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(202) 452-8600
www.icnl.org

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Editor: Stephen Bates

Senior Editor: Douglas Rutzen

Contributing Editor: Stephan Klingelhofer

Production Editor: Ivan Gan

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Letter from the Editor

In this issue of the *International Journal of Not-for-Profit Law*, we proudly feature three seminal essays on civil society and civil liberties. The essays received the top awards in the ICNL-Cordaid Civil Liberties Competition, as **Douglas Rutzen**, President of the International Center for Not-for-Profit Law, explains in his introduction to the articles.

The winner of the ICNL-Cordaid Civil Liberties Prize is a comparative study of the often troubled relationship between civil society and “war on terror” statutes and regulations. The author, **Mark Sidel**, is Professor of Law, Faculty Scholar, and Lauridsen Faculty Fellow at the University of Iowa. A revised edition of his book *More Secure, Less Free? Antiterrorism Policy and Civil Liberties After September 11*, was published in 2007.

Oonagh Breen received a Distinguished Research Award in the ICNL-Cordaid Competition for her essay arguing that in EU states, judicial action may enable civil society more effectively than legislative action. Breen is a Professor in the School of Law at University College Dublin.

Adong Florence Odora also received a Distinguished Research Award. Odora’s essay analyzes the suppression of civil society in authoritarian environments and proposes some preconditions for civil society to rise again after years of suppression. Odora is a Ugandan attorney who has worked as a researcher with Equalinrights in the Netherlands.

In addition to the ICNL-Cordaid Civil Liberties articles, we offer a timely analysis of the Turkish Assembly’s recent reform of foundation law. **Filiz Bikmen** finds that the new law substantially improves the working environment for foundations in Turkey, but that more remains to be done. Bikmen is an Advisory Board Member of the International Center for Not-for-Profit Law and Adviser to the Chairman and Board of TUSEV, the Third Sector Foundation of Turkey.

We gratefully acknowledge Cordaid, for joining ICNL in sponsoring the essay competition, as well as the authors of our incisive and provocative articles.

Stephen Bates
Editor
International Journal of Not-for-Profit Law
sbates@icnl.org

ICNL-CORDAID AWARDS

Introduction

Douglas Rutzen

President

International Center for Not-for-Profit Law

In November, many of us were introduced to a new image of public protest. It was a photograph from Pakistan—a man in a black suit wearing dark-rimmed glasses, his tie still taut, his jacket buttoned at midriff. He wears the uniform of his profession—a lawyer. In his right hand, he holds a tear gas canister, which he is throwing back at police. Capturing the moment, headlines roared, “At War with the Law.”

It’s a remarkable image. If lawyers confront the police, they generally opt for words softly spoken, armed with facts, laws, and reason. But we’re witnessing a contest over civil space around the world—with lawyers and law on the front lines.

In some countries, governments have undertaken a frontal assault on the law. In others, governments seek to co-opt the law. They enact laws violating human rights, embrace legal opinions justifying torture, and impose sanctions for violations of Kafkaesque legal requirements. Governments then present the antiseptic argument that their actions are not an affront to civil liberties, but rather demonstrate their adherence to the “rule of law.”

History demonstrates the perils of this approach. Whether we are speaking about apartheid-era legislation in South Africa or the Nuremburg Laws in Germany, legislation can as easily trample rights as protect them. The rule of law must be supplemented by the rule of justice, human rights, and human dignity. Otherwise, law converts from shield to sword, undercutting civil society.

Unfortunately, the legislative backlash against civil society seems to be gaining momentum. In the past few years, more than forty countries have introduced or enacted legislation constricting civil society. Justifications are often presented in broad, rhetorical terms. Governments argue that restrictions are necessary to protect national security, to preserve state sovereignty, or to advance the “War on Terror.” But these are malleable concepts, and discussions at this level are often unconstructive.

To add analytic depth to the discussion, ICNL and Cordaid launched the Civil Liberties Prize to promote scholarship on civil society and civil liberties. Cordaid was an ideal partner for this initiative. Based in the Netherlands and with a worldwide network, Cordaid contributed ninety years’ experience as well as keen international perspectives on contemporary issues.

We also express our appreciation to all the scholars who submitted manuscripts as well as the panel that reviewed each submission. Chaired by Kumi Naidoo (CIVICUS), the panel included Clare Doube (Civil Society Watch), Grace Rebollos (Western Mindanao State University), and Richard Fries (former Chief Charity Commissioner, England and Wales). After thorough review, the panel selected the following manuscripts for recognition:

Winner of the ICNL-Cordaid Civil Liberties Prize

Mark Sidel (professor of law, faculty scholar, and Lauridsen faculty fellow at the University of Iowa) for his manuscript, *Counter-Terrorism and the Enabling Legal and Political Environment for Civil Society: A Comparative International Analysis of “War on Terror” States*.

Distinguished Research Awards

Oonagh Breen (professor in the School of Law at University College Dublin) for her manuscript, *EU Regulation of Charitable Organizations: The Politics of Legally Enabling Civil Society*.

Adong Florence Odora (a Ugandan lawyer who has served as a researcher with Equalinrights in The Netherlands) for her manuscript, *Rising from the Ashes: The Rebirth of Civil Society in an Authoritarian Political Environment*.

Honorable Mention

Angela Calvo (Regional Director of Advocacy and Citizen Committee for Caritas in Latin America and the Caribbean) for her manuscript, *Strategies to Advance Civic Space in Countries with Limited Adherence to the Rule of Law*.

Shambhavi Murthy Gopalkrishna (lecturer and senior academic faculty member, Department of Political Science at the University of Lagos) for her manuscript, *Reflections as a Citizen of Civil Society Amidst Divided Lands on Reinventing Civil Society, Civil Liberties and Governance in Post-Conflict Societies: Patterns, Potentials, and Challenges in the Globalized New Millennium*.

The first three articles are featured in this issue of the Journal, and the manuscripts receiving Honorable Mention awards are available at www.icnl.org/prize.

This year, we mark the sixtieth anniversary of the Universal Declaration of Human Rights. We hope these papers help will inform our journey from principles to performance, ensuring safe legal space for civil society around the world.

ICNL-CORDAID AWARDS

**Counter-Terrorism and the Enabling Legal and Political Environment for Civil Society:
A Comparative Analysis of “War on Terror” States**

Mark Sidel¹

This article focuses on the legal and political environment for civil society in an era in which counter-terrorism policy and law have challenged civil society and civil liberties in a number of countries. The ways in which counter-terrorism law and policy affect civil society can differ dramatically by country and region. So this article seeks to provide some comparative analysis of the impact of counter-terrorism policy and law on civil society in several countries in which the “war on terror” is being fought, emphasizing impacts on the enabling environment for civil society such as laws, regulations, policies, and practice influencing the existence, structure, activities, and vibrancy of civil society.

I address these impacts in the United States, the United Kingdom, and Australia, with some comparative and brief reference in the conclusions to Canada, Netherlands, and the European Union. Certainly other countries and regions could and should be discussed, but limited space forces a focus on some of the countries in which the “war on terror” has been waged most vigorously and where the impact of counter-terrorism law and policy on civil society has been most widely contested.

There are significant differences in the way that the nexus between counter-terrorism law and policy and civil society is regulated in the U.K., the U.S., and Australia. The British approach has relied significantly on charity regulators as statutory-based core partners in the battle against terrorism, often as “first responders” in situations where charities are allegedly tied to terrorism or terrorist finance. The American approach to shutting off terrorist finance from nonprofits largely sidesteps charity regulators in favor of direct action by prosecutors, a function of both prosecution- and homeland security-led counter-terrorism measures and the bifurcated nature of nonprofit regulation under the American federal structure. Australia’s developing approaches and

¹ Mark Sidel is Professor of Law, Faculty Scholar, and Lauridsen Family Fellow, University of Iowa, and President-elect, International Society for Third Sector Research.

I am grateful for discussions on these themes with Sanjay Agarwal, Barnett Baron, Noshir Dadrawala, Alan Fowler, Myles McGregor-Lowndes, Kent Roach, Doug Rutzen, Rajesh Tandon, Joo-Cheong Tham, and several other colleagues who cannot be named. I have greatly benefited from responses by participants to earlier presentations and papers on these issues at the Centre for Civil Society Studies, London School of Economics (June 2007); Association for Research on Nonprofit Organizations and Voluntary Action (ARNOVA) (November 2007); Government of Canada Commission of Enquiry into the Investigation of the Bombing of Air India Flight 182 (Major Commission) (November 2007); and other venues.

their impact on civil society have been under-studied and are well worth discussion given the expansion of security legislation in Australia.

The article begins from the premise that measures used to monitor, investigate, restrict, prosecute, or otherwise affect charities with the goal of restricting terrorist financing should also seek to maintain the autonomy and vibrancy that characterizes the charitable sector in democratic societies, and that serious efforts must be made to balance society's interests in freedom from terrorism with society's interests in a vibrant, autonomous, and powerful charitable sector.

These are not the "state's" interests distinguished from the "charitable sector's" interests; combating terrorism and preserving and enhancing the vital role of the charitable sector are interests that states and charitable sectors share, as do other forces in society.

The impact of counter-terrorism law and policy on civil society and the enabling environment for it have been the subject of important early² as well as recent³ work by Barnett Baron, Alan Fowler, Jude Howell and colleagues, Joe McMahan, David Moore, Kasturi Sen, and other commentators. It has also been the subject of crucial work by organizations that have focused intensively on these issues.⁴ I seek to build upon that

² The growing academic and practice literature on government-charitable sector relations and anti-terrorism includes Richard Moyers, *A Shocking Silence on Muslim Charities*, CHRONICLE OF PHILANTHROPY, 17 October 2002; Barnett Baron, *Detering Donors: Anti-Terrorist Financing Rules and American Philanthropy*, INTERNATIONAL JOURNAL OF NOT-FOR-PROFIT LAW 6(2), 1-32 (2004) (www.ijnl.org); Alan Fowler, *Assessing the Impact of Counter-Terrorism Measures for Nongovernment Organizations* (INTRAC, 2004, at www.intrac.org); InterAction, HANDBOOK ON COUNTER-TERRORISM MEASURES: WHAT U.S. NONPROFITS AND GRANTMAKERS NEED TO KNOW (2004); Kumi Naidoo, *Coming Clean: Civil Society Organizations at a Time of Global Uncertainty*, INTERNATIONAL JOURNAL OF NOT-FOR-PROFIT LAW 6(3): 1-3 (2004) (www.ijnl.org); Alan Fowler, *Aid Architecture: Reflections on NGDO Futures and the Emergence of Counter-Terrorism*, INTRAC Occasional Papers Series No. 45, Oxford, 2005; Teresa Odendahl, *Foundations and their Role in Anti-terrorism Enforcement: Findings from a Recent Study and Implications for the Future*, Georgetown University, June 2005.

³ Alan Fowler, *Counter Terrorism Measures, Development, and Civil Society*, Powerpoint presentation given at the INTRAC workshop in the Netherlands, January 2006 (www.intrac.org); Blake Bromley, *The Post 9/11 Paradigm of International Philanthropy*, paper presented to the International Society for Third Sector Research Seventh International Conference, Bangkok (July 2006); Terrence Carter, *THE IMPACT OF ANTI-TERRORISM LEGISLATION ON CHARITIES: THE SHADOW OF THE LAW* (Carters, Toronto, 2006); Civicus, *IMPACT OF COUNTERTERRORISM MEASURES ON CIVIL SOCIETY* (Civicus, Southdale [South Africa], 2006); Jude Howell, *The Global War on Terror, Development and Civil Society*, JOURNAL OF INTERNATIONAL DEVELOPMENT 18: 121-135 (2006); Mark Sidel, *MORE SECURE, LESS FREE? ANTITERRORISM POLICY AND CIVIL LIBERTIES AFTER SEPTEMBER 11* (University of Michigan Press, 2004, revised ed. 2007); C.R.M. Versteegh, *Terrorism and the Vulnerability of Charitable Organisations*, paper presented to the International Society for Third Sector Research Seventh International Conference, Bangkok (July 2006); Jude Howell and colleagues, *THE BACKLASH AGAINST CIVIL SOCIETY IN THE WAKE OF THE LONG WAR ON TERROR* (LSE Centre for Civil Society, 2006); LSE Centre for Civil Society, *Aid, Security and Civil Society in the Post-911 Context: Briefing Report of an International Workshop* (June 2007); Nancy Billica, *Philanthropy, Counterterrorism and Global Civil Society Activism* (June 2007).

⁴ They include Cordaid, INTRAC, the International Center for Not-for-Profit Law (ICNL, www.icnl.org), and other organizations. For the important work of these organizations on the issues discussed here, see, e.g., Alan Fowler, *Counter Terrorism Measures, Development, and Civil Society*, presentation given at the INTRAC workshop in the Netherlands, January 2006 (www.intrac.org); INTRAC/VANI *Overview on South Asia CTM Workshop*, June 2006; INTRAC, *Overview Report on CTM*

work here, as well as some of my earlier work in this area,⁵ to discuss the growing conflict between governments and the charitable sector (sometimes called the nonprofit, not-for-profit, or “third”) sector in a number of countries. A significant reason for that growing conflict and mistrust is the perception on the part of a number of governments that the charitable sector is a link to terrorism, through financing, ideology, and facilitating meetings and organization.

More broadly, a number of governments do not now appear to regard civil society and the charitable sector as a source of human security. Rather, they seem to regard the third sector as a source of *insecurity*; not as civil society but as encouraging *uncivil* society; not as strengthening peace and human security, but as either a willing conduit for, or an ineffective, porous, and ambivalent barrier against insecurity in the form of terrorism and violence.

There has always been mistrust of the voluntary sector by governments in many nations around the world. This mistrust is expressed in tightened regulation, stricter governance and financial requirements, restrictions on foreign funding, limitations on endowment growth and investments, barriers to advocacy, and a host of other legal and policy requirements. But for a number of governments, the current suspicion of civil society goes beyond traditional mistrust or skepticism and reflects a vision of the charitable sector as a source of insecurity and incivility that has fueled the reemergence of terrorism, particularly in the wake of the 2001 and subsequent attacks in New York City, Washington, D.C., Bali, London, Madrid, and elsewhere. Civil society and the voluntary sector are now under suspicion and investigation⁵ for the role – real or alleged – that some charitable organizations may have played in terrorism. And even where governments do not make the explicit ties between the charitable sector and terrorism, the sector is generally regarded as easily used by terrorists, an ineffective and porous source of finances, organization, communications, and the transfer of goods and services for terrorist purposes.

The ripples of this pressure on civil society travel far indeed. The perception that civil society is uncivil and a source of insecurity contributes to an environment of enhanced regulation of the voluntary sector, strengthened state oversight of voluntary sector activities, and declining confidence in the sector’s ability to contribute to the

Workshops: Redefining Development for National Security – Implications for NGOs and CSOs (2007) (www.intrac.org); Kasturi Sen, *THE WAR ON TERROR AND THE ONSLAUGHT ON DEVELOPMENT* (INTRAC, October 2007, www.intrac.org); Joseph McMahon, *Developments in the Regulations of NGOs via Government Counter-Terrorism Measures and Policies*, INTRAC Policy Briefing Paper 11 (September 2007, www.intrac.org); ICNL, *Recent Laws and Legislative Proposals to Restrict Civil Society and Civil Society Organizations*, INTERNATIONAL JOURNAL OF NOT-FOR-PROFIT LAW 8:4 (August 2006) (www.ijnl.org); David Moore, *Safeguarding Civil Society in Politically Complex Environments*, INTERNATIONAL JOURNAL OF NOT-FOR-PROFIT LAW 9:3 (July 2007) (www.ijnl.org); ICNL and World Movement for Democracy, *DEFENDING CIVIL SOCIETY* (January 2008); and other publications.

⁵ Sidel, *The Third Sector, Human Security, and Anti-Terrorism in Comparative Perspective* (keynote address delivered to the Seventh International Conference of the International Society for Third Sector Research [ISTR]), Bangkok, July 2006); Sidel, *The Third Sector, Human Security, and Anti-Terrorism: The United States and Beyond*, 17 VOLUNTAS: INTERNATIONAL JOURNAL OF VOLUNTARY AND NOT-FOR-PROFIT ORGANIZATIONS 199-210 (2006) (www.ijnl.org); Sidel, *MORE SECURE, LESS FREE?*

resolution of social problems and the advancement of human security. Governments that believe that the third sector is a conduit for terrorism and a source of human insecurity may respond with heightened regulation of the charitable sector, including new or enhanced financial, governance, reporting, or other restrictions. Sometimes these policies may be relatively informal, more along the lines of what Jude Howell has called the “intangible creation of climates of opinion or shifting attitudes” toward the voluntary sector.⁶

Government responses may take many forms, including anti-terrorism laws and regulations that directly affect the nonprofit sector (India and elsewhere in South Asia); enhanced restrictions on gatherings and associational activities (China); limitations on funding and new certification requirements for funders and nonprofits alike (the United States); inclusion of charities in new anti-terrorism legislation and enhanced investigations (the United Kingdom); and a host of other measures. In dozens of countries, law governing terrorist finance has expanded rapidly since the horrific and criminal attacks of September 11, 2001, in response to Security Council mandate and intense pressure in the United States and other countries. Many of those terrorist finance laws implicate nonprofit and philanthropic communities.

State policies may, depending on the context, contribute to declining funding for civil society and voluntary sector organizations, a diminishing ability for the sector to obtain support for innovative programs, and an atmosphere of investigation and suspicion that may envelop civil society. State policies may contribute to a shifting of aid priorities, including preferences for anti-terrorism programs in foreign aid. And such government policies may contribute to timidity within the voluntary sector. Charities may avoid undertaking important and innovative but also perhaps controversial work when they are under pressure in a number of countries and intense pressure in a few. Finally, these conflicts and circumstances demand that the voluntary sector do more, and do more effectively, to regulate itself.

It is also important to note that the idea that the charitable sector is a source of insecurity, even a conduit for terrorism, may not be the primary factor in state attempts to monitor or tighten control over the sector. Other factors can play a major role in such policies. They can include opposition to the advocacy role of the sector, concerns about accountability and transparency, the growing role of political and religious giving, and the rapidly growing role of diasporas in social development, among many other possible factors. In some countries, and some situations, counter-terrorism may be a rationale or even an excuse for tightening regulation, not the core reason.

I. Counter-Terrorism, Civil Liberties, and the Enabling Legal and Political Environment for Civil Society in the United States

As the leading country in the “war on terror,” it is not surprising the counter-terrorism law and policy have provoked the greatest anxiety about the enabling legal, political, and policy environment for civil society in the United States. The impact of

⁶ Comments by Professor Howell at the Program on Terrorism and Development, London School of Economics, 17 October 1995 (www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20051017-TerrorismAndDevelopment.pdf).

counter-terrorism policy and law on civil society in the United States has been both real and perceived, and it has spread across the full range of government action. This section discusses the most important ways in which counter-terrorism law and policy have affected the enabling environment for civil society in the United States, as well as the responses by American charities, foundations, and other nonprofits in the United States to U.S. counter-terrorism policies and statutes since September 2001.

These responses have taken many forms, some overlapping across nonprofit sub-sectors and some specific to particular parts of the nonprofit community or even a few institutions. Responses differ at times by public charities and foundations, for example, though at other times they have been allied in response to government initiatives such as the “voluntary guidelines” on overseas giving. One particular subset of affected institutions, indicted Muslim charities, has had a more severe set of challenges and thus a differing set of responses.

In the broadest sense, the American nonprofit sector has sought to maintain the autonomy and vibrancy of the sector and of individual organizations while agreeing to and acceding in the government’s interest in preventing nonprofit organizations from being conduits in terrorist finance or otherwise supporting terrorist organizations or goals.

The Framework of Counter-Terrorism Law and Policy and Its Impact on Civil Society in the United States

In the United States, enhanced regulation of charitable ties to terrorism (usually reflecting concerns about terrorist financing) goes back to the 1993 bombing of the World Trade Center, including legal provisions that allow proscription of terrorist organizations and that bar “material support” to terrorist organizations. These provisions have been the subject of extensive litigation in the United States and have generally been upheld.

By the time of the September 2001 attacks, a fairly comprehensive legal framework for investigating and prosecuting charitable links to terrorism was in place. In particular, the Antiterrorism and Effective Death Penalty Act, adopted in 1996, criminalized “material support” for terrorist organizations through charitable and other vehicles. The International Emergency Economic Powers Act (IEEPA), originally enacted in 1977, also prohibits transactions that the U.S. executive branch has determined to be inimical to the national security of the United States, including terrorist financing through charities.

These pre-2001 statutes were supplemented almost immediately after September 11 by Executive Order 13224 (October 2001), which eased the process of proscription and freezing of terrorist assets, and by several provisions of the Patriot Act (November 2001), which were made applicable to the charitable sector. Among its provisions, the Patriot Act expanded the ability of the government to seize assets of “persons engaged in planning or perpetrating ... terrorism,” or “acquired or maintained” for that purpose, or “derived from [or] involved in terrorism.” The Patriot Act also expanded the “material support” prohibition to further bar “expert advice or assistance” to terrorist organizations, a bar that has been applied to charitable organizations and has been the subject of

extensive litigation. Such provisions are of course applicable to charitable and nonprofit institutions as well as a much broader range of individuals and organizations.⁷

Initial Prosecutions, Organizational Defiance, and Sectoral Disengagement

The government's first moves in this area were against several Muslim charities, initially the Benevolence International Foundation, Global Relief Foundation, and the Holy Land Foundation for Relief and Development. Each was closed and its assets frozen in late 2001 and thereafter, on charges of violating the prohibition against providing "material support and resources" to a foreign terrorist organization, as well as violations of the IEEPA, money laundering, tax evasion, and other charges. Other organizations were added to the proscription list and their assets frozen in the years that followed.

The government's offensive against several Muslim charities was pursued with a vigor that convinced many in the American nonprofit sector that the government's actions were based on solid evidence. But in the heat of the environment after the horrendous and murderous attacks of September 2001, the remainder of the American nonprofit sector – with virtually no exceptions – did not criticize the breadth of government tactics in the investigation and closure of Muslim charities that admittedly distributed funds in the Muslim world and in some cases to terrorist organizations and the families of suicide bombers.⁸

Some, however, criticized the breadth and potential implications of government's approach. Key Muslim community organizations warned that the government's actions contributed to an anti-Muslim backlash. But outside the Muslim community, there were few dissenting voices. One of the few was the director of an umbrella association of nonprofits in Ohio, in the American industrial Midwest. This nonprofit leader stepped forward in 2002 to warn of the "implications of the unprecedented effort by federal agencies, working in concert, to shut down significant charities, seize their records and assets, and force the organizations to suspend operations until their innocence can be proven."⁹

But those voices were solitary ones in the sector. Most of the nonprofit sector in the United States hoped for a kind of unspoken bargain with the government: government criminal enforcement would be limited to Muslim charities that had funneled donations to some combination of terrorist and charitable activities abroad, and those organizations would be considered guilty until proven innocent. Meanwhile, in the other side of this unspoken bargain, the rest of the American nonprofit sector seemed to hope that the broader sector would remain unaffected, undisturbed by the investigations, indictments, and broad statements about a group of registered Muslim charities, and that the new Patriot Act would not be applied vigorously against the nonprofit sector beyond a handful of Muslim charities.

⁷ For further information, see Sidel, *MORE SECURE, LESS FREE?*, chap. 6.

⁸ These prosecutions are discussed in more detail in Sidel, *id.*, and parts of this section are adapted from that work.

⁹ Richard Moyers, *A Shocking Silence on Muslim Charities*, *CHRONICLE OF PHILANTHROPY*, 17 October 2002.

The director of the Ohio nonprofit association challenged that unspoken bargain. “Will any organization be subject to the same treatment if the government claims links to terrorism? How broadly will terrorism be defined ? What about eco-terrorism, or domestic disruptions such as the protests organized against global trade and financial institutions? If a major U.S. philanthropic institution is discovered to have made a grant to an organization that the government claims is linked to terrorism, will it be subject to the same ‘seize and shut-down’ treatment?”¹⁰

At this first stage of prosecution of Muslim charities on “material support” and other grounds, the response from the affected charities was defiance in an atmosphere in which the government was clearly the stronger actor, and disengagement from the remainder of the nonprofit community.

Broadening Sectoral Opposition and Self-Regulation as a Response to Broadening Government Policy against the Nonprofit Sector

In late 2002, however, the U.S. administration took a broader action that more deeply concerned a wider range of the American philanthropic and nonprofit sector.

That step was the release of the *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities*, by the U.S. Treasury Department in late 2002. The Guidelines provided a broad and detailed range of new provisions for charitable and philanthropic organizations to use in their overseas giving, intended to prevent the channeling or diversion of American funds to terrorist organizations or purposes. These steps included the collection of considerably more information about grantees than is often available, the vetting of grantees, extensive donor review of financial operations beyond industry norms, and other requirements in quite detailed terms.¹¹

In the words of Barnett Baron, Executive Vice President of the Asia Foundation, the 2002 Treasury Guidelines carried the danger of “setting potentially unachievable due diligence requirements for international grant-making, [and] subjecting international grant-makers to high but largely undefined levels of legal risk, [which] could have the effect of reducing the already low level of legitimate international grant making.”¹² And the Guidelines carried the risk that legitimate and well-meaning charities would struggle to comply with standards while less professional or less well-meaning groups might just ignore them.¹³

When threatened by government action that many prominent public charities active in overseas aid and foundations considered overbroad, vague, and impossible to implement effectively, a significant portion of the American philanthropic and nonprofit community providing aid and support overseas began to complain about the breadth of the government’s so-called “voluntary” prescriptions, and banded together in opposition.

¹⁰ Id.

¹¹ U.S. Treasury Department, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*, November 2002.

¹² Barnett Baron, *Deterring Donors: Anti-Terrorist Financing Rules and American Philanthropy*, INTERNATIONAL JOURNAL OF NOT-FOR-PROFIT LAW 6(2), 1-32 (2004) (www.ijnl.org).

¹³ I am grateful to Kent Roach for a discussion on this point.

A band of major charities and foundations, angered and anxious at the sweep of Treasury's new guidelines and fearful that "voluntary best practices" would be treated as law even though they had not been adopted by Congress or formally adopted by a government agency, sought to engage the U.S. Treasury in discussions on the Anti-Terrorist Financing Guidelines. When they did not receive satisfactory responses in those sporadic conversations, and after a lengthy process among themselves, these foundations and charities active overseas also proposed a new approach that sought to employ the power of alliance and opposition to strengthen self-regulation as a means of forestalling government action: what they called the *Principles of International Charity*.

They prefaced their new *Principles* by noting that "after consideration of both the effectiveness of existing procedures and the implications of strict compliance with the [Anti-Terrorist Financing] Guidelines, charitable organizations concluded that that Guidelines are impractical given the realities of international charitable work and unlikely to achieve their goal of reducing the flow of funds to terrorist organizations, but very likely to discourage international charitable activities by U.S. organizations." The nonprofits asked the government to withdraw the onerous and ineffective Treasury Department Guidelines and to substitute the new *Principles of International Charity* drawn up by the nonprofit and philanthropic sector.¹⁴

Those *Principles of International Charity* emphasized that charitable organizations and foundations ought to comply with American law but also that they are not agents of the U.S. government. They stressed that charities are responsible for ensuring, to the best of their ability, that charitable funds do not go toward terrorist organizations, and that there are key baseline steps that can be taken to help in reaching that goal – but also that there are a diverse range of ways to accomplish that goal, and that different methods of safeguarding and protection will work for different kinds of organizations with different types of risk. The organizations concluded, "each charitable organization must safeguard its relationship with the communities it serves in order to deliver effective programs. This relationship is founded on local understanding and acceptance of the independence of the charitable organization. If this foundation is shaken, the organization's ability to be of assistance and the safety of those delivering assistance is at serious risk."¹⁵

In response to the charitable and philanthropic sector's concern, and because of the unworkability of the earlier, hastily drafted Guidelines, Treasury revised its Guidelines on overseas giving in December 2005. The "revised" *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* did make some

¹⁴ *Principles of International Charity* (developed by the Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors, March 2005) (<http://tinyurl.com/4fmb9m>). In effect, the organizations sought unsuccessfully to convince the authorities that a self-regulatory approach would work better in controlling these matters.

¹⁵ *Id.*

improvements, particularly in reducing some of the onerous and unworkable due diligence burdens on American organizations providing charitable funds overseas.¹⁶

But three basic issues remained that were of continuing and deep concern to the nonprofit sector. In the words of the concerned charities and foundations, “the revised Guidelines contain provisions that [continue to] suggest that charitable organizations are agents of the government.” Such an assumption could lead both to declining effectiveness and to severe harm to American aid personnel working overseas. Second, the revised Guidelines seem to require nonprofits funding overseas to collect even more data than the original 2002 Guidelines required. And third, the nonprofit community remained deeply concerned that these so-called “voluntary best practices” were in fact stealth law, adopted without consideration by Congress or formal rulemaking by an agency. In the words of the relevant charities and foundation Working Group, “we are concerned that the revised Guidelines will evolve into de facto legal requirements through incorporation into other federal programs, despite the inclusion of the word ‘voluntary’ in the title.”¹⁷

When directly confronted with government action that would impinge on the ability of American nonprofits and foundations to undertake overseas giving and perhaps endanger their programs, the American nonprofit and philanthropic sector has begun to resist aspects of the new government regulation of the nonprofit sector based in anti-terrorism. A battle of sorts has been joined between the government and the philanthropic sector over overseas giving, and neither side is giving in. Treasury has not withdrawn the new, revised Guidelines on overseas giving. Instead it issued a third, re-revised version of the Guidelines in late 2006,¹⁸ and then, without consulting with the American nonprofit and philanthropic sector, it issued a “risk matrix” for charitable institutions to use in connection with their overseas giving in 2007.¹⁹ In turn, the nonprofit community continues to urge that its *Principles of International Charity* should be substituted for the government’s revised Guidelines.²⁰ By mid-2008 the philanthropic community continued

¹⁶ U.S. Treasury Department, *Revised Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (2005) (www.treas.gov/offices/enforcement/key-issues/protecting/charities-intro.shtml).

¹⁷ Council on Foundations, Letter to the U.S. Treasury Department on the Revised Anti-Terrorist Financing Guidelines (2006) (www.usig.org/PDFs/Comments_to_Treasury.pdf).

¹⁸ See <http://tinyurl.com/5tvz5s>.

¹⁹ For Treasury’s risk matrix for the charitable sector, see <http://tinyurl.com/5tvz5s>.

²⁰ A number of other issues have arisen as well, but space precludes a full discussion here. These problems include controversies over testimony by the Director of the Office of Strategic Policy for Terrorist Finance and Financial Crimes to the Senate Homeland Security and Governmental Affairs Committee (May 2007); a report by the Treasury Department’s Inspector General for Tax Administration criticizing the Internal Revenue Service for not using the FBI Terrorist Screening Center consolidated watchlist to check for matches and process issues (May 2007); concerns raised by the American nonprofit community on the redesign of the Form 990, which reports on nonprofit activities, governance, and finances to the Treasury Department (June 2007); and requests by the nonprofit community that funds blocked under Executive Order 13224 (for example, Muslim charitable funds) be released for charitable usage, a request thus far denied by the government on grounds that those blocked funds must be retained for payment of civil judgments that may be entered against the charities. Discussions of these developments can be found at www.ombwatch.org.

to object to the Guidelines, and the government continued to ignore the *Principles of International Charity*.

Foundation Responses to Strengthened Government Policy and Regulation:
Disengagement and Shifting Risk to Grantees

In the philanthropic sector, some American foundations have been deeply concerned about potential investigations of their grant making by the executive or legislative branches. Others have largely ignored the issues, and disengaged from considering the impact of strengthened government counter-terrorism policy and regulation on their work beyond checking terrorist watch lists.

Those that are concerned – usually foundations that do extensive work overseas – have responded in some cases by shifting responsibility to their grantees, through new and broadly worded grant letters directing them not to engage in any activity that might be considered redolent of bigotry or encouraging terrorism or violence.

The Ford Foundation has been particularly active in this area, arising out of its disgust with the anti-Semitic statements made by a grantee at the United Nations Conference on Racism in Durban in 2000. But the breadth of the prohibitions and shifting of risk to grantee organizations in its new grant letters prompted opposition from a group of elite universities and a decision by the American Civil Liberties Union not to sign the broad new grant letter provisions and thus not to accept new funds from Ford,²¹ a sharp response to the risk-shifting approach that Ford had adopted.

Ford introduced new grant language in 2003 that required grantees to promise not to engage in a wide array of speech and other activities that might be perceived as bigotry or as encouraging terrorism or violence. The new grant letter stated that “[b]y countersigning this grant letter, you agree that your organization will not promote or engage in violence, terrorism, bigotry or the destruction of any State, nor will it make subgrants to any entity that engages in these activities.”²²

That broad new grant language left open, at least in the minds of a number of university grantees, whether grantees would be forced to limit speech or other activities because certain speech and activities – conducted on but not in the name of universities, for example – might be interpreted as violating the grant letter agreement. The Rockefeller Foundation introduced similar language as well. Concerned by the breadth of the language and prohibitions, a number of elite universities refused to sign the new grant agreements.

After negotiations between the Ford Foundation and a number of universities, the Foundation reaffirmed its commitment to academic freedom and free speech on campus, making clear that the language in the grant letter was not intended to interfere with academic freedom and free speech. In at least one case – Stanford University – where the

²¹ Sidel, *MORE SECURE, LESS FREE?*, id.; S. Sherman, *Target Ford*, *THE NATION*, 5 June 2006.

²² This is from a 2007 Ford Foundation grant letter; it is possible that some variations in wording were used earlier.

institution remained wary of signing the Foundation's very broad language, Ford issued a "side letter" strongly reiterating its commitment to academic freedom and free speech.²³

But this issue affected others as well. In 2004, after extensive internal debate, the American Civil Liberties Union began declining Ford Foundation and Rockefeller Foundation grants. The ACLU did so, in the words of its Executive Director, Anthony Romero, "rather than accept restrictive funding agreements that might adversely affect the civil liberties of the ACLU and other grantees" by restricting the free speech rights of the ACLU and its members. The ACLU issued a statement that primarily blamed the government, not the Ford Foundation, for this conflict:

This administration and its war on terror have created a climate of fear that extends far beyond national security concerns and threatens the civil liberties of all Americans.... The board and leadership of the ACLU have made the painful but principled decision to turn down \$1.15 million in future funding from the Ford and Rockefeller Foundations rather than accept restrictive funding agreements that might adversely affect the civil liberties of the ACLU and other grantees.... It is a sad day when two of this country's most beloved and respected foundations feel they are operating in such a climate of fear and intimidation that they are compelled to require thousands of recipients to accept vague grant language which could have a chilling effect on civil liberties. But the ambiguities are simply too significant to ignore or accept. They include potential prohibitions on free speech and other undefined activities such as "bigotry" as part of a misconceived war on terror. Indeed, vague terms such as "bigotry" often have charged meanings in a post-9/11 world. The ACLU cannot effectively defend the rights of all Americans if we do not stand up for those same rights ourselves....²⁴

This was a remarkable break. The Ford Foundation and the ACLU have a long and close history of work together on major civil liberties issues, and Ford has provided millions of dollars in grants to the ACLU for programs, operating costs, and endowment. The President of the Ford Foundation, Susan Berresford, issued a statement in which Ford's respect for the ACLU, as well as its own position on the matter, was fully clear:

We share the same basic values as the ACLU. The ACLU is dedicated to defending free speech, and we fully support their work in doing so. We also fully support their work in defending the rights of promoters of unpopular causes. That is why we have provided significant general financial support to the organization over the years for the full range of its activities.... The issue at hand has to do with our different missions. Ford's mission is to strengthen democratic values, reduce poverty and injustice, promote international cooperation and advance human achievement. Consistent with that mission, we are proud to support the ACLU's defense of free speech. We do not, however, believe that a private donor

²³ For a detailed account of Stanford's discussions with Ford from the Stanford perspective, see the January 26, 2005, minutes of the Stanford Faculty Senate at <http://news-service.stanford.edu/news/2005/january26/minutes-012605.html>.

²⁴ ACLU Declines Ford and Rockefeller Grants Due to Restrictive Funding Agreement; Painful but Principled Decision to Put Civil Liberties First, Statement of Anthony D. Romero, ACLU Executive Director, October 17, 2004, at <http://www.aclu.org/safefree/general/> (emphasis added).

like Ford should support all speech itself (such as speech that promotes bigotry or violence). We accept and respect the fact that we have a different mission from the ACLU, even while we share the same basic values.... We hope that over time we will once again work together.²⁵

This sort of philanthropic resistance has been largely limited to some elite American universities and groups like the ACLU. But in 2007, a prominent Indian NGO also raised this issue with the Ford Foundation, requesting modification of the Foundation's grant letter to restrict the very broad limitations to which it would have bound the Indian grantee. In the alternative, the Indian organization requested that the Foundation provide "assurances of its commitment to the value of independent citizenship and civil society actions to hold ... governments and their leaders to account." This Indian organization has been told that it is "the only southern NGO to raise this issue."²⁶

Broadening Government Regulation, Broadening Sectoral Opposition – and a Victory

Counter-terrorism law affected another aspect of American philanthropic in the summer of 2004, when the U.S. federal agency that runs the Combined Federal Campaign (CFC) – the integrated giving effort in which hundreds of thousands of federal employees donate to nonprofit organizations – announced a significant change in its policies. The agency issued a memorandum requiring each nonprofit receiving CFC funds to certify that it "does not knowingly employ individuals or contribute funds to organizations found on the ... terrorist related lists promulgated by the U.S. Government, the United Nations, or the European Union." The new, mandatory certification requirement was explicitly drawn from the provisions of the so-called "voluntary" anti-terrorism financing guidelines issued by the Treasury Department in 2002.²⁷

This new requirement, requiring that recipient organizations certify the absence of any links to terrorism, ignited a firestorm of controversy. A number of American nonprofit organizations refused to sign the certification, arguing that they could not vouch for every single one of their employees, contractors, consultants, and anyone else who worked with their organizations, particularly given the chaotic nature of the government's terrorist watch lists. Finding such a name, though clearly a false positive, would require nonprofits to ask the employee "intrusive questions about his [or her] personal life and beliefs."²⁸ They argued that the federal agency administering the Combined Federal Campaign lacked the statutory or constitutional authority to issue this new regulation, and that doing these kinds of checks would violate the privacy and associational rights of their employees. And they opposed the conversion of the so-called

²⁵ Statement of Susan V. Berresford in response to announcement by the American Civil Liberties Union, www.fordfound.org/news/view_news_detail.cfm?news_index=147.

²⁶ Letter from [redacted individual, redacted organization] to Ganesan Balachander, Representative, The Ford Foundation, New Delhi, October 1, 2007.

²⁷ Combined Federal Campaign, *Combined Federal Campaign Memorandum 2003-10, New Certification for 2004 CFC Application* (2003) (www.opm.gov/cfc/opmmemos/2003/2003-10.asp).

²⁸ American Civil Liberties Union, *ACLU Announces Diverse Nonprofit Coalition Opposing Restrictions on Recipients of the Combined Federal Campaign*, 12 August 2004 (<http://www.aclu.org/safefree/general/>).

“voluntary” guidelines issued by the Treasury Department into a legal mandate without Congressional approval or formal rulemaking.²⁹

Eventually the American Civil Liberties Union and a number of other organizations filed suit against the federal government seeking to overturn the new certification requirement.³⁰ In the meantime, nonprofits lost funds because of their refusal to sign the certification – the ACLU, for example, lost some \$500,000 in donations by federal government employees in 2005.³¹ In November 2005, however, the federal government withdrew the requirement that recipient organizations under the CFC sign the certification in favor of a much more general pledge by organizations participating in the CFC that they are in compliance with existing anti-terrorist financing laws.³²

The “shifting of risk” to grantees goes beyond the actions of some private foundations and the aborted effort by the Combined Federal Campaign. In recent years, at least several – and possibly many – local United Ways in the United States have required that each nonprofit organization receiving United Way funds certify that it complies with anti-terrorist financing laws and regulations; that individuals or organizations that the organization works with are not on government terrorism watch lists; and that no material support or resources are being provided to support or fund terrorism.

The forms of these required certifications seem to vary depending on the United Way and perhaps depending on the year involved. In 2007, for example, the United Way of New York City required that receiving agencies certify “that all United Way funds and donations will be used in compliance with all applicable anti-terrorist financing and asset control laws, statutes and executive orders.”³³ A major United Way agency in another large American city required each receiving agency to “represent[] that it takes reasonable steps to: I. Verify that individual or entities to which it provides, or from which it receives, fund or other material support or resources are not on the U.S. Government Terrorist Related Lists; II. Protect against fraud with respect to ... material support or resources to person[s] or organizations on such lists; and III. Ensure that it does not knowingly provide financial, technical, in-kind or other material support or resources to any individual entity that it knows beforehand is support or funding terrorism....”³⁴

²⁹ *ACLU to Withdraw from Charity Drive*, NEW YORK TIMES, 1 August 2004; *Nonprofits Scramble to Meet Terror Rules; Worker Screening Required for CFC funds*, WASHINGTON POST, August 14, 2004; see also Sidel, *MORE SECURE, LESS FREE?*, id.

³⁰ *Charities Sue Over Antiterrorism Certification Regulation*, NEW YORK TIMES, 11 November 2004; *Groups Sue OPM on Terrorism Rule; Charities Told to Screen Workers*, WASHINGTON POST, 11 November 2004.

³¹ *ACLU Board is Split Over Terror Watch Lists*, NEW YORK TIMES, 31 July 2004.

³² *Requirement on Watch Lists is Dropped*, NEW YORK TIMES, 10 November 2005.

³³ United Way of New York City, *Anti-Terrorism Compliance Measures form (2007)*, on file with the author.

³⁴ United Way of [redacted], *USA Patriot Act [on cover sheet] Statement of Compliance (2007)*, on file with the author (internal grammar adapted). Location redacted to protect source.

The great breadth of this required certification or “represent[ation]” is clearly an attempt to shift risk of non-compliance with any government regulation to the nonprofit concerned, and away from the funding agency.

Opposition in Isolation: The Lonely Struggle over “Material Support”

The prosecution and deregistration of Benevolence, Global Relief, Holy Land, and other Muslim charities have been pursued over a number of years, and several cases remain active. In many cases those government actions are based on the provisions of law, carried forward from before 2001 but strengthened since, that ban “material support” to terrorism and terrorist organizations.

These “material support” provisions have been among the most controversial legislative provisions on terrorism affecting the nonprofit sector in the United States. The crime of providing material support to terrorism was drafted into the Antiterrorism and Effective Death Penalty Act of 1996, which was adopted after the Oklahoma City bombing in 1996.

In its original form, the 1996 Act provided criminal and civil penalties for anyone who “provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out [various terrorist offenses] or in preparation for, or in carrying out, the concealment from the commission of any such violation....” The 1996 Act also criminalized “knowingly provid[ing] material support or resources to a foreign terrorist organization, or attempt[ing] or conspir[ing] to do so,” in accordance with the procedures for “designating” foreign terrorist organizations.

In the 1996 Act, “material support or resources” was defined as “currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” These provisions came under legal attack before September 11, on the grounds that such terms as “training” and “personnel” were unconstitutionally vague and might include constitutionally protected activities. This litigation continued after September 11.

The Patriot Act expanded the offense in several important ways. It added “monetary instruments” to the definition of “material support or resources,” filling a possible lacuna between “currency” (cash) and “financial securities.” Perhaps more importantly, it added the term “expert advice or assistance” to the definition of “material support or resources.”

By not removing the term “training,” but adding “expert advice or assistance,” the Patriot Act “only increase[d] the ambiguity” in the scope of activity punished.³⁵ “This vague language allows wide-ranging prosecutorial discretion and could chill legally protected activities by nonprofits, which might fear criminal charges.” OMB Watch quotes David Cole as noting that “the reason material support laws have proven so popular with federal prosecutors is that ... these laws do not require proof that an individual intended to further any terrorist activity... Under this law it would be a crime

³⁵ OMBWatch report on material support provisions, www.ombwatch.org.

for a Quaker to send a book on Gandhi's theory of nonviolence—a 'physical asset'—to the leader of a terrorist organization in hopes of persuading him to forgo violence."³⁶

Since 2001 there has been extensive litigation on the scope, meaning, and constitutionality of the material support provisions, sometimes with contradictory results. Congress attempted to fix these problems in the late 2004 revision to the Antiterrorism and Effective Death Penalty Act and the Patriot Act by reformulating the scope of the "personnel," "training," and "expert advice or assistance" provisions of the law.

Congress mandated that "no person may be prosecuted under this section in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control."

Congress also legislated an "exception" to the "personnel," "training," and "expert advice or assistance" prohibitions: "if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act)." It added the notion that providing support oneself to terrorism may constitute "material support," by redefining the provision of "personnel" in the 1996 to include anyone who "work[s] under that terrorist organization's direction and control or to organize, manage, supervise or otherwise direct the operation of that organization." The 2004 amendments also stipulate that "individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist's organization's direction and control."³⁷

Further, the 2004 amendments sought to define the types of "training" and "expert advice or assistance" that would trigger application of the materials support provision. "Training was defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." "Expert advice or assistance" was defined as "advice or assistance derived from scientific, technical or other specialized knowledge."

Congress also mandated that "nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States." In addition, Congress "clarified a mens rea requirement that the donor know that the foreign terrorist organization has been designated as a foreign terrorist organization or has engaged in terrorist activities,"³⁸ stipulating that "a person must have knowledge that the organization is a designated

³⁶ David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.- C.L. L. REV. 1, 9 (Winter 2003).

³⁷ 18 U.S.C. § 2339B(h).

³⁸ Humanitarian Law Project v. Gonzales 2005, p. 7.

terrorist organization, that the organization has engaged or engages in terrorist activity, or that the organization has engaged or engages in terrorism.”³⁹ In short, “Congress’s 2004 ... amendment underscores Congress’s decision to dispense with any specific intent requirement. The 2004 ... amendment clarified that the only *mens rea* required under §2339B is that a donor know that the recipient is a foreign terrorist organization.”⁴⁰

In response to the Congressional amendments, the Ninth Circuit affirmed the District Court’s 2001 order “holding the terms ‘training’ and ‘personnel’ impermissibly vague ... [and] vacated its [2000] order ... in which it had previously construed the [1996 Act] to require knowledge that a recipient organization was either a foreign terrorist or had engaged in terrorist activities.”⁴¹

In response, the same plaintiffs once again questioned the constitutionality of several important elements of the “material support” provisions after the amendments became law. The same federal court in California ruled in 2005 that “the terms ‘training’ and ‘expert advice or assistance’ in the form of ‘specialized knowledge’ and ‘service’ are impermissibly vague” under the Constitution but that other challenges to the material support provisions failed.⁴²

“Training” was originally judged impermissibly vague because “it easily reached protected activities, such as teaching how to seek redress for human rights violations before the United Nations.” Adding the definition of training as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge,” “fails to cure the vagueness concerns that the Court previously identified” and “leaves the term ‘training’ impermissibly vague because it easily encompasses protected speech and advocacy, such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations.”⁴³

Similarly, the vagueness of “expert advice or assistance” is not fixed because, “even as amended, the statute fails to identify the prohibited conduct in a manner that persons of ordinary intelligence can reasonably understand,” and “includes the same protected activities that ‘training’ covers....”⁴⁴ The term “service” in the material support statute was also impermissibly vague under the Constitution.

In 2006, a federal court in California ruled that the post-September 11 executive order issued by the President banning “services” for terrorist organizations was not unconstitutionally vague or overbroad, and that other terms used were not unconstitutionally vague. But the court also ruled that the President’s designation of terrorist organizations in the order “provide[d] no explanation of the basis upon which these twenty-seven groups and individuals were designated, and references no findings akin to those the secretary of treasury is required to make ... [and] the procedures for

³⁹ 18 U.S.C. § 2339B.

⁴⁰ Humanitarian Law Project v. Gonzales 2005, p. 24.

⁴¹ Humanitarian Law Project v. Gonzales 2005, p. 7.

⁴² Humanitarian Law Project v. Gonzales 2005, p. 29.

⁴³ Humanitarian Law Project v. Gonzalez 2005, pp. 29, 30.

⁴⁴ *Id.*, p. 32.

challenging designations made by the secretary of treasury are not clearly available with regard to designations made by the President...[T]he President's designation authority is subject only to his unfettered discretion..." and thus "unconstitutionally vague." It also found that "the prohibition on being 'otherwise associated with' a[] [terrorist or terrorist organization] on its face unconstitutionally intrudes upon activity protected by the First Amendment." It is also unconstitutionally overbroad because it "imposes penalties for mere association with an SDGT."

In 2007, attempts were even made to strengthen and broaden the "material support" prohibition. Legislators introduced an amendment that would have redefined material support to apply to any individual who "provides material support or resources to the perpetrator of an act of international terrorism, or to a family member or other person associated with such perpetrator, with the intent to facilitate, reward, or encourage that act or other acts of international terrorism."

As OMBWatch, a Washington-based NGO, noted, "the terms 'family member' or 'person associated' were not defined in the amendment. Under this language, it may have been possible that someone who provided water or medical care to the child of a suicide bomber would have been subjected to criminal penalties. This legislative vagueness, combined with severe penalties, had the potential to discourage humanitarian aid and development programs, particularly in high-risk areas where such aid is greatly needed."⁴⁵ Penalties would have been increased to up to 25 years in prison, or up to life in prison if a death resulted.⁴⁶

Material support issues have remained at the forefront of concern in the United States about the impact of counter-terrorism law and policy on the enabling legal and policy environment for civil society. These issues came to the fore in the first major "material support" prosecution in the United States, the trial of the Holy Land Foundation and its leaders in 2006-2007. The defendants were acquitted on a number of the major material support-related charges in the fall of 2007. That fall, Muslim organizations and charities renewed a call to the government for guidelines on safe giving, because of the continuing anxiety within American Muslim communities that their charitable donations would be subject to special scrutiny by the government. Some Muslim charities and other organizations reported continuing problems in relationships with banks and banking authorities.⁴⁷

General Conclusions

What can we learn from the difficult and complex history of counter-terrorism law and policy and its impact on the enabling environment for civil society in the United States since 2001?

Statutes and regulations barring various forms of charitable assistance to or use by terrorists were generally in place before September 11. They have been rapidly

⁴⁵ Senate Votes Down Effort to Expand Definition of Material Support, OMB Watch, 20 March 2007, <http://www.ombwatch.org/article/articleview/3759/1/407?TopicID=1>.

⁴⁶ On recent issues in this area, see Shutting Out Terrorism's Victims (editorial), NEW YORK TIMES, 9 March 2007; www.nytimes.com/2007/03/09/opinion/.

⁴⁷ Further information on these developments is available at www.ombwatch.org.

broadened in the ensuing years, either through positive law or through so-called “voluntary” measures, “guidelines,” or other methods. As the Combined Federal Campaign and other episodes indicate, these measures tend to continue to broaden still further over time, either in scope or in application.

Opposition has been episodic and, perhaps understandably, significant opposition and resistance have been largely limited to groups directly affected by counter-terrorism policy and law, such as Muslim charities, along with a few leading voices in the civil liberties arena such as the American Civil Liberties Union. Broader opposition or resistance has emerged where government efforts were perceived as dangerous to the broader sector, as in the government’s guidelines on overseas giving, which sparked broader discontent and opposition in the sector.

Where opposition or resistance has emerged, it has taken diverse forms depending on the nature of the government action or threat and the breadth of opposition. Those forms include alliance-building, litigation by individual organizations, and other strategies discussed in this article – but never have those strategies been sector-wide.

Of these, attempts by the nonprofit sector to strengthen self-regulation have emerged as a method of forestalling either further government intervention or the application of new or existing policies. This new self-regulation “imperative,” as I have discussed it in a broader context elsewhere, enables the American nonprofit sector to try to address broader issues of accountability and transparency while also addressing specific problems of counter-terrorism law. The *Principles of International Charity* proposed by a group of nonprofit and philanthropic organizations are a key example of self-regulation as a sophisticated defensive strategy.⁴⁸

The Dangers in the Failure to Oppose

Nearly seven years after the September 11 attacks and the strengthening of government counter-terrorism regulation in the United States, we may begin to draw some lessons from nonprofit and philanthropic sector responses to government action in this area. The parts of the nonprofit and philanthropic sector that have been directly prosecuted or attacked have responded with vigorous legal and public defenses, but much of the American nonprofit sector, not directly affected by new government policy, has remained quiescent. Most of the American nonprofit and philanthropic sector has learned to live with these new legal requirements, and in most cases these institutions have been able to continue their activities with relatively few limitations.

But the relative quiescence of the American nonprofit and philanthropic sector poses some potential dangers. One risk in nonprofit sector passivity is the assumption that government action vis-à-vis the nonprofit sector will be limited to organizations under formal investigation, indictment, or prosecution. But events in 2005 and 2006 directly challenged the widespread assumption that government actions would be directed solely

⁴⁸ In this as in many other aspects of the relationships between nonprofits and counter-terrorism, the situation in the U.K. appears to be quite different. In the U.K., the important role of the Charity Commission in educating the charitable sector and seeking to forestall these issues through proactive institutional action, as well as its role in knowledgeable investigatory and enforcement action, has perhaps reduced the need for a “self-regulatory” approach.

against a few Muslim charities and other targeted groups, and that the remainder of the nonprofit sector would be left alone.

The American press has revealed that the U.S. government has in fact targeted a much broader swath of the American nonprofit sector for surveillance and observation than was originally understood or assumed. Hundreds or perhaps even more American nonprofits have had events observed, telephone calls sorted, or financial transactions examined by government agencies.⁴⁹ In early 2007 it was revealed that the U.S. government is employing donor-tracking software to search and correlate donors to an as-yet undefined range of nonprofit institutions.⁵⁰

These issues have moved into other areas but have not faded out entirely. Recent discussions, for example, have focused on the U.S. Agency for International Development's plans to implement a "partner vetting system" that would require US AID grantees to provide highly detailed information about key grantee personnel and leaders for checking against government watchlists. At a meeting with government representatives in April 2008, a senior official at InterAction, the consortium of American charities and nonprofits working overseas, called the "partner vetting system" a dramatic over-reaction to charges of charitable links with terrorism: "Our members spend billions of dollars every year in funds received from the public and from the U.S. government. Imposing the PVS described in last summer's Federal Register notices on NGOs because of unsubstantiated media allegations that some USAID funds may have gone to suspect organizations is using a flame thrower to kill an ant. And more than ants may be killed if the PVS is implemented."⁵¹

Despite these growing ripples of influence on the broader nonprofit sector from government activity, especially where nonprofit and philanthropic activity may be directly affected (as in the Partner Vetting System), there remains a reluctance in the broader American nonprofit and philanthropic sector to take an active role in opposing over-reaching impacts of government counter-terrorism policy and law on the sector, or in assisting legal efforts to provide a legitimate defense to organizations that have been indicted and prosecuted. U.S. government policy has fairly carefully avoided targeting large portions of the American nonprofit and philanthropic sector, and thus has avoided the emergence of large-scale opposition. Where the government has imposed requirements that impact a significant portion of the nonprofit and philanthropic community's operations, as with the planned introduction of the Partner Vetting System, the section of the community most directly affected has indeed protested.

⁴⁹ See, e.g., MSNBC, *Is the Pentagon Spying on Americans? Secret Database Obtained by NBC News Tracks 'Suspicious' Domestic Groups*, www.msnbc.com (NBC News), 14 December 2005; *Surveillance Net Yields Few Suspects*, WASHINGTON POST, 5 February 2006.

⁵⁰ *Anti-Terrorism Program Mines IRS Records; Privacy Advocates Are Concerned that Tax Data and Other Information May Be Used Improperly*, LOS ANGELES TIMES, 15 January 2007.

⁵¹ *USAID Tells NGOs It Will Proceed with Plan to Use Secret Watch List*, OMBWatch, April 15, 2007. See also InterAction's resource page on the partner vetting system, <http://tinyurl.com/6lqyzc>, which includes links to texts of the PVS plans, as well as *Aid Groups Urge U.S. to Revise Plan to Screen their Workers*, NEW YORK TIMES, August 24, 2007; *U.S. Delays Terror Screening for Aid Groups*, WASHINGTON POST, August 28, 2007.

Opposition and resistance have been largely limited to specific organizations and sub-sectors that have come under investigation, strengthened regulation, or prosecution, with the broader array of nonprofits and philanthropic institutions staying away from those battles. To the degree that the broader sector has reacted to increasing government efforts, that has been primarily through broad-based support for increased self-regulatory efforts – a form of compliance that, the sector hopes, will put the nonprofit and philanthropic community increasingly in charge of its own destiny.

But additional dangers emerge as well. In recent years, for example, several “federated” American nonprofits such as the United Way have begun requiring their local affiliates to obtain certifications from their local grantee charitable institutions that those recipients have no ties to terrorism. This is a substantial over-reaction, but it is to be expected in a situation in which the government has inspired anxiety and concern through the application of counter-terrorism law and policy to the nonprofit sector. Likewise, public charities and community foundations have become increasingly concerned about the possibility that diaspora donations – gifts by emigrant communities in the United States earmarked for charitable organizations and causes back in their home countries through donor-advised mechanisms – will inadvertently wind up in terrorist hands or used for “dual” purposes.

II. Counter-Terrorism, Civil Liberties, and the Enabling Legal and Political Environment for Civil Society in the United Kingdom

The Framework of Counter-Terrorist Law and Policy and Its Impact on Civil Society

British law and policy with respect to charities and terrorist finance have, in one key respect, been consistent with developments in the United States and other countries. British law allows proscription of terrorist organizations, and bans supporting proscribed organizations, such as helping them arrange or manage meetings to further their activities. British law also more broadly bans fundraising and making various kinds of funding arrangements for “purposes of terrorism.” It also prohibits retention or control of “terrorist property,” among other provisions.⁵²

But state policy has gradually expanded to the point that new legislation adopted in 2006 (the Terrorist Act 2006) criminalizes not only direct support for terrorist organizations and activities, but also “encouragement,” “glorifying,” and other activities more closely related to speech and association. This seemingly inexorable expansion of mandates for the charitable sector puts particular pressure on charitable organizations affiliated with certain religious and ethnic groups.

The primary anti-terrorism legislation affecting charities in the U.K. is the Terrorism Act 2000, which entered into force in February 2001. The Terrorism Act 2000 provides authority to proscribe an organization if the Secretary “believes that it is concerned in terrorism.” “Concerned in terrorism” is defined broadly as “commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism,

⁵² Legal Opinion by Edward Fitzgerald Q.C. and Caoilfhionn Gallagher, Doughty Street Chambers, London, in National Council of Voluntary Organisations (NCVO), *Security and Civil Society* (January 2007) (www.ncvo-vol.org.uk).

or is otherwise concerned in terrorism either in the UK or abroad.” An organization may be “any association or combination of persons.” Membership in a proscribed organization is illegal, as is assisting, fundraising, funding, supporting, or displaying support for such an organization. All property of a proscribed organization may be seized by the government. Organizations are allowed to apply for de-proscription, and an appeals process is provided for organizations denied de-proscription.⁵³

Further, the Terrorism Act 2000 criminalizes membership in a proscribed organization (sec. 11). It also prohibits various forms of support for proscribed organizations, which makes vulnerable to prosecution one who “invites support” for a proscribed organization (not limited to financial support (sec. 12(1)), “arranges, manages or assists” in arranging meetings for a proscribed organization (sec. 12(2)), or wears the uniform of a proscribed organization (sec. 13). More broadly the Terrorism Act 2000 criminalizes fund-raising for “purposes of terrorism” (sec. 15); using money or other property for purposes of terrorism (sec. 16); undertaking other funding arrangements for purposes of terrorism (sec. 17); or engaging in broadly defined money laundering of terrorist property (sec. 18).⁵⁴

In addition, the Charity Commission has the statutory power under the Regulation of Investigatory Powers Act 2000 and the Serious Organised Crime and Police Act 2005 to “send ‘Covert Human Intelligences Sources’ ... i.e. spies or undercover agents, to work in charities that are under suspicion.”⁵⁵

The Role of the Charity Commission: Keeping Charity Regulators Central in Terrorist Finance Enforcement

Whereas the American approach to shutting off terrorist finance from nonprofits largely sidesteps charity regulators in favor of direct action by prosecutors, the British approach has, at least in part, relied on charity regulators as partners and, often but not always, “first responders” in the anti-terrorist enterprise.⁵⁶ The independent statutory regulator of charities in England and Wales is the Charity Commission, which has been near the forefront of charity-related terrorism financing investigations since before September 11. The Charity Commission has been key to these efforts and has played a core role in investigating, resolving, and where necessary collaborating in prosecuting

⁵³ Terrorism Act 2000, Part II, Sec. 3. See Charity Commission, *Operational Guidance: Charities and Terrorism*, OG96-28 (January 2003) (www.charity-commission.gov.uk/tcc/terrorism.asp). A list of proscribed organizations is provided at the end of OG96-28 Operational Guidance. See also Home Secretary Moves to Ban 15 Terror Groups, Home Office, Press Office, 10 October 2005 (<http://press.homeoffice.gov.uk/press-releases>) (containing a full banning order and additional information).

⁵⁴ Terrorist Act 2000, Part III, Secs. 14-19.

⁵⁵ Legal Opinion by Edward Fitzgerald Q.C. and Caoilfhionn Gallagher, Doughty Street Chambers, London, in NCVO, *Security and Civil Society* (January 2007), at www.ncvo-vol.org.uk. Whether government bodies agree that they have this statutory power has not yet been confirmed.

⁵⁶ See also Sidel, MORE SECURE, LESS FREE?

ties between charities, terrorism, and terrorist finance. The Commission's central role was reaffirmed under the new Charities Act 2006.⁵⁷

Of course, that is not the only possible approach on this issue. Charities have been used to funnel funds to external terrorist groups in Britain as in the United States and other countries, and the government moved quickly after September 11 to enforce the U.N. resolutions that called for freezing funds held by Al Qaeda, the Taliban, and other terrorist groups. So clearly, prosecution has an important role to play as well, and the Charity Commission recognizes that.

Charity regulators in the United States – for example, well-informed specialists in the U.S. Treasury Department's Exempt Organizations Division – sometimes seem somewhat marginalized in the enforcement of laws against terrorist financing by charities in the U.S. because of the structure of nonprofit regulation in the United States, historical limitations on their roles, and the prosecution-centered nature of anti-terrorist law and policy in the U.S. Their counterparts in the U.K. appear to play a more central role. That structure has been to Britain's advantage in helping keep charity regulators directly involved in anti-terrorist policy and activities in the post-September 2001 era.

The Charity Commission certainly had jurisdiction over investigations of charitable links to terrorism in England and Wales before the September 2001 attacks. For example, the Commission had already investigated the North London Central Mosque Trust (Finsbury Park Mosque), which Sheikh Abu Hamza al-Masri (Abu Hamza) had taken over in the late 1990s. In that earlier proceeding, after Commission investigation, the original mosque trustees had reached an agreement with Abu Hamza in which the trustees would resume "full control of the Mosque and other property" in exchange for Abu Hamza being permitted to give half of the Friday sermons at the mosque (later three out of four sermons).⁵⁸

But Abu Hamza's control of the mosque persisted, and the more moderate trustees were forced to the sidelines until the Charity Commission intervened again. This was done after 2001 and effectively removed Abu Hamza and returned the mosque to proper control. This approach was effective because of the Charity Commission's wide investigatory and enforcement powers and its detailed understanding of developments in the charitable sector including the North London Mosque. In addition, the Commission had an array of means at its disposal to resolve charitable failures to abide by the law – ranging from technical assistance and advice to agreements to change practices to, where needed, orders removing trustees, freezing funds, or closing organizations.

The Charity Commission's role in this area accelerated after 2001, initially with an investigation of the U.K.-registered International Islamic Relief Organization after a *Times of London* report that "the charity was under CIA scrutiny in connection with the possible transfer of funds which may have been used to support the terrorist attacks in the

⁵⁷ For detailed information on the role and functions of the Charity Commission, see <http://www.charity-commission.gov.uk/tcc/ccabout.asp>, and, for summary information on the Charities Act 2006, <http://www.charity-commission.gov.uk/spr/ca2006prov.asp>.

⁵⁸ Charity Commission, *Inquiry Report: North London Central Mosque Trust* (2003) (www.charity-commission.gov.uk/news/mosqueinq.asp).

United States.” That inquiry was closed a month later after the Commission determined that the organization had ceased to operate in the U.K. and removed it from the register of charities.⁵⁹

A number of other inquiries have taken place since the September 11 attacks, as the Commission strongly reaffirmed that “any kind of terrorist connection is obviously completely unacceptable [and] investigating possible links with terrorism is an obvious top priority for the charity commission.” But in doing so the Commission also sought to assuage fears of a witch-hunt and to maintain a balanced analysis of the role of charities in terrorism: “The good news is that, in both absolute and relative terms, the number of charities potentially involved are small. Neither the charity commission, nor other regulatory and enforcement organizations have evidence to suggest that the 185,000 charities in England and Wales are widely subject to terrorist infiltration.”⁶⁰

The Charity Commission’s role in investigating charitable links to terrorism has continued and expanded in recent years. In May 2002, the Commission reported that it had “evaluated concerns” about ten charities since the September 11 attacks, “opened formal inquiries” into five, closed two, and frozen the assets of one group.⁶¹ “Vigilance is everything,” the Commission warned: “Any links between charities and terrorist activity are totally unacceptable. Links ... might include fundraising or provision of facilities, but also include formal or informal links to organizations ‘proscribed’ under the Terrorist Act 2000, and any subsequent secondary legislation.”

But the Commission also emphasized that its relationship to the charitable sector was useful in the anti-terror battle, and that charities would not be left out of the process. “[T]he Charity Commission is committed to working with the sector it regulates – to ensure that terror groups are never allowed to gain a foothold within England and Wales; 185,000 registered charities.” And an important responsibility would continue to fall on trustees to “take immediate steps to disassociate” any charity from links to terrorist activity and to “be vigilant to ensure that a charity’s premises, assets, volunteers or other goods cannot be used for activities that may, or appear to, support or condone terrorist activities....” Accountability and transparency – not only prosecution – were crucial to that process,⁶² and particularly crucial was the existence and clear role of the Charity Commission.

As investigations continued, more guidance was clearly needed for charitable organizations. The Commission issued “operational guidance” on “charities and terrorism” in January 2003 that reaffirmed the Commission’s central role in investigating alleged charitable links to terrorism and enforcing law and policy with respect to the sector. The 2003 operational guidance also reconfirmed the close relationship between the Commission – through its Intelligence and Special Projects Team (ISPT) – and other

⁵⁹ Debra Morris, *Charities and Terrorism: The Charity Commission Response*, INTERNATIONAL JOURNAL OF NOT-FOR-PROFIT LAW (September 2002) (www.ijnl.org).

⁶⁰ John Stoker, *Weeding Out the Infiltrators*, THE GUARDIAN (U.K.), 28 February 2002.

⁶¹ Charity Commission, *Charity Commission Policy on Charities and Their Alleged Links to Terrorism* (May 2002) (www.charity-commission.gov.uk/tcc/terrorism.asp).

⁶² *Id.*

law enforcement, security and intelligence organizations.⁶³ Later that spring, the Commission issued guidelines for charities working abroad, which focused on the risk that charitable funds would reach terrorist organizations and did not appear to impose as many new burdens on charities as their American counterpart guidelines.⁶⁴

Throughout this work a recurring theme was the notion that the Commission should remain at the center of work against the use of charities in terrorist financing, seeking to retain cooperation with the voluntary sector while combating terrorism, rather than ceding that work to security and police organizations. That fit well with the Commission's traditional role. As the Commission's annual report for 2002 and 2003 put it, perhaps in a broader context, the goal was "maintaining our independence and working with others."⁶⁵

North London Central Mosque (Finsbury Park Mosque) (2001-2003)

Investigations have continued. The most prominent has been the Commission's long engagement with the problems of the North London Central Mosque (Finsbury Park Mosque) and its radical, anti-American leader until 2004, Sheikh Abu Hamza al-Masri. Abu Hamza and his followers had taken over the mosque from more moderate trustees and were using it for extremist religious and political purposes. After the September 11 attacks, the Commission renewed earlier investigations of the mosque, Abu Hamza's role upon receiving tapes of sermons that were "of such an extreme and political nature as to conflict with the charitable status of the Mosque," and reports of a "highly inflammatory and political conference" at the mosque on the first anniversary of the World Trade Center and Pentagon attacks.

In cooperation with police and security agencies and with the support of the mosque's original trustees, in a 2003 decision the Commission suspended Abu Hamza from his position within the mosque, froze mosque accounts controlled by Abu Hamza, and in February 2003 removed him from all positions in the mosque. At the same time the London police secured the mosque and handed it back to the original trustees.⁶⁶ In undertaking this complex task the Charity Commission was aided by the wide array of powers at its disposal. These powers included freezing funds, appointing substitute trustees and auditors, ordering specific activities or organizations shuttered for periods of time, and other measures. The Commission was also assisted by its detailed knowledge of the mosque gained through a number of years of charity enforcement.

⁶³ Charity Commission, *Operational Guidance: Charities and Terrorism*, OG96-28 (January 2003) (www.charity-commission.gov.uk/tcc/terrorism.asp).

⁶⁴ Charity Commission, *Charities Working Internationally* (2003) (www.charity-commission.gov.uk/tcc/terrorism.asp).

⁶⁵ Charity Commission Annual Report 2002-2003.

⁶⁶ Charity Commission, *Inquiry Report: North London Central Mosque Trust* (2003) (www.charity-commission.gov.uk/news/mosqueinq.asp); *British Arrest Radical Cleric U.S. Seeks*, NEW YORK TIMES, 28 May 2004. See also extensive coverage of the Abu Hamza case in British newspapers, especially THE TIMES (London) and THE GUARDIAN, in May and June 2004. For a sense of the different atmosphere at the mosque in 2005, see *At Mosque That Recruited Radicals, New Imam Calls for Help in Catching Bombers*, NEW YORK TIMES, 9 July 2005.

In May 2004, U.S. Attorney General Ashcroft unsealed an eleven-count indictment charging Abu Hamza with conspiracy to provide material support to terrorists, assistance to a 1998 bombing in Yemen, and other offenses. The British authorities arrested Abu Hamza at the request of the U.S. government and prepared to extradite him to the United States. In 2006 Abu Hamza was sentenced to seven years imprisonment in the U.K. for counseling murder and racial hatred.⁶⁷

Society for the Revival of Islamic Heritage (2002)

The Charity Commission conducted a number of other investigations into alleged charitable links with terrorism, not all with similarly dramatic conclusions. A 2002 inquiry into the Society for the Revival of Islamic Heritage was prompted by notice that the U.S. Treasury Department had issued a blocking order against a group with a similar name that had offices in Pakistan and Afghanistan, and that the U.S. government believed that that the group “may have financed and facilitated the activities of terrorists ... through Usama Bin Laden.” After investigating possible ties between the organization registered in London and the group proscribed by the United States, the Commission found no evidence linking the U.K. charity with the U.S.-banned group, and closed its inquiry.⁶⁸

Minhaj-UI-Quran UK and Idara Minhaj-UI-Quran UK (2002)

Another inquiry was launched in 2002 after allegations that the London-based Minhaj-UI-Quran UK and Idara Minhaj-UI-Quran UK was engaged in “supporting political activities in Pakistan.” There were also allegations that the records kept at the Charity were poor and that its financial controls were weak. After investigation, the Commission cleared the charity of the political support allegations. The Commission did, however, order the group to strengthen accounting controls, and reached an agreement with the trustees on new controls.⁶⁹ This case demonstrates the Commission’s ability to investigate a charity’s internal functions as well as whether it has improper ties.

Divergence from the United States: The Interpal Case (2003)

In response to a U.S. allegation that funds from the Palestinians Relief and Development Fund (Interpal) were going to Hamas, the Commission contacted Interpal in April 2003 to determine whether Interpal funds had supported “political or violent militant activities” of Hamas in Palestine. This followed on a 1996 investigation of Interpal that had found “no evidence of inappropriate activity, and the information available indicated that Interpal was a well-run organization.”

⁶⁷ *Abu Hamza Convicted*, THE GUARDIAN (London), 8 February 2006. Such a prosecution might be more difficult in the United States because of speech protections.

⁶⁸ Charity Commission, *Trustees Have No Link with Terrorism* (Press Release PR94/02), 5 November 2002 (www.gnn.gov.uk/environment/detail.asp?ReleaseID=31330&NewsAreaID=2&NavigatedFromDepartment=True). Unfortunately we do not know with certainty whether the Commission found no evidence, or no evidence that rose to a useable or probative level. The Commission is required to maintain confidentiality of sensitive security information.

⁶⁹ Charity Commission, *Inquiry Report: Minhaj-UI-Quran UK*, 2002 (www.charity-commission.gov.uk/inquiryreports/minhaj.asp); and *Inquiry Report: Idara Minhaj-UI-Quran UK*, 2002 (www.charity-commission.gov.uk/inquiryreports/idara.asp).

The initial 2003 investigation by the Commission found that Interpal had “improved its procedures and record keeping since the Commission’s previous Inquiry, although these procedures could be further enhanced by introducing a greater degree of independent verification of the work done by Interpal’s partners in the region on its behalf.” The Inquiry also turned up evidence that Interpal had received funds from an organization proscribed under U.N. sanctions in May 2003, the Al-Aqsa Foundation, though “the funds received were in respect of humanitarian work already carried out by Interpal and then invoiced” to Al-Aqsa.

While the Commission’s Inquiry was underway, the U.S. government formally named Interpal as a “specially designated global terrorist” organization and proscribed its activities in the United States “for allegedly supporting Hamas’ political or violent militant activities.” The Commission immediately opened a formal Inquiry under section 8 of the Charities Act 1993 and froze Interpal’s accounts “as a temporary and protective measure.” The Commission also requested “evidence to support the allegations made against Interpal” from the United States, but, according to an understandably limited report from the Commission, the U.S. was “unable to provide evidence to support allegations made against Interpal within the agreed timescale.”⁷⁰

In late September, the Commission decided that, “in the absence of any clear evidence showing Interpal had links to Hamas’ political or violent militant activities,” Interpal’s accounts would be unfrozen and the Commission’s Inquiry closed.

The Interpal Inquiry also enabled the Commission to reassert that it will “deal with any allegation of potential links between a charity and terrorist activity as an immediate priority ... liais[ing] closely with relevant intelligence, security and law enforcement agencies to facilitate a thorough investigation.” The Commission also reemphasized that “as an independent statutory regulator the Commission will make its own decisions on the law and facts of the case.”⁷¹

Where Hamas has claimed that it carried out suicide bombings in Israel, the British bank NatWest was sued by people wounded or their relatives, based on claims that NatWest sent funds through accounts held by Interpal to Hamas. NatWest called the suit “without merit,” contested it in New York, and said that the Charity Commission had “found no evidence of wrongdoing” by Interpal in the 1996 and 2003 inquiries.⁷² In September 2006 a federal judge in New York denied NatWest’s motion to dismiss the suit, allowing it to continue,⁷³ and in 2007 Natwest closed Interpal’s accounts because of potential liabilities in maintaining them.⁷⁴

⁷⁰ From the Commission reporting on this matter is it not clear if the issue was that there was no evidence or that the United States was unwilling to disclose the intelligence that it might have had.

⁷¹ Charity Commission, *Inquiry Report: Palestinians Relief and Development Fund*, 2003 (www.charity-commission.gov.uk/investigations/inquiryreports/interpal.asp).

⁷² *Victims of Bombings in Israel Seek Damages in New York*, NEW YORK TIMES, 7 January 2006; *Hurt by Hamas, Americans Sue Banks in U.S.*, NEW YORK TIMES, 15 April 2006.

⁷³ *NatWest Loses First Round in Court Case over Charity Linked to Hamas*, THE GUARDIAN (London), 29 September 2006.

⁷⁴ *Interpal Account Closed*, THIRD SECTOR, April 4, 2007.

Tamils Rehabilitation Organisation (2000-2005)

In September 2000, the Charity Commission opened an Inquiry into the Tamils Rehabilitation Organisation (TRO), after allegations that TRO was “supporting terrorist activity by transferring funds to Sri Lanka in support of the Liberation of Tamil Tigers of Elam (LTTE),” a proscribed organization under the U.K. Terrorism Act 2000 and under many other nations’ laws as well. TRO provided funds to the Tamils Rehabilitation Organisation Sri Lanka (TRO SL), and it appeared that some of those funds might be making their way to the Tigers.

After receiving information that the charity’s “funds might be at risk,” the Commission restricted payments from TRO accounts under section 18 of the Charities Act (a step short of a complete freeze on the use of assets), and then found inadequate financial controls, lack of operational transparency, and evidence of mismanagement during its investigation. “The Trustees exercised little or no control over the application of funds in Sri Lanka and failed to demonstrate a clear audit trail relating to expenditure. They also failed to provide the Commission with any explanation as to the provenance of some of the funds received from the US and Canada. The Commission therefore concluded that the Charity’s property was at risk,” and appointed a prominent London lawyer as TRO’s interim manager under the Charities Act.

The interim manager’s tasks were indeed broad – in addition to managing the entire charity, he was charged with “establishing whether it was able to operate lawfully, in the manner intended by the Trustees, in providing charitable relief to Sri Lanka in circumstances of civil unrest”; “ascertain[ing] the extent of the risk that funds had been, or would in the future be, received by any organisation proscribed...”; and “making recommendations for the Charity’s future.”

The interim manager, Don Bawtree of BDO Stoy Hayward, determined that the Trustees could not account for funds and “were not administering the charity to an acceptable standard.” He commissioned a Sri Lankan firm to trace funds from TRO to TRO SL and onward to charitable activities in Sri Lanka, and that investigation determined that “TRO SL liaised with the LTTE in determining where funds could be applied.” Funds donated “were used for a variety of projects which appeared to be generally humanitarian, but not necessarily charitable in English law nor in line with the Charity’s objects.” The manager sought to find an NGO willing to work with TRO in finding appropriate projects and monitoring them effectively, but could not find one.

The interim manager then set up a separate new charity, the Tamil Support Foundation, in which he and the Commission could have confidence that legal obligations were being met. The plan was to transfer funds from the TRO to this new charity. (This seemingly extraordinary power is contemplated in the Commission’s authorizing legislation and appears to be unquestioned in Britain.) Then the tsunami hit Sri Lanka and other countries in December 2004, and the manager decided to donate most of TRO’s assets to tsunami relief through recognized charities, as well as to transfer some funds to the new Tamil Support Foundation. By August of 2005 TRO had no funds left because they had all been transferred to legitimate organizations working on tsunami relief or to the new, safeguarded Tamil Support Foundation. TRO ceased to operate, it

was removed from the Register of Charities, and the Commission discharged the interim manager.

From the perspective of the Commission, the results of this long and complex process were entirely positive: “The appointment of the Interim Manager protected the Charity’s funds at the time when he took control of its bank accounts, by preventing them from being applied in a manner that was unaccountable....Through the setting up of the Tamil Support Foundation, the Interim Manager secured another vehicle for those wishing to support the Tamil speaking people.”⁷⁵

New Initiatives Against Terrorist Financing through Charities, 2006-2007

The July 2005 bombings in London and charges of other links between British-based charities and terrorism have brought renewed pressure to clamp down on terrorist networks and their financing. Intelligence and police activities, raids, and detentions have increased dramatically, and the British government has proposed new measures on terrorist finance that could well affect the charitable sector in the U.K. And the U.K. is under continuing, perhaps increasing pressure from other countries – including the U.S., Israel, and Russia – to control terrorist finance through charities.

To its list of internationally proscribed individuals and groups linked to terrorism, the United Nations in February 2006 added several more individuals who reside in the United Kingdom, three companies and a related charity based in Birmingham, the Sanabel Relief Agency Sanabel, and the individuals and companies allegedly linked to an al-Qaeda-affiliated group called the Libyan Islamic Fighting Group.⁷⁶ The Charity Commission immediately opened an investigation as well and, it became clear later, British authorities either began or continued intensive surveillance of the group.

In February 2006, Gordon Brown MP announced that the government would conduct a new review of measures to combat the use of charities in terrorist finance and would establish a new intelligence center to investigate terrorist financing networks around the world and their impact on Great Britain. “[C]ut[ting] off the sources of terrorist finance ... requires an international operation using modern methods of forensic accounting as imaginative and pathbreaking for our times as the Enigma codebreakers at Bletchley Park achieved more than half a century ago.” At the same time, the government announced that it had frozen 80 million pounds of terrorist funds since September 2001 involving more than a hundred organizations.⁷⁷

In May, more than 500 British police raided nineteen locations in London, Bolton, Birmingham, Middlesborough, Liverpool, and Manchester against individuals and organizations suspected of funneling financial assets to terrorist organizations abroad. “At the center of the raids,” according to the *The Guardian*, was Sanabel, whose offices

⁷⁵ All quotations in this section are from Charity Commission, *Inquiry Report: Tamils Rehabilitation Organisation*, 2005 (<http://tinyurl.com/5ngsmm>).

⁷⁶ *Man Denies Terror Link after Assets Freeze*, THE GUARDIAN (London), 9 February 2006.

⁷⁷ *Modern-Day Bletchley Park to Tackle Terror Finance Networks*, THE GUARDIAN (London), 11 February 2006.

were entered and one of whose trustees, Tahir Nasuf, was arrested under the Terrorism Act 2000.⁷⁸

Also in May, Israel called the British-based charity Islamic Relief a “front for terrorists” involving the “transfer [of] funds and assistance to various Hamas institutions and organizations.” The charges raised bilateral issues between Israel and Great Britain because Britain finances Islamic Relief’s health and other work in Gaza and elsewhere. Islamic Relief denied the charges and said that Israel appeared to have confused several of its sub-grantees with groups tied to Hamas. And the U.K. government overseas aid group that funded Islamic Relief, the Department for International Development, said “[w]e have no reason to believe that the allegations are true.”⁷⁹ In the summer of 2006, British authorities uncovered a plot to blow up airliners traveling between Britain and the United States and detained 25 people. The British-based charities Jamaat ud Dawa (Association of the Call to Righteousness)⁸⁰ and Crescent Relief came under investigation for possible diversion of earthquake relief funds to terrorist groups that had planned to carry out the airliner attacks. The funds were reported to have come directly from the British organization or individuals linked to it.

A Charity Commission investigation was immediately launched as well, with its focus on Crescent Relief, including the freezing of Crescent Relief’s funds.⁸¹ In mid-2008, no public report of that investigation’s results has yet been released.

All these events sparked more intensive focus on charitable links to terrorism and their role in terrorist finance, especially links involving Islamic charities. As the *New York Times* reported from London in August, “the question is being asked here, with more urgency: To what extent to Muslim charities – on the surface noble and selfless – mask movements and money for terrorists and extremist groups?” And events in 2005 and 2006 highlighted the different approaches – in some cases divergent approaches – taken by American and British authorities on charities and terrorist finance and on charities that had come under suspicion.

“Since Sept. 11,” the *Times* continued, “American officials have banned many charities that still operate freely in Britain, reflecting a disagreement about where charity ends and extremism begins.” And increasingly American officials and commentators were critical of the process-based British approach, calling the Charity Commission and

⁷⁸ *Ten Held in Police Counter-Terror Raids Over Claims of Chanelling Cash to Iraq Insurgency*, THE GUARDIAN (London), 25 May 2006.

⁷⁹ *Israel Accuses British-funded Islamic Charity of Being Front for Terrorists*, THE GUARDIAN (London), 31 May 2006.

⁸⁰ News reports linked Jamaat ud Dawa – which is on the U.S. proscription lists – to Lashkar-e-Taiba, a terrorist group banned by both the U.S. and Pakistan, and indicated that Jamaat ud Dawa and individuals linked to it had been under intensive surveillance for some time.

⁸¹ *Pakistani Charity Under Scrutiny in Financing of Airline Bomb Plot*, NEW YORK TIMES, 14 August 2006; *Terror Plot*, THE GUARDIAN (London), 15 August 2006; *In British Inquiry, a Family Caught in Two Worlds*, NEW YORK TIMES, 20 August 2006; *Arrest: Father of Airline Attack Suspects is Held in Pakistan*, THE GUARDIAN (London), 21 August 2006; *British Study Charitable Organization for Links to Plot*, NEW YORK TIMES, 25 August 2006; *In Tapes, Receipts and a Diary, Details of the British Terror Case*, NEW YORK TIMES, 28 August 2006.

other British institutions “too lax.” All agreed that “the British showed signs of hardening, particularly after four bombers killed 52 people on buses and trains here on July 7 of last year.”⁸²

In the wake of the airline bomb plot arrests, the government reconfirmed that the Home Office and Treasury Department are reviewing the problem of terrorist finance through charities and intend to recommend legal and policy changes. “We are aware that existing safeguards against terrorist abuse in the charitable sector need to be strengthened,” a Home Office official told the *New York Times*.⁸³ The National Council for Voluntary Organisations (NCVO) also convened a panel to report on issues of charities and terrorist finance, concerned that the Home Office and security review would not be sufficiently consultative.

The investigations continued into the fall, including a widespread investigation of alleged “jihadists” that culminated in the arrest of fourteen people in London in September. They had allegedly been training for terrorist activities, including possibly at an independent school owned and run the by charitable group Jameah Islamiyah, which came under investigation by the Charity Commission as well in the fall of 2006.⁸⁴

In October 2006, the government began announcing some of its new measures to crack down on terrorist financing. Chancellor Gordon Brown and Economic Secretary Ed Balls stressed “closer cooperation between America and Europe,” and said that the U.K. government would now “use classified intelligence to freeze assets of those suspected of having links to terrorism” and “allow law enforcement agencies to keep their sources of information secret after it is used to track down and freeze bank accounts.” The government would also seek preemptive authority to halt terrorist financing. The inquiry on charities and terrorist finance continued. Brown also proposed new and inevitably controversial reforms to Britain’s terrorist law, including giving the government the power to detain terrorist suspects for longer than the current 28 days.⁸⁵

The Terrorism Act 2006 adds to the array of counter-terror enactments in the U.K. since September 11, particularly the Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001. It may affect charities because it expands the terrorist criminal offenses to include acts preparatory to terrorism: directly or indirectly inciting or encouraging others to commit terrorism, including the “glorification” of terrorism; the sale, loan, or other dissemination of publications that encourage terrorism or provide assistance to terrorists; and giving or receiving training in terrorist techniques, including mere attendance at a terrorist training site. The Terrorism Act 2006 also increases the

⁸² *Airplane Terrorism Case Prompts Questions About the Work of Islamic Charities in Britain*, NEW YORK TIMES, 24 August 2006.

⁸³ *British Study Charitable Organization for Links to Plot*, NEW YORK TIMES, 25 August 2006.

⁸⁴ *Police Search Islamic School on Expansive Estate in South Britain*, NEW YORK TIMES, 4 September 2006; *Training Camps Link to Anti-Terror Arrests*, THE GUARDIAN (London), 4 September 2006.

⁸⁵ *U.K. Unveils Plan to Freeze Terror Funds*, Associated Press, 10 October 2006; *Brown to Use Classified Intelligence in Fight to Cut Terrorist Funding*, THE GUARDIAN (London), 11 October 2006.

scope of proscription for terrorist organizations, providing the government with authority to proscribe organizations that “glorify terrorism.”⁸⁶

As of fall 2006, 42 organizations had been proscribed in the U.K. under the Terrorism Act 2000, 14 organizations were proscribed in Northern Ireland under earlier law, and under the new authority given to proscribe organizations that glorify terrorism in the Terrorism Act 2006, two such organizations had been banned.⁸⁷

Home Office and Treasury Review, and the Charity Commission’s Defense of its Role

In January 2007, in advance of the release of a long-awaited Home Office and Treasury review of charities, terrorist finance, and the role of the Charity Commission in counter-terrorism law and policy, the National Council for Voluntary Organisations released its own report on charities and terrorist finance, *Security and Civil Society*. The report criticized moves toward strengthening the U.K. legal regime for prosecuting charities and called on the government to view charities as allies in the fight against terrorism rather than as adversaries. The report also pointed out the fundamental sufficiency of the existing legal regime while also recognizing some problems, and it criticized the impact of some government actions in this arena on charitable activities in the U.K. and abroad, particularly with respect to Muslim organizations.⁸⁸

The Home Office and Treasury review of charities and terrorist finance was released in May 2007. The review called for tightened coordination between the Charities Commission and government agencies dealing with terrorism and terrorist finance, a more prosecution-based approach by the Charity Commission, increased funding focused on prosecutions and investigations rather than on improved governance in the sector, and other measures.⁸⁹ The response from the NCVO was swift and critical: “By placing a veil of suspicion over all charities, the Government is in danger of damaging the trusted reputation of the voluntary sector and making people less likely to donate to good causes.”⁹⁰

The Charity Commission released its formal response to the Home Office and Treasury Review in August 2007, providing plans to accelerate its work on terrorist finance and strengthen coordination with government agencies. The Charity Commission also sought to safeguard the independence of its work and structure, and its role in cooperating with the charitable sector to strengthen governance and accountability.⁹¹ The

⁸⁶ Home Office, *Counter-Terrorism Strategy, Terrorism Act 2006* (<http://security.homeoffice.gov.uk/counter-terrorism-strategy>).

⁸⁷ Home Office, *Counter-Terrorism Strategy* (<http://security.homeoffice.gov.uk/counter-terrorism-strategy>); *Home Secretary Moves to Ban 15 Terror Groups*, Home Office, Press Office, 10 October 2005 (<http://press.homeoffice.gov.uk/press-releases>, containing a full banning order and additional information).

⁸⁸ NCVO, *Security and Civil Society* (January 2007) (www.ncvo-vol.org.uk).

⁸⁹ The Home Office and Treasury Review is at www.homeoffice.gov.uk/documents/cons-2007-protecting-charities/Charities_consultation.pdf?view=Binary. For an example of the media coverage, see *Watchdog Must Combat Terror Funds*, BBC News, May 10, 2007.

⁹⁰ NCVO: *Overstating the risk of terrorist abuse could damage trust in charities*, <http://politics.co.uk>, May 10, 2007.

⁹¹ See Charity Commission, THE HOME OFFICE AND HM TREASURY’S REVIEW OF SAFEGUARDS TO PROTECT THE CHARITABLE SECTOR (ENGLAND AND WALES) FROM TERRORIST ABUSE: THE CHARITY

“key elements” of the Commission’s “response on safeguarding the sector from terrorist abuse” are worth citing in detail:

Actual instances of terrorist involvement and abuse of charities are extremely small in number but are completely unacceptable; the way we tackle the risk of terrorist abuse of charities falls squarely within our existing approach to regulation; we are uniquely placed to deal with abuse where it does occur, collaborate with other regulators and agencies and other parts of government and support trustees to protect their charities; when allegations of terrorist involvement or links with charities arise, we deal with them as a matter of priority. We will deal proactively, robustly, effectively and swiftly when we have evidence or serious suspicions of terrorist abuse involving charities; effective regulation involves putting a strong emphasis on giving support and guidance to charities to prevent problems and abuse occurring in the first place; we believe that the most effective way for the sector to minimise its exposure to the risk of terrorist abuse is through implementing strong governance arrangements, financial management and partner management. Charities which implement good general risk management policies and procedures will be better safeguarded against a range of potential misuses; and it is the responsibility of charity trustees to safeguard their charity from terrorist abuse. We will support them to do this, and will not prevent charities from carrying out legitimate and vital humanitarian and other work, within the law.⁹²

The Charity Commission spoke clearly: “The Commission will continue to ... take a balanced approach which is evidence- and risk-based, targeted and proportionate; ... work in partnership and collaboration with government and the charity sector itself; ... and ... maintain its strategic and operational independence in line with its statutory remit.”⁹³ The Commission re-emphasized its view that effective regulation involves putting a strong emphasis on giving support and guidance to charities to prevent problems and abuse occurring in the first place; “... we believe that the most effective way for the sector to minimize its exposure to the risk of terrorist abuse is through implementing strong governance arrangements, financial management and partner management. Charities which implement good general risk management policies and procedures will be better safeguarded against a range of potential misuses.”⁹⁴

In December 2007, the Charity Commission released a Draft Counter-Terrorism Strategy that embodied these principles and set forth working priorities and tasks.⁹⁵

COMMISSION’S RESPONSE TO THE CONSULTATION (August 2007), at www.charity-commission.gov.uk/supportingcharities/terror.asp. Other responses to the Home Office and Treasury Review are at www.homeoffice.gov.uk/documents/cons-2007-protecting-charities/cons-2007-charities-responses?view=Binary.

⁹² Id.

⁹³ Section 3.2 of the Charity Commission’s Response.

⁹⁴ Id.

⁹⁵ Charity Commission Draft Counter-Terrorism Strategy (December 2007), <http://www.charity-commission.gov.uk/spr/cts.asp>.

Lessons of the Experience in the United Kingdom

The English experience shows the value of continuing to have sophisticated charity regulators play a central role in investigating charitable links to terrorism and terrorist finance, including maintaining legal authority over these issues in the charity regulator. The Charity Commission has played an exceptionally useful role in England in cooperation with police and security forces, bringing to bear a detailed knowledge of the sector and of individual charitable organizations based on years of reporting and experience. The Charity Commission conducts investigations, gathers information that it shares as relevant with other agencies, and may take measures to require organizations to substitute trustees, improve accounting and disbursement, or other reforms.

This maintenance of a central role for a charity regulator, combined with the intensive focus on a small number of organizations suspected of terrorist finance links, has arguably resulted in both better targeting and better information for British law enforcement than for some of its international counterparts. The British situation contrasts with that of Australia, where anti-terrorism laws have been adopted that could apply to the charitable sector but have not yet been applied, and with the U.S. prosecution-centered approach. The approach taken in Australia will be discussed below.

III. Counter-Terrorism, Civil Liberties, and the Enabling Legal and Political Environment for Civil Society in Australia

The Framework of Counter-Terrorist Law and Policy and its Impact on Civil Society

In contrast with the United Kingdom and the United States, Australia had very little experience with terrorism within its borders before the September 11 attacks and very little specific anti-terrorist legislation on its books.⁹⁶ After the September 11 attacks, the government tightened domestic surveillance of suspected terrorists and introduced a number of anti-terrorism bills in the Australian parliament that, in general terms, sought to enhance government power in the anti-terrorism arena by vesting additional discretion and power in the Australian federal attorney general. Those bills included the Security Legislation Amendment (Terrorism) Bill, Suppression of the Financing of Terrorism Bill, Criminal Code Amendment (Suppression of Terrorist Bombings) Bill, Border Security Legislation Amendment Bill, and Telecommunications Interception Legislation Bill, all introduced in 2002.⁹⁷

The initial legislative proposals elicited widespread and broad opposition in Australia, including civil liberties groups and parliamentarians who argued that much of what the government wanted to re-criminalize through specialized anti-terrorist legislation was already effectively criminalized and handled through existing criminal

⁹⁶ Christopher Michaelsen, *International Human Rights on Trial: The United Kingdom's and Australia's Legal Response to 9/11*, 25 SYDNEY LAW REVIEW 275-303 (2003). An earlier and shorter treatment of the Australian scene is in Sidel, MORE SECURE, LESS FREE?

⁹⁷ David Kinley and Penny Martin, *International Human Rights Law at Home: Addressing the Politics of Denial*, 26 MELBOURNE UNIVERSITY LAW REVIEW 466-77, 471 (2002).

law.⁹⁸ Opponents forced some changes in the original set of bills adopted in the wake of the September 11 attacks. The very broad proposed definition of “terrorist act” in the government’s initial proposal was narrowed to require some element of intentional intimidation or coercion. And the government’s attempt to reverse the presumption of innocence in terrorism cases, requiring detainees to prove that they were not terrorists, was corrected.

The initial wave of legislative activity continued in 2003, when the government proposed the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (the ASIO Act), which was primarily intended to enable Australian security organizations to detain terrorism suspects or persons who might have some knowledge of potential terrorist activities and to criminalize “withholding of information regarding terrorism.”⁹⁹ This bill also elicited very strong opposition, delaying passage for more than a year, and resulting in softening to protect children in detention, adding a sunset clause, and other changes.

In 2003 and 2004 the government continued to press for statutory amendments to provide for closed trials for defendants charged with national security offenses, and clearances for lawyers, limited public access, and limited media coverage of certain national security trials, as well as authority to deny terrorism suspects bail and allow police to hold some detainees for terrorism-related question for twenty-four hours, a substantial increase from the four-hour limit under current law.¹⁰⁰

In 2005 the Australian government proposed new and tougher anti-terrorism legislation that would expand the definition of terrorist organizations to include advocacy within the proscribable range, expand the government’s powers to use “control orders” and preventive detention against a widened range of suspects, and strengthen the crime of sedition.¹⁰¹ The proposed expansion in government powers continued to be severely criticized by civil liberties groups.¹⁰²

Civil Society, Charities and Terrorist Finance

Within the framework of new and expanded anti-terrorist lawmaking in Australia, there has been some attention to the problem of terrorist finance – and within that rubric, some, but not extensive, attention to the issue of charitable conduits for terrorist finance. Among the laws passed in 2002 was the Suppression of the Financing of Terrorism Act 2002, which was intended to provide Australian implementation of the International

⁹⁸ For a clear expression of this view, see, e.g., Chris Maxwell, *September 11 and Its Aftermath: Challenges for Lawyers and the Rule of Law* (address to Maddock Lonie and Chisholm law firm, 15 April 2002) (www.libertyvictoria.org.au/documents/2002-04-15_cm_speech.pdf).

⁹⁹ Michaelsen, *International Human Rights on Trial*, p. 281.

¹⁰⁰ These developments are discussed more fully in Sidel, *MORE SECURE, LESS FREE?*, pp. 156-62.

¹⁰¹ See Prime Minister’s Officer, *Counter-Terrorism Laws Strengthened*, 8 September 2005, at www.pm.gov.au; Civil Rights Network, *The Anti-Terrorism Bill (No 2) 2005 (Cth)*, <http://tinyurl.com/3s4nqw>. The text of the draft is at <http://tinyurl.com/3s4nqw>.

¹⁰² “Appalling” *Anti-Terrorism Laws Draw Criticism*, ABC News Online, 27 September 2005.

Convention for the Suppression of the Financing of Terrorism and to “starve terrorists of assets and funds in order to reduce their capacity to operate.”¹⁰³

The Financing of Terrorism Act amends Australia’s general Criminal Code by criminalizing “the provision or collection of funds to facilitate a terrorist act.” The Financing of Terrorism Act, as McCulloch and colleagues explain, also requires “cash dealers and financing institutions to report suspected terrorist-related transactions,” “provide[s] a penalty for using the assets of those allegedly involved in terrorist activities,” “streamline[s] the process for disclosing financing transaction information to foreign countries,” and “allow[s] for the freezing of assets of proscribed persons and entities.”¹⁰⁴

The Australian financing of terrorism regime implicates charities in a number of ways – through potential penalties on individuals and on organizations, including proscription of organizations, for a range of acts. Charities and individuals in charities could in some cases be charged with various terrorist and terrorist financing offenses. In specific terms, as a result of post-September 11 legislation, the Australian Criminal Code criminalizes committing a terrorist act (subsection 101.1); providing or receiving training connected to terrorist acts (101.2); possessing things connected with terrorist acts (101.4); collecting or making documents likely to facilitate terrorist acts (101.5); undertaking other acts in preparation for or planning for terrorist acts (101.6); directing the activities of a terrorist organization (102.2); holding membership in, recruiting for, or providing or receiving training in connection with a terrorist organization (102.3, 102.4, 102.5); getting funds to, from, or for a terrorist organization (102.6); providing support to a terrorist organization (102.7); and associating with a terrorist organization (102.8). The law provides additional offenses for financing terrorism or a terrorist (103.1, 103.2). Individuals connected to charitable organizations may also be subject to the control orders or preventative detention provided in subsections 104 and 105 of the Code.

Some of the few commentators on this legal regime have raised challenging questions. McCulloch and colleagues, for example, suggest that “[i]ncreased regulation and surveillance of non-profit organisations and charities may undermine the ability of legitimate organisations to operate effectively in addition to curtailing their political independence. The flexibility of the definition of terrorism and the ease with which governments can deem organisations ‘terrorist’ for the purpose of freezing assets may result in some politically inconvenient or dissident charities and non-profit organisations being labeled terrorist organisations.”¹⁰⁵

¹⁰³ Jude McCulloch, Sharon Pickering, Rob McQueen, Joo-Cheong Tham, and David Wright-Neville, *Suppressing the Financing of Terrorism*, 16 CURRENT ISSUES IN CRIMINAL JUSTICE 71-78 (2004). See also Jude McCulloch and Sharon Pickering, *Suppressing the Financing of Terrorism: Proliferating State Crime, Eroding Censure and Extending Neo-colonialism*, 45 BRITISH JOURNAL OF CRIMINOLOGY 470 (2005).

¹⁰⁴ McCulloch et al., id., also citing M. Tan, *Money Laundering and the Financing of Terrorism*, 14(2) JOURNAL OF BANKING AND FINANCE LAW AND PRACTICE 81-107 (2003).

¹⁰⁵ McCulloch et al., id. On Australian constitutional issues with this legislation and its impact, see Joo-Cheong Tham, *Possible Constitutional Objections to the Powers to Ban ‘Terrorist’ Organisations*, 27 UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL 482 (2004).

The workings of this legislation in practice have also raised concerns. Under the legislation discussed above and the *Charter of United Nations Act 1945 (Cth)*, for example, the Liberation Tigers of Tamil Eelam had been proscribed in Australia, making it a criminal offense to donate, provide funds, or deal in the assets of the group, regardless of purpose, including humanitarian assistance. “This is of grave concern,” wrote one of Australia’s leading civil liberties organizations, Liberty Victoria, “especially given that the Australian Federal Police has acted upon this listing by raiding Tamil Coordinating Committee of Australia in November last year....The effect of these raids has been to generate fear amongst the Sri Lankan Tamil communities in Australia.”¹⁰⁶

The Report of the Security Legislation Review Committee (SLRC), released in June 2006, picked up on these criticisms and expanded them. The SLRC specifically criticized portions of the anti-terrorism amendments to the Criminal Code that “appear to have a disproportionate effect on human rights and could be subject to administrative law challenge.”¹⁰⁷ The SLRC recommended that these provisions be repealed or changed. The problematic legal provisions, many of which were of potential direct impact on civil society, include the following¹⁰⁸:

1. Process for proscription. The SLRC called for revamping “the process for proscribing an organisation as a terrorist organisation” under Criminal Code subsection 101.2, noting that

no sufficient process is in place that would enable persons affected by such proscription to be informed in advance that the Attorney-General is considering whether to proscribe the organisation, and to answer the allegation that the organisation is a terrorist organisation. A consequence of proscription is that, on account of their connection with the organisation, persons become upon proscription liable to criminal prosecution. In that prosecution the defendant cannot deny that the proscribed organisation is a terrorist organisation or for that matter “an organization”. All members of the SLRC believe that a fairer and more transparent process should be devised for proscribing an organisation as a terrorist organisation.

The SLRC recommended that the proscription process be improved either by enhancing the protective and notice aspects of executive proscription, or by making proscription a judicial process with notice, service, and a judicial hearing. The grounds for proscription were broadened in 2005 to include organizations that advocate committing a terrorist act.

2. Advocating terrorist acts. The SLRC noted that “advocating the doing of a terrorist act is one of the grounds for proscription of an organisation as a terrorist

¹⁰⁶ Liberty Victoria submission on the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth), 10 December 2006.

¹⁰⁷ REPORT OF THE SECURITY LEGISLATION REVIEW COMMITTEE (June 2006), p. 4, available at http://www.ag.gov.au/www/agd/agd.nsf/Page/National_securityReviewsSecurity_Legislation_Review_Committee. For the detailed recommendations, see pp. 8-16.

¹⁰⁸ Separate citations are not provided for each section below; all these recommendations and the specific quotations are found at id., pp. 3-16. Individual citations available on request.

organisation,” and called for deleting a portion of the broad definition of “advocates” in section 102.1(1A) in the Criminal Code that creates liability for “directly prais[ing] the doing of a terrorist act in circumstances where there is a risk that such praise might lead a person to engage in a terrorist act.”¹⁰⁹ The SLRC called that provision “on its face, broad and potentially far-reaching.” If its deletion were not possible, the SLRC stated that “the paragraph should be more tightly defined and changed to require that the risk be a substantial risk.”

3. Association. The SLRC also directly criticized the offence of “associating with terrorist organizations” that was added to the Australian Criminal Code in 2004.

On its face, this offence transgresses a fundamental human right – freedom of association – and interferes with ordinary family, religious and legal communication.... [S]ection 102.8 should be repealed. The interference with human rights is disproportionate to anything that could be achieved by way of protection of the community if the section were enforced.... [T]he most important feature of the section – making it an offence to provide support to a terrorist organization with the intention that the support assists the organisation to expand or to continue to exist – can be achieved by a new offence that does not rely on association between the person charged and anyone else.

4. Strict liability. The SLRC called for the repeal or amendment of several Criminal Code subsections applying strict liability (punishment without proof of fault—a concept similar to absolute liability in Canada).

5. Definition of terrorist act. The SLRC recommended that the definition of “terrorist act” in the Criminal Code also be amended by “omitting all reference to ‘threat of action’ . Its place in the definition causes uncertainty and is unnecessary.” The SLRC recommended a separate offence for “threatening action” or “threat to commit a terrorist act” if that was considered necessary.

The SLRC concluded that “the amendments ... recommended to the proscription, advocacy, association and strict liability elements of Part 5.3 of the Criminal Code would contribute to a reduction in fear and sense of alienation by at least some Muslim and Arab Australians. By doing so, there will be an enhancement, not a diminution, of anti-terrorism efforts.”

6. Training. The SLRC also recommended that the provision of the Criminal Code that criminalizes “training a terrorist organisation or receiving training from a terrorist organisation” be amended to “make it an element of the offence either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act,” and that the offense should not be a strict liability offense.

7. Funding to, from, or for a terrorist organisation. The SLRC recommended that the current broad offense of “getting funds to, from or for a terrorist organisation” under subsection 102.6 should “not apply to the person’s receipt of funds from the organisation

¹⁰⁹ Here the SLRC is paraphrasing rather than directly citing section 102.1(1A).

... solely for the purpose of the provision of ... legal representation ... or assistance to the organisation for it to comply with ... law....”

8. Providing support to a terrorist organization. The SLRC recommended that the support offence “be amended to ensure that the word ‘support’ cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organization and its stated objective,” reflecting freedom of expression concerns about the breadth of the support proscription.

In 2008, the recommendations of the Security Legislation Review Committee, as well as critical recommendations of the Parliamentary Joint Committee Intelligence and Security review of the Australian Security Intelligence Organisation’s questioning and detention powers,¹¹⁰ and the Australian Law Reform Commission’s review of sedition laws,¹¹¹ remained under review by the government. In addition, the new Australian government headed by Kevin Rudd initiated a full-scale review of homeland and border security arrangements, including legislation, in February 2008.

Contrasted with the warnings and limitations suggested by the Security Legislation Review Committee, the new Anti-Money Laundering and Counter-Terrorism Financing Act, adopted in 2006, will potentially increase the impact on the Australian charitable sector. The Act is intended to bring Australia into compliance with standards provided by the intergovernmental Financial Action Task Force (FATF), the group of G8 and other countries that has sought to strengthen terrorist finance and money laundering law around the world, particularly since 2001.

The Act¹¹² primarily affects “financial and gambling sectors, bullion dealers and lawyers/accountants (but only to the extent that they provide financial services in direct competition with the financial sector – legal professional privilege will still apply) who provide designated services,” and will be expanded to include further coverage of “real estate agents, jewellers, lawyers and accountants.” The Act’s definition of “designated services” covers

a wide range of financial services including opening an account, accepting money on deposit, making a loan, issuing a bill of exchange, a promissory note or a letter of credit, issuing a debit or stored value card, issuing traveller’s cheques, sending and receiving electronic funds transfer instructions, making money or property available under a designated remittance arrangement, acquiring or disposing of a bill of exchange, promissory note or letter of credit, issuing or selling a security or derivative, accepting a contribution, roll-over or transfer in respect of a member of a superannuation fund and exchanging currency.¹¹³

¹¹⁰ See <http://tinyurl.com/3pzxbr>.

¹¹¹ See Australian Law Reform Commission, Discussion Paper 71, *Review of Sedition Laws* (2006), <http://www.austlii.edu.au/au/other/alrc/publications/dp/71/>.

¹¹² The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 is at <http://tinyurl.com/45ny6d>; the Explanatory Memorandum is at <http://tinyurl.com/49xewp>.

¹¹³ Explanatory Memorandum, p. 1.

It is thus possible that a charitable or other organization undertaking such services would fall within the purview of the Act, perhaps for accepting a contribution, or sending electronic funds transfer instructions, even if it is not a designated target of the legislation.

Thus, according to a close Australian observer of this sector and the legislation, funds received from this [charitable and nonprofit] sector will be subject to the provisions of the [Act]. Obligations are generally imposed on 'reporting entities', that is, entities providing 'designated services' (s 5). 'Designated services' cover a range of financial services (... s 6, Table 1) hence, charitable and nonprofit organisations receiving designated services will be affected by the [Act] in the sense that 'reporting entities' when discharging their obligations under the regime will be collecting financial information regarding these organisations and, in some circumstances, forwarding them on to AUSTRAC (and from then on to security and police agencies).¹¹⁴

Australian nonprofits and charities may also be “subject to special attention when 'reporting entities' seek to comply with their obligations under the [Australian] AML/CTF regime”¹¹⁵ because the Act seeks to codify Australia’s commitments under the FATF standards, and a key focus of the FATF, through Special Recommendation VIII, has been nonprofit organizations.

The new Act also regulates what it terms “designated remittance arrangements,” which “is the [Act]’s synonym for alternative remittance systems like hawala.”¹¹⁶ So such groups – which may be nonprofit or charitable organizations or have close links to them – will be affected by the Act’s requirements of such “designated remittance arrangements,” including reporting requirements as “reporting entities” under the Act (sec. 6) and registration requirements (part 6). One potential concern here is that the Act would be used for indirect and selective regulation of charities and perhaps those that provide services to them.

The Act was roundly criticized by industry, civil liberties, academic, and other representatives during the mandatory comment period. At least one organization, Liberty Victoria, specifically raised the problem of impact on the charitable sector.

Liberty Victoria noted that because the underlying “financing of terrorism” offenses (discussed above, sec. 102.6 of the Criminal Code) are “very broad and capture conduct that go far beyond intentional funding of politically or religiously motivated violence,” including criminalizing donation of money to groups like Hamas “for the sole purpose of assisting its humanitarian activities,” and because “all but one of the listed ‘terrorist organisations’ under the Criminal Code are self-identified Muslim groups, the

¹¹⁴ Communication from an Australian academic.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Criminal Code ‘terrorist organisation’ provisions have resulted in a tangible sense of fear and uncertainty amongst Muslim Australians especially in relation to charity giving.”¹¹⁷

Liberty Victoria cites a member of the Islamic Council of Victoria on the effect of this legislation, and its potential compounding in the new Act:

This level of uncertainty in an offence this serious is deeply worrying. And for Australian Muslims, doubly so. Because charity is one of the five pillars on which Islamic practice is built, Muslims tend to be a charitable people. That is especially true at certain times of the Islamic year when charity is religiously mandated. Countless fund-raising efforts followed the tsunami and the Pakistan earthquake, and even in the normal course of events, Muslim charities regularly provide relief to parts of the Muslim world many other charities forget.¹¹⁸

Liberty Victoria disputes the necessity of such provisions – as well as the idea that they faithfully reflect Australia’s obligations under the International Convention for the Suppression of the Financing of Terrorism and the Financial Action Task Force’s Special Recommendations on Terrorist Financing. In reality, writes Liberty Victoria, “both these documents, while calling for the criminalization of the financing of terrorism, define financing of terrorism in a narrower manner than sections 20-1 of the *Charter of United Nations Act 1945* (Cth) and section 102.6 of the *Criminal Code*, by emphasising the need for an intention or knowledge that funds will be used to carry out terrorism.” “[B]y not requiring that there be intention or knowledge that funds be used to facilitate acts of violence, [the Australian legislation] is at odds” with these international standards.¹¹⁹

For Liberty Victoria, the solution is reasonably clear: the offenses in a separate section of the Australian Criminal Code, Division 103, “at least require that the funds have some connection with the engagement of a ‘terrorist act’. It is, therefore, recommended that ‘financing of terrorism’ under the [new Act] be restricted to conduct that amount to an offence under Division 103 of the Criminal Code.”¹²⁰ That suggestion was not taken by the drafters.

Based on current information, the enhanced Australian counter-terrorism statutory stream has not yet been used to proscribe charities on terrorism grounds or in other ways against charities. While new legislation may potentially have more effects on the charitable sector, the broad existing legislation does not appear to have been used against the charitable sector, and its effectiveness in halting any financial flows to terrorist organizations using charities and stopping terrorism might legitimately be questioned.

¹¹⁷ Liberty Victoria submission on the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth), 10 December 2006.

¹¹⁸ Liberty Victoria, id., citing Waleed Aly, *Reckless Terror Law Threatens to Make Charity End at Home*, THE AGE (Melbourne), 29 November 2005, 15.

¹¹⁹ Liberty Victoria, id.

¹²⁰ Liberty Victoria, id.

General Conclusions: Counter-Terrorism, Civil Liberties, and the Enabling Legal and Political Environment for Civil Society in Comparative Perspective

A number of common areas and lessons arise in the exploration of counter-terrorism and the enabling legal and political environment for civil society in the United States, the United Kingdom, and Australia.

1. Statutes and regulation barring various forms of charitable assistance to or use by terrorists were generally in place before September 11. They were rapidly broadened, and have since been further broadened. In several countries – including Canada – still further broadening measures are underway.

2. Opposition from civil society and the voluntary and charitable sector has been episodic at most, and most clearly focused in the United States, where the government's voluntary guidelines on overseas giving have sparked discontent, particularly in the philanthropic sector. Charities and philanthropic organizations tend to become exercised by broadening government regulation in this area only when they are directly affected, as by the U.S. Treasury Department's guidelines on overseas funding. The British approach, at which the Charity Commission's regulatory role has thus far remained at the center of investigatory and enforcement activities, appears to have sparked less opposition from the voluntary sector.

3. Certain key issues central to the legal and political enabling environment for civil society appear to arise in each country. They include the following:

- The process, scope, intentionality requirement and reviewability of proscription decision making;
- The availability and fairness of a de-proscription process;
- The breadth of terrorist "support" or "material support" or "assistance" or "training" or financing offenses, including the frequent lack of a *mens rea* requirement and the breadth of the offense;
- The dangers to associational freedom potentially posed by the broad legislation already enacted or proposed;
- The difficulty in preserving a central role for nonpolitical and nonpartisan charity regulators, where they exist.

4. There are some key differences among "war on terror" states in their approaches to counter-terrorism and civil society. The British and American cases represent divergent approaches, while each remains committed to combating terrorist activity, including the misuse of charities for terrorist purposes.

The British regulatory approach, with the Charity Commission at its center, focuses inquiries into suspicious cases, with a range of potential solutions that can include strengthened procedures, replacement of trustees and on up to closing and proscription of the charity. The American approach has been centered on prosecution for "material support" and other criminal charges, more recently supplemented by "voluntary guidelines" intended to promote compliance, particularly in the philanthropic sector.

The British approach may well have worked more effectively in the years since 2001. The British case studies discussed above demonstrate that the Charities Commission employs a broad range of investigative and regulatory responses when charities are suspected of having links to terrorism. Not all of the regulatory responses are punitive; they can include requiring improved record-keeping and other measures that may make it easier to detect links with terrorists in the future. It should be noted, however, that the regulation of charities in Britain is centered in one level of government whereas the United States, Australia, and Canada are all federations in which regulatory jurisdiction over charities are divided between different levels of government.

5. Is self-regulation by civil society and the voluntary sector a useful solution to the problems of counter-terrorism law and policy? Self-regulation emerges with mixed success in these jurisdictions.

In the United States, the self-regulatory approach of Treasury's voluntary guidelines on overseas giving sparked opposition. Some charities attempted to comply with these voluntary guidelines through additional vetting procedures, while some attempted to shift risk downstream to grantees through revised and strengthened grant letters. In Britain the sophistication and nuance of the Charity Commission and its role has perhaps reduced the need for a self-regulatory approach, as the Commission has helped to educate the charitable sector as well as adopting a range of investigatory and enforcement measures.

Measures affecting civil society and its enabling legal and political environment are, of course, not limited to the United States, the United Kingdom, and Australia. This article has focused on those three countries because they have played a leading role in the "war on terror," and because developments in them have gone deeper and may have a more long-lasting impact on civil society and the voluntary sector.

But it is important to note that other very important countries have encountered these dilemmas and conflicts as well. They include the Netherlands,¹²¹ Canada,¹²² and South Africa, as well as regions such as the European Union.¹²³ And of course initiatives

¹²¹ See C.R.M. Versteegh, *Terrorism and the Vulnerability of Charitable Organisations*, paper presented to the International Society for Third Sector Research Seventh International Conference, Bangkok (July 2006). The Netherlands has enacted an Act on Terrorist Crimes (August 2004), intended to be consistent with the European Union framework for counter-terrorism measures. In 2006 the Netherlands adopted further legislation banning organizations (including charitable organizations) on the United Nations or European Union terrorism organization proscription lists. See Background Note: The Netherlands, at <http://www.state.gov/r/pa/ei/bgn/3204.htm>.

¹²² On developments in Canada, see Blake Bromley, *The Post 9/11 Paradigm of International Philanthropy*, paper presented to the International Society for Third Sector Research Seventh International Conference, Bangkok (July 2006); Terrence Carter, *The Impact of Anti-Terrorism Legislation on Charities in Canada: The Need for an Appropriate Balance* (2007), at www.antiterrorismlaw.ca; Terrance S. Carter, *Canadian Charities: The Forgotten Victims of Canada's Anti-Terrorism Legislation*, INTERNATIONAL JOURNAL OF CIVIL SOCIETY LAW IV:4 (October 2006); Blake Bromley, *Funding Terrorism and Charities*, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (2007).

¹²³ On developments in the European Union, see the Council Framework Decision on Combating Terrorism (13 June 2002), Commission Communication on the Prevention of and Fight against Terrorist Financing (20 October 2004), and the Commission Communication on the Prevention of and Fight against Terrorist Financing through Enhanced National Level Coordination and Greater Transparency of the Non-

to chart a better course in the relationship between counter-terrorism law and policy and the enabling environment have been launched. These include the Montreux Initiative in Europe and the Middle East¹²⁴; other efforts to bring together Islamic charities and to improve standards, such as the Humanitarian Forum, established in June 2005¹²⁵; the efforts by public charities and foundations in the United States to establish the Principles of International Charity¹²⁶; the joint work between the European Foundation Centre and the U.S. Council on Foundations to draft and publicize the Principles of Accountability for International Philanthropy¹²⁷; and the efforts by the Charity Commission in the U.K. to fight terrorism while preserving the enabling environment for the voluntary sector and the distinct roles of the Commission and other bodies in the U.K.¹²⁸

Each of the countries and regions analyzed here, and others such as the Netherlands, Canada, South Africa, and the European Union, will be important to follow carefully in the years ahead as nations struggle to balance security and freedom and to formulate and enforce appropriate counter-terrorism laws and policies without unnecessarily damaging the enabling legal and political environment for civil society. Counter-terrorism law and policy is challenging civil society and civil liberties in a number of “war on terror” states, and we must work toward ameliorating those effects wherever possible.

profit Sector (29 November 2005). These and other efforts are reviewed in the *Independent Scrutiny in Response to Recommendation 41 of the EU Counter Terrorist Financing Strategy Presented to the European Council of December 2004 to Assess the EU's Efforts in the Fight Against Terrorist Financing* (1 February 2007). These and additional useful materials are at <http://tinyurl.com/4tcubu>. For independent analyses, see Grantmakers Without Borders, Update, *Note on developments at EU-level relating to CTM* (21 June 2007); and Amnesty International, HUMAN RIGHTS DISSOLVING AT THE BORDERS? COUNTER-TERRORISM AND EU CRIMINAL LAW (2005), at www.amnesty.org/en/library/info/IOR61/012/2005.

¹²⁴ See *The Montreux Initiative (MI): Towards cooperation in removing unjustified obstacles for Islamic Charities* (February 2007); The Montreux Initiative, *Conclusions* (Revised in Istanbul, 22 November 2005); Jonathan Benthall, *Towards cooperation in removing obstacles for Islamic charities*, feasibility study for the Federal Department of Foreign Affairs, Bern (May 2005).

¹²⁵ For further information on the Humanitarian Forum, see www.humanitarianforum.org.

¹²⁶ See www.ombwatch.org/npa/Treasury%20Principles%20Final%20Document%20.pdf, and the discussion of the Principles of International Charity in the U.S. section above.

¹²⁷ See <http://www.cof.org/council/prdetail.cfm?ItemNumber=10038>.

¹²⁸ See Charity Commission, THE HOME OFFICE AND HM TREASURY'S REVIEW OF SAFEGUARDS TO PROTECT THE CHARITABLE SECTOR (ENGLAND AND WALES) FROM TERRORIST ABUSE: THE CHARITY COMMISSION'S RESPONSE TO THE Consultation (August 2007), at www.charity-commission.gov.uk/supportingcharities/terror.asp.

ICNL-CORDAID AWARDS

EU Regulation of Charitable Organizations: The Politics of Legally Enabling Civil Society

Oonagh B. Breen*

I. INTRODUCTION

Traditionally, the European Union has adopted a laissez-faire approach towards the regulation and governance of charitable organizations. The legal enablement of these bodies occurs in the national legislation of Member States and thus stops at the borders of those countries, forcing nonprofit organizations that work across borders to grapple with different national legal and regulatory regimes. Different tax laws, different company laws and at times, different charity laws therefore apply to charitable organizations that wish to work across a number of European Member States. In some instances, the European Union lacks competence to harmonize national laws — for example, in the area of direct taxation.¹ In other areas, such as company law, the EU has legislative competence to harmonize national laws but has chosen to exclude nonprofit organizations from the scope of its regulatory efforts. Whatever the underlying reason for this lack of enablement — whether classified as benign neglect or legal parsimony on the part of EU institutions — the current European legal regime prevents nonprofit organizations from fully enjoying the benefits of the common market.

One solution commonly proffered as a panacea for nonprofit organizations' difficulties is to develop a European legal vehicle to facilitate nonprofits that operate on a pan-European basis. To this end, demands have been made for a European Statute for Foundations and a European Statute for Associations, enacted by way of European Council Regulation and thus directly applicable in all Member States. These European vehicles, the argument runs, would have transparent and uniform requirements in each State and thereby cut down on the legal and administrative bureaucracy that nonprofits currently endure in attempting to open new branches or deal in Member States other than their founding Member State. The advantages cited in support of the adoption of such

* Dr. Oonagh Breen, oonagh.breen@ucd.ie, is a professor in the School of Law, University College Dublin. This article was recognized with a Distinguished Research Award in the ICNL-Cordaid Civil Liberties Competition.

¹ Within the EU, the power to tax is, in the words of Shaw, a “jealously guarded aspect of national sovereignty” (SHAW, JO, JO HUNT & CHLOE WALLACE, *ECONOMIC AND SOCIAL LAW OF THE EUROPEAN UNION* (Palgrave, 2007) at 168. The raising of revenue through forms of direct taxation falls within the competence of the Member States and a reluctance to share or cede this power affects the EU's ability to develop tax policies. This restraint on EU harmonization powers is evident in Arts. 93-95 EC (*see* after the coming into force of the Treaty of Lisbon Articles 113 -115 TFEU), which restrict the EU's ability to legislate in the area of taxation to those occasions upon which there is Member State unanimity at Council level, making it an unlikely occurrence. *See* CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, Official Journal C 115 of 9 May 2008.

European Statutes² tend to be three in number. First, proponents argue that the statutes would facilitate the giving and receiving of gifts and grants across borders and the general improvement of cross-border operations and activities of funders and foundations in Europe. Second, the provision of new instruments for cooperation among funders would both enhance the existing well-established practice of co-funding and engaging in joint activities and projects throughout the EU and assist in the increasing number of trans-national collaborative projects between European nonprofit organizations in other countries. And third, the statutes would enable nonprofits to enjoy the freedom of establishment for all activities that contribute to the objectives of the Community, irrespective of the form taken by the nonprofit that carries them on.

Legislative proposals for European foundation and association statutes have enjoyed considerable support in the nonprofit sector. In a recent Commission Consultation paper on *Future Priorities for Company Law Action*, responding foundations unanimously endorsed a Commission proposal for a feasibility study on the need for a European Foundations Statute.³ The response rate to the question was an impressive 55 percent of respondents,⁴ with many foundations responding exclusively to this question in the Consultation,⁵ implying strategic lobbying by these organizations. Advocates of a European legislative solution seek parity of treatment for nonprofit organizations with for-profit entities and view the European Company Statute, enacted in 2000 to provide a common European legal vehicle for public limited companies (plcs), as an ideal template for a similar statute tailored for nonprofit organizations.

This article takes issue with those who view the introduction of a European regulation as the most effective way to facilitate nonprofit activity in the EU. It argues that the judicial route and not the legislative route may prove more fruitful if the aim is to achieve greater legal enablement of civil society organizations within the European Union. Part II outlines the difficulties associated with uniform European regulatory solutions in company law and explains why a European legal instrument will not provide an effective answer to the problems currently facing nonprofit entities. In the absence of a legislative solution, Part III considers alternative judicial and political attempts to create a legally enabling environment for nonprofit organizations in the EU. Finally, Part IV puts the judicial developments relating to nonprofits in the broader political context of an emerging European Union that can no longer be viewed solely in terms of economics. The article concludes that given the evolving nature of the relationship between EU institutions and civil society organizations, a judicial solution to facilitate cross-border

² See, e.g., Why is a European statute for foundations needed?, European Foundation Centre 18th Annual General Assembly (AGA) and Conference, June 1st-3rd 2007, Madrid.

³ See Directorate General for Internal Market and Services, Report on Consultation and Hearing on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union (available at http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf) (hereinafter, "Future Priorities Report"), at 26. See further discussion of this report *infra* n. 22 and accompanying text.

⁴ The average response rate for other questions in the survey, which dealt with company law issues, was typically in the low 40s.

⁵ See n. 3 *supra*.

nonprofit and charitable activities may be politically more effective and timely than a statutory solution.

II. EUROPEAN STATUTES: INAPPROPRIATE INSTRUMENTS FOR THE CREATION OF A LEGALLY ENABLING ENVIRONMENT FOR NONPROFIT ORGANIZATIONS

The Background of the European Company Statute

The idea for a European Council Regulation,⁶ creating a European legal form recognizable in all Member States, is not new. The debate on the need for a European Company Statute began in Paris in the 1960s.⁷ Although there was little disagreement as to the general principle, achieving consensus on the details proved difficult. Over the following 20 years the Commission published various proposals⁸ for a European company model, but deadlock continued to persist in the European Council over the prescribed forms of worker participation in the proposed model.⁹ A breakthrough occurred with the completion of the internal market in the early 1990s, when the Commission published new initiatives to revive the Company Statute.¹⁰ The publication of the Davignon Report¹¹ in 1997 enabled real progress to be made and the European

⁶ A regulation is a legal instrument of general application that is binding in its entirety and directly applicable in all Member States.

⁷ Congrès Internationale pour la Création d'une Société Commerciale de Type Européen, Report, published by *Revue de Marché Commun* (Paris), supplement to No. 27, July-August 1960. The Congress drew on the practical and academic legal expertise not only of those within the existing six Member States that constituted the EEC at the time but *also* boasted representatives from the UK, the United States and the Council of Europe. The Congress proposed the signing of a Convention between the six Member States to recognize a common form of trading company that would exist alongside the national forms in each Member State but would operate under uniform European rules, be registered in a central registry and subject to European judicial control. Tax matters relating to the company, however, would continue to be a matter for national law in each case. *See further*, Thompson, *The Project for a Commercial Company of European Type* (1960) 10 *ICLQ* 851, at 858.

⁸ *See* Proposal For A Council Regulation Embodying A Statute For The European Company, COM(70) 600, OJ C 124 (10.10.1970); Bull EC Supp 8/70 and Amended Proposal For A Council Regulation On The Statute For European Companies, COM (75) 150 final, (19.03.1975); Bull EC Supp 4/75.

⁹ On the general trials and tribulations relating to the legislative history of the European Company Statute *see* Sanders, *The European Company*, 6 *GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* (1976); Wehlau, *The Societas Europaea: A critique of the Commission's 1991 amended proposal*, 29 *CML REV.* 473 (1992); Edwards, *The European Company — Essential Tool or Eviscerated Dream?* 40 *CML Rev* 443 (2003).

¹⁰ Memorandum from the Commission to Parliament, the Council and the two sides of industry, "Internal Market and Industrial Cooperation — Statute for the European Company — Internal Market White Paper, point 137", COM(88)320; EC Bull Supp 3/88, outlining the Memorandum of the Commission on the SE Statute (in which the Commission moved from having an obligatory board participation system for all SEs to giving companies instead the choice between different board participation systems. *See also*, the Commission Proposal OJ C 263, 16.10.1989, in which the Commission for the first time suggested splitting the SE legislation into a Regulation and a Directive. The latter aimed to deal with the controversial issue of employee involvement.

¹¹ Final Report on European Systems of Workers Involvement of the Group of Experts (hereinafter referred to as the "Davignon Report") May, 1997. The Davignon Group concluded that the national systems of workers' involvement were too diverse, making general harmonization impossible. The report proposed that priority should be given "to a negotiated solution tailored to cultural differences and taking

Council finally adopted the European Company Statute in Nice in 2000.¹² The European Company Statute (“ECS”) came into force in 2004.¹³ The objective of the ECS is to enable companies incorporated in different Member States to merge or form a holding company or joint subsidiary while avoiding the legal and practical constraints arising from the existence of 27 different legal systems. Although the intention in 1960 was to enable people to form a company governed entirely by European principles rather than the laws of any particular Member State,¹⁴ legal realities and cultural differences forced the drafters to modify the model. The final version consists of a “European” public company that is registered in one Member State, governed by the Statute in certain key areas (e.g., minimum capital, management structure, shareholder meetings) but otherwise is subject to national laws for public companies. The ECS specifically does not apply to nonprofit organizations.¹⁵

The ECS experience illustrates the difficulties of attempting to accommodate the intricacies of divergent national company laws in one all-encompassing Council Regulation. The limited format of a legal regulation does not lend itself to the distillation of the granular details necessary to create a generic legal vehicle that will work uniformly and coherently in all 27 Member States. Drafters of the ECS were forced instead to adopt certain lowest-common-denominator requirements that can apply to all Member States by regulation, with issues that are not expressly covered by the regulation left to be decided by national law.¹⁶ Whereas minimum capital requirements, management structure, employee rights, and shareholders’ meetings are governed by a European standard, other important matters (such as directors’ liability, audits and accounts, liquidation and insolvency, tax, and registration and publication of documents) still fall under the

account of the diversity of situations.” It was agreed that the relevant parties should first try to agree on a worker participation model for each European company but if negotiations should fail, a set of standard rules would then apply instead.

¹² See Council Regulation 2157/2001, OJ L 294 and Council Directive 2001/86/EC, OJ L 294/22, 10.11.2001. The objective of the Regulation, which came into force in all Member States in October 2004, is “to create a European company with its own legislative framework.” See further, <http://europa.eu/scadplus/leg/en/lvb/l26016.htm> (last accessed October 30, 2007).

¹³ Only six countries managed to meet the 8 October 2004 deadline for the transposition of the SE Directive, thereby preventing employees from their country from participating in negotiations in upcoming SEs, see Commission Press Release, Company law: European Company Statute in force, but national delays stop companies using it, IP/04/1195, 08/10/2004. In the overwhelming majority of countries the considerable delay was not caused by substantial national debates on the substance of the Directive but rather by an apparent lack of interest in the issue. See, e.g., <http://www.eurofound.europa.eu/eiro/2005/01/feature/si0501303f.htm> on Slovenian approach (last accessed May 23, 2008) and more generally, http://www.worker-participation.eu/european_company/countries_transposition (last accessed May 23, 2008).

¹⁴ See Thompson, *supra* n. 7.

¹⁵ See Art. 3 Regulation 2157/2001 (providing that “Companies and firms within the meaning of the second paragraph of Article 48 of the Treaty and other legal bodies governed by public or private law, formed under the law of a Member State, with registered offices and head offices within the Community may form a subsidiary SE.”) The aforementioned Art 48(2) EC specifically excludes nonprofit organizations from its scope.

¹⁶ See, in this regard, Articles 9(1)(c) and 10 of Regulation 2157/2001.

relevant national law. The troublesome issue of employee involvement has been dealt with by an accompanying Council Directive and individual Member State legislation.

The Practical Effectiveness of the Societas Europae

The commercial adoption of the European company, or “SE,” as it is known,¹⁷ has not been overwhelming. To date, there have been 105 SEs established throughout the EU.¹⁸ Many of these have begun not to facilitate the conversion of existing autonomous business operations in different Member States into one pan-European company, but rather to assist new entities that want to enter a market quickly.¹⁹ According to the European Employers Federation (UNICE), the perceived weaknesses of the SE include the absence of an agreed tax regime and the creation of now 27 different national statutes to give effect to the Directive.²⁰ The value of a legal structure without these elements is limited since it cannot effectively facilitate cross-border trade, a flaw predicted by some commentators before the European Company Statute was enacted.²¹

The practical utility of the SE remains in doubt: in the Commission’s *Report on Consultation and Hearing on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union*,²² 60 per cent of those responding to the question about the utility of ECS did not think the Statute was either very useful or particularly so.²³ Among the practical problems cited by those currently using the SE as a legal vehicle were the persistent difficulties caused by the

¹⁷ The European Company is known by its Latin acronym Societas Europae or “SE” for short.

¹⁸ Source: http://www.worker-participation.eu/european_company/se_companies/brief_general_overview (figures current to November 2007).

¹⁹ *Ibid.*

²⁰ See Edwards, *The European Company — Essential Tool or Eviscerated Dream?* (2003) 40 CML REV 443, at 463. On the various national implementing legal instruments see http://ec.europa.eu/employment_social/labour_law/documentation_en.htm#10.

²¹ See Edwards *supra* n. 20, at 463 (noting, “since many cross-border corporate structures are dictated by tax considerations more than any other factor, the availability of a pan-European instrument which leaves the existing mosaic of fiscal regulation untouched may prove to be irrelevant.”). See also, Winter, *EU Company Law on the Move* (2007) 31 LEGAL ISSUES OF ECONOMIC INTEGRATION 97, 98 (commenting that, “The trouble with the Statute, in its agreed-upon form, is that it precisely fails to achieve [its] objective. There is no uniform set of rules applying to the SE, as Member States were unable to agree to one set of rules.”)

²² Directorate General for Internal Market and Services, Report on Consultation and Hearing on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union (available at http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf) (hereinafter, “Future Priorities Report”). The Report reported on the views of more than 270 interested parties who responded to the consultation; see further, Commission Press Release, Company law and corporate governance: public hearing on future priorities for the Action Plan, IP/06/574, May 4, 2006.

²³ See Future Priorities Report, *supra* n. 22, at 22. Notably, the report itself takes a more positive approach to this figure, stating although at an early stage in its evaluation: “Still about 40% of the respondents considered the European Company Statute to be very useful or partly useful.”

differing national taxation regimes²⁴; the need to coordinate other Community legislation that could obstruct the creation of an SE; and the issue of whether an SE incorporated in one Member State that operates in another Member State (which would require it to register a branch in that Member State if it were a public limited company) should be required to register a branch, given that the practice seems to vary between Member States.²⁵

When surveyed as to whether there was need for a similar European statute for private companies, a quarter of respondents were against its introduction, citing the lack of industry interest in such corporate form. According to the *Future Priorities Report*, this negative impression was informed by the limited adoption of the existing SE model and yet again, the “doubted practical value of the Statute due to other obstacles to corporate mobility such as taxation, accounting, insolvency or employee participation issues.”²⁶ Moreover, those in favor of the European Private Company (i.e., three-quarters of the 40 percent of respondents who answered this question) stressed the need for any new statute to provide a “uniform, genuinely supranational form with as few references to the national laws as possible.” In other words, what is sought is an approach akin to the original aspirations for the SE but far removed from the SE model currently in operation.²⁷

Current Obstacles Affecting Civil Society Organizations That Wish to Operate on a Pan-European Basis

Enthusiasm for European Statutes in aid of nonprofit organizations must be considered in the context of this negativity. Responding foundations to the Future Priorities Consultation unanimously urged the Commission to carry out a feasibility study on a European Foundation Statute.²⁸ Non-foundational stakeholders, many of which have experienced operational difficulties with the ECS, dissented. Whereas some of the dissenters adopted a self-interested stance in counseling the Commission to ignore nonprofit organizations,²⁹ the majority of dissenters raised a note of caution as to whether the proposed statute could solve the structural obstacles that now inhibit nonprofit activities throughout the EU.³⁰

²⁴ Although COM 88/320, *supra* n. 10, at 15, suggested greater use of bilateral tax treaties to solve the taxation problems that would still be encountered by SEs, this solution has not proved practical in many cases.

²⁵ *Supra* n. 22, at 23.

²⁶ *Ibid.*, at 25.

²⁷ *Ibid.*, at 25.

²⁸ *Ibid.*, at 26.

²⁹ *Ibid.* (noting that, “A few respondents, mainly from the private sector, considered that the Commission should focus on issues which directly relate to enhancing the competitiveness of profit making entities and the improvement of the functioning of the internal market.”).

³⁰ *Ibid.* (stating that “More than half of [those not in favor of introducing a new Statute] (mainly from the public sector, industry associations, representatives of the financial sector and some professional services providers) were sceptical as to the usefulness of such an instrument or would prefer other solutions to address the foundations’ requests.”)

It is true that nonprofit organizations, like many for-profit entities, face structural obstacles when they seek to operate on a cross-border basis across the EU. These obstacles take the form of differing legal and fiscal regimes that operate in each of the 27 Member States, with which nonprofit organizations must comply if established in any of these States.³¹ Imagine, for instance, a donor who wishes to establish a pan-European foundation enjoying charitable tax-exempt status in the EU Member States of Ireland, France, Germany, and Malta.³² To establish the organization, French law requires both registration and State approval, and approval is subject in practice (although not in law) to a minimum capital requirement of €1 million. Germany also requires registration and State approval, but the State enjoys no discretion regarding approval; although there is no official minimum capital requirement for establishment, the foundation must have sufficient assets to carry out its purpose, which generally requires a minimum capital requirement of €50,000. Ireland requires registration with the Revenue Commissioners, with no minimum capital requirement. An organization in Malta must register and, if it wishes to take the form of a “voluntary organization,” must seek State approval. There are *de minimis* Maltese minimum capital requirements, with the prescribed amount being €240 for social purpose foundations and €1,200 for all others.

Once an organization is established, it faces a variety of governance requirements. Ireland alone requires that a majority of the governing board reside within the jurisdiction. French law requires all foundations to appoint an auditor and a substitute and to file annual returns and financial statements with administrative authorities. These reports must be made publicly available only if the foundation receives annual gifts in excess of €153,000 or support from public authorities. By contrast, German law does not have any publication requirement, although if tax exemption is sought, dual filing is required both to State authorities and to the relevant financial authorities. Irish law requires all charities with an annual income of over €100,000 to prepare audited accounts, but imposes a public filing requirement only on incorporated charities. Even then, this requirement is not consistently applied. Religious charities are statutorily exempt from the requirement to make accounts available.³³

Retention of tax exemption also varies. If the foundation carries out activities outside its country of establishment, its tax-exempt status remains unaffected in Malta. French law makes the continuation of tax-exempt status conditional upon proof that the activities are in the public interest and of a nonprofit nature, whereas German law is the most demanding, requiring such activity to have a positive effect on the reputation of

³¹ Information for this comparison is drawn primarily from the EUROPEAN FOUNDATION CENTRE, FOUNDATIONS’ LEGAL AND FISCAL ENVIRONMENTS — MAPPING THE EUROPEAN UNION OF 27 (2007).

³² These four States are chosen simply to illustrate existing national regulatory divergences — a combination of other Member States might not provide the same logistical difficulties but would provide others in lieu. Thus as Dube, Rossi & Surmatz point out in (Summer, 2007) EFFECT 13, “While you need at least 3,000 Euros to start a foundation in Copenhagen, Denmark, just a short drive across the Oresund Bridge in Malmö, Sweden, there is no such fixed requirement, although your assets should be adequate to pursue your planned purpose for five years. And if you set up a foundation in Cieszyn, Poland, you can run a business activity to generate income for it, but you can’t do so if you set one up just across the Friendship Bridge in Tešín, Czech Republic.”

³³ See s. 2 Irish Companies (Amendment) Act 1986.

Germany and its population before tax-exempt status for foreign activity can be guaranteed.

The diverse laws of the 27 Member States create the greatest difficulties in the treatment of capital-asset movement and tax treatment of donations, particularly cross-border donations. In general, EU Member States agree that there are justifications for granting special tax privileges to charities. The private supply of public goods by charities for the benefit of the community provides the basis for the tax exemptions and privileges that these bodies enjoy. The ability to tax, however, is seen as a sacrosanct power of a sovereign nation. It is an element of sovereignty that Member States have been extremely resistant to sharing with the EC.³⁴ The resulting lack of harmonization has meant that Member States have remained free to develop their own legal criteria for what constitutes public benefit for tax purposes and what ancillary legal requirements are placed on an organization seeking tax relief for its charitable purposes. One such ancillary condition typically relates to establishment — only those organizations established within the territory of a Member State may be eligible for the relevant tax relief. In this way, national tax laws tend to limit tax benefits to domestic charities and discriminate against foreign charities. Of the 27 Member States, only the Netherlands, Poland, and Slovenia allow a resident's donations to a foreign-based public benefit organization to be income-tax deductible. The Dutch and Polish laws on this topic are newly minted and result largely from national legislatures' attempts to preempt Commission infringement proceedings.³⁵ These laws, the scope of which has not yet been fully defined, are in the minority. Sixteen Member States do not allow deductibility under any circumstances for such donations, despite allowing deductions for donations to similar domestic organizations.³⁶ The remaining eight States allow deductibility in some limited, exceptional cases.³⁷

Many of these problems equally afflict for-profit companies operating on a transnational basis in the EU, and the introduction of the European Company or "SE" has not solved them. Directors of SEs must still turn to the various national implementing laws to determine issues of liability as well as reporting and auditing requirements. Moreover, the tax treatment of companies using the SE as their legal vehicle has not improved, because in the absence of unanimity at Council level, the Commission lacks the competence to harmonize national tax laws.

The Appropriateness of the ECS Model in the Legal Enablement of Nonprofits

It remains difficult, therefore, to see how the introduction of a European Statute — even one tailored to the specific characteristics of nonprofit associations or foundations — could hope to resolve the central structural problems encountered by such entities. Attempts to develop parallel nonprofit-friendly facilitative regulation to date

³⁴ To be adopted, European tax regulation requires the unanimous support of all Member States. Not surprisingly, the Commission's attempts over many years to harmonize national tax laws have failed.

³⁵ See *infra* Part III.

³⁶ See further EFC, FOUNDATIONS — LEGAL AND FISCAL ENVIRONMENTS, *supra* n. 32.

³⁷ Thus, France allows income tax deductions only if the foreign-based organization would be recognized as being of public benefit in France.

have failed. In 2006 the Commission withdrew its proposals for Regulations on the Statute for a European Association (ESA)³⁸ and the statute for a European Mutual Society,³⁹ introduced in 1991, on the overarching grounds that they “were not found to be consistent with the Lisbon and Better Regulation criteria, unlikely to make further progress in the legislative process or found to be no longer topical for objective reasons.”⁴⁰

The withdrawal of the ESA proposal came in the wake of a frustrating 20-year incubation period. Institutional support for an ESA had sprung from the European Parliament’s adoption of the Committee on Legal Affairs and Citizens’ Rights *Report on Nonprofit Making Associations in the European Community*⁴¹ in 1987.⁴² With a suggested Treaty base in Article 12 EC’s prohibition of discrimination on grounds of nationality,⁴³ the idea behind the European association was to facilitate transnational transactions by nonprofit membership associations. Despite its enthusiastic beginnings, the ESA proposal made little progress for almost 15 years, because its fate — like that of its sibling regulations, the European Statute on Mutual Societies and the European Statute on Cooperative Societies — was tied to that of the ECS.⁴⁴ Although the latter’s enactment in 2000 gave some renewed impetus to the ESA proposal, the political will necessary to make the ESA a reality did not exist. A number of stakeholders share the blame for this demise. Some Member States viewed the enactment of a European Statute as an unwelcome Commission encroachment into an area of third sector policy previously reserved to national deliberation,⁴⁵ an unwarranted intrusion for which there was no legal Treaty basis.⁴⁶ Indeed, the Commission’s commitment to the ESA proposal

³⁸ COM (1991) 273, OJ C 99, 21.4.1992, 1.

³⁹ COM (1991) 273, OJ C 99, 21.4.1992, 40.

⁴⁰ OJ C 64, 17.3.2006, 3.

⁴¹ Working Documents, Series A 2-196/86, January 8, 1987 (hereinafter “THE FONTAINE REPORT”).

⁴² European Parliament, Resolution on non-profit-making associations in the European Community, OJ C 99/205 (13 April 1987).

⁴³ Article 12, Treaty Establishing the European Community [TEC] Consolidated Text, Official Journal C 321 E/48 of 29 December 2006. Article 12 will be renumbered by the Lisbon Treaty as Article 18 of the Treaty on the Functioning of the European Union [TFEU]; see Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal C 306, 17 December 2007.

⁴⁴ CEDAG, *The Proposed Statute for a European Association: Background and Challenges*, Document presented to the Liaison Group of the European Economic and Social Committee with civil society organizations and networks, Brussels, 28 February 2006. See also Gjems-Onstad, *The proposed European Association: a symbol in need of friends?* (1995) 6(1) VOLUNTAS 3.

⁴⁵ Germany and the United Kingdom are alleged to have subscribed to this view. See Jeremy Kendall & Laurent Fraisse, *The European Statute of Association: Why an obscure but contested symbol in a sea of indifference and scepticism?*, LSE TSEP WORKING PAPER 11, June 2005.

⁴⁶ Some Member States (most notably the UK) expressed concern as to whether Article 48 EC, which expressly excludes nonprofit entities from its scope, could provide a legal basis for the regulation for a Statute for European Associations, which by definition are nonprofit entities. Indeed, Perri ascribed the failure of the Statute as far back as 1995 to the disagreements among both Member States and the organizations themselves. See Perri, *The voluntary and non-profit sectors in continental Europe*, in J. D.

has not always been constant or consistent, due in part to the lack of definitive Directorate General responsibility for nonprofit associations during the 1990s.⁴⁷ Similarly, with each rotation of the Presidency of the European Council, the attention given the ESA has varied, depending on the interests of the Member State in control of the legislative policy agenda.⁴⁸

Support for the ESA in legal circles has also been scarce. In its report to the EU Commission in November 2002 on a modern regulatory framework for company law,⁴⁹ the High Level Group of Company Law Experts recognized the difficulties surrounding the development of either a European Association or a European Foundation Statute. In particular, it stated that a European form of association was not regarded as a priority for the short or medium term. According to the Group, long-term plans for any such legal vehicle should depend on a review of the European Statute on Cooperative Enterprises.⁵⁰ In sum, the High Level Expert Group's overall recommendation was not to proceed with the introduction of the social economy statutes but instead to consider working towards the adoption of model laws instead.⁵¹ Arguing in favor of a different regulatory approach, the Group concluded:

The work on such model laws would need to reach agreement on the basic characteristics the European legal form should have, and thus contribute to agreement on a certain level of harmonisation of these national legal forms. Once that level of agreement is reached, the introduction of alternative European legal forms could become feasible.⁵²

SMITH, C. ROCHESTER AND R. HEDLEY (eds.), *AN INTRODUCTION TO THE VOLUNTARY SECTOR* (Routledge, 1995) at 141.

⁴⁷ See Gjems-Onstad, *supra* n. 44, at 4, suggesting that, during this period, "it is obscure whether anybody, either outside or inside the official bureaucracy of Brussels, much cared about what happen[ed] to the proposals." See also, BREEN *infra* n. 134.

⁴⁸ Thus, the Greek Presidency in the first half of 2003 revitalized the consideration of the Statute for European Associations by prioritizing it during its tenure, according to Kendall & Fraisse, *supra* n. 45. Kendall surmises however that Greece's "interest may have had more to do with the national Government's wish to progress corporate legislation in general than a specific interest in the association sector as such." The Irish presidency, which followed, chose to focus on the mutual statute to the exclusion of the association statute.

⁴⁹ Published in November 2002 and available at http://ec.europa.eu/internal_market/company/modern/index_en.htm (last accessed May 23, 2008). In its recommendations the Group stated that it failed to see how uniform regulations of the European Association and European Mutual Society could be achieved if there was no agreement on harmonization of the underlying national rules. On the other hand, the Group acknowledged that the progress made on the SCE regulation (regulation for European Co-operative) represented an important precedent for the other proposed Regulations.

⁵⁰ *Ibid.*, Recommendation VIII.1. at 120.

⁵¹ The European Foundation Centre has carried out some work in this area with the preparation and publication of the EFC Model Law for Public Benefit Foundations in Europe; see http://www.efc.be/ftp/public/EU/LegalTF/model_law.pdf (last accessed May 23, 2008).

⁵² *Ibid.*, at p. 122.

Thus, strong opinions of individual Member States (doubting the legal basis for the regulation and querying its proposed scope)⁵³ and of expert legal groups (doubting the utility of the EA as a legal vehicle),⁵⁴ along with institutional lack of direction, militated against the introduction of the EA. Notwithstanding this death knell of the proposal for a European Statute for Associations, charities have continued to lobby for a European Foundation Statute.⁵⁵ Institutional openness to this proposal to date, perhaps in light of the ESA experience, has been neither constant nor consistent.⁵⁶

III. ALTERNATIVE WAYS OF CREATING A LEGALLY ENABLING ENVIRONMENT FOR CIVIL SOCIETY ORGANIZATIONS

Part II has illustrated that the ECS has not resolved the legal and administrative hazards for for-profit companies operating on a cross-border basis. Nonprofit organizations experiencing similar problems and charitable organizations experiencing greater difficulties (from a taxation perspective) are therefore unlikely to find that statutory law is capable of creating the legally enabling environment that they seek. The search for an alternative resolution of these difficulties begins with this realization. And, along the lines of Aesop's fable of the hare and tortoise,⁵⁷ what cannot be achieved directly by way of legislation often can be better (albeit incrementally) achieved judicially.

The European Court of Justice, aided in part by the European Commission, has been presented with a number of opportunities to reinterpret the Treaty in aid of nonprofit

⁵³ General reservations on the need for such a regulation have been expressed by Netherlands, Sweden, Finland, Germany, Ireland, Denmark, and Austria; while Italy has made a scrutiny reservation regarding the need for the regulation. These are apart from the more particular concerns of the UK delegation regarding the content of the proposed regulation and its likely effect on charity law. *See* Working Party on Company Law (EA) Council Documents 6873/03 (17 March 2003) and 8401/03 (10 April 2003).

⁵⁴ *See* in particular pp. 120 et seq. of the High Level Company Expert Group's report at http://ec.europa.eu/internal_market/company/modern/index_en.htm (last accessed May 23, 2008).

⁵⁵ *See, e.g.*, Synthesis of the responses to the Communication of the Commission to the Council and the European Parliament "Modernising Company Law and Enhancing Corporate Governance in the European Union — A Plan to Move Forward" — COM (2003) 284 final of 21 May 2003: A Working Document of DG Internal Market, November 15, 2003, at 23. *See also*, the work of the European Foundation Centre, which produced a draft Statute for Foundations and successfully lobbied the Commission to carry out a feasibility study on a European Foundation Statute, a study which is expected to begin in late 2008; *see* <http://www.efc.be/projects/eu/legal/efcefs.htm> (last accessed October 30, 2007).

⁵⁶ *See* the speech of Commissioner for the Internal Market, Mr. Charlie McGreevy to the European Parliament's Committee on Legal Affairs, November 21, 2006 (expressing caution regarding the introduction of a multiplicity of European corporate forms to the effect that he was "not yet convinced about the ability of a European Foundation Statute to respond to the specific needs of foundations.") (available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/720&format=HTML&aged=1&language=EN&guiLanguage=en>, last accessed November 29, 2007). *Cf.* the positive feedback given by Commission Official Nathalie Berger in support of proceeding with the plans for a European statute for Foundations at European Foundation Centre Conference, Towards a European Framework for foundations in Europe, Brussels, September 14, 2006.

⁵⁷ AESOP, AESOP'S FABLES, ACCOMPANIED BY MANY HUNDRED PROVERBS AND MORAL MAXIMS (1836, P.D Hardy, Dublin).

organizations, and particularly charities. From what might be viewed as inauspicious beginnings and the relatively barren soil of the founding Treaty provisions, the Court is using a functional approach to restate the rights and duties of nonprofit organizations under EU law. Legal change for charities that operate in more than one Member State seems likely to result from growing judicial and institutional momentum. Part III traces this evolution from the initial silence of the Rome Treaty towards nonprofits, the rise of Treaty obligations on nonprofits in a number of spheres, and the recent case law elaborating for the first time on the rights of nonprofit organizations under European law.

The Treaty Basis for Community Competence over Nonprofit Organizations

Historically, the Treaty of Rome was silent on the role of nonprofit organizations under EU law. It wasn't until 2000, with the ratification of the Treaty of Nice, that a reference to "civil society" appeared in the governing provisions of the Treaty.⁵⁸ The Nice Treaty amended Art 257 EC⁵⁹ to include reference to "organised civil society" as one of the constituent groupings to be represented by the Economic and Social Committee, thus giving nonprofit organizations an indirect (though largely ineffective) voice in European affairs. For almost 50 years before this, the only express reference to nonprofit organizations in the Articles of the Rome Treaty was a negative one in Article 48 EC.⁶⁰ Article 48 EC expressly excludes nonprofit bodies based in one Member State from the right to establish in the territory of another Member State,⁶¹ a right that is enjoyed by for-profit companies and EU workers. This difference in treatment highlights the EU's preference for facilitating commercial entities and workers and the circulation of capital within the EU. For a Treaty founded on economic interests and corresponding rights, which created a community for many years known as the "European *Economic* Community," this initial disregard for nonprofit bodies is unsurprising. As the European Court of Justice in *Sodemare* noted:

[Article 48 EC] . . . has the function of assimilating companies, firms and other legal persons, other than those which are non-profit-making (hereinafter normally referred to as "commercial companies"), to natural persons who are nationals of Member States, for the purposes of freedom of establishment. Thus, non-profit-

⁵⁸ Between 1957 and 2000 there were protocols to various Amending Treaties that did refer to charities and nonprofits organizations such as Declaration 23, Treaty on European Union, 1992 (providing, "The Conference stresses the importance, in pursuing the objectives of Article 117 of the Treaty establishing the European Community, of co-operation between the latter and charitable associations and foundations as institutions responsible for welfare establishments and services.") and Declaration 38 of the Treaty of Amsterdam ("The Conference recognises the important contribution made by voluntary service activities to developing social solidarity. The Community will encourage the European dimension of voluntary organisations with particular emphasis on the exchange of information and experiences as well as on the participation of the young and the elderly in voluntary work."). These declarations, however, have no legal basis in European law and thus do not provide a source of legal rights to such organizations.

⁵⁹ See, after the coming into force of the Lisbon Treaty, Article 300(2) TFEU.

⁶⁰ See, after the coming into force of the Lisbon Treaty, Art 54 TFEU.

⁶¹ See Article 43 EC (giving rights of freedom of establishment to all natural persons and companies), which is expressly qualified by Art 48(2) EC which provides that nonprofit organizations are excluded ("Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.")

making companies, firms and other legal persons do not benefit from freedom of establishment.⁶²

The Court in *Sodemare* did not address the significant issue of whether the scope of the Article 48(2) EC exclusion should be interpreted narrowly, as relating to nonprofit *establishment* rights only, or broadly, as indicating a general lack of Community competence over nonprofit organizations. For its part, the Committee on Legal Affairs and Citizens' Rights of the European Parliament has chosen to interpret the exclusionary provisions narrowly.⁶³ The Fontaine Report, presented to the European Parliament in 1987, pointed to a number of other Treaty bases that could potentially provide Community competence over nonprofit organizations, such as Article 12 EC,⁶⁴ Article 308 EC,⁶⁵ and Article 95 EC.⁶⁶

Most notable in this regard is Article 12 EC, which prohibits discrimination on grounds of nationality. This provision applies to a State whose legislation reserves to its citizens alone the right to form or administer associations. An opportunity for the European Court to test this legal basis arose in 1998. In *Commission v. Belgium*,⁶⁷ the Commission challenged the validity of two Belgian laws that prescribed associational membership. Under a 1919 Belgian law, the conferral of legal personality on an international association pursuing "philanthropic, religious, scientific, artistic or pedagogical objectives" required at least one Belgian member on the executive organ of the organization.⁶⁸ Similarly, a 1921 Belgian law concerning non-profit-making associations and institutions promoting the public interest required that three-fifths of an organization's members be of Belgian nationality in order to qualify for legal personality against third parties.⁶⁹

The Court of Justice ruled that these two laws, making legal personality contingent on the presence of Belgians in an organization or its governing structure, breached Article 12 EC, prohibiting discrimination on the grounds of nationality.⁷⁰ The Court based its ruling on the freedom of establishment enjoyed not only by Belgian nationals but by nationals of other Member States who wished to form new associations

⁶² Case C-70/95 *Sodemare SA and Others v. Regione Lombardia* [1997] 3 C.M.L.R. 591, 604 (The court went on to note, however, that material scope of the establishment freedom was not in any way affected by this holding since "national rules which treat non-profit-making companies differently from natural persons or commercial companies are not excluded, simply by virtue of Article 58, from the scope of application of Chapter 2 of Title III of the Treaty if their effect is to restrict the freedom of establishment of the latter. Otherwise, the simple exclusion of one category of legal persons from the benefit of Treaty rights would affect the extent of the rights actually enjoyed by other categories.")

⁶³ THE FONTAINE REPORT, *supra* n. 41 stated that it could not be deduced that this provision was general in scope and aimed to exclude non-profit-making associations from *any* Community powers.

⁶⁴ *See*, after the coming into force of the Lisbon Treaty, Article 18 TFEU.

⁶⁵ *See*, after the coming into force of the Lisbon Treaty, Article 352 TFEU.

⁶⁶ *See*, after the coming into force of the Lisbon Treaty, Article 114 TFEU.

⁶⁷ Case C-172/98, *Commission of the European Communities v Belgium* [1999] ECR I-3999.

⁶⁸ Article 1 of the Belgian Law of October 25, 1919.

⁶⁹ Article 26 of the Law of June 27, 1921.

⁷⁰ *See supra*, n. 67, at par. 14.

in Belgium.⁷¹ It followed that given its membership element, a nonprofit *association* could not be discriminated against in terms of establishment in a Member State: to do so would indirectly discriminate against citizens of the EU on the basis of their nationality. A *foundation*, however, is not based on membership, which reduces the applicability of Article 12 EC.

The Fontaine Report did not limit the potential Treaty bases for Community legislative competence over nonprofit organizations to Article 12 EC. The Report put forward two other Treaty articles: Article 95 EC⁷² and Article 308 EC.⁷³ These two articles operate differently, so it is significant which one is adjudged to be the correct Treaty basis for European facilitative regulation of nonprofit organizations.

Article 308 EC is essentially a catch-all provision, which allows the Council of Ministers to take action to achieve the Treaty's objectives where the Treaty has not provided the Council with the necessary powers.⁷⁴ The Fontaine Report believed that facilitating nonprofit activity within the EU could be a Community objective, in the course of the operation of the Common Market. To this end it sought to view the contribution of nonprofit organizations through the lens of European economic activity. In the Report, the Parliament's Committee on Legal Affairs considered that nonprofit organizations contribute to the economic life of the EC, as both a direct and indirect generator of employment and as a product consumer. For this reason, "it would be incomprehensible for the association sector properly so called to be left on the sidelines on the basis of an incorrect and restrictive interpretation of the Treaty."⁷⁵ Accordingly, these organizations could cite Article 308 as a Treaty basis for jurisdiction.

One of the principal difficulties with Article 308 EC, however, is the procedure for its use: legislation based on Article 308 must be passed unanimously by the European Council. Unanimity in a Council representing 27 Member States is a rare occurrence and thus a recipe for inaction and ultimately inaction.

Article 95 EC, by contrast, uses the co-decision procedure with the European Parliament and requires only a qualified majority vote within the Council. Lacking the catch-all quality of Article 308, Article 95 may be used only when the Council adopts "measures for the approximation of the provisions laid down by law, regulation or

⁷¹ See *supra*, n. 67, at par. 11.

⁷² The Fontaine Report actually refers to Article 8A of the SEA. Article 8A subsequently became Art 100A EC Treaty, is currently renumbered as Article 95 EC, and after the coming into effect of the Lisbon Treaty will be referred to as Art 114 TFEU.

⁷³ Likewise, the Fontaine Report actually makes reference to the precursor of Art 308 EC, namely Art. 235 EC Treaty, which upon the coming into effect of the Lisbon Treaty will be renumbered as Art 352 TFEU.

⁷⁴ Article 308 (Consolidated Version of The Treaty Establishing The European Community, OJ C 321 E/3, December 29, 2006) states that "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

⁷⁵ THE FONTAINE REPORT, *supra* n. 41, at par. 60.

administrative action in Member States which have as their object the establishment and functioning of the internal market.”

To date, there has been some controversy as to whether Article 95, although more user-friendly, is the appropriate legal basis for introducing legal instruments in support of nonprofit organizations. The Statutes for European Associations and European Cooperative Societies started out with Article 95 as their legal basis.⁷⁶ Disagreeing with this basis, the Council decided to rely on Article 308 instead.⁷⁷ The European Parliament, supported by the Commission, unsuccessfully challenged this change of legal basis before the European Court of Justice.⁷⁸ In procedural terms, this decision reconfirms the need for Council unanimity in adopting social economy statutes. Given the reluctance of some Member States to countenance the adoption of a statute for European Associations,⁷⁹ the return to unanimous voting in Council greatly lessened the chances of this statute ever being enacted and probably influenced its subsequent withdrawal by the Commission, over the protests of the Parliament and Economic and Social Council.⁸⁰ The Court’s decision in *European Parliament v. Council* has also led proponents of the European Foundation Statute tentatively to cite both Articles 95 and 308 EC as appropriate legal bases, a combination that legally is entirely inconsistent.⁸¹

⁷⁶ See, e.g., Council of The European Union, *Draft Council Regulation on the Statute for a European Cooperative Society (SCE); and Draft Council Directive supplementing the Statute for a European Cooperative Society with regard to the involvement of employees — Reconsultation of the European Parliament*, DRS 58 SOC 384 (Brussels, 12 September 2002).

⁷⁷ COUNCIL REGULATION (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), O.J. L 207/1, 18.08.2003.

⁷⁸ See Case C-436/03, *European Parliament v Council* [2006] ECR I-3733 in which the Court held that the Regulation on the Statute for a European Cooperative Society was correctly adopted on the basis of Article 308 and not on the basis of Art 95 EC, as the Parliament had sought to argue. According to the Court, “the contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms.”

⁷⁹ See CEDAG (Comité européen des associations d’intérêt général), CHRONOLOGIE DES TRAVAUX SUR LE STATUT DE L’ASSOCIATION D’EUROPEENE ET LES ACTIONS DE CEDAG, June 2002 — January 2004 (outlining the reticence of the Netherlands, Italy, Ireland, Germany and Austria to support fully the proposals for the EA) at http://www.cedag-eu.org/cedag/index.php?page=european-statute-of-association&hl=en_US (last accessed May 27, 2008).

⁸⁰ See Communication from the Commission to the Council and the European Parliament: Outcome of the screening of legislative proposals pending before the Legislator, Brussels, COM(2005) 462 final, 27.9.2005.

⁸¹ See, e.g., EUROPEAN FOUNDATION CENTRE, PROPOSAL FOR A EUROPEAN FOUNDATION STATUTE, January 2005, which remains open to either Article 95 or Article 308 as potential legal bases for the legal instrument (http://www.efc.be/ftp/public/EU/LegalTF/european_statute.pdf) last accessed December 4, 2007. See also the European Foundation Project, *The European Foundation: A New Legal Approach* (2005), which suggests both Articles 95 and 308 as the appropriate legal basis for a European Foundation Statute — which one might suggest is entirely inconsistent (http://www.bertelsmann-stiftung.de/cps/rde/xbcr/SID-0A000F14-F62735BC/bst_engl/The%20European%20Foundation%20-%20A%20New%20Legal%20Approach.pdf) last accessed December 4, 2007.

Treaty Obligations on Nonprofits — Labor Law, Competition Law, and State Aid

Notwithstanding the narrow Treaty basis for Council or Commission competence over nonprofit organizations, the ECJ has found nonprofits to be subject to Community law. In *Sophie Redmond Stichting v. Hendrikus Bartol*,⁸² the Court of Justice ruled that under the Directive on the Transfer of Undertakings, European labor law requirements applied to a Dutch nonprofit financed entirely by government.⁸³ In his Opinion, Advocate General Van Gerven acknowledged that never before had the Court been called upon to consider the application of this Directive to nonprofit organizations.⁸⁴ Nonetheless the AG, with whom the Court ultimately agreed, found that *functionally* there was nothing to prevent the application of the Directive to nonprofits on the transfer of their employees.⁸⁵

Similarly, nonprofit organizations have found themselves subject to Community competition rules — in the contexts of cartel and monopoly proceedings and of State aid.⁸⁶ To be subject to the competition rules, a nonprofit organization must be found to be an “undertaking,” a fact determined by whether it engages in an “economic activity” regardless of its legal status and the way in which it is financed.⁸⁷ The Court has applied a very broad test, holding that an entity engages in an “economic activity” when it offers goods or services on the market.⁸⁸ The Court has further held that the non-profit-making nature of the entity in question or the fact that it seeks non-commercial objectives is irrelevant for the purposes of defining it as an “undertaking.”⁸⁹

⁸² Case C-29/91 [1992] ECR I-03189.

⁸³ Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of businesses.

⁸⁴ Case C-29/91, Opinion of AG Van Gerven [1992] ECR I-03189, at par. 6 -7 (commenting, “The actual text of the directive makes no distinction depending on whether an undertaking is commercial or non-commercial. . . The directive, it appears from the preamble thereto, was prompted by changes in the structure of commercial undertakings, caused by economic trends at both national and Community level. . . However, there is nothing in the wording of the directive to rule out a broad interpretation of the term “undertaking” used therein.”).

⁸⁵ *Supra* n. 82, par. 18 (ECJ holding that “moreover, the fact that in this case the origin of the operation lies in the grant of subsidies to foundations or associations whose services are allegedly provided without remuneration does not exclude that operation from the scope of the directive. The directive, as has already been stated, is designed to ensure that employee rights are safeguarded, and covers all employees who enjoy some, albeit limited, protection against dismissal under national law.”)

⁸⁶ C-222/04 *Ministero dell’Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA* [2006] ECR I-289.

⁸⁷ C-41/90 *Höfner and Elser* [1991] ECR I-1979.

⁸⁸ See Joined Cases C-180/98 to C-184/98 *Pavlov Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, at par. 75; see also C-222/04 *Ministero dell’Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA* [2006] ECR I-289.

⁸⁹ See C-244/94 *Fédération Française des Sociétés d’Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d’Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l’Agriculture et de la Pêche* [1995] ECR I-4013, at par. 21; Joined Cases C-180/98 to C-184/98 *Pavlov Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, at par. 117 (holding that

In principle, the Court of Justice has held that Community competition and internal market rules ordinarily do not apply when organizations that perform predominantly social functions engage in non-profit-making activities of a non-commercial nature.⁹⁰ The Commission has interpreted this case law to mean that internal market and competition rules generally do not apply to “non-economic activities” of organizations such as trade unions, political parties, churches and religious societies, consumer associations, learned societies, charities, and relief and aid organizations.⁹¹ The definition of “economic” as opposed to “non-economic” activity is not always clear,⁹² which has had two effects: it has prompted the Commission to consider the need to clarify the rights and responsibilities of nonprofit organizations performing largely social functions⁹³; and it has led the European Economic and Social Committee to seek complete immunity from Community competition rules.⁹⁴

The recent *Italian Banking Foundations* case demonstrated the potential implications for charities that are subject to the competition law rules. In that case, the ECJ explored the possibility that tax benefits to such organizations might qualify as State aid and thus be held incompatible with EU competition law.⁹⁵ The preliminary reference case concerned Italian foundations of banking origin,⁹⁶ created by statute to be the controlling shareholders in companies engaged in banking activity upon the privatization of Italian public sector credit institutions. The issue was whether these foundations could be subject to the Community rules on competition — even when they were assigned

the fact that a pension fund is non-profit-making and the solidarity aspects emphasized by the fund and the governments which had submitted observations were not sufficient to relieve the fund of its status as an undertaking within the meaning of the competition rules of the Treaty.)

⁹⁰ See Cases C-159/91 and C-160/91 *Poucet v. Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon, and Pistre v. Caisse Autonome Nationale de Compensation de l'Assurance Vieillesse des Artisans* (hereinafter: “*Poucet and Pistre*”) [1993] ECR I-637; Case C-109/92 *Wirth v Landeshauptstadt Hannover* [1993] ECR I-6447.

⁹¹ Communication from the Commission, Services of general interest in Europe (OJ C 17/04) 19.1.2001, at par. 30. The Communication goes on to state that “whenever such an organisation, in performing a general interest task, engages in economic activities, application of Community rules to these economic activities will be guided by the principles in this Communication respecting in particular the social and cultural environment in which the relevant activities take place.”

⁹² European Commission, Green Paper on Services of General Interest, COM(2003) 270 final, at par. 46 (noting that, “the evolving and dynamic character of this distinction has . . . raised concerns, in particular among providers of non-economic services who ask for more legal certainty regarding their regulatory environment.”).

⁹³ *Ibid.* at par. 48.

⁹⁴ Opinion of the European Economic and Social Committee on the Green Paper on Services of General Interest, OJ C 80/66, 30.3.2004 (stating that, “In order to distinguish between economic and noneconomic activities, services associated with national education systems and the mandatory membership of a basic social security scheme, and services provided by not-for-profit social, charitable and cultural entities, must be exempt from competition rules and provisions relating to the internal market, but not from the principles of Community law.”)

⁹⁵ See *supra*, n. 88. See also European Antitrust Review (2006) at 77.

⁹⁶ On the history of the Italian nonprofit Banking Foundations see Piero Gastaldo, *Let's not forget the past — A commentary on “Italian philanthropy rediscovered”* (Summer, 2007) EFFECT 18-19.

objects of social benefit.⁹⁷ The Court distinguished between, first, a foundation that simply makes grants to nonprofit organizations⁹⁸; and, second, a foundation acting directly to pursue public-interest or social-assistance aims, using the national legislature's authorization to undertake necessary or opportune financial, commercial, real estate, and asset operations. Whereas the former was not an undertaking, the latter had to be viewed as one because "it is capable of offering goods or services on the market in competition with other operators, for example in fields like scientific research, education, art or health."⁹⁹ It would seem to follow that where a competing market exists in areas of general interest, such as education, health, science, and research, operating foundations that enjoy national tax exemptions might find themselves in conflict with EU rules on State aid competition.

Nonprofit organizations, therefore, do not enjoy a general immunity from the EU rules that apply to their for-profit counterparts. In the areas of labor law and competition law, nonprofits must comply with Treaty rules. This functional approach to nonprofits logically leads to the extension of the State aid rules to tax exemptions to nonprofit foundations in certain circumstances, an extension that alarms some charitable organizations. If a functional basis lies behind the application of Treaty obligations to nonprofits, is the same true for Treaty rights? The *Stauffer* case provides an important starting point in this discussion.

The Extension of Treaty Freedoms to Nonprofit Organizations: The Stauffer Case

In *Centro di Musicologia Walter Stauffer v. Finanzamt Munchen fur Korperschaften* (hereinafter "*Stauffer*"),¹⁰⁰ the Court of Justice was asked whether German corporation tax applied to commercial property in Munich owned by an Italian charitable foundation, when comparable property owned by German charities was exempt. The Stauffer Foundation, established in Italy, endowed scholarships for young Swiss people to study the history of music in Cremona, Italy. Under German tax law, Stauffer pursued recognized charitable objectives. Moreover, the German legislation did not require that the pursuit of such objectives benefit German nationals. In principle, then, the Italian foundation should have been exempt from corporation tax. However, because the foundation's seat and management were in Italy, its rental income in Germany was subject to tax. A preliminary reference from the German Bundesfinanzhof

⁹⁷ The Italian privatization process allowed public credit institutions, including savings banks (allocating entities'), to allocate their banking concerns to public limited companies established by them and of which they remained the sole shareholders. The newly created public limited companies performed the banking activities previously carried out by the allocating entities. Under the 1990 Italian decree allocating entities (i.e., foundations of banking origin) were required to pursue aims of public interest and social assistance, mainly in the sectors of scientific research, education, art and health. *See* Opinion of A.G. Jacobs in Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*. [2006] ECR I-289.

⁹⁸ *Ibid.*, at par. 119 ("Such an activity is of an exclusively social nature and is not carried on on the market in competition with other operators. As regards that activity, a banking foundation acts as a voluntary body or charitable organisation and not as an undertaking.")

⁹⁹ *Ibid.* at par. 122.

¹⁰⁰ Case C-386/04 *Stauffer* [2006] ECR I-8203.

asked the Court of Justice whether this approach was incompatible with the Treaty's provisions on freedom of establishment and free movement of capital.

The Court found that the provisions governing freedom of establishment were inapplicable to Stauffer. The Court did not make this finding on the ground that nonprofit organizations can never avail themselves of the establishment provisions. Rather, the Court held that "establishment" is a broad concept. It found that the right of establishment allowed a "Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons."¹⁰¹ This finding advances or perhaps a clarifies the Court's conclusion in *Sodemare*,¹⁰² in that it does not automatically exclude a nonprofit organization from the scope of the right of establishment if the organization actively contributes to economic and social integration in the EU.¹⁰³ Stauffer could not rely on the establishment provisions, however, because it did not have a secured permanent presence in Germany for the purposes of pursuing its activities. A German property management agent handled the services ancillary to the leasing of its Munich property.

The free movement of capital provisions in Article 56 EC¹⁰⁴ proved more helpful to Stauffer. Capital movement, although undefined by the Treaty, has been interpreted to include, *inter alia*, investments in real estate on a national territory by a nonresident.¹⁰⁵ Article 56 EC forbids any restriction on capital movement between Member States. Because the German tax exemption applied only to charitable organizations established in Germany, the exemption in principle discriminated against charitable organizations established in other Member States. As such, it constituted an obstacle to free movement.¹⁰⁶

To maintain the restriction, Germany would have to show that the law was nondiscriminatory in that it dealt with objectively different situations. The German Government, supported by the UK Government, sought to make this argument by distinguishing a charitable foundation with tax exemption (i.e., a charitable foundation resident in Germany) and a foundation like Stauffer, which had limited tax liability due to its residency outside Germany. The German foundation, it was argued, contributed to German society and benefited the State's budget by relieving the State of some responsibilities. The charitable activities of Stauffer, on the other hand, had no benefits

¹⁰¹ *Ibid*, at par. 18, citing Case 2/74 *Reyners* [1974] ECR 631 and Case C-55/94 *Gebhard* [1995] ECR I-4165.

¹⁰² *See supra* n. 62.

¹⁰³ A finding that is quite in line with the earlier thinking of the European Parliament's Fontaine Report in 1987. *See supra* n. 41.

¹⁰⁴ *See*, after the coming into effect of the Lisbon Treaty, Art. 63 TFEU.

¹⁰⁵ *See* Article 1 Directive 88/361. Cf. Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661; Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, pointing to the indicative albeit non-exhaustive value of the Directive's definition of capital movement and payment.

¹⁰⁶ *See supra*, n. 100, at par. 28.

for the German people. The interveners also argued that the conditions for granting charitable status varied between Member States, according to each State's conception of public utility and its perception of what constitutes a "charitable purpose." It followed that a foundation deemed charitable under Italian law differed from a foundation deemed charitable under German law.¹⁰⁷

The Court of Justice rejected both arguments. Although Member States could require a close link between a foundation's eligibility for tax-exempt status and its activities, no such requirement applied here—the tax law in question did not require that the charitable objects be carried out on German territory. With regard to the comparability argument, the Court acknowledged that Member States have discretion on whether to confer tax-exempt status on a foreign foundation. Nonetheless, the Court held that even within the area of direct taxation, in which Member States enjoy full competence, their discretion must be exercised in accordance with Community law.¹⁰⁸ An organization recognized as a charity within its Member State of origin is not automatically entitled to the same status in another Member State's territory. But where a foundation meets three conditions—it holds charitable status in one Member State; it satisfies the requirements for charitable status in a second Member State; and it promotes the same public interests (a matter for the authorities of the second State, including its courts, to determine)—the second Member State cannot deny the right to equal treatment solely on the ground that the foundation is established in another State.

It followed that the discriminatory restriction in *Stauffer* (namely, the requirement of German establishment) could only be saved if it was justified by overriding reasons in the general interest. A number of reasons were put forward: the promotion of culture, training, and education; the need for effective fiscal supervision; the need to ensure the cohesion of the national tax system; the need to protect the basis of tax revenue; and the fight against crime. All were rejected by the Court. The ECJ conceded that a Member State faces difficulties in determining whether a foreign charitable organization fulfills the Member State's public benefit requirements, and in monitoring the management of the organization. These difficulties, however, are of a "purely administrative nature." As for the public benefit requirement, the national tax authority could require that the organization produce evidence to support its claim,¹⁰⁹ and it could call upon tax authorities in other Member States to validate the information.¹¹⁰ As for the fight against

¹⁰⁷ *Ibid.*, paras. 33-35.

¹⁰⁸ See, e.g., Case C-80/94 *Wielockx* [1995] ECR I-2493; Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057; and Case C-513/03 *Van Hilten-van der Heijden* [2006] ECR I-1957, par. 36. With regard specifically to nonprofit organizations, see Case C-415/04 *Kinderopvang Enschede* [2006] ECR I-1385, par. 23.

¹⁰⁹ See Ineke Koele, *Cross-Border Philanthropy: Solving the "Landlock,"* (2006) 8(1) SEAL 30, 32 (discussing who should bear the burden of proof as to whether a donation qualifies for tax relief); See also Case C-39/04 *Laboratoires Fournier SA v Direction des vérifications nationales et internationales* [2005] ECR I-2057 (to the effect that national law preventing a taxpayer from submitting such evidence could not be justified in the name of effectiveness of fiscal supervision).

¹¹⁰ Such assistance would be rendered under the Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of Member States in the field of direct taxation (OJ 1977 L 336, 15.), as amended by Council Directive 2004/106/EC (OJ 2004 L 359, 30).

crime, the Court held that a foundation's establishment in another Member State could not of itself give rise to an assumption of criminal activity; barring tax exemptions on this basis was disproportionate.¹¹¹

The Likely Effect of the Stauffer Ruling in the Legal Enablement of Nonprofits

The ruling in *Stauffer* is tremendously important with regard to the legal and policy framework for foreign funding of civil society. *Stauffer* establishes that in principle, a charitable organization that satisfies a Member State's requirements for tax exemption cannot be discriminated against in another Member State on the basis of its nonresident status.¹¹² The judgment forces Member States for the first time to consider whether a nonresident charity and a resident charity qualify for comparable tax treatment. Until *Stauffer*, Member States could deny parity of benefits to nonresident charities through (a) reliance on national tax law and its requirement that an organization have its seat in the Member State; and (b) reliance on the varying requirements of charity law in each country. *Stauffer* means that a Member State must justify its denial of tax relief to a nonresident charity in substantive terms, based on an analysis of national requirements for charitable status and an explanation of how the foreign requirements satisfied by the applicant fall short. The applicant's non-residence cannot *per se* justify discrimination.

Notwithstanding these groundbreaking developments for charities, the Court's procedural methodology of reasoning has not changed. The ECJ maintains its functional approach in assessing the scope of the Treaty's freedoms. The fact that *Stauffer* was a charitable foundation carrying out nonprofit activity was merely incidental to the European Court's determination of the case. Focusing on the activity in question — the letting of property — and viewing it as an economic activity in its own right, the Court proceeded to consider whether German tax law was compatible with the Treaty.

Substantively, this ruling augurs well for nonprofit organizations in a number of respects. First, because the term *capital movement* also covers donations,¹¹³ charities established in one Member State undoubtedly will seek inclusion in tax schemes of other host Member States that grant tax rebates on donations to resident charities but exclude foreign charities for reasons similar to those in *Stauffer*.

Second, the scope of capital movement is likely to be tested in the near future. A recently filed application for a preliminary reference, *Hein Persche v Finanzamt Ludenscheid*,¹¹⁴ asks the Court of Justice to consider whether the free movement of capital applies where a national of a Member State donates goods to a body based in a different Member State, when the goods are recognized as charitable under the law of

¹¹¹ Citing C-243/01 *Gambelli* [2003] ECR I-13031, at par. 74.

¹¹² In this way, *Stauffer* builds on the earlier case of *Barbier*, which held that freedom of capital applies to gifts and comparable transactions within the EU irrespective of whether the donor or donee is carrying out economic activities that are protected by the freedoms of the EC Treaty. See Case C-364/01 *The heirs of H. Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen* [2003] ECR I-15013.

¹¹³ See Florian Becker, *Case C-386/04, Centro di Musicologia Walter Stauffer v. Finanzamt München*, (2007) 44(3) COMMON MARKET LAW REVIEW, 803 at 812.

¹¹⁴ Case C-318/07, OJ C 247/3, 20.10.2007.

that Member State (Art. 56 EC). Again the nub of this inquiry relates to taxation: *Hein Persche* essentially asks the Court whether, under Article 56 EC, a Member State can confer a tax benefit on donations to charitable bodies only if those bodies reside in that State. Although the full facts of the reference have yet to come before the Court, it would seem that on the basis of *Stauffer*, if donations of goods are covered by *capital*, neither the lack of residency nor the administrative difficulties borne by the Member State in verifying the details of the donation will justify refusing tax relief as a matter of course. Moreover, an express provision excluding relief on donations to nonresident charities would still require overriding reasons to justify such apparently discriminatory behavior.

Third, the outcome of *Stauffer* has raised the profile of Third Sector activity in the EU and provided a welcome boost to pending claims that Member State tax regimes discriminate against nonprofits in a way that is incompatible with EU law. Currently, the Commission is investigating the tax regimes of a number of Member States (including Belgium, the UK,¹¹⁵ Ireland,¹¹⁶ Poland,¹¹⁷ and Portugal) in a variety of areas as they relate to charities. The extent of the tax privileges vary in detail between the different States, but in general comprise exemptions from income tax, corporate tax, capital gains tax, capital acquisition tax, stamp duty, deposit interest retention tax, inheritance tax, and in many countries the ability to reclaim taxes already paid on donations received, sometimes referred to as gift tax exemption or gift aid. A common requirement for tax exemption or relief is that the charity in question be based in the country granting the tax break — as was the case in *Stauffer* — and be recognized as a charity or public benefit organization according to the laws of that country. These requirements create tax difficulties for (a) donors who live and pay taxes in a different Member State from their original home State (i.e., expatriates) and who want to donate to a charity in their home State; (b) charities that operate and solicit funds from taxpayers in one Member State but are legally established in another Member State; and (c) donors who wish to give to charities not registered in their home Member State. Under current tax laws, many Member States can discriminate in favor of domestic charities in a manner that arguably conflicts with the idea of the single market and consequently breaches European Law.

Before and particularly since the decision in *Stauffer*, the Commission has actively encouraged complaints regarding alleged Member State discrimination against foreign charities in the area of tax exemption. In 2002, the Commission sent a reasoned opinion to Belgium seeking the modification of Flemish, Walloon, and Brussels tax legislation that discriminated against foreign-based charities by limiting to domestic charities the benefits of reduced taxation of legacies and gifts. All three regions amended their tax laws to extend the benefits to charities located in other Member States, thus settling the matter relating to the Flemish and Brussels legislation. The Walloon amendments,¹¹⁸ however, did not satisfy the Commission.¹¹⁹ The reduced rates on gifts or

¹¹⁵ Commission Press Release, IP/06/964, July 10, 2006.

¹¹⁶ Commission Press Release, IP/06/1408, October 17, 2006.

¹¹⁷ *Ibid.*

¹¹⁸ Article 60 of the Walloon “Code des droits de succession” and Article 140 of the Walloon “Code des droits d’enregistrement, d’hypothèque et de greffe” provide for a reduction of inheritance and gift taxes but only for two types of organizations: a) Organizations resident in Belgium and b) (for the application of the inheritance tax law) organizations established in the EU Member State in which the

inheritance tax did not apply when Walloon residents who never worked or lived in a particular Member State made legacies or gifts to charities in that State. The reduced rate also did not apply if a person who moved from another Member State to Belgium made a gift or legacy to a charity in a third Member State.¹²⁰ Having referred the case to the Court of Justice in 2005,¹²¹ the Commission suspended temporarily the initiation of the procedure before the ECJ in 2006, in the apparent understanding that the infringement still existed but that the case would be reentered on a broader basis than merely inheritance tax.¹²²

Since the decision in *Stauffer*, the Commission has begun action against the UK, Ireland, and now Belgium to end their discrimination against foreign charities in the area of direct tax. In each case, the Commission cites the preferential tax treatment of charities established in each Member State over foreign charities as incompatible with EU law, in particular as impeding the free movement of capital, contrary to the free movement of persons — because workers and self-employed persons moving to the infringing Member State might wish to make gifts to charities established in the Member State where they came from — and contrary to the freedom of establishment—because foreign charities are forced to set up branches in the infringing Member State in order to benefit from the favorable tax treatment. Proceedings against infringing States were delayed during 2007 when the respondents met with the Commission in an attempt to reach a resolution, but the end of negotiations in November 2007 means that the Commission is likely to resume proceedings against the three, with new actions pending against Denmark and France.¹²³

The Commission's infringement actions have borne fruit in some countries without court action. Cases against Poland, the Netherlands, and Slovenia will be set aside because the countries agreed to change their legislation to comply with EU principles. Given the Commission's success in these cases, coupled with the strong precedent of *Stauffer*, it is hard to see how other Member States could convince the ECJ that discriminatory tax laws are compatible with EU law. In all cases, revenue authorities

person making the legacy (the “de cujus”) effectively resided or had his place of work at the time of his death, or in which he had previously effectively resided or had his place of work and (for the application of the gift tax law) organizations in the EU Member State in which the donor effectively resides or has his place of work at the time of the donation, or in which he has previously effectively resided or had his place of work.

¹¹⁹ The press release reporting the Commission's referral of the infringement to the Court of Justice in July 2005 stated that the Walloon law breached Articles 12, 43 and 48 EC thereby basing the Commission's case on discrimination on the grounds of nationality and infringement of the freedom of establishment of salaried workers.

¹²⁰ See Commission Press Release, IP/05/936, July 14, 2005.

¹²¹ *Ibid.*

¹²² Source: GIVING IN EUROPE (accessed at <http://www.givingineurope.org>). This supposition has been borne out by the Commission's issuance of a reasoned opinion requested Belgium to end its discrimination against foreign charities in the area of direct taxation — see Commission Press Release IP/06/1879, December 21, 2006.

¹²³ Emilie Filou, *UK faces European court over taxation of foreign donations*, THIRD SECTOR, 28 November 2007 (available at <http://www.thirdsector.co.uk/channels/Finance/Article/769721/UK-faces-European-court-taxation-foreign-donations>) last visited January 11, 2008.

and ultimately national courts will be required to compare the public benefit requirements under national law for tax exemption with the activities or purposes of the foreign charity. Probable outcomes include greater clarity, clear justification of overriding reasons for treating otherwise comparable situations differently, and an end to discrimination based simply on non-residency. Success in these areas will arguably do more to facilitate philanthropy in general and cross-border giving in particular than any Council Regulation could hope to achieve.

Informal Civil Sector Efforts at Facilitation of Cross-Border Activities and Donations

In the intervening period, informal mechanisms assist donors of one Member State who wish to give tax-efficient donations to charities in another Member State. The Transnational Giving Europe Project, set up under King Badouin Foundation, is one example.¹²⁴ The TGE Project consists of a network of large, accredited foundations in a growing number of European countries, including Belgium, France, Ireland, Germany, the Netherlands, Poland, and the United Kingdom. A donor wishing to donate to a foreign charity in one of the participating States contacts his or her national foundation, which then contacts its partner foundation in the recipient country for an assessment of the potential donee nonprofit. If the assessment is positive, the foundation in the home country accepts the donation from the donor and issues a tax receipt in compliance with national law before transferring the donation to the partner foundation on behalf of the intended beneficiary.

The TGE Project thus enables a donor to make a charitable gift to a foreign nonprofit and receive the same tax benefits as when making a gift to a charity in his or her own country. It eliminates the need for foreign charities in participating countries to establish branches in other Member States; and in the lag-time before the creation of a legally enabling environment for charities engaged in cross-border activities, it provides a stopgap measure in those countries where it operates. To date, TGE has proved particularly popular with academic institutions that solicit donations from individuals and companies and possess a significant number of alumni in other countries.¹²⁵

IV. CONCLUSION: THE HISTORICAL POLITICO-LEGAL RELATIONSHIP BETWEEN NONPROFIT ORGANIZATIONS AND THE COMMISSION OF THE EUROPEAN UNION

The Context of Review

The relationship of nonprofit organizations with the EU is a complex one that to be understood fully must be viewed through the lenses of history, politics, and law. Laws present a snapshot of rights and duties of various stakeholders, based on past political understandings between those parties, which are shaped themselves by preceding dealings and events. Legal reform is most effective when it involves an understanding of how relations between stakeholders have changed since the previous regulation (i.e., a

¹²⁴ See <http://www.kbs-frb.be/call.aspx?id=209842&LangType=1033> (last accessed January 13, 2008).

¹²⁵ See, e.g., the development pages of Oxford University at http://www.development.ox.ac.uk/ways_to_give/tax_efficient_giving/tgn.html (last accessed January 13, 2008).

political perspective) and an appreciation of the implications of this change for the power balance between those parties (i.e., a historical perspective).

If we apply this analysis to the treatment of civil society organizations under EU law, we find that historically, the Treaty Articles had little to say regarding the rights and responsibilities of nonprofit organizations, apart from the negative reference in what is currently Article 48 EC. This non-recognition of civil society organizations has changed, at least superficially, with the ratification of the Treaty of Nice, which specifically refers to “civil society” in its governing provisions.¹²⁶ The Lisbon Treaty, which has yet to be ratified by all Member States, appears to build further upon the legal standing of such organizations in requiring European institutions to “maintain an open, transparent and regular dialogue with representative associations and civil society,”¹²⁷ although the form that such participatory democracy will take (beyond the usual reference to “consultation”) and the sanctions for disobedience remain unspecified.

To reconcile the historical view of nonprofit organizations under EU law (i.e., non-rights holders in an economic community) with the emerging role of nonprofit organizations today (i.e., entities that are not only subject to the rigors of EU law but are increasingly viewed as a valuable communicative conduit between the Commission and the European demos and as a sounding board for Commission initiatives) requires some understanding of the political events that have brought about this change and the current political events that are likely to alter the relationship in the future.

Past Political Catalytic Events Affecting the Legal Enablement of Nonprofits

Notwithstanding the lack of formal legal standing upon which this article has focused, certain nonprofit organizations have long enjoyed strong, informal policy relations with the Commission. For decades the European Commission relied largely on the field experience of development agencies and human rights groups in developing European policy in this area.¹²⁸ The European Parliament¹²⁹ and Council¹³⁰ also reaffirmed the specific and irreplaceable role of NGOs and the usefulness and effectiveness of their development operations. Indeed, the strong relations forged between human rights and development organizations enabled their successful lobbying of EU institutions to bring development work within the pillars of the Treaty and to give this field (and NGO involvement in it) a constitutional underpinning at the time of the

¹²⁶ Article 257 EC, the intended Art 300 TFEU.

¹²⁷ See after the coming into force of the Lisbon Treaty, the new Article 11 TEU.

¹²⁸ DG VIII/B/2, the department in the Development Directorate General of the Commission is colloquially known as the “NGO Unit.”

¹²⁹ See EP Resolution of 14 May 1992 on the role of NGOs in development cooperation, June 15 1992, OJ (C 150) 273 (1992) (emphasizing in particular the key role of NGOs’ work on behalf of marginal social groups in developing countries, the need to preserve the NGO’s freedom of action, and the vital role of NGOs in promoting human rights and the development of grassroots democracy.)

¹³⁰ Council resolution on Community cooperation with nongovernmental development organizations, (May 27, 1991), Bull. EC 5-1991, point 1.3.76, underlining the importance of the autonomy and independence of NGOs in the context of development assistance in a Council Resolution on cooperation with the NGOs.

Maastricht Treaty in 1992.¹³¹ The success of this legal enablement of civil society in political terms may best be described as mixed. Although nongovernmental organizations now are legally entitled to work alongside the Commission and Member States in the development of policy, bringing development assistance within the Treaty has radically changed the balance of power between the parties, though perhaps not as anticipated by NGOs. In practice, the development assistance agenda must now compete for priority with the EU's other objectives for external relations, which tend to be of an intergovernmental nature. These other objectives frequently take precedence over the concerns of development organizations.¹³²

Aside from the admittedly exceptional case of human rights organizations, nonprofits have built informal collaborative relations with the Commission that have influenced the formation and change of policy. The Commission's DG for Employment and Social Affairs (DG V), for instance, sought the participation of nonprofits in its Green Paper on Social Policy in 1993.¹³³ A successful collaboration between DG V and social nongovernmental organizations led to the Commission's establishment of the biennial European Social Forum, which provided greater opportunities for NGO/Commission dialogue. Moreover, the Commission's heightened interest in social NGOs — albeit necessitated by the Commission's inability to achieve consensus among Member States on social policy issues¹³⁴ — provided the momentum that led to the publication of a joint DG V and DG XXIII¹³⁵ Communication on the role of voluntary organizations in Europe in 1997.¹³⁶

Given the Commission's growing reliance on nongovernmental organizations to bridge the communication gap between the European institutions and the citizenry of Europe (often referred to as the democratic deficit, but maybe more correctly defined as

¹³¹ In the context of non-governmental development organizations, Article 181 EC, as inserted by the Maastricht Treaty, states that: "Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organizations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300." *See*, after the coming into effect of the Lisbon Treaty, Article 211 TFEU.

¹³² *See, e.g.*, The Convention on the Future of Europe's Final Report of Working Group VII on External Action (Brussels, 16 December 2002) CONV 459/02, which makes minimal reference to development cooperation and instead approaches development policy from a perspective of strategic interests within the broader sphere of the common foreign and security policy ("CFSP").

¹³³ European Commission, *Green Paper on European Social Policy*, COM (93) 551 final.

¹³⁴ This, occurring in the wake of the UK government's veto of the incorporation of a new Social Chapter in the Maastricht Treaty in 1992 resulting in political stalemate that forced the Commission to explore less controversial ways of keeping social policy on the reform agenda. One such alternative was to engage social NGOs in policy dialogue, which soon became known as "civil dialogue." *See further* BREEN, CROSSING BORDERS: COMPARATIVE PERSPECTIVES ON THE LEGAL REGULATION OF CHARITIES AND THE ROLE OF STATE-NONPROFIT PARTNERSHIP IN PUBLIC POLICY DEVELOPMENT, Thesis (J.S.D.) — Yale Law School, 2006.

¹³⁵ DG XXIII is the Directorate General in charge of Enterprise Policy, Distributive Trades, Tourism and Cooperatives.

¹³⁶ Interview by author with Pádraig Flynn, former EU Commissioner for Employment and Social Affairs, in Dublin (January 11, 2005).

the accountability deficit),¹³⁷ it would be politically difficult for the Commission, on the one hand, to accept such support, while, on the other, refusing to endorse if not advocate a clear statement of the legal rights of these organizations.¹³⁸ Politically, a clearer statement of rights of these organizations will not affect the balance of power between EU institutions and such nonprofits. The Commission, thus, has nothing to lose in championing their claims before the ECJ. Individual Member States will be most affected by any judicial rulings in favor of greater European legal enablement of nonprofits. It is extremely unlikely that the unanimity, necessary at Council level under Article 308 EC, to pass any regulation to facilitate the cross-border activities of nonprofits will be achieved by the States that will bear the costs of recognizing foreign charities in their own territories. If anything, national governments may be more willing to work together to redress the perception of a shift in the balance of power in their relationships with nonprofit organizations.

In this regard, one final political event deserves consideration, given its potential to affect the legal enablement of civil society organizations at European level — namely, the introduction by the UN's Financial Action Task Force (FATF) of Special Recommendation VIII in 2004. Issued in the wake of the 9/11 terrorist attacks, Special Recommendation VIII seeks to prevent terrorist organizations from misusing nonprofit organizations: (i) to pose as legitimate entities; (ii) to exploit legitimate entities as conduits for terrorist financing, including avoiding asset-freezing measures; or (iii) to conceal or obscure the fact that funds intended for legitimate purposes are not clandestinely diverted to terrorist purposes. Special Recommendation VIII has given the European Commission, a reluctant if not uninterested regulator in the past, a political platform for coordinating the regulation of nonprofit organizations. Over the past three years, the Commission has issued draft recommendations,¹³⁹ consulted nonprofit

¹³⁷ Given the lack of representativeness among many nonprofit organizations it would be difficult for the EU to argue that the type of federated umbrella organizations with which it likes to deal are a proxy for dealing with the Union's citizens. However, the intermediary role that these organizations play, once recognized as a channel for communicating with citizens and not an alternative for so doing, is nonetheless of value to the Commission.

¹³⁸ Two recent examples of such reliance on NPOs related to the period of negotiations preceding the referenda on the ill-fated Treaty for a Constitution on Europe in 2002-2004 and the period before the accession of the ten candidate Eastern European States in 2004, both occasions on which the Commission's professed support for the role of NGOs in ensuring democratic accountability and participatory democracy.

¹³⁹ European Commission Directorate-General Justice, Freedom And Security, Draft Recommendations to Member States Regarding a Code of Conduct for Non-Profit Organisations to Promote Transparency and Accountability Best Practices: An EU Design for Implementation of FATF Special Recommendation VIII — Non-Profit Organisations (Brussels, July 22, 2005).

organizations throughout Europe,¹⁴⁰ and issued a code of conduct for nonprofit organizations operating not just on a Europe-wide basis but also on a local basis.¹⁴¹

Recently, the Commission has maintained that it can regulate such organizations to fight not just terrorist-funding but also fraud.¹⁴² The potential to extend its remit beyond terrorist-financing was evident in the Commission's Guidelines for Member States on national-level coordination structures and vulnerabilities of the nonprofit sector.¹⁴³ The Commission's expressed intention remains the same: to establish common principles for supervising nonprofits on which national implementation can be based. But that should not in any way hinder nonprofit organizations' legal, cross-border activities.¹⁴⁴ The recommended common principles make Member States responsible for overseeing nonprofit activities within their territories, facilitated through national cooperation between the relevant authorities responsible for registering such bodies, overseeing fundraising and banking activities, regulating tax exemptions and grant applications, and requiring annual reporting.

In addition to establishing a good infrastructure for nonprofit supervision, Member States are encouraged to promote compliance with the Commission's Code of Practice amongst nonprofits, which, if achieved, would lead to similar transparency and accountability goals in each Member State. The coordination of supervisory responsibilities at a national level would aid cooperation between authorities in Member States, thus echoing the Court of Justice's vision in *Stauffer* of national authorities sharing information in the furtherance of European affairs. As between individual Member States and the EU, the Commission cites potential roles for the European Anti Fraud Office (OLAF) in assisting in cooperation and information-exchange; and the European Police College (CEPOL) in training senior police officers to recognize vulnerabilities of the sector and typologies of abuse, as well as promoting cooperation/information exchange.

¹⁴⁰ The European Commission's Directorate General for Justice, Freedom and Security opened a consultation on 26 July 2005 on a draft Recommendation to Member States regarding a "voluntary" Code of Conduct for Non-Profit Organisations in order to promote a so-called "transparency and accountability." See http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_public_en.htm (last visited January 13, 2008).

¹⁴¹ European Commission, *The Prevention of and Fight against Terrorist Financing through enhanced national level coordination and greater transparency of the nonprofit sector*, COM(2005) 620 final (Brussels, November 29, 2005).

¹⁴² A Commission-sponsored survey regarding the scope and extent of nonprofit financial abuse in Member States, to which the author has contributed, is currently underway. The Commission hopes that greater empirical data will enable it to better grasp the issues facing nonprofit organizations active in the EU and enable the Commission eliminate opportunities for financial fraud without unduly interfering with the diverse philanthropic endeavors undertaken by these organizations.

¹⁴³ See *supra* n. 141, at 8-9 (stating, "While the focus of the present Communication is to prevent abuse of NPOs by terrorist financing, the enhanced transparency and accountability measures will *also* help to protect organisations from other forms of criminal abuse. The Recommendation and the Framework for a Code of Conduct should therefore enhance donor confidence, encourage more giving, while preventing or at least reducing the risk of criminal abuse.")

¹⁴⁴ *Ibid.*, at 12.

From a nonprofit perspective, the Commission's recommendations are similar to those commonly issued by national charity regulators, which relate to the need for a clear mission purpose for each organization to which resources are applied; the importance of maintaining up-to-date governing documents that are publicly available; the maintenance of proper books of account; the use of formal channels for transferring funds; and the necessity for audit trails of funds transferred outside the host Member State and of funds transferred to any person delivering service on behalf of the nonprofit. Lacking is any mention of sanctions for noncompliance, making the Commission, at best, a fledgling regulator.

If implemented in a proportional, transparent, and properly resourced manner, the Commission's Guidelines will aid nonprofit organizations throughout Europe by requiring each Member State to establish an adequate regime for regulating nonprofits. This regulatory initiative would not only develop regulatory regimes in Member States that perhaps lacked them in the past, but would require all Member States with existing regimes to review their practices for clarity, efficiency, and effectiveness. Implementation in this manner would help avoid nonprofit abuse while also providing opportunities for the type of Member State cooperation that should exist in an integrated Union. The stakes are high, however. If Member States implement the European guidelines half-heartedly, nonprofits will remain subject to disparate reporting requirements and national legal requirements, loosely justified by the Guidelines or the fight against crime more generally. Member State noncompliance might also diminish cooperation between national regulatory authorities and, as a result, hamper nonprofit activities across the Union.

Achieving true legal enablement of nonprofits within the European Union is thus a long-term and ongoing project. This article has argued that European legislation, even legislation focused on nonprofits, is unlikely to move that project forward. Paradoxically, the legal enablement of civil society may be better advanced through the Court's adoption of a functional approach towards the rights and liabilities of nonprofit organizations under the Treaty's fundamental freedoms. In light of this conclusion, great care should be taken in implementing European policies to counter terrorism and fraud in the operations of nonprofits, lest such policies become an excuse for Member States to erect or maintain national barriers to the free movement of civil society organizations in an integrated Union.

ICNL-CORDAID AWARDS

**Rising from the Ashes:
The Rebirth of Civil Society
in an Authoritarian Political Environment**

Adong Florence Odora¹

Drawing on examples from many nations, this article examines the difficulties confronting civil society in authoritarian environments, including political repression, legal repression, and threats. The article also discusses the preconditions for the reemergence of civil society where it has been suppressed.

INTRODUCTION

Legal thought, at least as embodied in international and regional human rights instruments and even in most national constitutions, assumes the universality of certain principles. The “four freedoms”—association, assembly, speech, and religion—are taken for granted as applicable, if not always applied, around the world. They form the basis of human rights campaigns, advocacy, and policy reforms, as well as one justification for intervening in the affairs of nations. For many people, these freedoms represent the foundation of participatory democratic government. Yet political and social structures, traditions, laws, and other forces that shape human behavior can restrict the growth and effectiveness of civil society. Some of these forces are benevolent. Others are not, and therefore conflict with the ideals of the “four freedoms.”

In most countries, civil society groups can be classified as civic movements or organizations; political parties; human rights movements; social assistance organizations; labor/trade unions; rural, agricultural and other workers’ cooperatives; independent professional and sectoral associations; independent journalism; cultural and arts groups; and faith-based groups and institutions.

Political and social forces can weaken civil society in several fashions. An inadequate civil society can be a legacy of patronage politics, especially rulers who monopolize economic, social, and political opportunities as a way of controlling people. Political entrepreneurs continue to dominate markets, including clandestine ones, and use this social domination to buy off members of mass movements.

The state is often responsible for stifling civil society. It is difficult if not impossible for civil society to emerge and grow in an authoritarian political environment. For example, state actors regularly use force to prevent indigenous communities from

¹ Adong Florence Odora, adong_florence@yahoo.co.uk, is a Ugandan lawyer who has served as a researcher for Equalinrights in The Netherlands. This article was recognized with a Distinguished Research Award in the ICNL-Cordaid Civil Liberties Competition.

organizing on sufficient scale to defend their interests. Without freedom of association, civil society cannot exist.

Why do rulers undermine civil society? Some are paranoid and will do anything to safeguard their interests. This is especially true where there are indications of possible military or social uprising against the government. In other cases, a state can exploit divisions in politics. For example, the citizens of many states cannot reach a consensus on how the state should be governed. This is especially true in Africa, as well as in the former Soviet Union, Latin America, and Central Asia.

A country's political environment defines the spaces and the issues on which nongovernmental organizations (NGOs) and civil society organizations (CSOs) can operate and advance. This article explores how these restrictions play out in less-than-democratic states, and how civil society can sometimes endure and ultimately reemerge.

THE POLITICAL AND LEGAL MILIEU WITHIN WHICH CSOs OPERATE

In democratizing countries, civil society should ideally function as a school in which citizens learn democratic thinking and acting, tolerance of diversity and pluralism, mutual acceptance, willingness to compromise, trust, and cooperation. Civil society organizations should serve as advocates, influencing government both to adopt positions supported by their members and to follow rules that facilitate open, free, and fair political debate and decisions. Thus, a crucial element of democratization is the creation of organizations that can act independently and confront the government, either to hold it to account or to influence policy.

Constricted political space, however, commonly limits CSOs to matters outside the explicit political arena, including democracy and democratization. On this point, Oloka-Onyango (2000, p. 23) rightly ponders whether genuine democracy can be realized in a political framework that monopolizes discussions of governance, suppresses organized opposition, and curtails political space.

Such a framework has several consequences. Many CSO officials admit that they do not want to confront a repressive government; others say that they wish to avoid matters considered controversial. As such, many CSOs avoid democratization and governance issues and dwell on "soft issues," such as women and children's rights and developmental topics. The suppression of dissent also explains why governments are more receptive to service-providing CSOs than to advocacy ones. Restrictions imposed by existing law, as well as potential restrictions embodied in pending legislation, further keep CSOs and NGOs on a short leash. Taken together, these factors forestall free discussions of political matters, and thereby prevent civil society from playing its proper role as intermediary between groups of citizens and the wielders of political power.

Uganda provides a useful case study. Ugandan CSOs are relatively young. Most of them were founded after the NRM regime captured power in 1986. Most of these organizations, further, have a narrow social base and thin geographical coverage. In particular, most leading CSOs are concentrated in Kampala, the capital of Uganda, and conduct only limited activities elsewhere. The middle class plays a prominent role in the most visible organizations, too. Finally, the bulk of CSOs are involved in service delivery and other relatively uncontroversial activities.

Uganda does provide relative leeway for forming and operating CSOs, as well as a relatively free press. Nonetheless, advocacy CSOs face a difficult time, because of restrictions on political spaces. CSOs active on issues of democratization, governance, human rights, and accountability are especially affected. Consequently, civil society is largely limited to topics and approaches that reinforce the status quo, or at least pose no threat to it.

Before 1986, Uganda was marked by tyrannical regimes and economic collapse. Although the political environment has improved, the present regime does not seem fully committed to democracy. The government continues to restrict political pluralism and shows intolerance toward serious political competition. On many occasions, the government has prevented CSOs from advancing democratization and governance goals. Now, a proposed NGO Registration (Amendment) Bill threatens to impose new regulations on the registration and activities of CSOs. This problem is compounded by a reluctance of CSOs to confront the state on certain issues. For these reasons, CSOs remain largely outside the arenas of politics and democratization.

The classic model of civil society requires a meaningful institutional separation between citizens and their organizations, on the one hand, and a relatively autonomous bureaucratic state, on the other. Sub-Saharan Africa does not satisfy that requirement, according to Patrick Chabal (Chabal and Daloz, 1999). There, no sharp dichotomy can be drawn between state and civil society. Rather, the two interpenetrate each other.

Chabal argues that African societies are essentially plural, fragmented, and above all, organized along vertical lines. Sociopolitical cleavages usually reflect factional divisions, which arise primarily because of competition for scarce resources. In general, vertical divisions remain more significant than horizontal bonds or ties of solidarity between those who are similarly employed or professionally linked. That helps limit the effectiveness of associations charged with promoting the common good. Chabal holds that questions of identity or community often undermine attempts at occupational or professional unity, and further, that the business of politics is usually conducted along informal, vertical channels linking the elites with the rest of the population, such as patron-client networks and communal organizations. The primacy of vertical and personalized ties precludes a functional civil society. Assertions that civil society exists in sub-Saharan Africa derive more from wishful thinking or ideological bias than from a careful analysis of conditions.

Further, such assertions suggest that African political systems are more similar to their Western counterparts than they really are. It is misleading to talk of a politically salient cleavage between “state” and (civil) “society.” Instead of focusing on such vague categories, one should pay attention to the behavior of the main political actors. Private and public domains blur, and the few embryonic societal movements opposing central power are limited in their organizational capacities.

Chabal's points apply to Uganda. Vertical relations and bonds of patronage are common, and they help explain why civil society actors hardly ever challenge the state. In addition, the distribution of socioeconomic resources is highly unequal in Uganda. As a result, the system of political coordination tends to produce a “mobilization of bias” and thereby provides opportunities for powerful elites to influence policy by interacting with

their political and governmental counterparts. The proliferation of NGOs in Uganda is not evidence to the contrary. It reflects donors' practice of channeling more resources outside the state, not an increased political importance of civil society.

The experience of some countries suggests that civil society can exist even though it does not follow the classic model. Under this theory, civil society need not be totally independent from the government; the key is to manage the relationship between civil society and political power. In Spain as well as some former communist countries, civil society once meant political society, though it now refers to the network of voluntary associations, markets, and public spaces outside the *direct* control of the state. For Perez-Diaz this distinction is critical, because a civil society can be fostered, in a limited sense at least, by the state.

LEGAL FRAMEWORK APPLICABLE TO CIVIL SOCIETY ORGANIZATIONS

Repressive governments often closely regulate the registration process for CSOs, and thereby discourage the formation of organizations, particularly advocacy groups. Tactics include exercising vast discretion over registration; making registration expensive, inconvenient, or burdensome; delaying registration decisions unduly; and requiring organizations to reregister every few years, allowing the government to revisit the issue of whether a given organization should exist.

In Azerbaijan, Ethiopia, and Algeria, regulations governing registration are vague and leave great discretion to the officials. CSOs are sometimes denied registration, and other times subjected to long delays or repeated requests for information. In Azerbaijan, registrations have been de facto suspended as a result of poor implementation of the registration laws.

In Belarus, the government in recent years has adopted a series of laws restricting both public gatherings and CSO activity. Among other powers, the laws give the government substantial discretion over registration. A National Commission on Registration of Public Associations advises the Ministry of Justice on whether an organization should be permitted to register, in a process that is not transparent. Applicants have waited for more than a year for a response to their applications (the law provides for one month), only to be denied registration without explanation.

Except for its restrictions on political parties under the Constitution and the laws on sedition, Uganda's legal framework at first appears to provide sufficient space for forming and operating CSOs. The constitutional framework supports the existence and free operation of civil society organizations. CSOs in Uganda generally operate under the 1995 Constitution of Uganda, which guarantees the right of association and recognizes the existence and role of civil society organizations. The relevant constitutional provisions are as follows (emphasis added):

Principle 5 (ii) of the National Objectives and Directive Principles of State Policy provides that “the state shall *guarantee and respect the independence* of nongovernmental organizations which protect and promote human rights.”

Article 29(1) provides for “the freedom of association which shall include the freedom to form and join association or unions, including trade unions and political and other *civic organizations*.”

Article 38(2) provides that “every Ugandan has a right to participate in peaceful activities to influence the policies of Government through *civic organizations*.”

Article 269 provides for limiting certain activities of political organizations, which was translated into the exasperating Political Organizations Act. The restrictions against political organizations in these laws include rules against operating branch offices, holding public rallies, and conducting any activities that may interfere with the Movement political system for the time being. Because of the restrictions, the traditional political parties operate more or less like CSOs, including The Free Movement (TFM), the Forum for Democratic Change (FDC), and Uganda Peoples’ Congress and Democratic Party, which oppose the hegemony of the Movement and take political stances. The constitutional article and the Act have been widely condemned by the opposition parties, which consider them to violate fundamental freedoms of association and expression.

Besides the Constitution, CSOs are governed by the **NGO Registration Statute 1989**. This statute provides for the registration and regulation of NGOs. It defines an NGO as “a Non-Governmental Organization established to provide voluntary services including religious, educational, literary, scientific, social, or charitable services to the community or any part thereof” (Ugandan NGO Registration Statute No. 5, 1989, Section 13). The statute further provides that no organization can operate in Uganda unless it has registered with the Board, subject to such conditions and directions as the Board may think fit.

However, the government has tabled bills that threaten to limit the general freedom and operations of CSOs. These bills address the suppression of terrorism, the registration of NGOs, and the regulation of political parties:

The Bill on the Suppression of Terrorism 2001 contains several provisions that threaten fundamental freedoms of expression and liberty. In its present form, the bill is inimical to human rights in general, and it potentially endangers individuals and groups in the opposition. The proposed law expands the definition of terrorism and increases the number of offenses related to terrorism; imposes a mandatory sentence of death for the offense of terrorism and raises the penalties for offenses related to it, including the forfeiture of assets and other property belonging to associations deemed terrorist groups; increases ministerial powers to declare organizations terrorist; introduces wide powers for surveillance and interception of communications, even without any evidence that the individuals affected are involved in terrorist activities; and introduces an offense for displaying support for terrorism in a public place.

The NGO Registration (Amendment) Bill 2000 seeks to restrict space for NGOs and increase control by the state. Key provisions include a requirement for a permit on top of registration; a prohibition against registering NGOs whose objectives are in “contravention of any government plan, policy or public interest”; penalties and fines for individuals in NGOs; an NGO Registration Board composed of officials from the State and security organs; and appeals of non-registration or canceled registration to the Minister of Internal Affairs. The

bill violates the constitution to the extent that it threatens the autonomy of civil society organizations.

The Political Parties Bill 2001, in Article 269, stifles the operations of parties and negates political pluralism. The delay in passing a law that legitimately regulates the activities of political parties is a cause of concern to many CSOs in general and political parties in particular.

CSOs were not involved in preparing the Bill on the Suppression of Terrorism or the amendment to the NGO Registration Law. Instead, their involvement was reactive, arising only after the bills had been published. All in all, the government today interacts with CSOs primarily when the state stands to benefit. In many cases, too, CSOs rely on the expertise of technical consultants outside their membership, which has two negative consequences: the government does not take them seriously, and they cannot effectively and sustainably channel and or represent popular opinion or influence government policies.

Uganda is not unique. Over the past year, several countries have introduced legislation aimed at weakening civil society. In the most restrictive political environments, governments do not grant the right to associate or form organizations at all:

- Saudi Arabia has no law governing CSOs. As a result, the few organizations that exist were established by royal decree or operate under government control.
- In Libya, the law does not recognize any right to associate.
- The Russian Duma passed on first reading a bill that would have barred foreigners from participating in Russian civil society organizations; prohibited foreign organizations from operating branches in Russia; and given the government unchecked powers over CSOs, including a requirement that it be notified of such informal groups as neighborhood associations (International Center for Not-for-Profit Law, 2006, p. 76). However, some of the more restrictive features were eliminated through the efforts of Russian civil society leaders, combined with support from international organizations and diplomatic pressure from the United States, the European Commission, and others. Nonetheless, the law ultimately adopted on January 17, 2006, gave the Russian government significantly greater control over NGO activity.
- China, finally, provides no legally guaranteed right for CSOs to exist. Nevertheless, civil society in China exists to some extent through the ingenuity of its CSOs, which, for example, often register as different forms of organizations.

Some governments restrain civil society by limiting the access of CSOs to foreign funding, apparently as a means to reduce foreign influence.

- Zimbabwe in 2004 enacted a law that prohibits local CSOs engaged in “issues of governance” from accepting foreign funds, and bars foreign

CSOs involved in these activities from registering. Upon introducing the bill, Zimbabwe's President Robert Mugabe declared that “we cannot allow CSOs to be conduits or instruments of foreign interference in our national affairs.” Mugabe ultimately declined to sign the controversial bill, citing “one or two issues he wanted to be addressed,” but there is concern that the bill will be revived.

- In Eritrea, the government introduced CSO Administration Proclamation No.145/2005 that prohibits the United Nations and similar international agencies from funding CSOs under most circumstances, and requires all donor funds to flow through government ministries. The proclamation also imposes taxes on food aid and other donations, outlaws CSO work in fields other than relief and rehabilitation, and increases reporting requirements.
- In Uzbekistan in 2004, the government assumed greater control over foreign funding of CSOs by requiring them to deposit funds in one of two government-controlled banks, thereby allowing monitoring and control of all money transfers. Within a short time after enactment of these provisions, the government had obstructed the transfer of over 80 percent of foreign grants to CSOs. Worse, the system is administered according to unwritten policies and oral instructions, making it difficult for CSOs to follow the rules or appeal adverse decisions. More recently, the government has suspended the operations of some foreign democracy and governance organizations that have partnered with and funded local groups, and has refused to register others. On May 3, 2007, Uzbekistan published a new Law on Charity, which grants the Cabinet of Ministers the right to monitor and control the use of charitable donations from foreigners, including international and foreign organizations.
- On February 20, 2006, the National Assembly of Sudan passed a draconian bill that restricts the work of NGOs in Sudan and grants discretionary power to the government over NGO operations.
- On December 8, 2006, Peruvian President Alan Garcia signed into law amendments to Peru’s Law Creating the Peruvian Agency for International Cooperation (APCI), which grants APCI the authority to “prioritize” NGO activity with “national development policy and the public interest” and to regulate the flow of foreign funding to human rights defenders and other Peruvian NGOs that receive international technical cooperation.

These events are part of a regulatory backlash against CSOs throughout the world.

POLITICAL CONSTRUCTION AND THE REBIRTH OF CIVIL SOCIETY

Civil society can sometimes emerge under authoritarian rule through an iterative “political construction” approach that combines political opportunities, social energy, and scaling up. However, civil society reformists, with a greater concern for political legitimacy and thus a preference for negotiation over confrontation, may conflict with

hard-line colleagues over whether and how to proceed. If and when cracks in the system appear, civil society organizations often try to occupy these spaces from below, demanding broader access to the state while trying to defend their capacity to articulate their own interests autonomously. These efforts usually provoke an authoritarian backlash, which ends the cycle of opening.

Scaling up in civil society organizations is especially important for representing the interests of dispersed populations, which have the greatest difficulty in defining common interests and are the most vulnerable to “divide and conquer” efforts from above. If CSOs do successfully scale up, they are still vulnerable to the “iron law of oligarchy,” because dispersed populations have little capacity to monitor the activities of their leadership and hold them accountable. Accordingly, regional organizations are vital for representing the interests of dispersed and oppressed groups and thereby offsetting the power of authoritarian elites. These organizations are more effective through overcoming locally confined solidarities, exercising representative bargaining power, and providing access to information. Regional collective action, however, often is most likely to be targeted for repression.

Cuba exercised strict controls over CSOs, even going so far as to form its own organizations. However, the resurgence of civil society was credited with playing a critical role in Cuba’s so-called Third Wave of democracy (1974-1987). Social movements, human rights organizations, churches, and other forms of organized “people power” mobilized repressed populations against authoritarian government. The emergence of civil society in Cuba in the context of systemic crisis can be compared with developments in other communist states, including the handful of regimes that resisted the democratization of the Fourth Wave. Many observers declare the Fourth Wave, which came unexpectedly with the collapse of European communist regimes and the dismantling of the Soviet Union, a triumph of civil society against the state. Vladimir Tismaneanu (1992, p. xiii), for example, asserts that the main cause of the East European revolutions was “the rise and ripening of civil societies in countries long dominated by totalitarian Leninist parties.”

Civil societies arise from the increasing complexity of social and economic life and the proliferation of interests, identities, and causes. A particular civil society is thus the result of a unique combination of structures, cultures and values, and of notions of public versus private spheres. When civil society organizations emerge and seek autonomy from a communist state, however, the regime sees a challenge to its very coherence and legitimacy. Civil society cannot emerge or reemerge unless the onerous conditions of foundational regimes are alleviated. The “reformation” of classic communist regimes took place in the wake of the death of the founding leaders, such as Joseph Stalin, Mao Zedong, and Ho Chi Minh.

After the United Nations Transitional Authority organized multiparty elections in Cambodia in 1993, authoritarian forms of government gradually shifted toward limited political development. Setbacks occurred, however, including the Cambodian People's Party’s assuming a role in government between 1993 and 1998 despite holding fewer seats than the party Funcinpec. In addition, the government did not separate powers or respect human rights, and continued to use violent or military means to resolve conflicts. This last point was illustrated by the March 1997 grenade attack and the July 1997

fighting between the two parties. However, the 1998 multiparty elections and other developments indicate that Cambodian civil society is rising.

Despite strict controls, civil society continues to emerge in China. With the disengagement of the Chinese state from many sectors of the public life, citizens have empowered themselves, creating associations to promote their economic, cultural, religious, and other interests. Some of these associations operate illegally, underground, but many operate publicly and accept a certain degree of government control.

PRECONDITIONS FOR REBIRTH OF CIVIL SOCIETY

The systemic crisis that caused civil society to sprout in Eastern Europe and the Soviet Union, according to Weigle and Butterfield (1992, pp. 5, 18), resulted from the regimes' failures "to adequately perform self-defined functions of value formation and interest representation" and "to respond to needs of a complex society and modern economy." They describe four stages in the development of civil society:

Defensive: private individuals and independent groups actively or passively defend their autonomy from the party-state.

Emergent: independent social groups or movements pursue limited goals in a widened public sphere sanctioned or conceded by the reforming party-state.

Mobilizational: independent groups or movements undermine the legitimacy of the party-state by offering alternative forms of governance to a politicized society.

Institutional: publicly supported leaders enact laws guaranteeing autonomy of social action, which lead to a contractual relationship between the state and society regulated eventually by free elections.

Each stage embodies complex characteristics and sequences of events. The first two stages are shaped to a great extent by the shared characteristics of communist party regimes, while the last two depend largely on historical precedent, political culture, nationalism, and the level of institutional development. To understand how the process is initiated, one must examine the nature of the regime, the severity of the systemic crisis, the capabilities of the state, the status of societal initiative, the political culture, and the historical trajectory.

How does civil society reemerge in states that have eliminated it? The most important preconditions are the survival of independent thought and of some vestige of prerevolutionary patterns of social organization.

Foundational communist systems eliminated opposition and dissolved independent sources of power that might rival the "Communist Party" (used generically to cover all political parties in power), such as other political parties, trade unions, professional associations, religious organizations, and vestiges of the preceding regime. Preexisting non-communist organizations were usually banned, co-opted, or merged into new entities created by the state, while the majority of the population was inducted into mass organizations that served as transmission belts for the party. Alternative visions survived only by hibernating or dissimulating acquiescence. The costs of individual or collective action were very high, especially in the mobilizational periods when opposition

could lead to exile, death or lengthy imprisonment in the *gulags* (see Courtois, Werth, et. al., 1998).

Stalinist Europe provides examples. With the exception of pockets of anti-communist guerrilla activity that lasted into the early 1950s, collective resistance was either passive, in such nonpolitical forms as cultural, ethnic, and religious activity, or spontaneous and violent, such as the riots of 1953 in East Germany and Poland.

When reforms came, their main characteristics were the shift of political power away from the maximum leader toward the party apparatus, a process in keeping with Lenin's concept of democratic centralism; the replacement of widespread state terror with subtler, "hegemonic" forms of social domination; and the renegotiation of the coercive compact between state and society. This is the environment in which the defensive stage of emergence occurs.

The defensive stage is actually a period of complex interactions that produce conditions in which the public can articulate divergent views. The defensive stage occurs in three steps: decompression, liberalization, and retrenchment. The first signs of life are triggered by social decompression, such as the elimination of mass terror and the reinforcement of the private, individual domain. The party-state relieves pressure without making substantial reforms. It may relax the enforcement of repressive laws, tone down its ideological rhetoric, and cautiously tolerate new cultural expression. Those seeds of civil society that have survived the violence of the communist takeover and the terror of the mobilizational phase begin to sprout during this period, particularly among intellectuals and religious groups.

Put differently, the catalyst for emergence is a change in the political regime that lowers the costs of individual and collective self-organization and opens public space for participation. The change may result from conscious pressures to reform, the diminution or erosion of state capabilities, conjunctural conditions that have unintended consequences, or some combination of the three. At this point, divergences or dissents from communism begin to publicly appear from above and from below.

Divergence from above in communist-type polities emerges from party elites, first as revisionism and later as dissidence. Revisionism is a critique of the party from within in order to perfect it, usually appealing to communist utopian ideals to criticize bureaucratism and other "deformations" of socialism, as with Leon Trotsky and Rudolf Böhro. Dissidence, by contrast, questions the foundations of the party. Although dissidence is confined at first to urban intellectuals, it serves as an example to potential activists and the community at large.

Divergence from below emerges as dissent or resistance in the social realm, motivated by political, economic, social, religious, ethnic, or national differences with the authorities (Ionescu, 1967, p. 179). It commonly begins among the lower-status intelligentsia and students, whose reasons are political or ideological, and tends to aggregate in educational and cultural organizations. Ironically, the dissent often breeds in institutions created by the state, and many of the new dissidents are youthful products of the new order. The form of social resistance depends to some extent on the type of grievance. Work-related complaints might spawn strikes, for example, and restrictions on political space can lead to demonstrations. Whatever the form, social resistance can

organize through traditional networks and surviving prerevolutionary institutions, such as churches and fraternal organizations.

Liberalization can follow decompression. Liberalization involves actual reforms that permit a pluralization of social life and address the economic shortcomings endemic to communist party-states. Thomas F. Remington (1993) states that a theory of transition from communism should take into account how the regime and the society “influence and penetrate each other and how that relationship changes during the transition itself.” This period permits the articulation of revisionism and dissent in more active or public ways, often with the tacit assent of reformist party elites and sometimes with the open adoption of revisionist agendas, as with Prague Spring.

The continuation or expansion of reform depends on a number of factors, but the perception of regime elites is central. Their perspective helps determine the regime’s tolerance of opposition and a self-organizing society. Regime elites will stay the course if they see that changes in the coercive compact enhance political power and regime legitimacy. Early successes might even lead to deeper reforms, which allow civil society to advance to the emergent phase.

However, where the regime elites sense danger, retrenchment—a reversal of either decompression or liberalization—becomes likely. The result is a systemic crisis in which the regime typically clamps down on dissent and on independent economic and social activity. If elites can maintain unity in the systemic crisis, they can re-equilibrate through force or the threat of force, and later renegotiate the coercive compact with the population. If regime elites split and cannot resolve the impasse, however, a regime breakdown is likely to occur. If an embryonic civil society exists, a transition to democracy may be possible.

Where the seeds of civil society exist, according to Ariel Hidalgo (1994, pp. 46-47), the social contradictions repressed by legal means will, by necessity, emerge illegally, at the margins. Despite a rigid totalitarian structure, social forces that contest the regime are inevitable, such as parallel trade unions, human rights committees, and independent cultural, religious, and environmental associations. Thus, even under totalitarianism, an opposition can arise with the proper preconditions. Hidalgo writes with regard to Cuba’s systemic crisis of social domination starting in the late 1980s, which led to the proliferation of dissident, opposition, and independent social organizations.

Guillermo O’Donnell (1988) writes that “a crisis of social domination is a crisis of the state in society”—indeed, “the supreme political crisis”—because “the state is failing to guarantee the reproduction of basic social relations and, with them, of the system of social domination” (p. 26). Political reforms led to increasing autonomy from the state for individuals, groups, and organizations. In his landmark study of the political economy of communist systems, János Kornai (1992, p. 569) observes:

Reforming tendencies increase the autonomy of individuals, groups, and organizations in several respects. This applies to independent political movements, associations in society, private businesses, self governing local authorities, self-managed firms, state owned firms that become more independent in accordance with the ideas of market socialism, and so on. Various degrees of autonomy and subordination appear, but within them the

weight of autonomy grows as a result of the reform, and as it increases, so the totalitarian power of the central leadership decreases. Once some degree of autonomy has taken place, it becomes a self-generating process....

Despite decades of repression and the exile of the most prerevolutionary civil society leaders, as in China, independent thought and key prerevolutionary institutions such as the Roman Catholic Church can survive. Religious practice was the only public form of dissent tolerated in China, albeit under significant restrictions.

The inherently uneven “rebirth” of civil society, especially under authoritarian rule, often reflects the politics of fear. The fear of retribution, whether subjective, objective, or both, shapes the landscape of political opportunity within which individuals and groups act. Those who work to reduce the fear of retribution can make a powerful difference. Concerted action can sometimes, to some degree, overcome the legacies of history. No matter how limited or how personal a manifestation of independence is, some authorities will fear it as a defiance of the ruling ideology and a threat to their exercise of supreme power. This explains what can seem like a bizarre and paranoid response. However nonpolitical it is, an activity might turn into a political one, and officials treat it as such (Skilling, 1989, pp. 73-74). Consequently, seemingly innocuous activities can lead to jail or exile or even death.

Political prisons, however, can serve as greenhouses for dissident and opposition thought. The detention facilities in which dissidents and opposition leaders have been tortured in Uganda serve as an example. As Ariel Hidalgo (1994) writes, even though the prison organizations do not last long, their birth can show the possibility, even in the narrow confines of prison, of the pluralism of civic organizations that can one day develop into an independent civic movement throughout the country.

As stated earlier, once this pressure mounts, the government may allow slight changes in state-society relations by permitting the formation of NGOs, so long as they refrain from active involvement in the political arena. But the line may be difficult to hold. In Cuba, for example, the government’s new discourse on “socialist civil society” and “nongovernmental organizations” has encouraged dissident and opposition groups, which have adopted and adapted the model in their struggle for democratization and political change.

The number of organizations, their geographic distribution, and the size of their membership demonstrate the persistence of activists despite the repression, privations, and machinations of government intelligence. Where the organizations at first cannot advance beyond the margins, their causes can include not just the repressive nature of the state, but also facets affecting the civil society groups themselves, including a lack of material and logistical support, a lack of trust, and the lack of access to media. Then, through one of the mechanisms highlighted above, an authentic civil society may gradually emerge.

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ARTICLE

A Move in the Right Direction, But Not the Destination: Turkey's New Foundations Law

Filiz Bikmen¹

I. INTRODUCTION

On February 20, 2008, the Turkish Assembly ratified Law #5737, a significant reform of foundation law. Many of the changes were recommendations that grew out of a “Comparative Reports on NGO Law” project launched by ICNL and TUSEV in 2004, which created an inventory of the most critical legal obstacles and challenges affecting foundations,² assessed them vis-à-vis international standards, and recommended reforms.³ Ratification of the new law took more than four years.

It is remarkable that Turkish foundations continued to operate at all, given the rather restrictive circumstances that governed before enactment of Law #5737: a complex array of documents, including the Constitution and Civil Code, with core provisions regarding foundations; the original foundation law, drafted in 1935 and modified at least 20 times since, most thoroughly in 1970; plus circulars, court decisions, and other legal notices, many of which contradict core provisions and sometimes one another. Yet Turkish philanthropists persevered throughout decades of legal immobilization.

For centuries during the Ottoman Era, foundations provided almost all the core social services in the absence of a welfare state. Yet foundations and philanthropy in recent years have faced enormous hurdles. Why? The answer is complex, yet three points provide some insight:

- 1) The Republic of Turkey, the social welfare state established in 1923, did not initially conceive of foundations as “economic, social or political actors”⁴ or as components of “civil society” but merely as “charitable institutions”—a sentiment that continues to exist among many factions of the State.
- 2) While core provisions did adhere to international standards of rights and the role of the judiciary for foundations, intense social and political

¹ Filiz Bikmen is an Advisory Board Member of the International Center for Not-for-Profit Law and Adviser to the Chairman and Board of TUSEV, the Third Sector Foundation of Turkey, Istanbul, <http://tusev.org.tr/>.

² The ICNL and TUSEV analysis addresses only “new” foundations, which are otherwise known as “Civil Code” foundations. Law 5737 also addresses “old” foundations, which were established during the Ottoman Era.

³ See www.tusev.org.tr for all reports. The Background and Recommendation sections from the analysis portion of this article are based on the original Foundation Report.

⁴ In justifying his rejection of the initial foundation law draft in 2006, Former President Ahmet Necdet Sezer claimed that the role of foundations should be strictly charitable and not be considered “economic, social or political” actors.

unrest throughout the '60s, '70s and '80s, resulting in three military coups, led to a significant clamp down on all forms of civil society organizations, including foundations. In this light, it is interesting to note that Law #5737 in some ways reverses restrictions created by other legal interventions, realigning the law with its original form and purpose as reflected in the Civil Code.

3) Members of the public and especially state officials suspected that foundations were formed only to evade taxes and conduct other “adverse” activities. A few rotten apples and tales of corruption cast a shadow over the entire sector and thus were held to justified harsher laws and regulations.

A solution to the last issue would have been to increase the auditing capacity of regulators and improve public accountability and reporting standards for foundations. Instead, a complex system reigned, and was influenced greatly by previous coups and government suspicion of civil society activities. So the foundation regulation system became one that encouraged “charity” but discouraged “civic activity.” This system could be characterized as *autocratic* and *controlling*.

Autocratic reflects that the system commanded a sector based on the concept of private wealth for public good, and viewed foundations’ assets and activities as State property (e.g., requiring that a government representative participate in annual trustee meetings, and that funds be deposited in State banks).⁵ *Controlling* reflects requirements of prior permission for many facets of standard operations (e.g., buying and selling assets, and engaging in international activity).

This was the starting point for cooperation between TUSEV and ICNL, with the goals of restoring (in some cases) and advancing (in others) the rights of foundations in a democratic system. This article provides an analysis of the original problems, the proposed solutions, and the outcomes of the law reform initiative, in light of ICNL and TUSEV’s “Comparative Law Reform Reports Project,” and discusses how these changes, and those yet to be made, are likely to affect the foundation sector in the years to come.

II. ANALYSIS

Upon completion of a full review of the laws and regulations, ICNL and TUSEV decided the most critical issues meriting reform could be grouped under the following categories:

- 1) Financial (Endowment and Asset Management)
- 2) Governance (Founding Members, Board Membership Eligibility, Termination, and Government Participation in Meetings)
- 3) Activities (International Cooperation)

⁵ In Turkey, unlike some other countries in Europe, foundations are by default public benefit, as per their areas of operations. The challenges in public benefit law and tax exemptions raise different issues.

The following section provides an overview of the original problems, recommendations for reform, and the outcomes (new provisions in Law #5737).

1) Financial

a. Endowment

Background. As discussed in the comparative report, “the Turkish Civil Code does not state a minimum capital requirement for the endowment of a foundation: The only criteria requires that there be ‘enough’ capital/assets allocated to realize objectives as stated in the foundation by-laws (to be then determined on a case-by-case basis by the courts during the registration process). However, two communiqués of General Foundations Directorate dated 21 September 1997 and 21 January 1998 introduced additional limitations to these criteria. According to the provisions, the establishment of a foundation requires a minimum (as of 2004) of 375 to 940 Billion TL (app. USD 250,000 to 627,000) which is determined specifically (by the courts) according the purpose of the foundation.”

Recommendation. Although a minimum amount was not favored, the ICNL-TUSEV report put forth two options: 1) to determine a fixed amount, or 2) to leave it to the discretion of the registration authorities (courts).

Outcome. Law #5737 states that the amount will be determined each year by the General Directorate of Foundations High Council (GDF).⁶

b. Asset Management

Background. The report states, “The Communiqué of the General Directorate of Foundations dated 1999 gives this department (GDF) the privilege to intervene, to permit and to authorize issues related to the foundations’ asset management.” As such, there are two main concerns. One concerns altering or selling immovable foundation property. The Civil Code requires GDF to initiate procedures for the court application, and court approval is necessary; a subsequent Statute of 1970 requires GDF High Council permission before a court motion is initiated. With regard to cash and other movable assets, the Statute of 1970 requires foundations to use State banks for all deposits and transactions.

Recommendation. The report prepared by ICNL and TUSEV deems the process of prior approval both time-consuming and unsuitable, noting that foundations themselves are best positioned to manage their assets, whether immovable or movable. As a best practice, the report declares that the responsibility and accountability should rest with the board members of the foundation, to ensure effective financial management of foundation assets.

Outcome. With regard to a foundation’s original endowment (that is, the endowment when the foundation legally registers), Law #5737 requires that the foundation apply to GDF with an “independent expert valuation report.” Upon a favorable opinion of the GDF, a court motion is initiated and approval is required. For

⁶ The General Directorate of Foundations (GDF) is the official regulatory body for foundations; the courts are the official registration authorities. The GDF established a “High Council,” with members from the GDF staff as well as from private foundations.

property and assets acquired after the legal registration, the foundation board's decision together with an expert report are sufficient; no opinion from the GDF or court approval is required. For foreign foundations, laws regarding titles and deeds apply.

As for cash and movable assets, an official notice issued in 2005, before Law #5737, nullified the requirement that foundations deposit their funds in State banks. Foundations are free to choose the banks that will let them use their funds in the best possible way.⁷

2) Governance

a. Founding Members

Background. The ICNL-TUSEV report states that “according to the Turkish Constitution Article 33, all real and legal persons have the right to establish a foundation. This right can only be restricted in the interest of national security and public order, preventing crime, protection of public health or good morals, and protecting the rights of others only with the law. In addition to these provisions, the Civil Code also requires founders to have ‘the capacity to act’ (which is described in detail in the Code). However, two communiqués issued by the General Directorate of Foundations in 1997 and 1998 created limitations on the original provision as stated in the Civil Code. According to these regulations, real persons convicted of a crime (including political and ideological convictions) and/or sentenced to imprisonment for over six months indefinitely revoke their eligibility to be a founder.”

Recommendation. ICNL and TUSEV suggest that restrictions on founders who are convicted criminals violate Articles 10 (freedom of assembly) and 11 (expression) of the European Convention of Human Rights and Fundamental Freedoms (ECHR).

Outcome. Law #5727 removed the indefinite eligibility for convicted criminals to be founders.⁸ However, convicted criminals are not permitted to be board members, as will be discussed in the next section.

b. Board Membership Eligibility

Background. As stated in the ICNL-TUSEV report regarding Board Membership Eligibility, “the Turkish Constitution Article 33 [allows] all real and legal persons the right to establish a foundation. This implies no discrimination between Turkish citizens and non-Turkish citizens (foreigners)—both of which would have to abide by the same laws and regulations regarding foundations. However, according to the Statute of the Foundations dated 1970, a foreigner can be founder, appoint board members, but is not eligible to be a board member themselves.⁹ According to Turkish Corporate Law, there are no limitations for foreigners as board members (but they may not constitute the majority on the supervisory board).”

⁷ Official Gazette 12.11.2005

⁸ Law #5737 no longer makes any distinction regarding “founders” since this is addressed in the Civil Code.

⁹ There is one exception: if the foundation has an operating institution affiliated with it (e.g., a hospital, school, or museum), non-Turkish citizens are eligible to be board members. They cannot, however, constitute the majority, and their appointment requires the permission of Council of Ministers.

Recommendation. ICNL and TUSEV cite the situation as a potential violation Article 11 of the ECHR, and noted cases in European countries where similar provisions were found to violate freedom of expression to everyone irrespective of nationality.

Outcome. Law #5737 states that foreigners can be board members. The majority of the board, whatever their nationality, must have residence permits in Turkey.¹⁰

c. Termination of Board Members

Background. Regarding termination of Board Members, the comparative report states, “According to the Statute of the Foundations Article 23, board members should administer foundations according to their by-laws and should be responsible and prudent managers. If a board member does not comply with the laws and regulations, their board membership may be terminated by a court decision with the application of GDF. Terminated board members are no longer eligible (for an indefinite period of time) to be board members in other foundations. According to Turkish Corporate Law, board members can only be terminated with a general assembly decision.”

Recommendation. According to ICNL and TUSEV, “It is imperative to emphasize that: (1) the removal is ordered by the court, rather than by a government agency, and (2) the disqualification is limited by a fixed term, rather than permanent. Moreover, this sort of remedy is generally imposed only for serious breaches of law.”

Outcomes. In this case, the proposal was accepted; however, the proposal regarding criminals and the temporary removal was not fully incorporated. Law #5737 states that board members cannot under any circumstances be removed from their positions without a court order. If existing board members have violated foundation regulations and have been penalized (fined) twice, the GDF High Council may recommend their removal to the GDF. The GDF then applies to court, which makes the final decision. If the crime or wrongdoing is irreversible, the GDF High Council can recommend that the court make an injunction for temporary removal until the court case is completed. Individuals found guilty of wrongdoing are also banned from existing Board positions in other foundations, and not eligible to be GDF High Council members or board members of any foundations for five years.

d. Board Meetings

Background. As the ICNL-TUSEV report notes, “The Communiqué of GDF dated 1998 requires an official representative to attend foundation’s general assembly meetings. This regulation also requires foundations to send invitations to the general assembly participants by registered mail or to publish the date and the location of the assembly in a nation-wide newspaper.”

Recommendation. The ICNL-TUSEV report states, “To allow government representatives to attend board meetings of private, voluntary organizations runs counter to European standards. Furthermore, such a rule is almost certainly a violation of the European Convention of Human Rights (namely the right to privacy as protected under Article 8).”

¹⁰ Note: a new provision in Law #5737 states that foreigners may only establish foundations on the basis of reciprocity—that is, if their country of origin allows for Turkish citizens to establish foundations.

Outcome. This requirement was overturned in a regulation published in November 2004. As such, foundations are no longer required to provide notices and invite government officials to their meetings.

3) International Cooperation

Background. According to the ICNL-TUSEV report, “The Decree Law of GDF (1984) describes under which conditions foundations can engage in international relations. This decree ‘allows’ Turkish foundations to engage in international cooperation, open branches or representative offices and become members of foreign foundations only upon obtaining prior authorization from the Ministry of Interior and Ministry of Foreign Affairs. These regulations also apply to foreign foundations operating in Turkey. The Ministry of Interior issued a circular in 9 January 2004 regarding the international relations of foundations, which requires these requests to be processed through the Department of Associations (a new unit formed to regulate associations in mid 2003, within the Ministry of Interior).”

Recommendation. ICNL and TUSEV note that prior approval is not a common practice in European countries and others, and often is used as a way to discourage activity. In Turkey, it is also a costly and burdensome process, with “vague descriptions ...and confusion for the ‘applicant’ foundation.”

Outcome. Law #5737 states that foundations, without any prior approval from or notification to the government, can engage in international cooperation, open branches abroad, create umbrella organizations, become members of such organizations internationally, and give and receive grants. Foundations must have such purposes clearly stated in their by-laws.

Should foundations give financial donations to organizations abroad, or receive financial donations from them, the transaction must be completed through the bank, and foundations must inform the GDF.

III. CONCLUSION

If the ICNL-TUSEV comparative report was used as a scorecard, it would yield quite good results: many of the recommendations put forth were incorporated into the new law, which will ease the government’s grip on foundations.

However, Law #5737 retains a trace of the past—perhaps even more than that—suggesting that this new bill is not entirely an example of “out with the old, in with the new.” Some provisions still do not adhere to good practice, and in some cases, even international standards. And the regulation for the law has yet to be published (it is expected in fall 2008), and as they say, the devil is in the details.

Yet it is important to see the big picture: this is only the beginning of the journey, one that, to be fair, has not by any means been smooth. While Law #5737 may not signify a radical departure from the past, it does signify an important shift from *autocratic* to *democratic*, and from *controlling* to *enabling*.

Advocates of better laws for civil society know better than to throw in the towel. There is always more to be done, more to be gained. As a colleague in the sector says, “Civil society always wants more; that’s its *raison d’être*.”