

GLOBAL TRENDS IN NGO LAW

A quarterly review of NGO legal trends around the world

Letter from the Editor

The International Center for Not-for-Profit Law is pleased to announce the inaugural issue of our new publication, *Global Trends in NGO Law*. Complementing *the International Journal of Not-for-Profit Law*, which comprises contributions from legal experts around the world, this quarterly publication synthesizes key developments relating to the legal and regulatory issues that affect non-governmental organizations (NGOs).

In our inaugural issue we provide an overview of five major themes that have emerged with respect to laws affecting NGOs proposed or enacted during the past two years, including:

- Restrictions on the formation, operation, and activities of NGOs in comprehensive NGO framework laws;
- Increasing restrictions on foreign funding to NGOs;
- International cooperation laws that place prohibitions on NGO exchanges of knowledge, capacity, and expertise across borders;
- Implications of government funds to support civil society; and
- Use of tax incentives to support government policy toward civil society.

In this first issue we present a summary discussion of the major developments in each of these categories as an introduction to policymakers, lawyers, and NGO leaders who have an interest in the right to free association and the laws governing NGOs. Upcoming issues of *Global Trends in NGO Law* will consider particular themes in greater detail to analyze their origins, implications, and the ways in which policymakers and other interested stakeholders might address the restrictions that are increasingly being placed on civic organizations.

We invite all of our readers to submit developments, comments, and ideas online by visiting <http://www.icnl.org/globaltrends/>.

GLOBAL TRENDS IN NGO LAW IS A PUBLICATION OF THE INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW, AN INTERNATIONAL NOT-FOR-PROFIT ORGANIZATION THAT PROMOTES AN ENABLING ENVIRONMENT FOR CIVIL SOCIETY AND PUBLIC PARTICIPATION WORLDWIDE. SINCE ITS INCEPTION IN 1992, ICNL HAS BEEN THE WORLD'S LEADING ORGANIZATION PROMOTING PROGRESSIVE LAWS GOVERNING CIVIL SOCIETY. SINCE ITS INCEPTION, ICNL HAS PROVIDED TECHNICAL ASSISTANCE TO NGO LAW REFORM INITIATIVES IN MORE THAN ONE HUNDRED COUNTRIES. WE INVITE YOU TO LEARN MORE ABOUT ICNL AND OUR PROGRAMS BY VISITING US ONLINE AT [HTTP://WWW.ICNL.ORG](http://www.icnl.org).

Introduction

On January 6, 2009 the Ethiopian Parliament voted by a 327 to 79 margin to enact the *Proclamation for the Registration and Regulation of Charities and Societies*, perhaps one of the most widely reported-on developments in NGO law in the past year. The adoption of the *Proclamation*, which US Assistant Secretary of State for Democracy and Human Rights David Kramer called “a closing of political space,”¹ followed months of attempts by domestic civil society, international NGOs, and other governments to dissuade the Ethiopian government from enacting the *Proclamation*. The *Proclamation* will become effective immediately upon publication in the Official Gazette.

The *Proclamation* has been roundly criticized by international organizations and governments, including Amnesty International, CIVICUS, the UK Foreign Office, the Canadian Parliament, and many others.² As only one example, Georgette Gagnon, Africa director at Human Rights Watch, said that “the only reason to have such a repressive law is if it would be used to strangle Ethiopia’s few remaining independent voices.”³ Similarly, the European Parliament adopted a resolution on January 15, 2009 “regret[ing] that the Ethiopian parliament... ratified the *Proclamation*” and “call[ing] for significant adaptation to be made to guarantee basic human rights principles.”⁴

The new *Proclamation* imposes substantial restrictions on freedom of association in Ethiopia. Among other issues, the law:

- requires mandatory registration of all NGOs (Articles 64(2) and 65(4));
- prohibits any domestic NGO receiving more than 10% of its funding from abroad from engaging in activities related to “the advancement of human and democratic rights... the promotion of the equality of nations, nationalities and peoples and that of gender and religion... the promotion of the rights of the disabled and children’s rights... the promotion of conflict resolution or reconciliation... [and] the promotion of the efficiency of the justice and law enforcement services” (Articles 2 and 14(5));
- gives government officials virtually unlimited authority to require the production of the internal documents of charities and societies (Article 85);

¹ Binyam Tameme, “Ethiopia: U.S. Expresses Concern on Ethiopia CSO Law,” *Daily Monitor* (23 October 2008), <http://allafrica.com/stories/200810230780.html>.

² Mark Tran, “Ethiopia curb on charities alarms human rights activists,” *The Guardian* (26 January 2009), <http://www.guardian.co.uk/world/2009/jan/26/ethiopia-charities-human-rights>; Abugida Ethiopian American Information Center, “Canadian MPs write letter to their Prime Minister asking to condemn Zenawi’s regime” (22 January 2009), <http://www.abugidainfo.com/?p=7210>; <http://www.abugidainfo.com/?p=7252>; Afrique en ligne, “Ethiopian parliament votes overwhelmingly to gag NGOs” (6 January 2009), <http://www.afriquejet.com/news/africa-news/ethiopian-parliament-votes-overwhelmingly-to-gag-ngos-2009010618918.html>; UN Office for the Coordination of Humanitarian Affairs, “Ethiopia: New law on charities passed despite objections,” *IRIN* (6 January 2009), <http://www.irinnews.org/Report.aspx?ReportId=82223>.

³ Human Rights Watch, “Ethiopia: Draft Law Threatens Civil Society,” (13 October 2008), <http://www.hrw.org/en/news/2008/10/13/ethiopia-draft-law-threatens-civil-society>.

⁴ Josep Borrel Fontelles, Helene Flautre, et. al., Letter to His Excellency Jose Manuel Duao Barroso, President of the European Commission (26 January 2009), available online at http://66.92.66.199/abugidainfo2009/wp-content/uploads/2009/01/ana_gomez.pdf.

- creates “Sector Administrators” who have the power to “supervise and control operational activities of Charities and Societies” (Article 67(3)); and
- allows the Charities and Societies Agency to suspend officers of organizations and require organizations to “assign another person as an officer” with or without cause (Article 91).

Many Ethiopian NGOs depend on foreign funding to conduct and maintain their operations. As a result, the *Proclamation’s* rule prohibiting groups which receive more than 10% of their funding from abroad from engaging in a wide variety of activities may have the practical effect of shutting down dozens of NGOs. Eric Sottas, Secretary General of the World Organization Against Torture, made this clear when he said that “with this new law, there are strong reasons to believe that most human rights defenders’ activities will now be made impossible.”⁵ But the prohibition is likely to affect groups beyond the human rights community, including groups such as the Ethiopian Women Lawyers’ Association that protect victims of rape and sexual violence (see sidebar) to humanitarian groups promoting the safety and welfare of children, the disabled, and victims of armed conflict.

Madhere Paulos, Director of the Ethiopian Women Lawyers’ Association,

... told the BBC that 99% of [the Association’s] funding to provide legal aid for women currently comes from abroad.

She said her members would continue to give up their time for free.

“But when we think about the premises, when we think about the court fees that we pay for our clients, the transportation, the medical fees for those who are victims of rape and sexual violence, it’s very difficult to think of only using voluntary contributions.”

Agence France-Presse, “Ethiopia Adopts Controversial Aid Agency Bill” (6 January 2009), <http://www.ethiomeia.com/aurora/9530.html>.

Similarly, provisions allowing government officials to attend NGO meetings, suspend the officers of NGOs, and appoint their replacements, will have negative effects on the independence and sustainability of NGOs; as parliamentary opposition leader Bulcha Demeksa put it, “the government is going to silence the NGOs and their leadership when they speak about human rights, when they speak about democratic rights, when they speak about giving democratic education to the citizens.”⁶ The Ethiopian government has strenuously denied these charges; as one official stated, “the law is needed to create a conducive environment for NGOs and CSOs and provide a separate legal framework for them. It does not mean to shut them down.”⁷

⁵ World Organization Against Torture, “Law on Charities and Societies: Freedom of Association in Jeopardy!” (9 January 2009), <http://www.omct.org/index.php?id=&lang=eng&articleId=8283>.

⁶ Voice of America, “Ethiopia defends proposal to criminalize many foreign NGO activities,” *ReliefWeb* (13 October 2008), <http://www.reliefweb.int/rw/rwb.nsf/db900sid/KSAI-7KE529?OpenDocument>.

⁷ UN Office for the Coordination of Humanitarian Affairs, “Ethiopia: New law on charities passed despite objections,” *IRIN* (6 January 2009), <http://www.irinnews.org/Report.aspx?ReportId=82223>.

I. NGO “Framework” Laws: Restrictions on Formation, Operations, and Activities

In recent years civil society organizations around the world have had to confront new and serious threats to their survival as a backlash against the spread of democracy has intensified and grown. Many observers have reported on this phenomenon, one that is “characterized by a profound shift from outright repression of democracy, human rights, and civil society activists and groups to more subtle government efforts to restrict the space in which civil society organizations... operate.”⁸

NGO framework laws – that is, laws that attempt to address all of the issues that arise over the “lifecycle” of a non-governmental organization – have been considered, adopted, or amended in at least a dozen countries in the last two years, including Bahrain, Cambodia, China, Ecuador, Egypt, Jordan, Kosovo, Rwanda, Sierra Leone, Sri Lanka, Tajikistan, Uganda, and Yemen.⁹ NGO framework laws can be an important contributor to the development and sustainability of civil society by providing legal protections for NGOs and their volunteers and employees. However, framework laws can also be misused (as in the case of the Ethiopian *Proclamation*) to reinforce the backlash against civil society.

Despite the increasing attention paid to the backlash against civil society and democracy, many governments continue to use the legislative tools at their disposal to control and restrict NGOs. A number of the laws considered or enacted in the past two years have raised serious questions as to their compliance with international norms governing the right to free association as well as the practical obstacles that they raise to NGO operations. Among other issues, some of these laws impose restrictions on the ability of NGOs to form and become legal entities, and carry out activities without undue government interference. Others provide governments with broad discretion to shut down NGOs. We review recent developments below.

1. Registration Provisions

A number of new framework laws and drafts require informal groups of persons to register as formal legal entities and prohibit them from conducting activities unless they do. By prohibiting any associational activities – even informal activities, such as a group of neighbors meeting weekly to discuss political events – without prior registration, these laws clearly infringe upon the right to free association protected by the *International Covenant on Civil and Political Rights* and other conventions. Furthermore, mandatory registration is often used by repressive governments as a tool to crack down

⁸ International Center for Not-for-Profit Law and World Movement for Democracy Secretariat at the National Endowment for Democracy, *Defending Civil Society: A Report of the World Movement for Democracy* (February 2008).

⁹ Bahrain: draft *Law on Not-for-Profit Organizations and Foundations* (2008); China: draft *Charities Law* (2008); Ecuador: draft *Law Governing NGOs* (2009); Egypt: currently drafting amendments to the *Law on Non-Governmental Organizations* (Law 84 of 2002); Jordan: new *Law on Societies* (2008); Kosovo: new *Law on the Freedom of Association in Non-Governmental Organizations* (2009); Rwanda: draft *Non-Governmental Organization Bill* (2008); Sierra Leone: draft *Policies and Guidelines for the Operation of Non-Governmental Organizations* (2008); Sri Lanka: draft *Bill to Monitor NGO Activities* (2008); Tajikistan: new *Law on Public Associations* (2007); Uganda: draft *Non-Governmental Organizations Regulations* (2007); Yemen: currently drafting amendments to the *Law on Associations and Foundations* (Law 1 of 2001).

on individuals and organizations speaking out against government policies – as in Belarus, where the government used a requirement prohibiting activities by unregistered associations to fine or arrest dozens of civic activists in 2004.

Key examples of new laws that impose mandatory registration include:

- **Ethiopia’s 2009 Proclamation for the Registration and Regulation of Charities and Societies.** Articles 64(2) and 65(4) allow the government to dissolve any organization that fails to register within three months of formation.
- **Uganda’s Non-Governmental Organizations Registration Act (enacted 2006; amendment process initiated 2007).** Sections 2(5) and 2(6) of the law criminalize unregistered activity, providing that “an organization which... carries out any activity without a valid... certificate of incorporation commits an offense” and the director or officer responsible is liable for “a fine not exceeding twenty currency points or imprisonment not exceeding six months or both.”
- **The draft Policies and Guidelines for the Operation of Non-Governmental Organizations introduced in Sierra Leone last year.** Articles 2.2.5 and 2.2.6 require “all NGOs” to “register and sign an agreement with the government of Sierra Leone before they can commence operations.”
- **Bahrain’s 2008 draft Law on Not-for-Profit Organizations and Foundations.** The draft law would have imposed mandatory registration and required all “temporary social committees” – that is, groups that “fulfill an urgent demand” of society but “do not obtain legal personality” – to “follow the instructions of the Ministry [of Social Development]” (Articles 86-89), potentially infringing upon the independence of any such group.
- **Kosovo’s Law on the Freedom of Association in Non-Governmental Organizations (2008).** This law had been enacted by the National Assembly in 2005, but was not signed by the UN’s Special Representative of the Secretary General after local and international NGOs protested the last-minute inclusion of a mandatory registration provision reading “All NGOs must register.” Following Kosovo’s independence, a legislative committee considered comments of NGOs and others, and in a draft amendment released in February 2009 eliminated this provision.¹⁰

Even in countries where registration is voluntary, the *process* of registration may be difficult or time-consuming; examples from the past year include:

- **Jordan’s 2008 Law on Societies** requires societies to file their applications with a local office of the Ministry of Social Development, which forwards applications to a ‘Controller of the Registry of Societies’ who checks to see if the application meets statutory requirements. If the Controller approves the application, it is passed to a “relevant Minister in light of the aims and goals of the society,” and the relevant Minister then has almost unlimited discretion to accept or deny the application (Articles 10 and 11). Although the new law was intended to streamline an existing

¹⁰ At the time of publication, the draft law was enacted by Kosovo’s National Assembly but was not yet publicly available. When the law becomes available, this entry will be updated.

registration process known for delay, the imposition of several new layers of bureaucracy may lead to new implementation problems and potentially unforeseen additional delays in the future.¹¹

- Similarly, **Ecuador's draft *Law Governing NGOs (2009)*** establishes a registration process that fails to specify procedures or timelines for government review of registration applications (Title III, Chapter I). Failure to specify these limits can be a potential source of delay that effectively prevents organizations from ever gaining legal personality; several Middle Eastern countries, for example, have refused to approve or deny applications from politically-sensitive groups for years at a time, thus depriving these groups from appealing a refusal to an independent court.

Provisions like these, which impose potentially time-consuming bureaucratic hurdles, can discourage groups from ever applying to register in the first place – preventing the emergence or consolidation of a strong and independent civil society. An instructive example comes from a study of thirty NGOs attempting to register in Egypt, where the *Law on Non-Governmental Organizations* creates a difficult and highly bureaucratic registration system: of the thirty, only seven had successfully registered. Five were fighting rejections in court, and the remaining eighteen had simply given up, choosing to become alternative legal structures or simply to disband.¹²

Finally, some framework laws include provisions that require registered NGOs to re-register once a year or once every two years, giving government officials repeated opportunities to deny disfavored groups the right to operate. For example, in recent years the Yemeni Ministry of Labor and Social Affairs has established a yearly re-registration requirement through implementing regulations (even though this is not provided for in the NGO law itself) and, according to the US Department of State, has used this requirement to “harass NGOs critical of the government by denying their annual registration.”¹³ In 2008, the Arab Sisters Forum for Human Rights, Women Journalists Without Chains, and the National Organization for Defending Rights and Freedoms – three of the most prominent human rights groups in Yemen – were all refused re-registration without any explanation from the Ministry of Labor and Social Affairs.¹⁴ Re-registration requirements were also proposed in:

- **Sierra Leone.** The 2008 draft *Policies and Guidelines* provides that “all registration shall be for two calendar years.”
- **Tajikistan.** The 2007 *Law on Public Associations* required all local and international NGOs to re-register by the end of the year. The registration process was subject to a high level of bureaucratic scrutiny. As a result, according to the Ministry of Justice, the number of registered

¹¹ As of this writing, the Jordanian government has indicated that the *Law on Societies* will be amended in 2009 to substantially streamline the registration process by having all registration applications handled and decided upon in a single government office rather than in multiple offices and ministries.

¹² Human Rights Watch, *Egypt: Margins of Repression* (3 July 2005), available online at: <http://www.hrw.org/en/node/11675/section/7>.

¹³ U.S. Department of State, “Yemen: Country Report on Human Rights Practices 2007,” (11 March 2008), <http://www.state.gov/g/drl/rls/hrrpt/2007/100610.htm>.

¹⁴ *Id.*

local NGOs dropped from 3,130 to 1,040 by December 31, 2007, as the majority of NGOs failed to meet the re-registration requirements. By November 2008 that number had risen to 1,700 – still a substantial reduction from the number of NGOs existing prior to passage of the law.

- **Kosovo.** The draft *Freedom of Association Law* originally enacted by the Assembly required re-registration every two years, but this provision was eliminated in the amendments proposed by the Legislative Committee reconsidering the Law.

2. Restrictions on Activities: Government Supervision and Monitoring

Several laws passed this year empowered government officials to engage in invasive supervisory oversight of NGOs. These restrictions took the form of (1) power to interfere in an NGO's internal governance, a matter generally left to the NGO; (2) extensive investigatory powers; and (3) restrictions on the ability of NGOs to carry out certain program activities without notice to the government.

Internal Governance. Several laws grant government authorities the right to interfere in an NGO's internal governance. For example, **Jordan's** new *Law on Societies*, like several other laws in the Middle East region, provides that elections to the Board of Directors and decisions taken by the General Body of any NGO may not take effect unless the supervising Ministry has been notified and does not object. Jordanian NGOs strongly objected to this provision on the grounds that it would erode their independence and make the Ministry the effective supervisor of every organization in Jordan. (The Jordanian government recently announced that the law would be amended in 2009 to, among other things, require only notification of elections and decisions to the Ministry. The Ministry would not be allowed to object except in cases of changes to the society's Articles of Incorporation).

Investigatory Powers. **Ethiopia's** 2009 *Proclamation* allows the government to:

- institute inquiries about a charity or society without limitation or notice, and for purposes of an inquiry, require a charity or society or its officers or employees to produce accounts and statements in writing on any matter at issue in the inquiry, produce documents, and to appear before government officials at a specified time or place to give evidence or produce documents (Article 84); and
- require any charity or society to “furnish orally or in writing... any information” and “transmit” any document demanded by government officials, even in the absence of a formal inquiry (Article 85).

The *Proclamation* includes no provisions allowing for procedural protections, such as notice, an opportunity to object, the right to counsel, or the right to a hearing, for those affected by these sweeping powers. In the context of an environment where NGOs already fear harassment (the well-known charity Doctors Without Borders recently removed all staff from Ethiopia because of “recurrent

arrests of [Doctors Without Borders] staff without charge or explanation),¹⁵ the *Proclamation's* grant of such extensive and far-reaching powers is especially worrisome.

Programmatic Restrictions. Finally, some laws place prior restrictions on the types of activities that NGOs can engage in without government approval. **Uganda's** 2007 draft *Non-Governmental Organizations Regulations* requires NGOs to give "seven days notice in writing" of any intention to "make direct contact with people in any part of the rural area of Uganda" (Article 12). As only one example of the negative effects of this type of restriction, because Ugandan NGOs are prohibited from making "contact" with any rural residents without first notifying the government and waiting seven days to ensure that the government does not object, they are restrained from providing immediate assistance in the wake of a natural or man-made disaster.

3. Dissolution of NGOs

Several new laws allow the government to dissolve organizations on discretionary grounds and without appropriate procedural protections.

- **Ecuador's** draft *Law Governing NGOs* permits the government to involuntarily dissolve NGOs for, among other things, failure to complete or departure from the goals for which the organization was established, falling below a minimum number of members, and failure to present multiyear operational plans for more than two consecutive reporting periods.
- The **Yemeni** Ministry of Labor and Social Affairs has proposed amendments to the *Law on Associations and Foundations* that would remove dissolution proceedings from the court system to the Ministry itself, allowing the Minister of Labor and Social Affairs to make such determinations on his own and without judicial review (Article 53).

These types of provisions violate international norms protecting the right to free association; in more practical terms, by giving the government a discretionary right to dissolve NGOs practically at will, civil society as a whole may become far less likely to engage in politically sensitive activities.

II. Restrictions on Foreign Funding

A number of governments around the world moved last year to restrict and control the flow of funding from abroad to domestic NGOs. This trend appears to stem from a confluence of factors, including (1) international pressure on governments to protect against terrorist financing and money laundering; (2) a desire to coordinate and increase the effectiveness of foreign aid; and (3) concerns about national sovereignty. Restrictions on foreign funding have appeared in recent years in several countries, including:

¹⁵ Doctors without Borders, "Ethiopia: Obstructions Lead MSF-Switzerland to Withdraw from Fiiq, Somali Region of Ethiopia," *Common Dreams* (10 July 2008), <http://www.commondreams.org/news2008/0710-11.htm>.

- **Jordan**, where the 2008 *Law on Societies* requires government approval of any transfer of funds from abroad, no matter how small. Although the Jordanian government has promised to amend the law in 2009 to remove several provisions objected to by civil society, it has indicated that no changes will be made to the provision on foreign funding.
- **Yemen**, where amendments now being proposed to the 2001 *Law on Associations and Foundations* would require government approval before any foreign funds transfer.
- **Bahrain**, where the proposed *Law on Not-for-Profit Organizations and Foundations* of 2007 would have removed many restrictions from Bahrain's 1989 NGO law but retained severe restrictions on foreign fundraising, including a penalty of up to six months imprisonment for any person who "receives... funds from abroad... without the approval of the Ministry [of Social Development]" (Article 94(6)).
- **Egypt**, where amendments to the 2002 *Law on Non-Governmental Organizations* now being finalized by the Ministry of Social Solidarity are reported to improve the registration system and remove the ban on political activities – positive developments – but will also create a "strict governmental monitoring mechanism" for foreign funding, which might include an outright ban on direct funding to Egyptian NGOs.¹⁶

Regardless of the justification for these restrictions on foreign funding, the effect on the operations of NGOs of all kinds can be detrimental. Particularly in countries where local philanthropy is underdeveloped and government funding is not substantial, many groups could be forced to cease operations if denied access to funding sources from beyond their borders.¹⁷

III. Restrictions on Exchanges of Knowledge, Capacity, and Expertise

Even more far-reaching than restrictions on foreign funds are restrictions on international coordination and the exchange of knowledge, expertise, and experience across borders. These types of laws represent a kind of 'intellectual protectionism' in which the logic animating restrictions on foreign funds is extended to effectively sever domestic civil society from the broader international community.

The first model for this type of law appears to be the draft *Law on International Cooperation* introduced in Venezuela in 2006. The Venezuelan draft would have given the President and Cabinet of Venezuela unprecedented authority to organize, control, direct, and coordinate all "activities of international cooperation," including transfers of assets, technology, and other forms of material support. All foreign funds would have to be routed through a "Fund for International Cooperation and Assistance," which would then have the sole authority to decide which NGOs could receive support from abroad; and any

¹⁶ Dina Guirguis, "NGO Bill Imperils Civil Society Funding," *Arab Reform Bulletin* (February 2009), <http://www.carnegieendowment.org/arb/?fa=show&article=22697>.

¹⁷ Attempts to starve civil society of resources have not been limited to direct prohibitions on foreign funding. In Belarus, *Presidential Edict No. 533* of April 2008 declared that NGOs renting state property would be charged at the same rate as commercial businesses (previously they had enjoyed the ability to pay lower rents). Following this edict, NGO rents increased tenfold in some cases and a number of NGOs were forced to dissolve.

domestic organization engaging with a foreign counterpart would be required to provide detailed reports and submit to government inspections and audits, which might easily lead to harassment and abuse of NGOs.

The Law went to first reading in the Venezuelan National Assembly in 2006, but was not thereafter enacted. It has nonetheless contributed to an atmosphere of uncertainty among both foreign funders and the NGOs that rely on them. As a coalition of Venezuelan NGOs writes, the “proposed law – and statements of support by members of the National Assembly – have worsened an environment already characterized by mistrust on the part of a government which regards NGOs as conspirators against the State... In this environment, much of the NGO community also feels threatened.”¹⁸

Many of the Venezuelan law’s characteristics have since appeared in proposed or enacted legislation in Latin America and elsewhere:

- A 2006 **Peruvian** law significantly increased the role of a government agency to prioritize and monitor NGO activities financed with international support, and expands the agency's authority to sanction NGOs for non-compliance with burdensome reporting requirements. The law was partially overturned by a decision of the Constitutional Tribunal in 2007 on the grounds that the government did not have the authority to demand certain private information not related to the use of public funds, but the right of the government agency to prioritize and monitor NGO activities was upheld.
- A **Bolivian** Presidential Decree issued in October 2007 imposes various restrictions on NGOs, including prohibiting Bolivian government agencies from using bilateral foreign aid to contract local NGOs to provide services, prohibiting any kind of foreign assistance that carries “implied political or ideological conditions,” and giving the government authority to veto hiring decisions of any international cooperation agencies operating in Bolivia.
- In **Mexico**, an *International Cooperation Bill* passed in the Senate in 2008 would have created a “Mexican Agency for International Cooperation” with a broad array of powers, including the right to “qualify” individuals and entities engaged in “international cooperation,” a term that covered funding from abroad as well as the exchange of “knowledge, educational, cultural, technical, economic, and financial expertise.”
- Finally, several statements made by the **Nicaraguan** Ministry of Foreign Affairs suggest that new restrictions on international cooperation are likely in early 2009, including a requirement that the government participate in selecting recipients of foreign funding.¹⁹

As outlined above, international cooperation laws apparently modeled on the Venezuelan model have spread to several countries in Latin America, but this may be only the beginning of an emerging global trend with dangerous ramifications. Indeed, an international cooperation regulation has appeared in

¹⁸ Espacio Civico, “About the Law,” (undated), <http://espaciocivicove.org/en/about-us.php>.

¹⁹ Jose Maria Castan, “Nicaragua: International NGOs Won’t Give Up Our Work or Reason for Being Here,” *Envio Digital* (November 2008), <http://www.envio.org.ni/articulo/3909>.

Indonesia. In August 2008 the Ministry of Home Affairs issued the *Regulation on Receipt and Giving of Social Organization Aid from and to Foreign Parties* that prohibits the transfer of money, goods, or services provided by foreign governments, foreign NGOs, or international and multilateral institutions to Indonesian NGOs without prior approval from the Minister of Home Affairs (Articles 2, 3, and 12). The law specifies that aid will be permissible so long as it is not used to contravene the Constitution; disrupt the national unity or public order of Indonesia; cause social anxiety; or facilitate intelligence, money laundering, terrorism, or separatism – but no real limits are placed on the Minister of Home Affairs in deciding whether to approve or deny an NGO request.

IV. Government Funds for Civil Society

Government funds for civil society can be employed to increase the sustainability and development of domestic NGOs by providing dedicated sources of income. For example, **Croatia's** National Foundation for Civil Society Development, began operation in November 2003 and has since emerged as the leading domestic donor for civil society, awarding more than \$4.5 million derived from Lottery Law proceeds alone in 2007.²⁰ **Hungary's** National Civil Fund, which began operating in June 2003, awarded more than \$36 million in support to NGOs in 2007;²¹ **Estonia's** National Foundation for Civil Society launched in December 2007 and awarded approximately \$200,000 in grants in 2008.²²

It now appears that several countries are using government funds for civil society as a means not only to support NGOs, but also to manage the NGO sector. Used in this way, funds can favor certain NGOs, and even displace independent civil society. In **Uzbekistan**, for example, a government fund to support civil society was created and began operations in 2008 without any implementing regulations or guidelines being issued. All funds distributed in 2008 went to a group of five government-affiliated NGOs without any bidding or competition process.

Two new government funds were launched last year, and as with the others discussed above, it remains too early to determine how they will affect NGO sustainability in the long term. **Azerbaijan** launched and began operations of a fund last year, and **Jordan's** 2008 *Law on Societies* calls for the creation of a "Fund for the Support of Societies" that is not yet in operation.

As the Uzbekistan example demonstrates, the absence of clear rules specifying fair and apolitical procedures for the operation of these funds can undermine their credibility. Ideally, the rules specifying operating procedure of government funds should be promulgated before the funds begin operations. This was the approach taken in **Albania**, which spent a substantial amount of time considering and drafting a *Law on the Civil Society Development Fund* that specifies exactly how the fund will work and implementing specific operating procedures, such as prohibiting members of the Supervisory Board

²⁰ USAID, *2007 NGO Sustainability Index for Central and Eastern Europe and Eurasia* (2008), p. 85 - 86.

²¹ *Id.* at p. 117.

²² Eesti Mittetulundusühingute ja Sihtasutuste Liit, *NENO Newsletter* (September 2008), <http://www.ngo.ee/24787>.

from voting on decisions in which they or their families have an interest, requiring funding competitions to be “open” and “public,” and specifying the criteria by which funding applications will be judged.

V. Use of Fiscal Legislation to Set NGO Policy

Some countries have begun to use fiscal legislation as a more sophisticated and subtle method of restricting the availability of international and domestic funds to NGOs. In **Russia**, for example, a decree to eliminate the ability of Russian NGOs to receive tax exempt donations from abroad was adopted last year. *Decree No. 485 of 2008* establishes a “white list” of foreign organizations, and any grants from foreign organizations that do not appear on the list are now considered taxable income for Russian recipients. As a result, many Russian NGOs that rely on funds from foreign organizations that are not on the white list found that they were subject to an often substantial new tax burden that required them to reduce spending on programs and other activities. Similarly, Kazakhstan’s 2008 amendment of the *Tax Code* eliminated two VAT exemptions for NGOs, increasing the tax burden of organizations accepting funds from foreign government grants (as well as from state social contracts) and again effectively requiring NGOs to reduce spending on programs and activities. Fiscal legislation has also been proposed to restrict domestic funds available to NGOs, as in 2007 when the **Mexican** government proposed a flat tax on all businesses, eliminating the tax deduction that was previously provided for corporate donations to NGOs. Mexican NGOs, fearing that the elimination of this deduction would remove a source of support for their work, lobbied strongly against the proposal with the assistance of international organizations and managed to defeat the bill, retaining tax deductions for corporate donations to NGOs.

Other developments point to an increased interest in using tax policy to leverage philanthropy in support of the NGOs sector, a trend that will likely take on increased significance in light of the unprecedented global economic crisis. In Europe, a recent decision by the **European Court of Justice** may serve to facilitate cross border philanthropy. On January 27, 2009, the Court handed down its judgment in the case of *Hein Persche v. Finanzamt Lüdenscheid*, ruling that a German law which allowed tax deductions for donations made to German NGOs but not to NGOs located outside Germany “constitutes... a restriction of the free movement of capital which is, as a rule, prohibited.”²³ The implications of this decision, at least for individuals residing within the European Union, appears to be that organizations recognized as charities by foreign states must be treated as charities in domestic legislation, a move which will greatly expand the number of NGOs which can receive tax-deductible donations from EU citizens. In May 2008, the **Mexican** government expanded the types of NGOs eligible to receive tax-deductible donations to include groups dedicated to civic activism, service to migrants and refugees, and several other areas. In **Montenegro**, the *Lottery Law of 2008* provided that NGOs would be eligible to receive up to 60 percent of all lottery funds collected in Montenegro, a significant step forward in the efforts of the NGO community to achieve long-term financial sustainability. **Bosnia’s**

²³ Court of Justice of the European Communities, “Press Release No 05/09: Judgment of the Court of Justice in Case C-318/07” (27 January 2009), <http://curia.europa.eu/en/actu/communiqués/cp09/aff/cp090005en.pdf>.

2007 *Law on Personal Income Tax* and *Law on Company Profit Tax* enabled tax deductions on donations to NGOs constituting up to 1.5 percent of personal earnings and 3 percent of corporate earnings, potentially creating a large new source of funding for NGOs.²⁴

Conclusion: The Effects of the Global Economic Crisis

The need for services provided by NGOs is bound to increase as the ranks of the unemployed, homeless, and malnourished grow as a result of the global economic crisis. At the same time, however, private donations to the sector are reportedly beginning to contract as donors have fewer resources. Further, governments may come under increasing pressure to reduce benefits to NGOs in order to balance their own budgets. As only one example, President Obama has put forth a new tax plan in which the tax deduction for charitable donations by those who earn more than \$250,000 per year will be reduced from 35% to 28%. This action, which will affect those individuals arguably most able to give, “could be a disincentive to some donors... [and] a problem for many struggling nonprofits... that are already facing a very difficult fundraising environment.”²⁵

NGO sectors in every country and region will likely face these tensions between the increased need for services and decreased resources. Those NGOs and their beneficiaries confronting restrictive legal and regulatory environments, however, may be affected far more seriously. If governments continue to use NGO framework laws to control and restrict civil society, for example, the impact on assistance to those in need may be disastrous. Worse still, when NGOs are impacted, marginalized and vulnerable peoples are deprived of “a constructive outlet for the redress of grievances,” increasing the likelihood of violence and radicalism.²⁶

Without an enabling legal and regulatory environment for civil society, both the rights and freedoms of citizens and the breadth and reach of social and economic development recede. Future issues of *Global Trends in NGO Law* will continue to cast a spotlight on the emerging trends affecting the NGO legal environment, presenting case studies of NGO experiences in certain countries and regions, in-depth studies of one or more emerging trends, and preliminary responses to proposals that restrict the legislative and regulatory space in which NGOs can operate. We invite you to submit comments and reports of emerging issues in your country by visiting <http://www.icnl.org/globaltrends/>.

²⁴ Although passed in 2007, the *Law on Personal Income Tax* and *Law on Company Profit Tax* will not be implemented until 2009.

²⁵ Diana Aviv, quoted in Al Kamen, “Giving, Till It Hurts,” *Washington Post* (27 February 2009), p. A15.

²⁶ See, e.g., Eric Rosand, Alistair Millar, and Jason Ipe, *Civil Society and the UN Global Counter-Terrorism Strategy: Opportunities and Challenges* (Center on Global Counterterrorism Cooperation, September 2008).