2014, http://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf. See also Financial Action Task Force, “Risk of Terrorist Abuse in Non-Profit Organisations,” Financial Action Task Force Report, June 2014, <http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-of-terrorist-abuse-in-non-profit-organisations.pdf>.

¹⁴⁵ Constraints by donor governments on the outflow of cross-border donations, albeit beyond the scope of this article, similarly present significant barriers to cross-border philanthropy. These states assert that they have an international responsibility to regulate the outflow of cross-border donations in order to ensure that funding destined for other countries will not support criminal or terrorist activities in those foreign jurisdictions. For more information about the justifications employed and the implications for civil society, please see: Ben Hayes, “Counter-Terrorism, ‘Policy Laundering’ and the FATF: Legalizing Surveillance, Regulating Civil Society,” Transnational Institute/Statewatch Report, February 2012, <http://www.statewatch.org/analyses/no-171-fatf-report.pdf>.

¹⁴⁶ Charity & Security Network, “How the FATF Is Used to Justify Laws That Harm Civil Society, Freedom of Association and Expression,” *Charity & Security Network*, May 16, 2013, accessed September 9, 2014, http://www.charityandsecurity.org/analysis/Restrictive_Laws_How_FATF_Used_to_Justify_Laws_That_Harm_Civil_Society.

- The **British Virgin Islands** (BVI) enacted a law requiring that CSOs with more than five employees appoint a designated Anti-Money Laundering Compliance Officer.¹⁴⁷ The law also imposes audit requirements for CSOs that are not required of businesses. These burdens were justified with explicit reference to FATF’s recommendation on nonprofit organizations and counterterrorism.¹⁴⁸
- In response to the UNSR’s Resource Report, a group of thirteen African states responded, “It is the responsibility of governments to ensure that the origin and destination of associations’ funds are not used for terrorist purposes or directed towards activities which encourage incitement to hatred and violence.”¹⁴⁹
- In 2013, a **Sri Lankan** government representative similarly stated, “While we agree that access to resources is important for the vibrant functioning of civil society, we observe that Mr. Kiai does not seem to adequately take into account the negative impact of lack of or insufficient regulation of funding of associations on national security and counterterrorism.”¹⁵⁰
- In a National Security Analysis released in August 2014, **Sri Lanka’s** Ministry of Defence claimed that some civil society actors have links with the Liberation Tigers of Tamil Eelam, a group with “extremist separatist ideology,” and that these CSOs thereby pose “a major national security threat.”¹⁵¹ During the same period, the Sri Lankan government announced that it was drafting a law requiring CSOs to register with the Ministry of Defence in order to have a bank account and receive international funding.

5. Hybrid Justifications

While these categories and examples represent the types of justifications offered by governments for restricting foreign funding, in practice, official statements often combine multiple justifications. A recent example is the statement made at the UN Human Rights Council by India on behalf of itself and twenty other “like minded” states, including **Cuba, Saudi**

¹⁴⁷ “Non-Profit Organisations,” British Virgin Islands Financial Investigation Agency, accessed September 9, 2014, <http://www.bvifia.org/non-profit-organisations>.

¹⁴⁸ Charity & Security Network, “How the FATF Is Used to Justify Laws That Harm Civil Society, Freedom of Association and Expression,” May 16, 2013, http://www.charityandsecurity.org/analysis/Restrictive_Laws_How_FATF_Used_to_Justify_Laws_That_Harm_Civil_Society

¹⁴⁹ UN Office of the High Commissioner for Human Rights, “Oral Statement—Gabon on behalf of the African Group,” 30 May 2013, accessed September 9, 2014, https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/23rdSession/OralStatements/Gabon%20on%20behalf%20ofAG_10_1.pdf.

¹⁵⁰ UN Office of the High Commissioner for Human Rights, “23rd Session of the HRC Statement by Sri Lanka—Item 3: Clustered ID with the SR on the rights to peaceful assembly & of association,” May 31, 2013, accessed September 9, 2014, <https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/23rdSession/Pages/OralStatement.aspx?MeetingNumber=12.0&MeetingDate=Friday,%2031%20May%202013>.

¹⁵¹ Gotabaya Rajapaksa, “Sri Lanka’s National Security,” Ministry of Defence and Urban Development of Sri Lanka, August 19, 2014, accessed September 9, 2014, http://www.defence.lk/new.asp?fname=Sri_Lankas_National_Security_20140819_02.

Arabia, Belarus, China, and Vietnam,¹⁵² which weaves together a number of different justifications, including foreign interference, accountability, and national security:

[C]ivil society cannot function effectively and efficiently without defined limits.... Civil society must also learn to protect its own space by guarding against machinations of donor groups guided by extreme ideologies laden with hidden politicized motives, which if allowed could potentially bring disrepute to the civil society space.... There have also been those civil society organizations, who have digressed from their original purpose and indulged in the pursuit of donor-driven agendas. It is important to ensure accountability and responsibility for their actions and the consequences thereof and also guard against compromising national and international security.¹⁵³

Similarly, Ethiopia, in its statement in response to the UNSR's Resource Report, referenced justifications relating to state sovereignty, aid coordination, and accountability and transparency:

It is our firm belief that associations will play their role in the overall development of the country and advance their objectives, if and only if an environment for the growth of transparent, members based and members driven civil society groups in Ethiopia providing for accountability and predictability is put in place. We are concerned that the abovementioned assertion [about lightening the burdens to receive donor funding] by the special rapporteur undermines the principle of sovereignty which we have always been guided by.¹⁵⁴

Similarly constructed statements have also been put forward by Pakistan and other states.¹⁵⁵

¹⁵² The "Like Minded Group" consisted of Algeria, Bahrain, Bangladesh, Belarus, China, Cuba, Egypt, India, Indonesia, Malaysia, Pakistan, Russia, Saudi Arabia, Singapore, South Africa, Sri Lanka, Sudan, Uganda, UAE, Vietnam, and Zimbabwe. UN Office of the High Commissioner for Human Rights, "Joint Statement: India on behalf of like-minded countries," March 11, 2014, accessed September 9, 2014, https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/25thSession/OralStatements/India_on%20behalf%20of%20LMG_PD_21.pdf.

¹⁵³ Ibid.

¹⁵⁴ UN Office of the High Commissioner for Human Rights, "Oral Statement: Ethiopia," May 31, 2013, accessed September 9, 2014, https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/23rdSession/OralStatements/Ethiopia_12.pdf.

¹⁵⁵ See, e.g., UN Office of the High Commissioner for Human Rights, "Statement by Pakistan on Behalf of OIC: Panel Discussion on Civil Society Space," March 11, 2014, accessed September 9, 2014, https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/25thSession/OralStatements/Pakistan%20on%20behalf%20of%20OIC_PD_21.pdf: "By virtue of its dynamic role civil society is well poised to build convergences with the view to develop synergies between state institutions and their own networks. These synergies would facilitate proper utilization of resources at the disposal state institutions and civil society actors. In this regard, it may be underscored that securing funding for its crucial work is the right of civil society, maintaining transparency and necessary regulation of funding is the responsibility of states.... Within this social space, the civil society can play its optimal role by working in collaboration with state institutions. Better coordination between civil society actors and state institution [sic] would also facilitate enhancement of international cooperation in the field of human rights."

In this section, the article briefly surveyed justifications presented by governments to constrain the inflow of international funding, including philanthropy. In the following section, we analyze constraints and their justifications under international law.

International Legal Framework

1. International Norms Protecting Access to Resources and Cross-Border Philanthropy

Article 22 of the International Covenant on Civil and Political Rights (ICCPR) states, “Everyone shall have the right to freedom of association with others....”¹⁵⁶ According to the UNSR:¹⁵⁷

The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association¹⁵⁸ but also to seek, receive and use resources¹⁵⁹—human, material and financial—from domestic, foreign and international sources.¹⁶⁰

The United Nations Declaration on Human Rights Defenders¹⁶¹ similarly states that access to resources is a self-standing right:

“[E]veryone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means....”¹⁶²

According to the Office of the United Nations High Commissioner for Human Rights, this right specifically encompasses “the receipt of funds from abroad.”¹⁶³

¹⁵⁶ United Nations International Covenant on Civil and Political Rights, Article 22, December 16, 1966, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

¹⁵⁷ While reports of the UNSR are not binding international law, his reports are referenced here because they provide a comprehensive articulation and explanation of international law.

¹⁵⁸ International law generally recognizes the freedom of association, and this section follows that formulation. Addressing the applicability of international law to non-membership organizations is beyond the scope of this article, but for more information, please see: International Center for Not-for-Profit Law & World Movement for Democracy Secretariat, “Defending Civil Society Report, Second Edition,” June 2012, 35, http://www.icnl.org/research/resources/dcs/DCS_Report_Second_Edition_English.pdf.

¹⁵⁹ The UNSR defines “resources” as a broad concept that includes financial transfers (e.g., donations, grants, contracts, sponsorship, and social investments), loan guarantees, in-kind donations, and other forms of support. See United Nations Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, para. 10, UN Doc. A/HRC/23/39 (April 24, 2013) at http://freeassembly.net/wp-content/uploads/2013/04/A.HRC_23.39_EN-funding-report-April-2013.pdf.

¹⁶⁰ *Ibid.*, para. 8.

¹⁶¹ The UNSR notes that while “the Declaration is not a binding instrument, it must be recalled that it was adopted by consensus of the General Assembly and contains a series of principles and rights that are based on human rights standards enshrined in other international instruments which are legally binding. *Ibid.*, para. 17.

¹⁶² United Nations General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Res. 53/144, Article 13, <http://www.un.org/Docs/asp/ws.asp?m=A/RES/53/144>.

¹⁶³ United Nations Office of the High Commissioner for Human Rights, “Declaration on Human Rights Defenders,” UN OHCHR, accessed September 9, 2014, <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>.

Reinforcing this position,¹⁶⁴ in 2013 the United Nations Human Rights Council passed resolution 22/6, which calls upon on States “[t]o ensure that they do not discriminatorily impose restrictions on potential sources of funding aimed at supporting the work of human rights defenders,” and “no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding thereto.”¹⁶⁵

The freedom to access resources extends beyond human rights defenders. For example, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief states that the right to freedom of thought, conscience, and religion includes the freedom to “solicit and receive voluntary financial and other contributions from individuals and institutions.”¹⁶⁶ Access to resources is also an integral part of a number of other civil, cultural, economic, political, and social rights. As the UNSR states:¹⁶⁷

For associations promoting human rights, including economic, social and cultural rights, or those involved in service delivery (such as disaster relief, health-care provision or environmental protection), access to resources is important, not only to the existence of the association itself, but also to the enjoyment of other human rights by those benefitting from the work of the association. Hence, undue restrictions on resources available to associations impact the enjoyment of the right to freedom of association and also undermine civil, cultural, economic, political and social rights as a whole.¹⁶⁸

Accordingly, “funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with article 22” of the International Covenant on Civil and Political Rights.¹⁶⁹

2. Regional and Bilateral Commitments to Protect Cross-Border Philanthropy

¹⁶⁴ This article briefly examines international norms governing global philanthropy. But it also recognizes that there are distinct limits to the impact of international law. For example, there is often an implementation gap between international norms and country practice. In addition, there are few binding international treaties, such as the ICCPR, and details are often left to “soft law,” such as the reports of the UNSR. At the same time, there is concern that any effort to create a new global treaty on cross-border philanthropy or foreign funding would lead to a retrenchment of existing rights.

¹⁶⁵ United Nations General Assembly, *Protecting Human Rights Defenders*, March 21, 2013, UN Human Rights Council, Resolution 22/6, para. 9, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/22/6.

¹⁶⁶ United Nations General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, November 25, 1981, UN General Assembly Resolution A/RES/36/55, Article 6(f), <http://www.un.org/documents/ga/res/36/a36r055.htm>.

¹⁶⁷ In similar fashion, the UN Committee on Economic, Social and Cultural Rights recognized the link between access to resources and economic, social and cultural rights, when it expressed “deep concern” about an Egyptian law that “gives the Government control over the right of NGOs to manage their own activities, including seeking external funding.” See Egypt, ICESCR, E/2001/22 (2000) 38 at paras. 161, 176, http://www.bayefsky.com/themes/public_general_concluding-observations.php.

¹⁶⁸ United Nations Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, para. 9, UN Doc. A/HRC/23/39 (April 24, 2013) at http://freeassembly.net/wp-content/uploads/2013/04/A.HRC_23.39_EN-funding-report-April-2013.pdf.

¹⁶⁹ Human Rights Committee, communication No. 1274/2004, *Korneenko et al. v. Belarus*, Views adopted on October 31, 2006, para. 7.2.

While this article is focused on global norms, cross-border philanthropy is also protected at the regional level. For example:

- The Council of Europe Recommendation on the Legal Status of NGOs states: “NGOs should be free to solicit and receive funding—cash or in-kind donations—not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies....”¹⁷⁰
- According to the Inter-American Commission on Human Rights, “states should allow and facilitate human rights organizations’ access to foreign funds in the context of international cooperation, in transparent conditions.”¹⁷¹
- In May 2014, the African Commission on Human and Peoples’ Rights (ACHPR) adopted, in draft form, a report of the ACHPR Study Group on Freedom of Association and Peaceful Assembly, with a specific recommendation that States’ legal regimes should codify that associations have the right to seek and receive funds. This includes the right to seek and receive funds from their own government, foreign governments, international organizations and other entities as a part of international cooperation to which civil society is entitled, to the same extent as governments.
- The European Court of Justice (ECJ) has issued a series of important decisions about the free flow of philanthropic capital within the European Union.¹⁷²

In addition, many jurisdictions have concluded bilateral investment treaties, which help protect the free flow of capital across borders. Some treaties, such as the U.S. treaties with Kazakhstan and Kyrgyzstan, expressly extend investment treaty protections to organizations not “organized for pecuniary gain.”¹⁷³ Indeed, the letters of transmittal submitted by the White House to the U.S. Senate state that these treaties are drafted to cover “charitable and non-profit entities.”¹⁷⁴

¹⁷⁰ Council of Europe, “Recommendation CM/Rec (2007)145 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe,” adopted October 10, 2007, Article 50, <https://wcd.coe.int/ViewDoc.jsp?id=1194609>.

¹⁷¹ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights Defenders in the Americas*, March 7, 2006, Recommendation 19, <http://www.icnl.org/research/resources/assembly/oas-human-rights-report.pdf>.

¹⁷² For more information on these decisions, see: European Foundation Center and Transnational Giving Europe, “Taxation of Cross-Border Philanthropy in Europe After Persche and Stauffer: From landlock to free movement?”, European Foundation Center Report, 2014, http://www.efc.be/programmes_services/resources/Documents/TGE-web.pdf; European Foundation Centre, “ECJ rules in favour of cross-border giving,” EFC briefing, January 27, 2009, accessed September 9, 2014, http://www.efc.be/programmes_services/resources/Documents/befc0908.pdf.

¹⁷³ U.S.-Kyrgyz Bilateral Investment Treaty, Article 1(b); U.S.-Kazakh Bilateral Investment Treaty, Article 1(b). See also Article 1(2) of the China – Germany BIT: “the term ‘investor’ means ... any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit.”

¹⁷⁴ Letters of Transmittal available at the U.S. State Department website: <http://www.state.gov/documents/organization/43566.pdf> and <http://www.state.gov/documents/organization/43567.pdf>.

A detailed discussion of investment treaty protection for cross-border philanthropy is beyond the scope of this article. This issue is presented in brief form, however, because it is a significant avenue for further exploration, as it expands the international legal argument beyond human rights and implicates bilateral investment treaties with binding enforcement mechanisms.¹⁷⁵ For further information on this issue, please see *International Investment Treaty Protection of Not-for-Profit Organizations*¹⁷⁶ and *Protection of U.S. Non-Governmental Organizations in Egypt under the Egypt-U.S. Bilateral Investment Treaty*.¹⁷⁷

3. Restrictions Permitted Under International Law

Continuing the discussion of global norms, ICCPR Article 22(2) recognizes that the freedom of association can be restricted in certain narrowly defined conditions. According to Article 22(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.¹⁷⁸

In other words, international law allows a government to restrict access to resources if the restriction is:

- (1) prescribed by law;
- (2) in pursuance of one or more legitimate aims, specifically:
 - national security or public safety;
 - public order;
 - the protection of public health or morals; or
 - the protection of the rights and freedoms of others; and

¹⁷⁵ In addition, the European Court of Human Rights has held that Article 1 of the First Protocol of the European Convention on Human Rights protects the right to peaceful enjoyment of one's possessions. (Article 1 of the First Protocol of the European Convention reads: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." In addition, the right to property includes the right to dispose of one's property (Clare Ovey & Robin White, *The European Convention on Human Rights*, 3rd edition (Oxford: Oxford University Press, 2002)), which would seem to embrace the right to make contributions to CSOs for lawful purposes.

¹⁷⁶ Luke Eric Peterson & Nick Gallus, "International Investment Treaty Protection of Not-for-Profit Organizations," *International Journal of Not-for-Profit Law* 10(1) (December 2007), http://www.icnl.org/research/journal/vol10iss1/art_1.htm.

¹⁷⁷ Nick Gallus, "Protection of U.S. Non-Governmental Organizations in Egypt under the Egypt-U.S. Bilateral Investment Treaty," *International Journal of Not-for-Profit Law* 14(3) (September 2012), <http://www.icnl.org/research/journal/vol14iss3/art2.html>.

¹⁷⁸ United Nations International Covenant on Civil and Political Rights, Article 22, December 16, 1966, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. Article 22, ICCPR

(3) “necessary in a democratic society to achieve those aims.”¹⁷⁹

Moreover:

States should always be guided by the principle that the restrictions must not impair the essence of the right ... the relations between right and restriction, between norm and exception, must not be reversed.¹⁸⁰

The burden of proof is on the government.¹⁸¹ In addition:

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the [activity at issue] and the threat.¹⁸²

The following section amplifies this three-part test contained in Article 22(2).

A. Prescribed by law

The first prong requires a restriction to have a formal basis in law. This means that: restrictions on the right to freedom of association are only valid if they had been introduced by law (through an act of Parliament or an equivalent unwritten norm of common law), and are not permissible if introduced through Government decrees or other similar administrative orders.¹⁸³

As discussed above, in July 2014, the Sri Lankan Department of External Resources of the Ministry of Finance and Planning disseminated a notice to the public, declaring that any organization or individual undertaking a project with foreign aid must have approval from relevant government agencies. Similarly, in July 2014, Nepal’s government released a new Development Cooperation Policy that will require development partners to channel all development cooperation through the Ministry of Finance, rather than directly to civil society. In both cases, the restrictions were based on executive action and not “introduced by law (through

¹⁷⁹ Case of *Vona v. Hungary* (App no 35943/10) (2013) ECHR para. 50, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122183>.

¹⁸⁰ United Nations Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, para. 16, UN Doc. A/HRC/20/27 (May 21, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf.

¹⁸¹ UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 15, Civil and Political Rights: The Human Rights Committee, May 2005, <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>.

¹⁸² United Nations Human Rights Committee, General Comment No. 34, para. 35, UN Doc. CCPR/C/GC/34 (September 12, 2011), <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>.

¹⁸³ See UN Special Rapporteur on the situation of human rights defenders, Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, July 2011, 44, <http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf>: “It would seem reasonable to presume that an interference is only “prescribed by law” if it derives from any duly promulgated law, regulation, order, or decision of an adjudicative body. By contrast, acts by governmental officials that are *ultra vires* would seem not to be ‘prescribed by law,’ at least if they are invalid as a result.”

an act of Parliament or an equivalent unwritten norm of common law).” Accordingly, they appear to violate the “prescribed by law” standard required under Article 22(2) of the ICCPR.

This prong of Article 22(2) also requires that a provision be sufficiently precise for an individual or NGO to understand whether or not intended conduct would constitute a violation of law.¹⁸⁴ As stated in the Johannesburg Principles, “The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.”¹⁸⁵

This prong helps limit the scope of permissible restrictions. As discussed above, certain laws ban funding of organizations that cause “social anxiety,” have a “political nature,” or have “implied ideological conditions.” These terms are undefined and provide little guidance to individuals or organizations about prohibited conduct. Since they are not “unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful,” there is a reasonable argument that these sorts of vague restrictions fail the “prescribed by law” requirements of international law.

B. Legitimate aim

The second prong of Article 22(2) requires that a restriction advance one or more “legitimate aims,”¹⁸⁶ namely:

- national security or public safety;
- public order;
- the protection of public health or morals; or
- the protection of the rights and freedoms of others.

This prong provides a useful lens to analyze various justifications for constraint. For example, governments have justified constraints to promote “aid effectiveness.” As the UNSR notes, aid effectiveness “is not listed as a legitimate ground for restrictions.”¹⁸⁷ Similarly, “[t]he protection of State sovereignty is not listed as a legitimate interest in the [ICCPR],” and “States cannot refer to additional grounds ... to restrict the right to freedom of association.”¹⁸⁸

Of course, assertions of national security or public safety may, in certain circumstances, constitute a legitimate interest. Under the Siracusa Principles, however, assertions of national security must be construed restrictively “to justify measures limiting certain rights only when

¹⁸⁴ Though not a fully precise comparison, this concept is somewhat similar to the “void for vagueness” doctrine in U.S. constitutional law.

¹⁸⁵ Article 19, Johannesburg Principles on National Security, Freedom of Expression and Access to Information (London: Article 19, 1996), Principle 1.1(a), <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>. The Johannesburg Principles were developed by a meeting of international experts at a consultation in South Africa in October 1995.

¹⁸⁶ Case of Vona v. Hungary (App no 35943/10) (2013) ECHR para. 50, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122183>.

¹⁸⁷ United Nations Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, para. 40, UN Doc. A/HRC/23/39 (April 24, 2013) at http://freemassembly.net/wp-content/uploads/2013/04/A.HRC_23.39_EN-funding-report-April-2013.pdf.

¹⁸⁸ *Ibid.*, para. 30.

they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.”¹⁸⁹ In addition, a state may not use “national security as a justification for measures aimed at suppressing opposition ... or at perpetrating repressive practices against its population.”¹⁹⁰ This includes defaming or stigmatizing foreign funded groups by accusing them of “treason” or “promoting regime change.”¹⁹¹

Accordingly, under international law, governments cannot rely on generalized claims of “state sovereignty” to justify constraints on global philanthropy. In the words of the UNSR:

Affirming that national security is threatened when an association receives funding from foreign sources is not only spurious and distorted, but also in contradiction with international human rights law.¹⁹²

This brief analysis is not intended to explore the details of the aid effectiveness and sovereignty justifications. Rather, the goal is to illustrate how the “legitimate aim” requirement of international law can help inform the analysis of certain justifications presented by governments, such as arguments based on “aid effectiveness” and “sovereignty.”

C. Necessary in a Democratic Society

Even if a government is able to articulate a legitimate aim, a restriction violates international law unless it is “necessary in a democratic society.” As stated by the Organization for Security and Co-operation in Europe, the reference to necessity does not have “the flexibility of terms such as ‘useful’ or ‘convenient’: instead, the term means that there must be a ‘pressing social need’ for the interference.”¹⁹³ Specifically, “where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.”¹⁹⁴

As stated by the UNSR:

In order to meet the proportionality and necessity test, restrictive measures must be the least intrusive means to achieve the desired objective and be limited to the associations

¹⁸⁹ See the “Siracusa Principles” [United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1984)], which were adopted in May 1984 by a group of international human rights experts convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Sciences. Though not legally binding, these principles provide an authoritative source of interpretation of the ICCPR with regard to limitations clauses and issue of derogation in a public emergency. They are available at: <http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/siracusa.html>.

¹⁹⁰ Ibid.

¹⁹¹ United Nations Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, para. 27, UN Doc. A/HRC/23/39 (April 24, 2013) at http://freeassembly.net/wp-content/uploads/2013/04/A.HRC_23.39_EN-funding-report-April-2013.pdf.

¹⁹² Ibid., para. 30

¹⁹³ OSCE/Office for Democratic Institutions and Human Rights (ODIHR), *Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations*, para. 5

¹⁹⁴ United Nations Human Rights Committee, General Comment No. 31 (2004), para. 6, UN Doc. CCPR/C/21/Rev.1/Add. 13, May 26, 2004.

falling within the clearly identified aspects characterizing terrorism only. They must not target all civil society associations....¹⁹⁵

Consider, for example, Ethiopian legislation imposing a 10 percent cap on the foreign funding of all CSOs promoting a variety of objectives, including women's rights and disability rights. As discussed above, Ethiopia has asserted a counterterrorism rationale to justify foreign funding constraints. Ethiopia does not establish a "direct and immediate connection between the [activity at issue] and the threat."¹⁹⁶ In addition, the cap is not the "least intrusive means to achieve the desired objective and ... limited to the associations falling within the clearly identified aspects characterizing terrorism." Accordingly, the counterterrorism objective fails to justify the Ethiopian cap on foreign funding.

The UNSR also applied this test to the "aid effectiveness" justification. In response, he stressed that:

even if the restriction were to pursue a legitimate objective, it would not comply with the requirements of "a democratic society." In particular, deliberate misinterpretations by Governments of ownership or harmonization principles to require associations to align themselves with Governments' priorities contradict one of the most important aspects of freedom of association, namely that individuals can freely associate for any legal purpose.¹⁹⁷

In addition, "longstanding jurisprudence asserts that democratic societies only exist where 'pluralism, tolerance and broadmindedness' are in place,"¹⁹⁸ and "minority or dissenting views or beliefs are respected."¹⁹⁹

Applying this test, the UNSR has noted that constraints are frequently justified with reference to rhetorically appealing terms, such as "sovereignty," "counterterrorism," and

¹⁹⁵ United Nations Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, para. 23, UN Doc. A/HRC/23/39 (April 24, 2013) at http://freeassembly.net/wp-content/uploads/2013/04/A.HRC_23.39_EN-funding-report-April-2013.pdf.

¹⁹⁶ United Nations Human Rights Committee, General Comment No. 34, para. 35, UN Doc. CCPR/C/GC/34 (September 12, 2011), <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>.

¹⁹⁷ United Nations Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, para. 41, UN Doc. A/HRC/23/39 (April 24, 2013) at http://freeassembly.net/wp-content/uploads/2013/04/A.HRC_23.39_EN-funding-report-April-2013.pdf. The UNSR finds support for this position in the global framework for aid effectiveness. For example, the Accra Agenda for Action, which has been adopted by 138 countries, states that civil society organizations are "independent development actors in their own right." Similarly, in the Busan Partnership for Effective Development Cooperation, 162 countries and territories agreed to "implement fully our respective commitments to enable CSOs to exercise their roles as *independent development actors, with a particular focus on an enabling environment*, consistent with agreed international rights, that maximises the contributions of CSOs to development." 4th High Level Event on Aid Effectiveness, "Busan Partnership for Effective Development Co-Operation," December 1, 2011, Para. 22(a), <http://www.oecd.org/dac/effectiveness/49650173.pdf> (emphasis added).

¹⁹⁸ United Nations Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, para. 17, UN Doc. A/HRC/20/27 (May 21, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf.

¹⁹⁹ *Ibid.* at para. 84(a). Volumes have been written on the attributes of a democratic society, and this article does not seek to enter into this general conceptual debate. Rather, it focuses on international legal documents that give meaning to this provision of the ICCPR.

“accountability and transparency.” Upon inspection, however, the asserted justification is often “a pretext to constrain dissenting views or independent civil society,”²⁰⁰ which violates international law.²⁰¹ Raising a similar argument, a civil society representative in China recently told the *Washington Post*, “The target is not the money, it is the NGOs themselves. The government wants to control NGOs by controlling their money.”²⁰²

Several recent studies examining foreign funding constraints and the political environments in which they arise support the UNSR’s claim. One study found that in most countries where political opposition is unhindered and voting is conducted in a “free and fair” manner, foreign funding restrictions are generally not imposed on CSOs. Rather, the study found a correlation between states where election manipulation takes place and states where the government restricts CSO access to foreign support.²⁰³ This can be explained, according to the study’s authors, by regime vulnerability, or fears that well-funded CSOs could contribute to the defeat of the ruling regime at the ballot box. In these cases, restrictions on foreign funding may be a tactic for a vulnerable regime to cling to power by defunding the opposition.

In addition, the study suggests that in some countries, foreign funding of CSOs is unpopular among the electorate. Therefore, restrictions on foreign funding may be a political tactic to appeal to these voters. For example, according to a Gallup poll conducted in 2012, 85 percent of Egyptians opposed direct aid from the U.S. to Egyptian CSOs. The study concludes that “by restricting foreign funding, Egyptian politicians appear to be responding to electoral incentives.”²⁰⁴

Another study analyzed the 2009 passage of new legislation restricting the ability of Ethiopian CSOs to access international funding.²⁰⁵ This study asserted that the ruling party’s intentions “were likely aimed at shutting down opposition altogether, rather than at creating a more vibrant, locally rooted civil society.”²⁰⁶ These findings are representative of a more general

²⁰⁰ United Nations Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, para. 23, UN Doc. A/HRC/23/39 (April 24, 2013) at http://freeassembly.net/wp-content/uploads/2013/04/A.HRC_23.39_EN-funding-report-April-2013.pdf.

²⁰¹ Russia is an interesting example to illustrate this point. Within a few months of the adoption of the foreign agents law, numerous other laws to restrict civic space were introduced and adopted. These include a treason law, a law banning NGOs that engage in political activities and receive funding from the U.S., a law on public assemblies, and a law restricting internet content. See, for example, Human Rights Watch, “Laws of Attrition: Crackdown on Russia’s Civil Society after Putin’s Return to the Presidency,” Human Rights Watch, 2013, accessed September 9, 2014, http://www.hrw.org/sites/default/files/reports/russia0413_ForUpload_0.pdf.

²⁰² Simon Denyer, “China taking the Putin approach to democracy,” *Washington Post*, October 1, 2014, A7.

²⁰³ Darin Christensen & Jeremy M. Weinstein, “Defunding Dissent: Restrictions on Aid to NGOs,” *Journal of Democracy* 24(2) (April 2013): 81.

²⁰⁴ *Ibid.*

²⁰⁵ Kendra Dupuy, James Ron, & Aseem Prakesh, *Reclaiming Political Terrain: The Regulatory Crackdown on Overseas Funding for NGOs*, CIDE 1 (October 2012).

²⁰⁶ *Ibid.*, 4.

trend that “governments are more likely to restrict external support to civil society when they feel vulnerable to domestic challenges.”²⁰⁷

Conclusion

As of January 2015, fifteen laws are pending that would restrict access to international funding, including cross-border philanthropy. These restrictions are justified with reference to concerns about political interference in domestic political affairs, CSO accountability and transparency, and aid effectiveness, as well as terrorism and national security.

International law provides a useful analytic lens to examine these restrictions. Under international law, restrictions are permissible only if they are:

- (1) prescribed by law;
- (2) in pursuance of one or more legitimate aims, specifically:
 - national security or public safety;
 - public order;
 - the protection of public health or morals; or
 - the protection of the rights and freedoms of others; and
- (3) “necessary in a democratic society to achieve those aims.”²⁰⁸

In some cases, restrictions will fail the “prescribed by law” standard because they are not contained in a law enacted by the legislative branch of government. In other cases, restrictions fail to meet the “foreseeability” requirement of the prescribed by law standard because they are insufficiently precise. Restrictions will also fail if they are based on grounds other than those listed in Article 22(2) of the ICCPR.

If these hurdles are overcome, it is then necessary to engage in a detailed analysis of the constraint and the country context. The key questions are whether the restriction is necessary or proportionate to the legitimate interest articulated by the government, and whether the justification is a pretext to constrain dissent or independent civil society.

Applying this analysis, the UNSR has found that many constraints are presumptively problematic:

Under international law, problematic constraints include, inter alia, outright prohibitions to access funding; requiring CSOs to obtain Government approval before receiving funding; requiring the transfer of funds to a centralized Government fund; banning or restricting foreign-funded CSOs from engaging in human rights or advocacy activities; stigmatizing or delegitimizing the work of foreign-funded CSOs by requiring them to be labeled as “foreign agents” or other pejorative terms; initiating audit or inspection

²⁰⁷ Darin Christensen & Jeremy M. Weinstein, “Defunding Dissent: Restrictions on Aid to NGOs,” *Journal of Democracy* 24(2) (April 2013): 83.

²⁰⁸ Case of Vona v. Hungary (App. no. 35943/10) (2013) ECHR para. 50, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122183>.

campaigns to harass CSOs; and imposing criminal penalties on CSOs for failure to comply with the foregoing constraints on funding.²⁰⁹

At the same time, this article recognizes that international law is but one lens through which to examine this issue, and there are limits to the practical impact of international law on national law. ICNL recently conducted a mapping study, which discusses an array of initiatives.²¹⁰ To supplement these ongoing initiatives, there is a need for further scholarly research to inform policy development in this field. Research needs include:

- Demonstrating the link between an enabling environment for civil society and development outcomes. As the international community develops the Post-2015 Development Agenda, the question frequently arises as to whether there is evidence to show that a more enabling environment for civil society leads to better development outcomes.
- Analyzing the impact of philanthropic pluralism versus philanthropic protectionism. This is related to the prior point but is specifically focused on the legal framework for cross-border philanthropy. Governments often argue that tight control over cross-border philanthropy promotes donor coordination and alignment with national priorities, thereby increasing the impact of cross-border philanthropy. Accordingly, it would seem important to collect empirical evidence on the extent to which restrictions affect cross-border philanthropy.
- Extracting lessons learned from the free trade debate. It took decades for globalization to take root and for countries to reduce barriers for trade. It would be interesting to study the process of reform to see if there are lessons learned to reduce barriers to the free flow of philanthropic capital across borders.
- Deepening the discussion on foreign funding and CSO “political activities.” Whether one considers the “foreign agents” law in Russia or U.S. Representative Wolf’s letter urging the Brookings Institution not to accept funding from foreign governments,²¹¹ there is ongoing concern about CSOs that receive foreign funding and engage in “political activities.” While some research has been undertaken to disaggregate the concept of “political activities,”²¹² the field would benefit from further research and recommendations on what kinds of rules should attach to CSOs engaged in different types of “political”/public policy activities.

²⁰⁹ United Nations Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, para. 20, UN Doc. A/HRC/23/39 (April 24, 2013) at http://freeassembly.net/wp-content/uploads/2013/04/A.HRC_23.39_EN-funding-report-April-2013.pdf.

²¹⁰ ICNL, “Mapping Initiatives to Address Legal Constraints on Foreign Funding,” August 20, 2014, <http://www.icnl.org/news/2014/20-Aug.html>.

²¹¹ See, for example, Eric Lipton, “Lawmaker Assails Foreign Donations to Think Tanks,” *New York Times*, September 12, 2014, accessed September 17, 2014, <http://www.nytimes.com/2014/09/13/us/lawmaker-assails-foreign-giving-to-think-tanks.html>.

²¹² International Center for Not-for-Profit Law, “Political Activities of NGOs: International Law and Best Practices,” *International Journal of Not-for-Profit Law* 12(1) (November 2009), http://www.icnl.org/research/journal/vol12iss1/special_1.htm.

- Assessing lessons learned and developing good practices for governments and international organizations interested in promoting an enabling legal environment for cross-border philanthropy and civil society. As demonstrated by President Obama's September 2014 speech at the Clinton Global Initiative, the shrinking space for cross-border philanthropy and civil society is a priority for the U.S. government. The Swedish government, the Community of Democracies, the European Union, the United Nations, and a number of other governments and international organizations have also prioritized this issue. At the same time, the engagement of the international community can prompt a backlash. Accordingly, it would seem important to identify lessons learned and options to promote constructive engagement by the international community. It would also seem important to study the infrastructure for response, including the role of policies, practices, and personnel in institutionalizing support for civil society and cross-border philanthropy.
- Developing good practices to address terrorist financing concerns, while protecting human rights and cross-border philanthropy. There is anecdotal evidence that CSO-specific measures have limited impact on the detection of terrorist financing by CSOs.²¹³ In addition, counterterrorism officials have complained that there is an opportunity cost to FATF's focus on CSOs, which detracts from resources available to go after more significant counterterrorism targets. It would be interesting to have further research on the impact of CSO-specific measures, as well as empirical evidence about the amount of terrorist financing flowing through states, quasi-state actors like ISIL, for-profit entities, and CSOs. The sector would also benefit from scholarly research on proportionate, effective measures to inform FATF's upcoming "Best Practices Paper" on terrorist financing and the nonprofit sector.

In conclusion, cornerstone concepts of civil society are currently being discussed, developed, and—at times—violently contested. After the fall of the Berlin Wall, a number of countries recognized the importance of defending civil society. In the current environment, however, many countries are defunding civil society. The outcome of this ongoing debate will shape the future of civil society, and global philanthropy, in many countries for decades to come.

²¹³ Emile van der Does de Willebois, "Nonprofit Organizations and the Combatting of Terrorism Financing: A Proportionate Response," *World Bank Working Paper No. 208*, 2010, <http://issuu.com/world.bank.publications/docs/9780821385470>.

