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Letter from the Editor

The International Journal of Not-for-Profit Law devotes this issue's special section to civil society in post-conflict situations. In our lead article, the **International Center for Not-for-Profit Law** comprehensively analyzes the restoration of civil society after a major conflict, including the timing of legal initiatives and their effect on the NGO sector. Next, **Eric Brahm**, a political scientist at the University of Nevada, Las Vegas, examines the role of civil society in helping implement "transitional justice," as a step toward fostering the rule of law in post-conflict nations. Next, we consider how young people can contribute to rebuilding civil society in a conflict's aftermath. The authors are **Donald J. Eberly**, Honorary President of the International Association for National Youth Service and a longtime civil society author and activist, and **Reuven Gal**, director of Israel's Civic Service Society.

Finally, **Michael D. Layton** discusses the failures to comprehend and appreciate civil society in Mexico, on the part of government leaders as well as philanthropists, and the resultant diminution of civil society's vigor. Layton is the Director of the Philanthropy and Civil Society Project, Instituto Tecnológica Autónomo de México.

We gratefully acknowledge our authors for sharing their expertise, as well as Rebecca See for assembling the issue and posting it online.

Stephen Bates

Editor

International Journal of Not-for-Profit Law

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CIVIL SOCIETY IN POST-CONFLICT SITUATIONS

Enabling Organizational Development: NGO Legal Reform in Post-Conflict Settings

International Center for Not-for-Profit Law¹

Executive Summary

The International Center for Not-for-Profit Law is pleased to present this report on the impact of NGO law reform initiatives in post-conflict environments. The report summarizes research examining lessons learned from the experiences of ICNL and of its local partners on the introduction and timing of civil society law initiatives in the aftermath of a conflict, and how these initiatives impact upon the development and sustainability of the NGO sector.

The research hypothesis considered in this study was that a *progressive law governing NGOs, instituted soon after a conflict has ended, facilitates the development and sustainability of NGOs*. The study considered the evidence in support of this proposition to date, as well as the circumstances under which it is correct and those under which it may not be.

The research focuses on three jurisdictions transitioning from conflict. In one (Kosovo), a progressive NGO regulation was put in place shortly after the cessation of armed combat. In a second (Afghanistan), the sector has operated for several years in a

¹ ICNL is grateful for the support of the United States Agency for International Development, Office of Private Voluntary Cooperation – American Schools and Hospital Abroad, which funded and offered its guidance and insights to this study. ICNL would further like to acknowledge the support of USAID, as well as Counterpart International and the Charles Stewart Mott Foundation, for its law reform projects in post-conflict Kosovo, Serbia, and Afghanistan. Much of the learning documented in this report was originally a product of these projects, which have supported an enabling legal environment for civil society, oftentimes under difficult conditions.

This report would not have been possible without the efforts of a number of persons. Catherine Shea and David Moore of ICNL were the principal authors of the report, with assistance from staff members Stephan Klingelhofer, Dragan Golubovic, Melanie Lyon, Erin Means, and Rebecca See, and consultant Jean Garland. Douglas Rutzen and Nilda Bullain provided their insights on a draft version of this report. Haki Abazi (Kosovo), Dejan Milenkovic (Serbia), and Anja de Beer (Afghanistan) served as local partners and conducted all field research. More than 90 NGO leaders in Kosovo, Serbia, and Afghanistan contributed their time and insights; ICNL is grateful to all for their contributions.

This report was made possible through support provided by the U.S. Agency for International Development, under the terms of the Award No. AFP-G-00-05-00016-00. This study is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of the authors and do not necessarily reflect the view of USAID or the United States Government.

framework replete with ambiguity and lacunae, which led to some attempts to over-regulate the sector, and to the enactment of a new law governing NGOs, enacted in June 2005. In a third (Serbia), the sector continues to operate under rules inherited from the prior regime.

The research methodology consisted of desk research, including review of contemporary literature on civil society in post-conflict environments, and analysis of the laws in each jurisdiction, as well as field research. Field research was conducted with the help of local researchers, who conducted a survey with a small sample of NGOs and interviewed select NGO representatives. A fuller description of the research methodology appears in Appendix A.

The report divides its findings into three sections. Section I presents an introduction to the issue of civil society in post-conflict environments. Section II presents separate country reports, on Kosovo, Afghanistan and Serbia, respectively, which detail the legal framework in each country prior to and after the relevant conflict, and also detail the results of the survey and interview findings in each country. Finally, section III presents an analysis of the findings.

In the analysis of the findings, the report first considers the impact of law reform on the NGO sector and on development and sustainability:

- Impact of Delay in Law Reform. In all three jurisdictions studied, delays in reforming the basic law regulating the NGO sector posed problems for the sector. Delay was short-lived in Kosovo, but the brief legal vacuum raised numerous questions regarding how donors and local groups could effectively respond to the humanitarian crisis. In Afghanistan, delay in reforming the legal framework extended over nearly four years, and fueled suspicion and distrust of NGOs within government circles, as well as the general public, thereby undermining the development of the sector. In Serbia, the delay is ongoing and has led to numerous problems and uncertainties, impeding the sector's maturation and hindering effective partnership between the sectors.
- Impact of Law Reform. In the case of Kosovo, reform of the legal framework governing NGOs had several identifiable positive impacts on the sector. The number of NGOs increased dramatically after the enactment of Regulation and the survey indicated that legal framework positively affected the ability of NGOs to carry out their missions and to sustain themselves financially. In Afghanistan, the new Law governing NGOs has generally been welcomed by the NGO sector. It has certainly had an immediate impact on the sector, through the re-registration process that led to the termination of more than 1600 NGOs, perceived by many to be 'false' NGOs. It is still too early, however, to conclude what the longer-term impact of the new Law will be, as so much depends on implementation.
- Impact of Legal Framework on Capacity and Sustainability of NGOs. The legal framework in Kosovo has enabled NGOs to participate constructively in the transition process in Kosovo. The NGO sector, despite the sometimes negative influence of donor-driven agendas, has grown in numbers and developed its overall capacity during the post-conflict period. Yet while the underlying framework legislation for NGOs is positive, NGOs are greatly concerned about

fiscal laws and regulations affecting their work and their shaky relationship with the government.

The prior legal framework in Afghanistan created confusion and uncertainty among NGOs, and distrust and suspicion between the NGO sector and government. The resulting environment undermined the capacity of NGOs to participate more constructively in the transition process. Although the NGO sector grew rapidly during the post-conflict period, the lack of clear definitions in the laws opened the door to for-profit enterprises being registered as NGOs. The new Law may be a turning point, helping to restore some clarity to the regulatory framework and some trust between the sectors, but that will depend on implementation; preliminary indications are decidedly mixed. Moreover, the Law introduced some barriers to effective NGO/government cooperation, which could act as a brake against improvements in NGO capacity and sustainability.

The current legal framework for NGOs in Serbia negatively influences the capacity and sustainability of NGOs. The post-conflict period in Serbia has not witnessed a demonstrable growth of capacity within the NGO sector. Reform to the underlying framework legislation for NGOs is still urgently needed; NGOs are greatly concerned about their fiscal treatment and the potentially disintegrating relationship with government. The state of the NGO sector in Serbia is perhaps best described as stagnant; its growth depends in large measure on the creation of a more enabling legal environment.

The report further considers the role of NGOs in supporting transition and in promoting stability.

- Impact of Legal Framework on Role of NGOs in Supporting Transition. The study identifies separate phases of the post-conflict transition, including (1) the emergency or crisis phase, (2) the reconstruction phase, and (3) the consolidation phase. NGOs have a distinctive role to play within each of these phases. Notably, in the initial, crisis phase, NGOs are the primary vehicle to meet emergency and humanitarian needs. In the latter phases, the roles of NGOs become much more diverse. The legal framework, while predominantly concerned with NGO formation and registration during the crisis phase, must be responsive to a far larger range of needs in the latter phases, including those relating to separate organizational forms, government partnership and financial sustainability.

In Kosovo, the enactment of an enabling law was critical in empowering the NGO sector to support the transition process, but also may have lulled the sector into complacency, leaving the sector with few NGO legal experts. In Afghanistan, the failure of the law to clearly define NGOs helped undermine the credibility and capacity of the sector overall. In Serbia, NGOs have been able to play a role in the crisis phase of Serbia's post-conflict period, but neither the country nor the sector has effectively transitioned out of the crisis phase.

- Impact of Legal Framework on Role of NGOs in Promoting Stability. Laws supporting NGOs also support stability in society. Sound laws governing NGOs will address each phase of the life-cycle of NGOs, including the types of organization, establishment and registration, internal governance, transparency

and accountability, financial sustainability, and NGO activities. Through enabling provisions, the law can facilitate the role of NGOs to promote stability; through disabling provisions, the law can hinder the role of NGOs to promote stability.

- Contribution of Legal Framework to Organizational Development of NGOs. By setting minimum standards for good organizational practices, the legal framework makes a direct contribution to the organizational development of NGOs.

Finally, the report summarizes the lessons learned and recommendations, which include the following:

- The preferred timing for NGO law reform is early on in the post-conflict period. Enabling laws have positive impacts, while delays in reform have detrimental consequences.
- The positive impact of law reform is dependent on a number of other variables, including how well the law is implemented and the overall political and economic situation. Support is therefore needed for the implementation of the law, including training of government officials, and development of regulations, forms, and processes that will support fair, consistent and non-partisan application of the law.
- Even where a good law is enacted early on, it is important to continue the process of educating both NGOs leaders and government officials to prevent backsliding.
- Inappropriate laws for NGOs in a post-conflict setting include (1) the law that is overly restrictive and in clear violation of international norms, and (2) the law that is overbroad and vague and ambiguous, thereby inviting on the one hand poor organizational behavior and on the other hand arbitrary implementation. Law reform initiatives should therefore take these dangers into consideration.
- In the wake of a conflict, NGO capacity is often weak; it is often necessary, in drafting an NGO law, to ensure that it is not overly complex and can be applied by small and newly formed NGOs. New NGO laws in a post-conflict environment often benefit, then, from simplicity.
- A key factor with respect to the sequencing of post-conflict law reform initiatives is the phase of post-conflict recovery. In the emergency or crisis phase, the predominant concern is ensuring that NGOs are easily able to form and be registered. As the country transitions toward consolidation, the legal framework must therefore address a far wider range of needs, and provide appropriate mechanisms for partnership and financial sustainability.
- The inclusion of NGOs into a participatory drafting process is critical to the preparation of a law that is fully responsive to practical realities and the needs of those governed by the law.
- In post-conflict environments, there are often limited formal mechanisms for encouraging public participation. In such cases, participation can be supported through the formation of informal working groups, through dissemination of draft legislation, and through public discussions. Moreover, the frequent turnover of government personnel underscores the need for ongoing broad-based education relating to a multi-stakeholder participatory process.

- In post-conflict environments, government and NGO representatives alike often lack expertise, which underscores the need for ongoing broad-based education relating to legal drafting skills and the substance of NGO law.
- Laws to encourage sustainability are generally best addressed as ‘second-tier’ issues, after the basic legal framework has been set in place.
- Good organizational practices can be developed through progressive laws that clearly define NGO organizational forms, set minimum standards of internal governance, and provide for external government supervision.

Section 1: Introduction

Civil society organizations (CSOs), including non-governmental, not-for-profit organizations (NGOs), play an integral role in the reconstruction process in most, if not all, post-conflict environments.²

Priority areas in post-conflict settings vary depending on the country and the implementing agency, but normally include demilitarization, peace and security, humanitarian assistance, support to displaced persons, human rights monitoring, infrastructure development, and economic development, among others. These priorities are usually based on the strategic priorities of donor agencies or on collaborative planning exercises with the affected country. For example, the United Nations and the World Bank have worked to create Post-Conflict Needs Assessments, which are “multilateral exercises undertaken in collaboration with the national government and with the cooperation of donor countries.”³

Within the confines of these post-conflict priority areas, NGOs are often called upon to play significant roles. The UN has explicitly recognized the importance of NGOs in the post-conflict rebuilding process:

NGOs occupy a unique place in this constellation. For many decades, you have been our partner on the ground: delivering humanitarian assistance in places struck by conflict or natural disaster, and in quieter places, helping people who are striving to build stable communities and effective institutions. Today this extraordinarily fruitful cooperation is closer than ever.⁴

The U.N. Development Programme (UNDP) also highlights the importance of working with civil society: “Country office experience in conflict and post-conflict

² This report makes reference to both “civil society” and to “NGOs.” Civil society is typically defined as the broader concept, embracing diverse forms of voluntary initiative, including informal, community-based initiatives, religious communities, trade unions and business associations, cooperatives, political parties, as well as non-governmental, not-for-profit organizations or NGOs. NGOs are therefore a narrower subset of civil society, typically including associations, foundations and other organizational forms dedicated to a not-for-profit mission. For purposes of this report, however, the focus is on NGOs specifically, and not all civil society forms. Where the term civil society or CSO is used, it is therefore intended to be synonymous with the term NGO.

³ <http://www.undg.org/content.cfm?id=1242>.

⁴ <http://www.un.org/News/Press/docs/2002/dsgsm168.doc.htm>.

reconciliation processes highlight the value added of bringing CSOs, including indigenous peoples' organizations (IPOs), into all stages of the reconciliation and rehabilitation process."⁵

The extent to which NGOs can fulfill these roles effectively and contribute meaningfully to the reconstruction and transition process depends on a wide variety of factors. These include, among others, the post-conflict security situation, the legitimacy of the post-conflict government, the nature of engagement of the international community and multi-lateral organizations, the existing capacity within and credibility of the NGO sector, and the inclusion and participation of the local population in the reconstruction process. Civil society often plays an extremely vital role in promoting public participation and local inclusion in the reconstruction process.

Equally important is cooperation between NGOs, government entities, international organizations and the private sector. The USAID Fragile States Strategy recognizes that responding more effectively to fragile states "requires donors to better understand what is required to arrest negative trends, the limits of absorptive capacity, and the necessity of harmonizing policies and sequencing interventions." The International Peace Academy speaks of the importance donors and implementing agencies working with representative actors at the national, regional and local level rather than defining priorities themselves, and the special responsibility of the many agencies involved (UN agencies, bilateral donors, multilateral financial institutions, regional organizations, and local and international NGOs) to coordinate their programs and ensure that relief assistance reinforces and complements longer term development co-operation."⁶

The goal of this report is to examine the impact of yet another critical factor – the legal framework and NGO law reform initiatives in post-conflict settings – upon the development, capacity and sustainability of the NGO sector and the extent to which NGOs can contribute meaningfully to the reconstruction and transition process. The report focuses on three jurisdictions transitioning from conflict. In one (Kosovo), a progressive (that is, enabling) NGO regulation was put in place shortly after the cessation of armed combat. In a second (Afghanistan), the sector has operated for several years in a framework replete with ambiguity and lacunae, which has led to attempts to over-regulate the sector, and to the enactment of a new Law governing NGOs, in June 2005. In a third (Serbia), the sector continues to operate under rules inherited from the prior regime. Each of these approaches has had a profound effect on the local NGO sector, and the study seeks to define that impact.

Section 2 provides a country overview for the three selected jurisdictions, each of which examines the pre-conflict and post-conflict legal and fiscal frameworks and sets the context for the research findings. (See Appendix A, Note on Methodology). Section 3 then presents an analysis of the research findings, looking particularly at the impact of the NGO law reform process on the development and sustainability of the NGO sector, and

⁵ <http://www.undp.org/cso/resource/policies/UNDPCSOPolicy.doc> UNDP and Civil Society Organizations: A Practice Note on Engagement.

⁶ Necla Tschirgi, *Post-Conflict Peacebuilding Revisited: Achievements, Limitations, Challenges*, published by the International Peace Academy, <http://www.ipacademy.org/Publications/Publications.htm>.

on the role of NGOs in supporting transition and in promoting stability. Section 3 closes with lessons learned and recommendations.

Section 2: Overviews

Kosovo

Setting the Scene

As part of the Socialist Republic of Serbia, Kosovo gained inner autonomy in the 1960s. In the 1974 constitution, the Socialist Autonomous Province of Kosovo's government received increased powers, making it a de facto Socialist Republic (SR) within the Federation, but still formally part of the Serbian SR. By the end of the 1980s, calls for increased federal control in the autonomous province became louder; Slobodan Milosevic pushed for constitutional change amounting to suspension of autonomy for both Kosovo and Vojvodina; in 1989, Kosovo was stripped of its autonomy and its assembly and government institutions were dissolved. The Albanian majority population was subjected to discriminatory laws and practices, including the closure of Albanian language schools, and the dismissal of ethnic Albanians from employment with state institutions.

Following the Dayton Agreement in 1995, some Albanians organized the Kosovo Liberation Army (KLA), employing guerilla-style tactics against the Serbian police forces. Violence escalated in a series of KLA attacks and Serbian reprisals into 1999, which led to mounting civilian casualties and thousands of refugees. In response to massive expulsions of ethnic Albanians living in Kosovo by FRY forces and Serb paramilitary groups, the North Atlantic Treaty Organization (NATO) commenced a bombing campaign against the FRY, including Belgrade. After eleven weeks of bombing, Milosevic finally acceded to international demands to withdraw Serbian forces from Kosovo.

With the signing of U.N. Resolution 1244 on June 10, 1999, the United Nations Interim Administration Mission in Kosovo (UNMIK) was installed as the provisional governing authority, with security provided by KFOR NATO troops. All legislative and executive authority was vested in UNMIK, to be exercised by the U.N. Special Representative Secretary-General (SRSG). In 2001, a Constitutional Framework establishing "Provisional Institutions of Self-Government" (PISG) was put in place; these institutions include a legislature and executive branch institutions that exercise governmental authority, except in areas reserved to the SRSG.

Kosovo remains to this day geographically a province of southern Serbia, but continues to be administered by the United Nations. A UN-led process, which is ongoing, was launched to determine Kosovo's future status. At issue is whether Kosovo will become independent or remain a part of Serbia. These status issues will certainly have a significant impact on the legal framework; indeed, it was the inclusion of a need for a "Freedom of Association" law in the standards implementation plan that forced the development of a new draft law.

The Legal Framework for Civil Society

A) Prior to the Conflict

During the Milosevic period, there was a bifurcated legal framework governing NGOs. Applicable laws existed at the federal (FRY) level and at the republic (Serbia) level, regulating the formation, registration, activities, dissolution, and general life cycle of NGOs.⁷ These laws were not harmonized, reflecting in part the political situation in the country. Additional confusion resulted from the fact that the laws were enacted during different eras and reflect disparate concepts of the NGO sector's role and purpose. The Serbian Law on Associations, enacted in 1982, reflects socialist precepts whereas the federal Law on Associations, enacted in 1990, reflects a more progressive approach to NGO regulation.

Problems with the legal framework included a mandatory registration requirement (that is, a prohibition against informal associations), the ability of registration officials to exercise broad discretionary powers, the inability of foreign NGOs to register representative offices, and a lack of consistency between the constitution and legislative acts governing NGOs. Moreover, the implementation of the laws varied considerably during the Milosevic period. At times, that implementation was quite regressive; NGOs were often precluded from registering and burdened by constraints on their everyday operations.

Moreover, in Kosovo, the situation was more problematic for NGOs due to systematic discrimination against the Albanian population. Kosovar Albanian NGOs were as a practical matter unable to register organizations as legal entities. Groups continued to carry out community initiatives on a voluntary basis, but these groups operated without the protections of law. Indeed, Kosovar society voluntarily provided itself with social, cultural and basic economic services, as well as its own court system through dispute resolution by village elders (ethnic Albanian judges, prosecutors, and most lawyers were barred from the legal system), and school system in the Albanian language – all outside the established, Serb-controlled government. As a result, by the time of the NATO bombing campaign in 1999, while there was much enthusiasm and energy in the Kosovar NGO sector, there was a lack of sufficient structure or support, and consequently only a handful of registered NGOs operating in Kosovo.

B) Since the Conflict

1. Legal Vacuum

With the cessation of the bombing campaign and the installation of UNMIK as the provisional governing authority, NGOs operated in a legal vacuum. UNMIK Regulation 1999/1 provided that the law of Kosovo would consist of UNMIK regulations when adopted, along with the laws in place in the Federal Republic of Yugoslavia as of 1989 or subsequent laws, if they addressed subject areas not covered by the pre-1989 legislation. Discerning what law was in place in the FRY as of 1989 was, however, not necessarily clear and easy, or likely to be undertaken by organizations deploying quickly to meet humanitarian needs. Indeed, the confusing overlap of FRY and Serbian laws and

⁷ See below, Section on Serbia, which details the legal framework in Serbia.

the inability of foreign NGOs to register under any of them forced most organizations to carry out their work in a legal vacuum.

The lack of a clear legal framework in Kosovo led to many questions, including the following:

- How organizations could be recognized as legal persons, thus ensuring the ability to carry out organizational business such as opening a bank account, receiving donations, making grants, etc.;
- How to provide legal protections to the individuals carrying out organizational activities (e.g. ability to contract in the name of the organization, limitations on personal liability, etc.);
- How to facilitate the flow of humanitarian aid – negotiating the import of aid, including border entry and customs duty issues; and
- How to protect the legitimate NGO sector and its reputation from unscrupulous individuals or organizations taking advantage of the post-conflict situation to defraud donors and potential donors.

2. The New Legal Framework: UNMIK Regulation No. 1999/22

Recognizing the need for a legal framework that would facilitate NGO activities during the post-conflict reconstruction period, UNMIK agreed to consider an NGO regulation that would set the basic conditions for NGO formation, recognition, and operation in Kosovo. In November 1999, UNMIK adopted Regulation 1999/22 on the Registration and Operation of NGOs in Kosovo. The Regulation immediately enabled the creation of and set the terms of operation for the many relief organizations dealing with returning refugees and others needing food, shelter, medicine, post-war reconstruction, and other humanitarian efforts. Perhaps more significantly, the Regulation legitimized associational activities of Kosovo-based organizations and gave them the protections of law – those rights and protections that were unavailable only a few months earlier. It further created the basis for the development of well-governed, accountable, and financially sustainable organizations with the introduction of rules regarding internal governance, external oversight, and income generation, as well as tax and other benefits.

Superseding the FRY and Serbian laws previously in effect, the Regulation recognizes two forms of domestic NGOs, associations and foundations, and enables foreign NGOs to register representative offices. Both domestic and foreign NGOs may apply for public benefit status. The Regulation introduced one of the most liberal regulatory regimes for NGOs in Europe, and reflected a number of international best practices. Among other things, the new Regulation:

- instituted a simple registration process;
- limited the registration office's authority to deny registration;
- confirmed the right to associate without establishing a legal entity;
- provided for the right of an NGO to conduct economic activities to support its statutory purposes; and

- established the basis for tax and other benefits for those organizations carrying out activities benefiting the public.

In terms of implementation, the NGO Liaison Unit, which originally operated as part of UNMIK, was transferred to the Ministry for Public Services in early 2004.

Most recently, in February 2005, the Kosovo Assembly passed a Law on Freedom of Association. The Law is currently pending review by the SRSG. If approved, the Law would become the basic governing framework for NGOs in Kosovo. The passage of the Law has not been without controversy; while the Law for the most part retains many of the features of the UNMIK regulation, it does include three restrictive provisions inserted at the eleventh hour by the Assembly.

3. The Fiscal Framework

In May of 2000, UNMIK issued Administrative Direction No. 2000/10, which clarified the procedures for registering an organization and provided other information to facilitate implementation of the NGO Regulation. The Administrative Regulation also provided an exemption from the taxes then in place (a “presumptive tax” and customs duties).

Subsequently, UNMIK adopted tax legislation, imposing taxes similar to those in place in European countries, including profits tax, an individual income tax, and a value added tax (VAT). The profits tax provided for an exemption on all income earned by an NGO with “public benefit status” regardless of the source of the income. Thus, an NGO with public benefit status that earns income from the sale of computer services (as one well-known NGO did) is exempt from taxation on that income, as well as on other income sources, such as grant income. An NGO without public benefit status is not entitled to exemption on any income, including grants or donations. Thus, a trade association that receives grants to develop marketing techniques in representing its members is not entitled to an exemption from taxation. This provision was retained when the Profits Tax law was amended and became the Corporate Tax law.

The Profits Tax regulation also permitted a deduction of up to 5% of taxable income for businesses that make contributions for “humanitarian, health, education, religious, scientific, cultural, environmental protection and sports purposes” – an incentive not limited to donations to NGOs. The Corporate Tax regulation later limited the deduction for contributions to NGOs with public benefit status and “non-commercial organizations” that perform activities in the public interest. As of 2005, individuals have also been permitted to take deductions for their charitable contributions up to 5% of taxable income.

The VAT regulation included a very limited preference for public benefit organizations involved in importing certain categories of humanitarian aid; these organizations were entitled to a rebate of VAT paid on these imports. But this provision was recently repealed, and NGOs must now pay VAT like any other consumer on all VATable transactions.

4. The Law Drafting Process

Among the core problems relating to legal reform in the wake of a conflict are the sheer number of laws needed, the pressure on the governing authority to move quickly and with certainty to address critical legal problems, the lack of organized means of disseminating information about draft laws, security issues with public meetings, and the difficulty in identifying key stakeholders relating to the law, all of which tends to discourage officials from seeking public participation in law drafting efforts. Moreover, in some situations, governing authorities may be disinclined, by virtue of historical practice, organizational rigidity, or the simple failure to recognize the importance of democratic practices to engage the NGO community or the public generally in commenting on pending legislation. As a result, it is all too often the case that laws in post-conflict environments do not benefit from effective public input. This can lead to a number of problems once legislation is enacted, including public indifference, legal provisions that are beyond the capacity of those affected to comply with, provisions that fail to take into account local conditions, etc.

UNMIK Regulation 1999/22, by virtue of UN legal office intervention, benefited from the input of NGOs during the drafting process. In Kosovo, as in many post-conflict zones, it was not possible to carry out a full-blown participatory process including such mechanisms as public notice, public meetings, and legislative hearings. Nonetheless, by contacting NGOs and disseminating the draft law to various organizations already working in Kosovo and the region, at least some portion of the NGO community was aware of the draft and a number provided comments that were incorporated into the law.

Interestingly, by the time that the tax regulations were put in place, UNMIK had ceased its openness to participation from NGOs in the law drafting process. The tax regulations were not circulated to the NGO community in any fashion for comment prior to their adoption.⁸ Even after adoption, when the NGO community attempted to approach the Central Fiscal Authority (the UNMIK department responsible for tax and fiscal matters) about the problems it was experiencing under the new VAT regime, the CFA brushed off complaints, stating that the NGOs simply had to manage their affairs better.

The Impact of NGO Law Reform: Survey Results

The survey and interview data support the idea that the general legislative framework established by Regulation 1999/22 is positive and enabling. These findings are reinforced by the 2005 USAID Sustainability Index, which states succinctly, “NGOs enjoy a favorable legal environment.” The data also reveals, however, severe concern over tax regulations affecting the financial sustainability of the sector. In addition,

⁸ While the tax law granted a fairly generous exemption for PBOs, as well as a deduction for corporate gifts to PBOs, there were some problems with the law that might have been avoided had wider public input been solicited. For example, the law initially extended the availability of the deduction for gifts to private businesses that engage in certain public benefit activity – a clear invitation to abuse, as the private owners would have the ability to benefit from the gift through their right to claim the profits of the business. Moreover, it has more recently become clear that certain types of organizations that would ordinarily be considered exempt from tax on at least grants, dues, membership fees and similar income – such as trade associations – are subject to tax in Kosovo because they are not PBOs.

respondents point to a generally troubling political climate as the country transitions from the oversight of UNMIK to the Provisional Institutions of Self Government (PISG).

A) Organizations Surveyed and Interviewed

Data was collected from 30 organizations through a survey and from six organizations through interviews. Of the 30 organizations surveyed, 25 are associations and five are foundations. The organizations are engaged in several different areas of activity, with most organizations focused on two or more areas of work. Of the organizations surveyed, 40% work in the area of education, 29.7% on youth, 19.8% on women's issues, 13% on the economy, 9.9% on health, 6.6% on water, and 6.6% on agriculture. In addition, 79.2% work in other fields such as art, media, human rights, humanitarian work, and advocacy.

Membership in the associations ranges widely from just three members to 16,800 members; the majority of associations consist of 25 members or less. The number of full-time employees for the organizations ranges from one to 121, with the majority employing fewer than five individuals. The annual budget of the organizations also varies from less than 10,000 Euros to more than 100,000 Euros. The distribution of budgetary amounts was fairly evenly divided along this continuum, with nine organizations having a budget of less than 10,000 Euro, seven having a budget between 10,000-50,000 Euro, six having a budget between 50,000-100,000 Euro, and eight having a budget of more than 100,000 Euro. While there is no direct correlation between membership size and the organizational budget, those organizations with larger staff numbers generally have larger organizational budgets. Both the survey data and interview data showed generally similar trends in most areas.

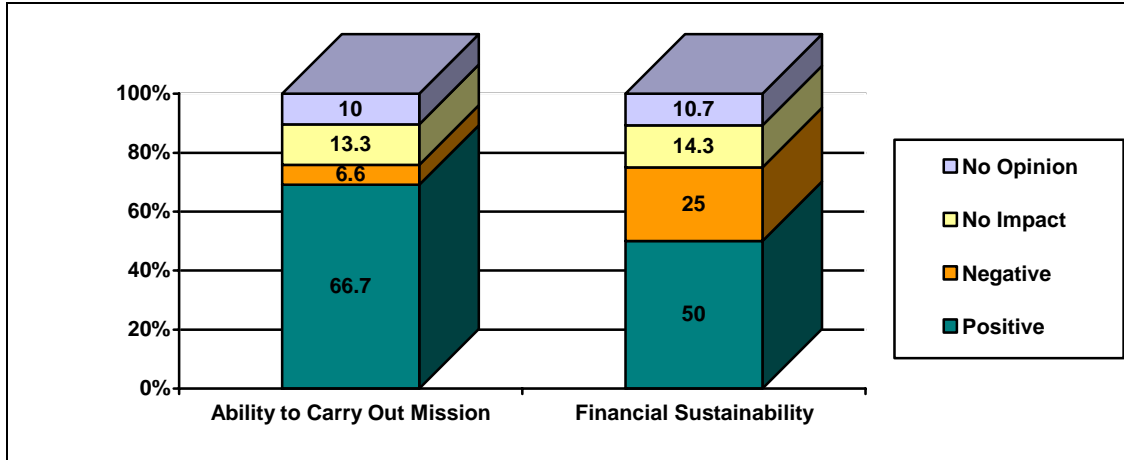
B) The Legal Framework for NGOs: UNMIK Regulation 1999/22

Shortly after the end of the conflict (indeed, within five months), UNMIK Regulation 1999/22 was enacted to govern NGOs in Kosovo. Despite the relatively speedy enactment of a governing law, respondents noted that the **legal vacuum** immediately after the war did have its consequences. One result was that many of the local NGOs were created and formed as a result of donor initiative and the needs of international NGOs to spend their funds quickly, rather than in accordance with the legal framework or in response to the overall reconstruction needs. This led to an artificial NGO activism that was mainly donor driven, and undermined local initiatives that were guided by clear missions. Furthermore, the legal vacuum after the war led to suspicion and distrust between the governmental sector and the NGO sector, as NGOs were perceived more as spenders of international money rather than as partners in the process of reconstruction.

Both the survey and interview data indicate that, once enacted, **UNMIK Regulation 1999/22** created a favorable legal environment for NGOs. Reflected in Figure 1, the majority of those surveyed (66.7%) indicated that the laws positively impacted on the ability of NGOs to carry out their mission; only two of the organizations surveyed (6.6%) indicated that the Regulation had a negative effect on their ability to carry out their mission, and seven organizations reported either no effect or no opinion. Regarding the impact of Regulation 1999/22 and the Corporate Tax Law and Procurement Law on NGO financial sustainability, results were more mixed, but still relatively positive; 14

respondents (50%) rated the impact positively, seven (25%) rated the impact negatively, and four (14.3%) indicated that the regulations had no effect on their ability to sustain themselves financially. Three respondents had no opinion.

Figure 1 - Kosovo: Impact of Legal Framework



That the new legal environment is generally enabling for NGOs is evidenced by the fact that most respondents (69.3%) reported the **registration process** to be very easy or easy. Not a single NGO surveyed rated the registration process as difficult or very difficult. The motivating rationale for NGOs being registered varied to some extent, with the vast majority seeking to attain the benefits of legal person status, as reported by 24 of the organizations (80%). As shown in Figure 2, 40% of organizations also indicated that they registered because it was required as a condition of funding. Five organizations believed that registration would help in obtaining funding, and five organizations indicated that they registered to be eligible for tax exemptions. Just a few respondents cited “eligibility for government benefits” as a reason to register.

The NGO interviewees underscored these findings; all agreed that UNMIK Regulation 1999/22 had enabled registration and positively affected the operation of NGOs.

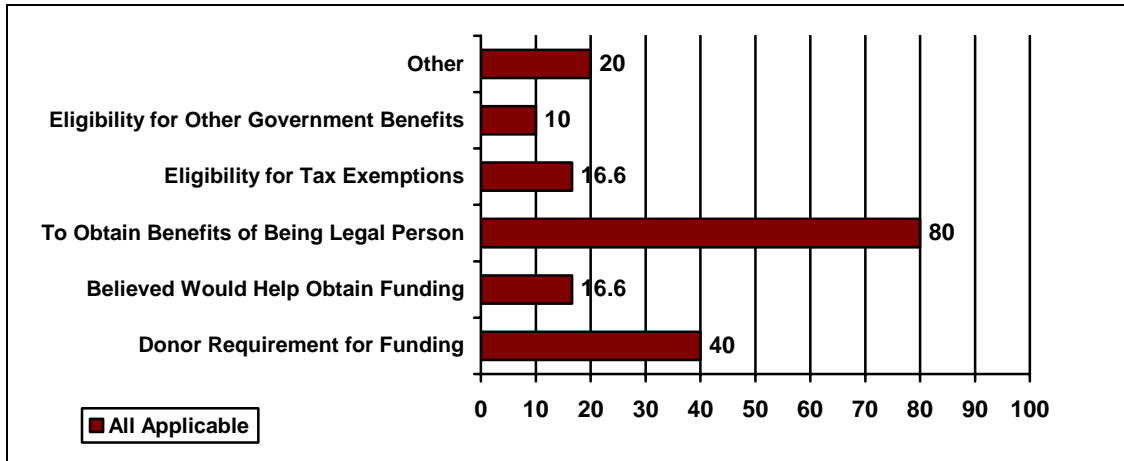
C) The Fiscal Framework for NGOs

The survey revealed substantial discomfiture with the impact of the fiscal framework on financial sustainability. 33% of those surveyed called the laws and regulations the greatest constraint in raising funds (Figure 3). Moreover, as mentioned above, 25% of survey respondents rated the impact of the overall legal framework on financial sustainability negatively.

While all NGO interviewees rated Regulation 1999/22 as favorable, most also indicated that subsequent laws and regulations affecting NGOs are ill-defined and at least potentially burdensome. The organizations interviewed expressed particular concern with recent regulations regarding VAT and custom taxes. According to those interviewed, the application of VAT has decreased the speed with which NGOs are able to respond to needs and has delayed the completion of projects. In particular, the recently enacted Regulation No. 2005/40 has placed NGOs and especially service-providing NGOs into a

very unfavorable situation by eliminating the rebate for VAT, even where goods and services are directly related to public benefit purposes. Many of the organizations surveyed and interviewed pointed out that, of all regulations affecting NGOs, it was the VAT regulations that most hindered the future development of their organizations.⁹

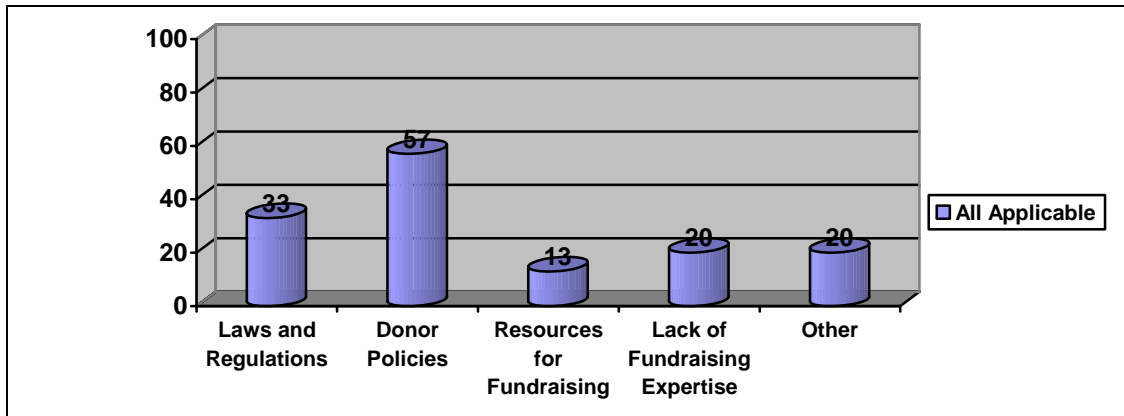
Figure 2 - Kosovo: Motivations for Registration



D) Funding and Sustainability

Along with concerns about the fiscal framework, respondents also indicated tremendous concern with funding in general. More than 50% of the respondents cited donor policies as the greatest constraint faced in raising funds, and one-third cited the legal and fiscal framework as the greatest constraint to sustainability. Only six organizations (20%) cited a lack of fundraising experience, and only four (13%) indicated a lack of resources for fundraising as the greatest hindrance (Figure 3).

Figure 3 - Kosovo: Fundraising Constraints

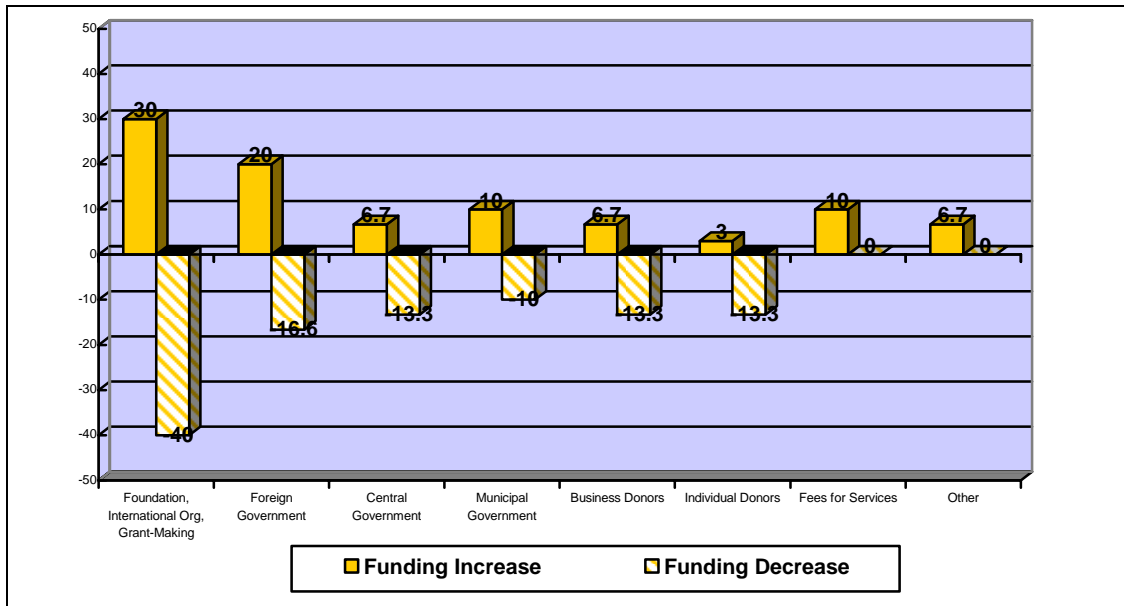


⁹ As a general consumption tax, VAT is a more important and burdensome tax for most NGOs than is the income or profits tax. Because the ultimate user or consumer pays full VAT on the final value of the supply, and because NGOs are typically end-users, the burden of VAT can fall heavily on NGOs.

As for funding sources, the findings reveal the beginnings of diversification. Some 22 (or 73%) of the organizations surveyed receive their funding from foundations or international organizations. The second most common source of funding is foreign governments, as reported by slightly fewer than half of the organizations surveyed. Funding from the central government or local governments constitutes a significant source for 23.1% and 26.4%, respectively. The least common source of funding is fees-for-services, which is a source for only 10% of respondents. About 10% of organizations reported other sources, including business donors and individual donors.

The survey showed considerable variety in funding trends. Nine organizations reported an increase in funding from foundations or international grant-makers, while twelve organizations reported a decrease in such funding since 1999 (Figure 4). Six organizations stated that funding from foreign governments had increased since 1999, while five organizations noted a decrease in funding from foreign governments. In the area of fees-for-services, three organizations reported an increase and none a decrease. Slightly more organizations found that donations from businesses and individuals had decreased rather than increased since 1999. The same is true for funding from central governments, with more organizations indicating a decrease rather than an increase.

Figure 4 - Kosovo: Funding Source Trends



E) NGO/Government Relations

The organizations interviewed had mixed opinions about the role of UNMIK in reforming laws governing the NGO sector. Respondents noted that UNMIK has helped improve the overall development of the legal environment for NGOs but, at same time, has prevented NGOs from being an integral part of the reform process due to its lack of transparency. Similarly, there were mixed opinions about the PISG. While some NGO representatives justified the inactivity of the PISG as a lack of competence and due to the slow transition of power from UNMIK, other representatives stated that the 'honeymoon' was over. Upon first being formed, the institutional doors of the PISG were open and

easily accessible. As the PISG gains greater strength and perceived competency, its doors are becoming more difficult to open. As a result, NGOs must be better prepared in order to achieve their goals.

In addition, many organizations interviewed cited a lack of capacity and communication among responsible government authorities relating to NGO activities. There is a lack of consistency in the communications to NGOs issued by the Ministry of Public Services, the Ministry of Finance, and customs authorities, all of which creates confusion. NGOs believe that limited government capacity to implement the law and monitor NGO activities has led to the enactment of discriminatory legislation like Regulation 2005/40, and likely contributed to the passage of a Law on Freedom of Association by the Kosovo Assembly in February 2005 (which is still pending review by the SRSG), which includes some restrictive provisions inserted by the Assembly.

Distrust between the government and NGO sector has increased as a result of poor communication and misunderstanding of the role of NGOs. Respondents complained about the lack of dialogue and inadequate communication between the sectors. The perception is that the government treats NGOs as opponents rather than partners. Some organizations voiced concerns with the government funding international NGOs for projects that could be performed more effectively and less expensively by local organizations.

Unfortunately, the NGO sector lacks the legal expertise to become more involved and engaged in NGO law reform and advocacy. As reported in the 2005 USAID Sustainability Index for Central and Eastern Europe and Eurasia, the Kosovo Institute for Not-for-Profit Law (IKDO) was the only organization that provided legal services to NGOs, but closed its offices in June 2005. While the political situation in Kosovo has been generally favorable for NGOs, the undecided political status of the country has prevented NGOs from strongly engaging in often controversial issues to avoid being seen as destabilizing factors. Thus, the political climate of uncertainty has chilled NGO activity.

Serbia

Setting the Scene

Between 1945 and 1992, Serbia was one of the federal units of the Socialist Federative Republic of Yugoslavia (SFRY). In 1992, following the secession of first Slovenia and Croatia, then Macedonia and Bosnia & Herzegovina, the SFRY gave way to the Federal Republic of Yugoslavia (FRY), consisting of Serbia and Montenegro. It was also at this time – 1991 in Croatia, 1992 in Bosnia – that the republics were plunged into war. These conflicts extended through 1995, brought to an end by Croatia's Operation Storm and the Dayton Agreement in Bosnia, respectively. The President of Serbia, Slobodan Milosevic, was perhaps the pivotal figure during this time period, blamed by many for the conflicts in the former republics. In 1997, armed rebellion erupted in Kosovo against Serbian rule; the Serbian response led to escalating retaliations and thousands made homeless. The conflict culminated in the Kosovo War of 1999, which

led, in turn, to a NATO campaign of air strikes that eventually forced Milosevic to back down.

In July 2000, desperate to keep up the appearance of his government's legitimacy, Milosevic, now President of Yugoslavia, called for elections to be held in September. As a result of efforts by international and local NGOs, more than 70% of Serbia's eligible voters went to the polls and the majority of votes were for the opposition leader, Vojislav Kostunica. However, Milosevic refused to recognize the election victory of Kostunica, prompting hundreds of thousands of people to take to the streets and declare a national strike. In October 2000, after weeks of uncertainty, election protesters stormed the Yugoslav parliament and the state-run media facilities, setting both buildings on fire. Many policemen took off their helmets and joined the protesters. After 13 years in power, Milosevic was finally ousted, leaving a country crippled by sanctions, with many Serbs living in desperate poverty.

In March 2002, the Belgrade Agreement was signed by the heads of the federal and republican governments, setting forth the parameters for a redefinition of Montenegro's relationship with Serbia within a joint state. On February 4, 2003, the FRY Parliament ratified the Constitutional Charter, establishing a new state union and changing the name of the country from the Federal Republic of Yugoslavia to the Union of Serbia and Montenegro. The contours of this loose confederation were never clearly defined. Most recently, on May 21, 2006, Montenegro held a referendum on independence, in which a clear majority (55.5%) voted for independence. Consequently, the Union of Serbia and Montenegro has given way to two fully independent states.

The Legal Framework for Civil Society

A) Prior to the Conflict

The activity of NGOs expanded significantly during the armed conflicts within the former Yugoslav republics beginning in 1991; organizations sprang up to address needs relating to the war, to assist victims, and to protect human rights. At the same time, however, the terms "not-for-profit organization" and "non-governmental organization" had not been accepted as yet; there was a great deal of misunderstanding about the role and purposes of NGOs. Indeed, NGOs were widely perceived as "anti-governmental" organizations and were frequently subject to government oppression.

The NGO sector in the Federal Republic of Yugoslavia (FRY) (officially established April 1992) predominantly operated under archaic laws enacted during the prior system (SFRY), which included the following:

1. The Law on Association of Citizens in Associations, Social Organizations and Political Organizations Established for the Territory of Socialist Federal Republic of Yugoslavia (1990);
2. The Law on Social Organizations and Associations of Citizens of the Socialist Republic of Serbia (1982); and
3. The Law on Legacies, Foundations and Funds of the Republic of Serbia (1989).

These laws failed to provide a clear, comprehensive and enabling legal framework for NGOs in Serbia and Montenegro. Associations operating throughout FRY were

subject to federal regulations and were required to register with the federal registration body. Associations restricting their activities to a certain territory were subject to the respective republic-level regulations. No federal law governed foundations, and they were not permitted to operate throughout FRY. Pursuant to Article 121 of the Yugoslav Constitution, individual decisions of governmental authorities in the respective republics, including decisions on registration, were valid and enforceable throughout the whole country. Nonetheless, none of the foregoing laws had been entirely harmonized with the Yugoslav Constitution (e.g., the Constitution guarantees freedom of association, without approval, and the legislation requires approval from the registering body). In addition, there were inconsistencies between the laws themselves.

Specific shortcomings in the legal framework included the following:

- Mandatory registration requirements for both associations and foundations;
- The failure to permit a foreign legal or natural person to be a founder of an association;
- The failure to permit foreign NGOs to establish a branch office in Serbia;
- Unwarranted restrictions on the ability of persons convicted of crimes to found associations;
- Broad discretionary power of the registration authorities (including a requirement that the registration body determine the necessity of establishing a foundation); and
- The requirement to register membership in international organizations.

B) Since the Conflict

1. NGO Law Reform Initiatives

Between the 1999 conflict and the ousting of Milosevic, not surprisingly, there were no serious efforts to reform the legal framework for NGOs. Since the regime change in Serbia in 2000, by contrast, there have been a number of initiatives to modernize the legal framework in Serbia, but none has yet led to enactment. In fact, Serbia is among the few countries in Europe whose legal framework for NGOs has not yet undergone comprehensive reform to bring it into compliance with international standards and regional best practices.

Even the constitutional protection of freedom of association is on uncertain ground in Serbia. While freedom of association is guaranteed in the Serbian Constitution, its scope and reach are uncertain, especially after the recent break-up of the Union of Serbia and Montenegro.¹⁰ Under Article 44 of the 1990 Serbian Constitution (which was in force until October 2006), freedom of association was guaranteed subject to registration, though it was not clear whether freedom of association extended to everyone

¹⁰ Formerly, the Charter on Human and Minority Rights and Citizens' Freedom of 2003, which supplemented the Constitutional Charter of the Union of Serbia and Montenegro, guaranteed the freedom of association and extended that freedom to "everyone," without prior approval, but "subject to registration with the competent authority." Following the independence of Montenegro, however, the Constitutional Charter is no longer in force.

or to citizens only. Moreover, Serbian legislation (which predates the Serbian Constitution) supported a restrictive reading of the constitutional language, as reflected in the requirement that an association may not engage in any activities before it is entered into the registry; fines are prescribed for associations and their responsible persons for violation of the registration requirement. To compound the problem, a new Constitution, which was adopted by the Parliament and subsequently approved by a referendum on October 28-29, 2006, under highly controversial procedures, incorporates the same language with respect to freedom of association as its predecessor. At the same time, however, Serbia is subject to the European Convention on Human Rights, including Article 11 (freedom of association).¹¹

Most legislative reform efforts have gone into revising the legal framework for associations. In 2001, a draft Law on Associations was prepared, and refined in 2002, with substantial input from the Council of Europe and both international and Serbian NGOs. The draft Law then languished before the Serbian Parliament and was subsequently withdrawn following early elections. In November 2004, the Serbian Ministry for Administration and Local Self-Government (Ministry) again prioritized the issue, and engaged with civil society representatives in developing a new draft Law on Associations. The draft Law underwent a series of amendments in 2005, based on feedback from the NGO community, the Council of Europe, and ICNL. In March 2006, the Ministry issued yet another version of the draft Law on Associations, which the Government subsequently approved and submitted to the Parliament. In the meantime, however, the Government lost majority support in the Parliament and as a result new general elections were scheduled for January 2007. Following the elections, the new Government has made the draft Law on Associations a priority. The Ministry of State Administration and Local-Self Government, in collaboration with local NGOs, is in the process of revising the draft that was prepared by the prior Government. The Ministry plans to finalize the draft and submit it to the Government for its consideration by September 2007.

In addition, a draft Model Law on Foundations was prepared by the Center for Advanced Legal Studies in 2002, and was submitted to the Ministry of Culture for consideration. A draft Law on Foreign NGOs was prepared by the (then) Federal Republic of Yugoslavia Ministry of Justice in the spring of 2002. Neither draft was pushed forward any further. In fact, the draft Law on Foreign NGOs, with the 2003 changes to the constitutional framework, became moot, since the FRY Ministry of Justice no longer had jurisdiction over the sector.

2. Fiscal Framework

In Serbia corporate tax law does not explicitly address NGOs as income or profit-tax exempt. Rather it refers to “other legal entities,” which the law exempts from tax.

¹¹ Serbia and Montenegro acceded to the Council of Europe on March 4, 2003; as part of the separation agreement between Serbia and Montenegro in 2006, Serbia inherited all prior state obligations, including membership with the Council of Europe. As a member state, therefore, Serbia is subject to the European Convention on Human Rights, including Article 11 (freedom of association). The rights enshrined in the European Convention apply to “everyone” in the Member States, and not to citizens only; moreover, the freedom of association protects informal associations and not simply registered groups.

These primarily include associations, legacies, foundations, religious, and sports organizations. The corporate tax law provides that corporations may deduct up to 3.5% of their gross income for donations to support public benefit purposes, which specifically include medical, educational, scientific, humanitarian, religious, environmental protection and amateur sport purposes. The concept of accepted public benefit purposes in the law is construed narrowly and does not include a number of activities which are conventionally deemed for public benefit (consumer protection, human and minority rights, the rule of law, anti-corruption, and social and economic development). Serbia is among the few countries in Europe that does not provide any exemptions for individual giving to NGOs. Recent amendments to the Serbian VAT Law exempt foreign donors from paying VAT on the import of humanitarian goods to Serbia. Under the property tax law, associations are subject to a 5% tax on gifts (movable assets and real estate alike) that they receive; these taxes are not levied on legacies, foundations, or funds.

3. Law Drafting Process

Despite the discouraging fact that reform of the draft Law on Associations is still pending, the law-drafting process gives reason to be encouraged.

In November 2004, the Serbian Ministry for Administration and Local Self-Government (Ministry) re-started the reform process by issuing a new draft Law on Associations. From the outset, the Ministry invited the inclusion and participation of NGOs. First, the Ministry hosted a roundtable event on the new draft Law and supported the formation of a working group consisting of local NGOs and an international expert. In April 2005, the Ministry issued a revised draft Law and requested comments from the NGO working group. In May 2005, the Ministry released a third version of the draft Law, which largely included the comments of the NGO working group. In November 2005, the Ministry, in collaboration with the Council of Europe and OSCE, hosted a roundtable on the draft Law, to discuss the draft Law and comments submitted by the Council of Europe. In addition to representatives of the host organizations, representatives of leading NGOs in Serbia, academics, and human right lawyers participated in the roundtable. In March 2006, the Ministry re-convened a meeting of the working group, to present the revised version of the draft Law. Subsequently, the Ministry issued the latest version of the draft Law on Associations, which the Government has approved.

Paradoxically, therefore, while NGO law reform has stagnated in Serbia, the law-drafting process is a model of an inclusive, participatory process. If the draft Law is ultimately enacted, the participatory process bodes well for the implementation of the Law.

Impact of NGO Law Reform: Survey Results

The survey and interview data reveal that the existing legal framework is less than favorable for NGOs operating in Serbia. These findings are reinforced by the 2005 USAID Sustainability Index for Central and Eastern Europe and Eurasia, which agrees that “NGOs in Serbia continue to operate with an inadequate, outdated legal framework to regulate their operations.” In addition to the main governing laws for NGOs, tax-related legislation was also a focal point of concern for respondent organizations. Additionally, respondents indicated dissatisfaction with the current relationship between

NGOs and the government and are generally skeptical of any future positive developments.

A) Organizations Surveyed and Interviewed

Of the 30 organizations surveyed, 28 are associations, while two listed themselves as “other,” without specifying a particular organizational form. None of the organizations surveyed described themselves as a foundation. Most organizations listed multiple fields of work: 80% focus on human rights, 70% education, 36.7% youth, 20% economic issues, and 16.7% on women’s issues, while none indicated water or agriculture as a field of work. 15 organizations, or half of all interviewed, indicated “other” as an area of activity, which included additional fields of work such as ecology and publishing, intersectoral cooperation, animal welfare, and culture and the arts.

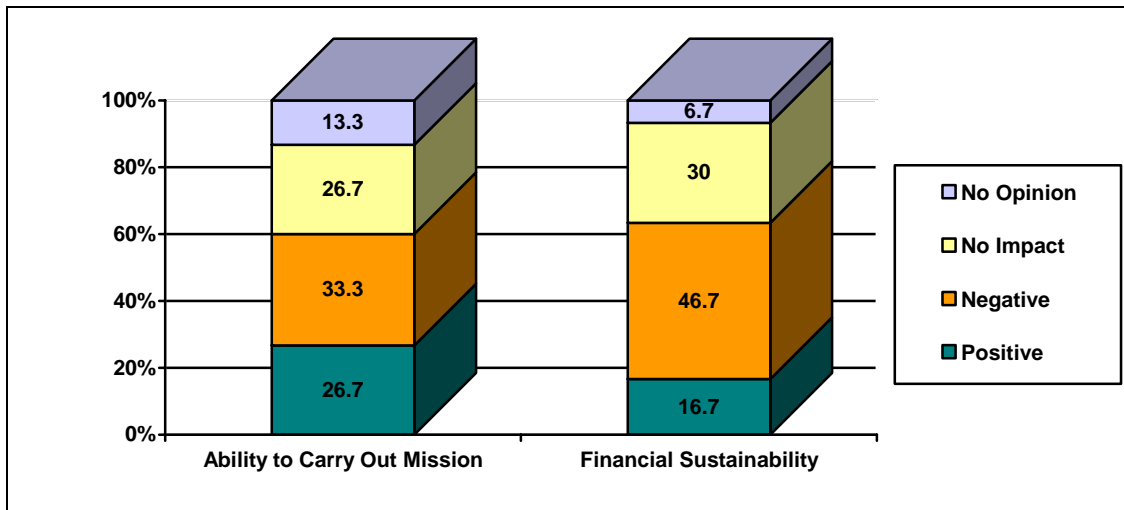
Of the 28 associations, five organizations have more than 100 members, of which one has more than 1,000. The remaining 23 membership organizations have an average of about 25 members. Of all organizations surveyed, 14 (47%) have an annual budget of more than €100,000, four (13%) have a budget of between €50,000-100,000, 11 (37%) boast a budget of between €10,000-50,000, and one has a budget of less than €10,000. There is no direct correlation between the size of the organizational budget and the size of the staff or membership base.

B) The Legal Framework for NGOs

The survey revealed mixed feelings regarding the **impact of the current legal framework** on the ability of NGOs to carry out their mission and to attain financial sustainability, as reflected in Figure 5. Many organizations reported a negative impact; specifically, ten organizations (33.3%) stated that the legal framework has had negative effects on their ability to carry out their mission, and 14 organizations (46.7%) reported negative effects on their organization’s ability to become financially sustainable. By contrast, some organizations noted that the legal framework had a positive effect; eight organizations (26.7%) stated that the law positively influenced their ability to carry out their mission and five organizations (16.7%) reported that the law positively influenced their ability to sustain themselves financially. The remainder indicated that the law had no effect or that they had no opinion on the matter.

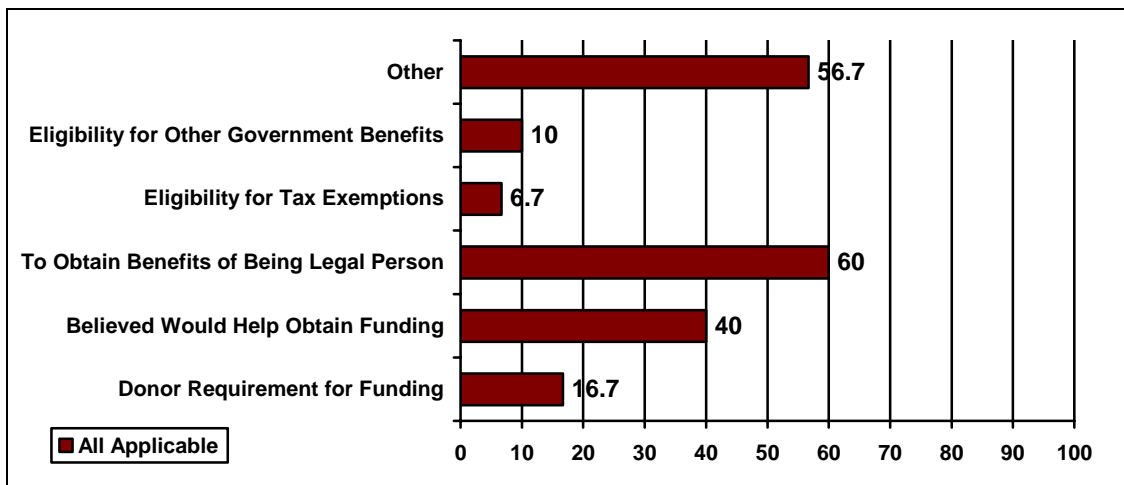
Most survey respondents were registered between 1991 and 2004, with exactly half registered after November 1999. Most of these organizations cited multiple **reasons for registration** (Figure 6). Interestingly, the most common reason for registration, as indicated by over half of the “Other” responses, was the need to comply with the legal obligation to register in order to function. The most clearly identified common motivation, as indicated by 18 organizations (60%), was the desire for the benefits of legal status. Some 12 organizations (40%) were motivated by the belief that

Figure 5 - Serbia: Impact of Legal Framework



registration would help secure funding. Donor requirements and eligibility for government or tax benefits were also motivating factors for five organizations (16.7%) and two organizations (6.7%), respectively.

Figure 6 - Serbia: Motivations for Registration



Survey respondents generally rated the **registration process** as “easy” under the current legal framework. Only two organizations rated the registration process as “very difficult” and one rated the registration process as “difficult.” Interview respondents, however, presented a more mixed assessment of the registration process. On the one hand, the interviewees reported that the legal framework – and particularly, the FRY Law on Associations – is generally positive for the NGO sector in Serbia, mainly because the registration procedure is fairly simple. On the other hand, when asked to reflect on their individual registration experience, all complained of a lengthy process of registration formalities. One organization related some difficulty in registering certain organizational activities, even though these activities were not against the law. The wide disparity in the registration practice under Serbian law should be noted. The FRY Law on Associations

and the Serbian Law on Associations create alternative registration systems. Because the registration procedures under the FRY Law are notably easier than the procedures under the Serbian Law (the Serbian Law assigning registration responsibility to the Ministry of Interior), most NGOs opt to register under the former.

Respondents were divided about whether the **adoption of a new NGO law** before 1999 would have provided better conditions for the development of NGOs in Serbia. Some interviewees speculated that a new law, adopted before 1999, would have had a positive influence on NGO development in Serbia, or would at least have had the effect of disclosing the attitude of the Milosevic regime towards the work of NGOs. Others, however, disagreed, suggesting that the introduction of an improved legal framework would not have been possible in the oppressive environment of the Milosevic regime; instead, according to these respondents, a new law governing NGOs should have been adopted immediately after the democratic changes in Serbia in October 2000.

When queried specifically about the **period between the conclusion of the war and the ousting of Milosevic**, some interviewees noted legal barriers relating to the work of foreign NGOs and problems with the tax regulations, including the inability to register a foreign NGO branch office, and intrusive financial inspections (break-ins by financial police) of certain NGOs during this period. Most agreed that these problems were more a product of the oppressive political climate, rather than the legal framework per se.¹²

C) The Fiscal Framework for NGOs

More than half (53.3%) of the organizations surveyed indicated that the laws and regulations are a major constraint in obtaining funding (Figure 7). Of greatest concern are the tax laws and regulations. NGOs interviewed highlighted several specific problems with the fiscal framework, including the following:

- Tax regulations that exempt only certain kinds of NGO activities (e.g., sports, culture, environmental protection), while overlooking other publicly beneficial activities, such as, for example, the protection and promotion of human rights and the rights of marginalized social groups, educational activities, and others;
- The existence of a tax on donations by natural persons;
- Vague legal provisions relating to activities that enable financial sustainability, especially economic activity (selling products or providing services);¹³
- The high tax on income (especially honoraria) for persons involved in various projects for NGOs (the same tax rate as applied to for-profit companies);¹⁴

¹² See Dragan Golubovic, *Registration of Human Rights Association Annulled*, International Journal for Not-for-Profit Law (IJNL), Vol. 3, Issue 1 (September 2000), http://www.icnl.org/JOURNAL/vol3iss1/cn_ee.htm.

¹³ Interestingly, this complaint seems to be misplaced. In fact, Serbian law has set out fairly clear conditions for NGOs to engage in economic activities.

¹⁴ The concern with the taxation of honoraria is similarly misplaced, since there is not persuasive rationale to treat this personal income differently merely because a service is being provided to an NGO rather than a for-profit company.

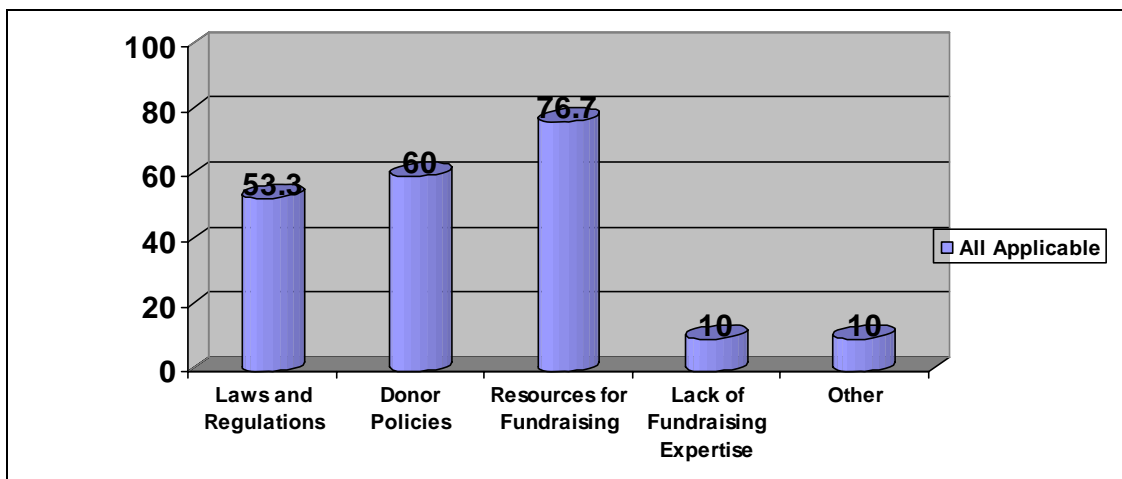
- The complex and unclear procedure for exemption under the VAT law;
- The non-transparent procedure for allocating budgetary funds for the realization of certain NGO activities in the public interest; and
- The lack of an independent institutionalized center for the development of the civil sector.

Interviewees highlighted their concern that the tax law does not explicitly address whether NGOs are exempt from paying income or profit taxes. Rather, the law provides exemptions for “other legal entities,” which include associations, foundations, religious groups, and sports organizations. Generally, under the current tax framework, NGOs are treated essentially as for-profit companies. That said, exemptions from taxation and VAT may apply to donations provided by certain foreign/international NGOs that have a special agreement with the state dating back to the Milosevic period. Unfortunately, in the absence of a clear NGO legal framework or explicit exemptions, government officials are able to apply the existing tax provisions as they see fit. There are neither special procedures or criteria, nor an independent fund for the development of the civil sector that would assist in providing significant funding from the state budget.

D) Funding and Sustainability

As shown in Figure 7, more than half (53.3%) of the organizations surveyed indicated that the legal and fiscal framework was a major **constraint in obtaining funding**. Most organizations indicated multiple restrictions to raising funds, the most common one (76.7%) being a lack of resources for fundraising. Respondents also blamed donor policies for limiting their ability to raise funds (60%). Few organizations (10%) found the lack of fundraising experience to be a constraint.

Figure 7 - Serbia: Fundraising Constraints

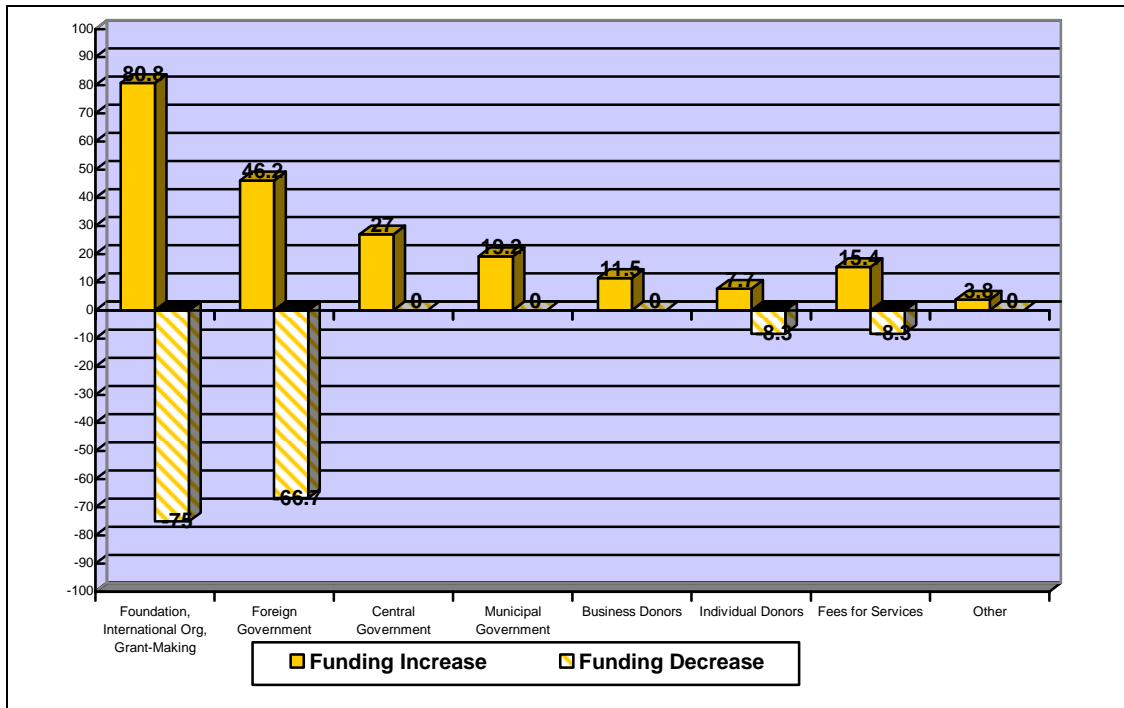


Despite these constraints, most organizations surveyed receive income from more than one **source of funding**. All organizations receive funding from a foundation, international organization or other grant-making organization. The second most common funding source is foreign governments, with 16 organizations (53.3%) receiving funding from this source. Only about a quarter of the organizations indicated that they are

receiving funding from the central government (meaning, at the time of the survey, the Union of Serbia and Montenegro), and only about one-fifth receive funding from the municipal government. Little funding support is derived from businesses or individual donors. Some of the organizations rely on self-generated income, with seven organizations receiving funds from fee-for-service activities and two organizations collecting membership fees.

The NGOs interviewed also confirmed that very little funding is available from the Serbian state; in fact, only one interviewee has ever received **money from the Serbian state** and none had received any Serbian state funding before 1999. Even where the possibility of budgetary funding exists, it is still extremely rare for the state or municipal governments to finance the work of NGOs. Some of the organizations believe that the reason for the lack of state funding is political and reflects a negative attitude of governing parties toward NGOs; according to the NGOs, the government is reluctant to finance the work of NGOs when some NGOs are openly critical of the government. Cooperation and funding from local governments may result from situations in which an NGO has close contacts with the local government officials, but interviewees noted that the funding procedures lack transparency.

Figure 8 – Serbia: Funding Source Trends



Those organizations in existence since 1999 (26 of the 30) were asked whether or not funding had increased or decreased since 1999. Most organizations (80.8%) reported that funding from foundations, international organizations and other grant-making organizations had increased (Figure 8). About 46% noted that funding from foreign governments had increased since 1999. Funding from the central government had only increased for seven of the organizations (27%) and funding from municipal governments had only increased for five organizations (19.2%). Few organizations reported increases

in funding from fees-for-services (four organizations), business donors (three organizations), individual donors (two organizations), and membership fees (one organization). Of the twelve organizations that reported a decrease in funding, 75% of the organizations reported decreases in funding from foundations, international organizations or other grant-making organizations. Eight organizations (66.7%) reported decreased funding from foreign governments. Only one organization indicated that its funding from fees for services decreased since 1999, and one organization reported a loss of funding from individual donors. None of the organizations reported a decrease in funding from the central government or municipal government, primarily because no such funding was provided prior to 1999.

E) NGO/Government Relations

The organizations interviewed expressed the opinion that the current political situation clearly shows that there is still no clear public understanding of the role and importance of NGOs. Many in Serbian society continue to perceive NGOs as a modern invention, imported from the West, whose role is determined by the events of daily politics. Interviewees suggested that this attitude, which existed in Milosevic's time, is ascendant in today's Serbia, and is being reinforced by the current governing political coalition. While the current situation is far better than the Milosevic period, it is still far removed from the kind of understanding and recognition that will give civil society a more influential and effective role.

After a short period of "understanding" with the first democratic government in Serbia that seemed to encourage the recognition of NGOs as partners in development (in the period 2001-2003), the current government appears to be reversing the process. The genesis of this new trend lies in the formation of the current Serbian government after elections in December 2003. The leading coalition apparently harbored a negative attitude towards NGOs, as reflected in comments that the NGO sector should be regulated through tight control of the financing of NGOs, according to the model set by the 2006 amendments to the legal framework in the Russian Federation. Such governmental attitudes are quite worrisome, especially as the new draft Law on Associations enters the parliamentary procedure.

Several of the organizations interviewed also noted an increase in public accusations against NGOs made by prominent politicians and public persons, and publicized through a number of controversial media outlets. As an example, an article published in early 2004 stated:

Today, even in the Balkans, there is one supranational network of power, made by special representatives, protectors, executives, soldiers, police, spokespersons, experts, journalists, ... whose task is state and general social engineering and administration in areas of war, post-war, and generally crisis centers. The question arises whether these people have experience that would qualify them to act in a competent and impartial way. In self-understanding, their preoccupation lies in human rights, but, by rule, without a major concern for the poor, refugees, the unsafe... They know only too well what inherited political framework they should

cling to in their reports and conclusions on Serbs and Serbia, in order to please their national promoters and employers...”¹⁵

Such views draw a clear line between those who are “self-proclaimed patriots” (as in Milosevic’s time) and “traitors and foreign employees.” Faced with such kinds of attacks, NGO representatives in Serbia, and especially human rights defenders, share a fear that Serbia is heading away from basic principles of democracy. This trend was recently cited in the quarterly report on the feasibility for accession of Serbia and Montenegro to the EU (February-April 2004), in which the Secretary General of the Council of Europe, among others, stated that “...Serbia still lacks the legal framework for functioning of the NGO sector,” and that “...After the military police intrusion into the premises of the Helsinki Committee for Human Rights in Serbia, a special concern arises of possible political pressure on NGOs that are dealing with protection of human rights.”¹⁶ On the other hand, recent public opinion polls (CESID, summer 2005) show that human rights NGOs are the ones best recognized by the public. Unfortunately, there is not a strong cadre of individuals or organizations able to advocate for the NGO sector.

Afghanistan

Setting the Scene

After the 1989 exit of the Soviet Army, Afghanistan experienced several years of civil war fueled by competing warlords and power centers within the country. The civil war ended in 1996 with the arrival of the Taliban to positions of power, under the aegis of restoration of freedom and peace to the ravaged country.

However, the Taliban regime, supported in part by Pakistani elements, ruled with an oppressive hand, and certain regional leaders formed an opposition – known as the “Northern Alliance” – to the Taliban. At the same time, a number of radical Islamic groups, including Al-Qaeda, found a welcoming home in Afghanistan from which they could safely launch activities in other parts of the world. In 1998, U.S. military actions were taken against their strongholds, without significant success. By September 11, 2001, the radical “guests” had become well-established in Afghanistan.

Subsequently, after the attacks on New York and Washington in 2001, the US and allied countries, together with the Northern Alliance and others within Afghanistan, attacked targets late in 2001, with the objective of eliminating both the radical Islamic bases in Afghanistan, and the host Taliban regime. The main bases were quickly destroyed and the regime removed from power, although remnants of both remain active within the country to the present day.

In December 2001, at a UN-sponsored conference in Bonn, Germany, the Afghan representatives came to an agreement providing for a staged reconstruction of an Afghan authority, beginning with a formal transfer of power to an interim government headed by Hamid Karzai. A national assembly, known as the Loya Jirga, met during 2002 and

¹⁵ See: Svetozar Stojanović, *Razmišljanje o našim izborima*, daily Politika, January 20, 2004.

¹⁶ See article: Valter Švimer *zabrinut za slobodu medija u Srbiji*, *anterfile Pritisni na NVO*, daily Danas, April 22-23, 2004. News transmitted through FONET media agency.

formed a new Transitional Government under Karzai's leadership. The Loya Jirga subsequently enacted a Constitution in 2004, replacing the 1965 Constitution, which had ostensibly governed the country during the first post-Taliban years. Also in 2004, the first presidential election was held, and Karzai emerged as victor, now serving under the new Constitution. Parliamentary elections were held in 2005, leading to the seating of a new Parliament in December 2005.

The Legal Framework for Civil Society

A) Prior to the Conflict

The pervasively stifling political and social circumstances that characterized the country under Taliban leadership dominated the immediate pre-conflict legal environment for NGOs. To the degree that freedom of association, like the other "universal freedoms," was recognized at all, it was strictly circumscribed, and subject to such tight control that it could hardly be considered a "freedom" at all.

The legal framework governing NGOs under the Taliban regime was based primarily on the Taliban-issued *Regulation on the Activities of Domestic and Foreign Non-Governmental Organizations in Afghanistan*.¹⁷ Not surprisingly, it contained numerous deficiencies, both from the perspective of international norms and in terms of practical application. For example:

- NGOs were inadequately defined, leading to confusion about what was being regulated. Even the requirement that no profit be distributed as such (e.g., as dividends) – also known as the non-distribution constraint – was lacking.
- Registration criteria were not clear and were subject to arbitrary administrative discretion, without time limits for final action or the right to administrative or judicial review.
- Internal governance rules were not prescribed, even by title, and no requirements existed for internal accountability or responsibility.
- Reporting and public accountability rules were draconian in form, but frequently not enforced, a practice leading to uncertainty and potential arbitrary action by the authorities and evasion by the sector.
- Termination provisions were lacking, and liquidation provisions inadequate. Indeed, upon liquidation, NGOs were required to transfer material assets to the government, either free of charge or through a sale.

B) Since the Conflict

1. Early Reform Efforts (2002-2004)

The Government recognized the importance of developing a comprehensive legal framework for NGOs in Afghanistan early in the reconstruction period.¹⁸ With the

¹⁷ The Taliban Regulation was issued in 2000, in the Official Gazette No. 792.

¹⁸ The Interim Government enacted a Law on Social Organizations in November 2002, which defined and governed a specific category of association as "the voluntary unions of natural persons, organized for ensuring social, cultural, educational, legal, artistic and vocational objectives." Most non-governmental organizations, including all foreign organizations, however, were governed by the NGO

support of the United Nations and the Afghan Transitional Government, work began in August 2002, with technical assistance provided by the International Center for Not-for-Profit Law (ICNL), in drafting a new law to replace the Taliban regulation.

With the support of then-Minister of Planning Mohaqeq, a legislative drafting group was formed, comprised of key ministry representatives (Ministries of Planning, Economy, Rural Rehabilitation and Development, Justice, Labor and Social Affairs, Finance, and Foreign Affairs) and representatives of the NGO sector.¹⁹ The working group prepared a progressive draft Law on NGOs, which was circulated widely to NGOs throughout Afghanistan. Based on feedback from NGOs, the draft Law was revised and refined before being submitted to the Ministry of Planning in July 2003. Thus, the July 2003 draft Law was the product of a broadly inclusive and deeply participatory process, which included both NGOs and government officials. Unfortunately, due in part to the resignation of Minister of Planning Mohaqeq to compete in the presidential elections, and in part to the appointment of Minister of Planning Bachardost, the draft Law was not enacted.

Interestingly, during this process and afterward, certain officials within the Afghan Government prepared and issued alternative draft laws governing NGOs (e.g., in 2002, in March 2003, May 2003, and November 2004). Each alternative draft was woefully inadequate and indeed little better than the existing Taliban Regulation. As time passed without any changes to the regulation of NGOs, tension and distrust grew between the sectors, making it more difficult to approach reform rationally.

Regulation throughout the early reform period. Indeed, as of June 2005, there were more than 2300 registered “NGOs” and approximately 400 registered social organizations.

¹⁹ Representative groups that participated included: ACBAR, the Agency Coordinating Body for Afghan Relief, one of the primary umbrella groups in Afghanistan, based in Kabul (its nearly 100 members include both foreign and local NGOs); ANCB, the Afghan NGOs’ Coordination Bureau, an umbrella group made up of some 300 to 400 local NGOs; and AWN, the Afghan Women’s Network, an umbrella group of women’s organizations.

2. The New Legal Framework: Law on NGOs (June 2005)²⁰

The new *Law on Non-Governmental Organizations* (NGOs) replaces the previous Taliban-era *Regulation on the Activities of Domestic and Foreign Non-Governmental Organizations in Afghanistan* from 2000. NGOs are defined broadly to include both domestic and foreign NGOs; a domestic NGO is defined as “a domestic non-governmental organization which is established to pursue specific objectives” (Article 5.2). Unlike the Taliban Regulation, the new Law complies with international standards and good regulatory practices in a number of critical areas:

- NGOs are properly defined as not-for-profit entities and bound by the non-distribution principle, thereby separating them clearly from businesses.
- NGOs are able to pursue a wide range of purposes, including both mutual benefit and public benefit purposes.
- NGOs are able to form umbrella groups and coordination bodies.
- NGOs are able to join international organizations and create branch offices.
- NGOs may be established by both Afghan nationals and foreigners, and by both natural persons and legal entities.
- NGOs may be formed by just two founding members.
- The grounds for denial are limited and objective.
- In case of the denial of registration, the registration authority must issue a written explanation to the NGO.
- NGOs may appeal adverse decisions, such as the denial of registration at the outset or the termination of an operating organization, to a special dispute resolution commission.

²⁰ It is important to emphasize that the legal form of “NGO” is one of several kinds of civil society organization in Afghanistan. A recent assessment of Afghan civil society, conducted by Counterpart International, concluded that there are three broad categories:

1. Village organizations, which are local aid committees formed by donors to advise or oversee the administration of a particular form of assistance. Village organizations include community development councils, educational committees, or other development committees. The number of village organizations has increased dramatically in recent years due to the Afghan Government’s National Priority Programs (NPP).
2. Shuras/Jirgas, which are traditional local councils that villages or tribes establish, usually for the purpose of self-government but also to represent a community’s interests to other parts of society. Shuras/Jirgas are local decision-making bodies that are arguably the most traditional building block of civil society in Afghanistan. They generally consist of the village elders and operate on an informal basis (that is, as un-registered groups).
3. Organizations registered as legal entities, either in the form of “non-governmental organizations” or in the form of “social organizations,” as defined by two separate pieces of legislation. “Social organizations (communities and associations)” are defined as “the voluntary unions of natural persons, organized for ensuring social, cultural, educational, legal, artistic and vocational objectives” (Article 2, Law on Social Organizations).

- NGOs may engage directly in related economic activity, are not prohibited from bidding on government projects except for those related to construction work, and may receive grants, donations, and other forms of income.
- NGOs are subject to record-keeping, financial auditing, and semi-annual reporting requirements.
- The termination of NGOs is subject to notice and the opportunity to respond.
- The assets of a liquidated NGO, after payment to creditors, will be distributed to another NGO working for similar objectives.

Despite these improvements, the new Law still contains gaps, ambiguities, and problematic provisions that could create difficulties for both the Government and NGOs. For example:

- *Article 8.8: An organization shall not perform the following activities: ... Participation in construction projects and contracts.* Through this provision, NGOs in Afghanistan are prohibited from engaging in construction projects and contracts, although the precise meaning and scope of the prohibition remains far from clear.
- *Article 23.1: Prior to the commencement of work, and after the examination and assessment of the line department, an organization shall submit committed project documents to the Ministry of Economy for verification and registration.* Also disturbing is this apparent requirement of advance project approval, the implementation of which also remains unclear, but potentially could lead to project delays, bureaucratic burdens and the opportunity for corruption.
- *Article 24.4: In recruiting foreign workers, an organization shall obtain prior permission from the relevant authorities and shall inform the Ministry of Foreign Affairs in writing of their arrival, commencement and termination of work.* The purpose of this provision is unclear, as is its implementation, but could create unnecessary burdens to address an illusory problem.

3. The Fiscal Framework

Afghanistan's Income Tax Law, enacted in 1965 and amended in 2005, was modeled on U.S. tax law. The Income Tax Law defines a category of "Tax Exempt Organizations" (Article 10). To qualify as an exempt organization, an organization must be (1) "established under the laws of Afghanistan," (2) "organized and operated exclusively for educational, cultural, literary, scientific, or charitable purposes," and (3) "[c]ontributors, shareholders, members or employees either during the operation or upon dissolution of the organization ... must not benefit from the organization." The contributions received and income from the necessary operations of qualifying organizations are exempt from taxation.

The Afghan Ministry of Finance has made available an income tax manual, which provides some guidance on application procedures for exempt status. The Income Tax Manual does make clear that it is the Ministry of Finance, and not the organization itself, that determines whether or not the organization qualifies for the exemption.

There are currently no tax incentives available for either individual or corporate donors making cash or in-kind contributions to NGOs in Afghanistan.

The Customs Law was enacted in April 2005. It does not provide for exemptions from customs duties for NGOs per se, but does exempt "[g]oods provided for government projects funded by loans or imported to the country by or for public and private foreign and international relief and development agencies." (Article 27(2)(5)). Thus it appears that the imported goods of many foreign organizations - as private relief and development agencies - may qualify for exemptions, while domestic organizations will have to pay full customs duties on nearly all imported goods. Domestic organizations may be able to benefit from a few general exemptions, such as those covering fuel and certain medical goods.

4. The Law Drafting Process

The newly elected Afghan Government placed priority on the enactment of a new NGO law. The Ministry of Economy issued a new draft law in February 2005. The draft Law was based in part on the ICNL-assisted draft of July 2003, but also included significant differences that sought to control and sometimes stifle NGO activity.

In response to objections from the NGO sector as well as the international community, the Ministry undertook to further develop the draft Law. Through meetings with NGO and Government representatives, some efforts were made to invite comments and feedback from the NGO community. As a result of this process, the draft Law underwent a series of revisions between February and June 2005. Among the most significant improvements were the following:

- Improved establishment criteria;
- Reduced registration fees;
- More reasonable reporting requirements;
- More reasonable requirements relating to independent audits;
- Improved liquidation procedures; and
- NGOs not excluded from bidding.

In response to the controversy surrounding the bidding exclusion (Article 8.8) – as contained in a late March 2005 draft backed by the Cabinet – President Karzai reacted quickly and appointed a joint task force, consisting of government officials and international donor representatives, to develop final recommendations regarding Article 8.8 and the draft law generally. In early May, the task force recommendations were submitted to the Government. President Karzai signed the new Law, which became effective immediately upon his signature in June 2005.

The Impact of NGO Law Reform: Survey Results

A) Organizations Surveyed and Interviewed

Data was collected from 30 organizations through the completion of a survey questionnaire, and from six organizations through interviews. Of the survey respondents, 19 are domestic organizations and 11 are international organizations. Of those

interviewed, three are domestic and three international. All surveyed but one are registered as NGOs; the one exception is registered as a social organization.

Participating organizations are active in a variety of fields, including education (70%), water (63%), agriculture (60%), health (56%), women (53%), youth (37%), economic development (33%), as well as advocacy, human rights, peace and democracy, social welfare, microfinance and environmental protection.

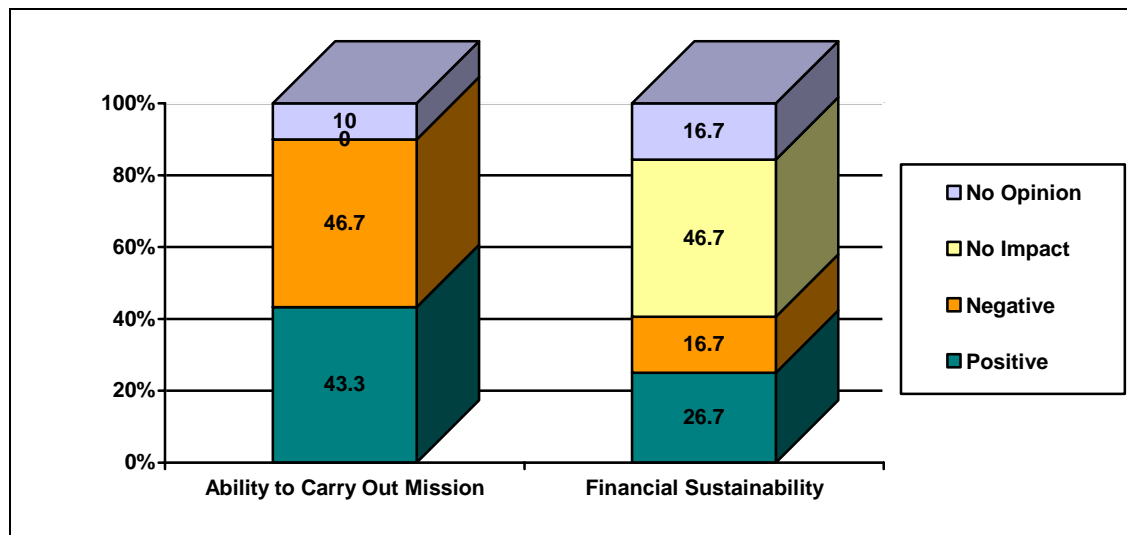
Most of the organizations (87%) boast an annual budget of greater than \$100,000. Only four organizations have a budget of less than \$100,000.

B) The Legal Framework for NGOs

NGOs surveyed were divided on the question of how the legal framework impacted on their ability to carry out their mission and to sustain themselves financially. Represented in Figure 9, 13 NGOs (43.3%) indicated that the legal framework positively affected their ability to carry out their mission; 14 NGOs (46.7%) noted a negative impact. 8 NGOs (26.7%) indicated that the legal framework positively affected their ability to sustain themselves financially; 5 NGOs (16.7%) noted a negative impact. 14 NGOs (46.7%) noted no impact and 16.7 had no opinion.

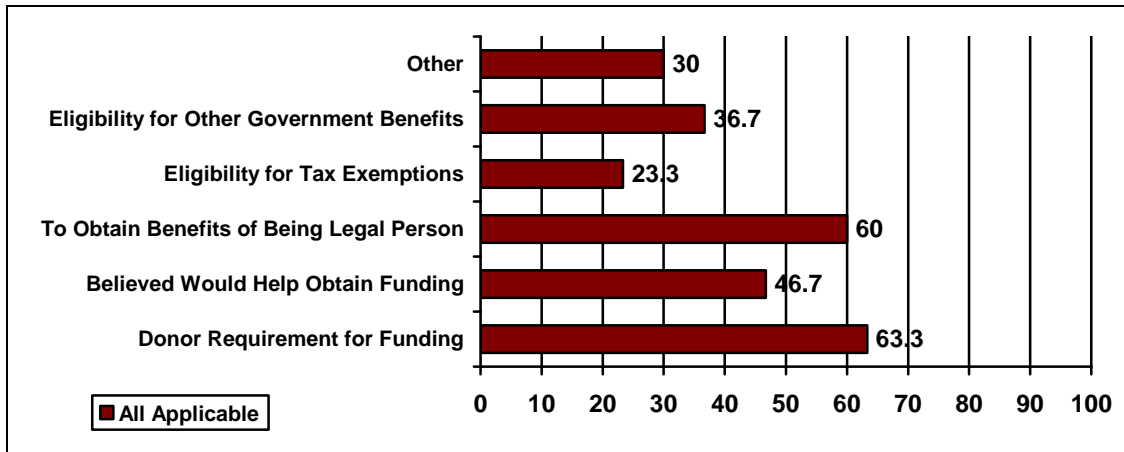
Regarding registration, those organizations surveyed were registered between 1961 and 2002. Most were registered in Afghanistan after 1991. At the time of the survey, all but one organization had undergone re-registration with the Ministry of Economy under the new Law on NGOs. The reasons given for registration are, in order

Figure 9 - Afghanistan: Impact of Legal Framework



of priority, (1) donor requirement to receive funding (63%), (2) the desire to secure the benefits of legal status (60%), (3) the belief that registration would help to secure funding (47%), (4) eligibility for other government benefits (37%), and (5) eligibility for tax exemptions (23%).

Figure 10 - Afghanistan: Motivations for Registration



The results were mixed regarding the ease/difficulty of the **registration** process. 52% found the process difficult or rather difficult. About half that number (24%) found the process very easy or rather easy. And 20% of those surveyed gave the registration process a 'middle' rating.

When asked specifically about the recently-required **re-registration** process, views were mixed. Some had no complaints, even lauding the process as helpful in distinguishing between legitimate NGOs and for-profits. Others described the process as unclear and wasteful; 54% of NGOs indicated that the re-registration process had been difficult. Some NGO interviewees complained of unclear procedures and multiple return trips to the Ministry.

When asked about changes in the law affecting NGOs since November 2001, more than half of those surveyed (57%) noted positive changes on their ability to operate. At the same time, the majority of those surveyed (74%) also noted negative changes on their ability to operate. Positive changes on the NGOs' ability to operate included:

- Clear legal status for NGOs, with false NGOs being 'weeded out' through the re-registration requirement;
- NGOs distinguished from construction companies and the private sector;
- Increased trust and credibility for NGOs, due to the prohibition against NGOs engaging in construction work;
- Clear focal point for government supervision in the Ministry of Economy;
- Increased accountability for NGOs through reporting;
- Improved coordination between NGOs and the government and cooperation in performing the activities; and
- Increased involvement of females in project implementation.

The survey revealed that legal changes since November 2001 had negative impacts on NGOs' ability to operate in the following ways:

- The prohibition against NGOs engaging in construction work, which creates inefficiencies, especially where NGOs have demonstrated capacity and expertise;
- The requirement of advance project approval for NGO projects;
- Foundations are not accepted as NGOs;
- The confusion and inefficiencies of the re-registration process, which wasted resources of the government and NGOs;
- Relationships with the governments need more time and resources;
- The confusion between different government ministries and departments regarding reporting and monitoring of NGOs;
- The lack of coordination and tangled bureaucracy between national and provincial levels of government agencies;
- The local language requirement for NGO reporting (all reports must be in Dari);
- The lack of capacity and expertise within governmental agencies for the real costs that NGOs must absorb;
- Ongoing government interference in the internal affairs of NGOs; and
- Delay in project implementation because of relationship with different government organizations.

Interestingly, NGO interviewees indicated that the 2003 draft law, if enacted, would have been much more enabling and comprehensive. The 2005 Law is seen to be an improvement over the prior legal framework, but its full impact will depend on the implementation; thus, it remains too early to tell. Concerns with implementation are rooted in inconsistent government decision-making and the lack of uniform interpretation. Nonetheless, all NGOs interviewed agreed that had the Law been enacted earlier, it would have done much to prevent the kind of negative atmosphere currently surrounding NGOs.

C) The Fiscal Framework for NGOs

Given the fact that the Law on NGOs was enacted only in June 2005, and given the fact that the Income Tax Law is in the initial stages of implementation, it is premature to judge clearly the full impact of the fiscal framework on NGOs. Much will of course depend on the implementation of these two laws, in addition to other government regulations and practices. Nonetheless, to date, 30% of organizations surveyed identified the laws and regulations as an impediment to raising and obtaining funds (Figure 12).

NGO interviewees complained of the following specific fiscal framework issues:

- The prohibition, in the NGO Law, against NGO participation in construction projects (although it is unclear how this will be implemented);
- Income tax on NGO personnel; and
- Problems in receiving funds from the government.

Regarding the tax framework, NGOs indicated that they generally benefit from exemptions on project-related imports. Taxation of NGOs, at this time, does not affect NGO program activity decisions.

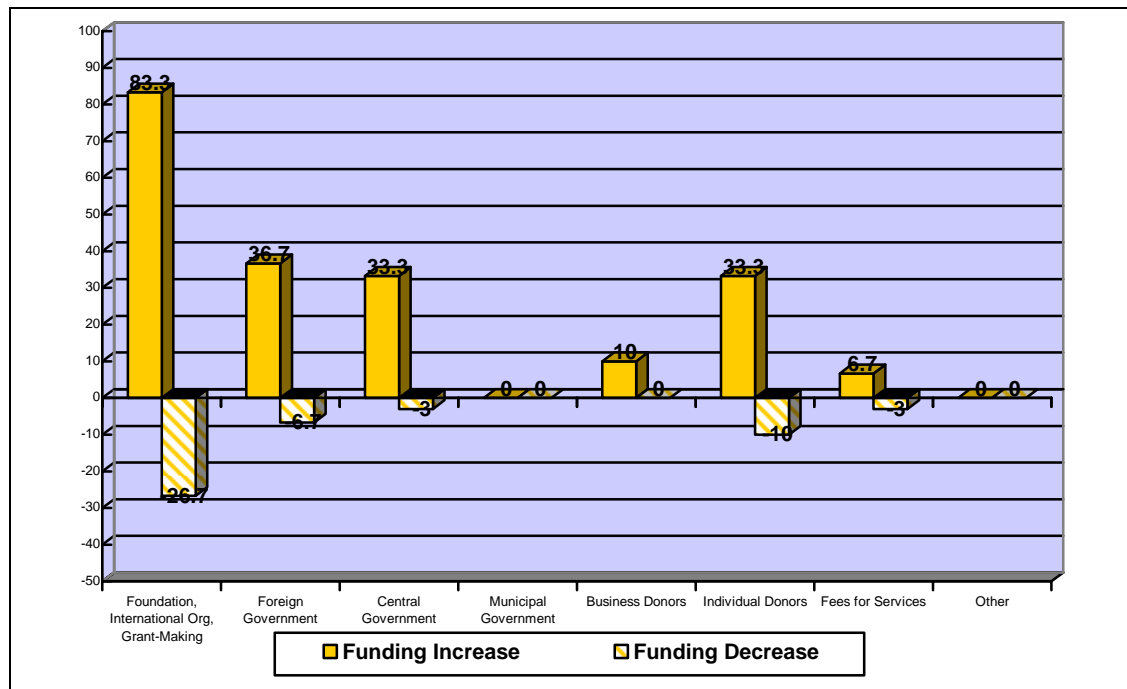
D) Funding and Sustainability

As might be expected, NGOs in Afghanistan are overwhelmingly supported by foreign donors. 73% of those surveyed receive funding from foundations, international organizations or other grant-making organizations; 56% receive funding from foreign governments. Interestingly, surveyed NGOs also receive substantial funding from individual donors (50%) and from the Afghan Government (40%). Somewhat fewer receive funding from business donors (13%) or generate their own income through fees-for-services (23%).

Also not surprisingly, the survey revealed strong funding increases for NGOs from most income sources since November 2001 (Figure 11). Most dramatic is the 83% increase in funding from foundations, international organizations or other grant-making organizations. Both foreign government funding and Afghan government funding for NGOs increased significantly, by 37% and 33%, respectively. Funding raised from individual donors and business donors also increased, by 33% and 10%, respectively. Fees-for-services showed about a 7% increase. Funding from the other sources decreased by 3%.

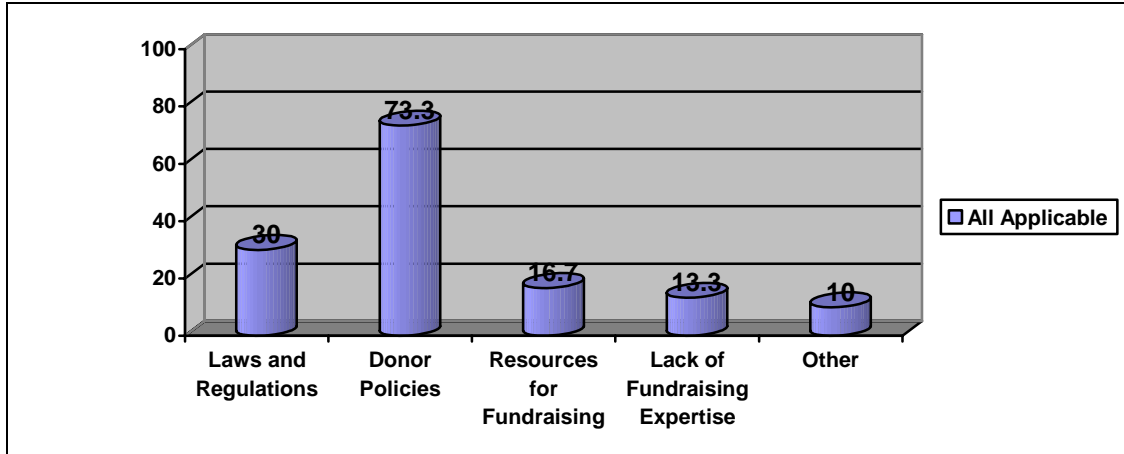
The same respondents reported decreased funding from certain sources, including (1) foundations, international organizations or other grant-making organizations (27%), (2) individual donors (10%), (3) foreign governments (7%), and (4) both the Afghan Government and fees-for-services (3%).

Figure 11 - Funding Trends



As for constraints in raising and obtaining funds, 73.3% of respondents blamed donor policies, and 30% pointed to the laws and regulations (Figure 12). Just 17% highlighted funding resources and 13% the lack of fundraising experience as constraints.

Figure 12 - Afghanistan: Fundraising Constraints



E) NGO/Government Relations

Building on the legacy of distrust and suspicion between the government and NGOs during the Taliban era, anti-NGO sentiment grew steadily in Afghanistan during the post-conflict period. As the Afghan Government faced the difficult task of rebuilding the country, certain government representatives came quite quickly to view the NGO sector not as an important contributor to reconstruction, but as a potential obstacle. Many within the Afghan Government believed (and still believe) that the NGO sector was competing for limited foreign funding, competing for high-quality local staff, and often misusing the funds it received for private inurement. The result was that NGOs worked in an increasingly hostile environment, fueled by the deteriorating security situation and uncertain political future of the country. Government accusations that NGOs squander money and live in luxury also undermined NGO credibility among the general public.

Moreover, there is a lack of legal expertise among NGOs. ACBAR, with support from ICNL, serves as the primary source of NGO-related legal information. NGOs generally have little knowledge of the laws affecting them, which contributes to an atmosphere of uncertainty.

Section 3: Analysis of Findings

I. Impact of Law Reform Initiatives on Development and Sustainability

A) Sequencing: Impact of Delays in Legal Reform

What are the impacts of delayed reform of the legal framework governing NGOs?

i. Brief Legal Vacuum in Kosovo

The initial, if short-lived, legal vacuum for NGOs in Kosovo posed an immediate problem for organizations responding to the humanitarian crisis in the wake of the war, as

well as an obstacle to the development of civil society generally. As highlighted above, the lack of a clear legal framework in Kosovo led to many questions, including how to deal with the flow of donor aid, how to provide legal personality and legal protection for legitimate groups and organizations, and how to prevent fraud and abuse by unscrupulous individuals.

Civil society in Kosovo prior to the conflict was largely based on informal community networks. Reportedly, there were only some 10 organizations formally registered as NGOs at the close of the 1999 conflict. The uncertainties in the legal framework were clearly one of the primary obstacles to the development of a multi-layered civil society, with strong formal associations and foundations.

With the close of the conflict, the influx of donor funds enabled humanitarian aid and reconstruction activity to flow into Kosovo rapidly. As revealed in the survey research, many Kosovar NGOs were created and formed as a result of donor initiative – since most donors work with only formally registered groups. Thus, the impact of donor-imposed agendas, which commonly affects development and civil society in any post-conflict environment, was particularly acute in a context like Kosovo, with so few pre-existing NGOs. The surge in donor funding may have contributed to NGO activism, but simultaneously may have undermined local initiatives, aimed at longer term goals, and guided by clear missions. Furthermore, the influx of funding to NGOs, where NGOs were operating in a legal vacuum, may have fueled governmental suspicion and distrust of the NGO sector, as NGOs were perceived more as spenders of international money rather than as partners in the process of reconstruction.

ii. Living Under the Taliban Law in Afghanistan

Unlike Kosovo, the NGO sector in Afghanistan was governed by the pre-conflict legal framework not for a mere five months, but for nearly four years. During this extended period of post-conflict reconstruction, NGOs found themselves operating in an environment increasingly marked by suspicion, distrust, and even hostility toward NGOs and the sector as a whole. “The three great evils Afghanistan has faced in its history are communism, terrorism, and NGO-ism.” These words, attributed to President Karzai, capture the intensely negative views surrounding NGOs in Afghanistan. Many in the government and among the general public came to believe that NGOs were engaged in profit-making activities and siphoning foreign aid money away from the Afghans for whom it is intended.²¹ NGOs became the scapegoat for a wide range of perceived abuses, from wasting billions of dollars of development aid to driving sports utility vehicles, from hiring the most talented local staff to paying inflated salaries to foreign consultants, from living luxurious lifestyles to throwing wild parties and orgies.

The negative perceptions of the sector developed quickly during the post-conflict period. As early as August 2002 – less than a year into the post-conflict period – Minister for Rural Rehabilitation and Development Hanif Atmar claimed that of 1000 registered

²¹ According to Ministry of Finance information, between January 2002 and September 2004, 45.5% of donor funding went directly to the UN; 28.5% went directly to the Afghan Government; 16.4% went directly to private contractors; and 9.6% went directly to NGOs. These statistics do not reveal the total percentage of donor assistance that ultimately went to NGOs, as the UN or Afghan Government will often re-program funding through NGOs.

NGOs at the time, only about 100 were legitimate NGOs, engaged in not-for-profit missions; the others were allegedly taking profit and siphoning aid money away from those in need. Over the next three years, with no legal reform enacted, the public image of NGOs continued to deteriorate. In December 2004, then-Minister of Planning Ramazan Bashardost announced the Ministry's intent to terminate nearly 2,000 NGOs, a plan that – though never carried out – was generally welcomed by the general public. The Ministry did, however, successfully place a moratorium on the registration of NGOs, which remained in effect for more than six months, until June 2005. Former Minister of Economy Dr. M. Amin Farhang, who became responsible for NGO registration and supervision in January 2005, soon after described NGOs as “running wild” and repeatedly expressed the need to control their activities.

Arguably, these negative perceptions were rooted, at least in part, in misunderstanding regarding the definition of who NGOs are, what they do and how they operate. NGOs were often blurred with private contractors, with foreign embassies, and with U.N. agencies in the minds of the Government and the eyes of the public. Arguably, the negative perception stemmed, inevitably, from the fact that donors often prefer to address reconstruction needs through NGOs rather than through the young Afghan Government.

It seems at least as certain, however, that the inadequate legal framework for NGOs, carried over from the Taliban period, left NGOs to operate for too long in an ambiguous, uncertain legal space and fueled the atmosphere of suspicion and distrust. Specific problems directly traceable to the legal framework included the following:

- The lack of a clear definition of the term “NGO” left an open door for false NGOs – including for-profit companies – to become registered as NGOs. According to many within both sectors, the failure to clearly define an NGO led, at least in part, to abusive practices. It was perceived that some NGOs, if not many NGOs, were actually engaging in business practices as their primary purpose; in other words, businesses were masquerading as NGOs. This perception seemed to be confirmed when, in February 2006, more than 1600 of 2355 registered NGOs were terminated for failure to apply for re-registration during the required re-registration process under the new Law.
- The lack of clear rules for internal governance of NGOs helped undermine the confidence of the Government and public in the transparency and accountability of NGOs. The concern within Ministry circles and among the public that NGOs misuse funds by operating NGOs for profit purposes, by using donor money to enrich the founders and staff, and by failing to fulfill their public benefit purposes could have been addressed in part through strengthened internal governance procedures. The lack of appropriate restrictions on self-distribution and private inurement contributed to the erosion of trust in the NGO sector.
- The lack of clear requirements relating to reporting and monitoring created confusion within both sectors and between the two sectors. Compliance with reporting was reportedly low, partly because there was no reporting form, partly because it was unclear how often reports were due (on a quarterly or bi-annual

basis), and due in large measure to uncertainty over the applicable regulation and the focal point for reporting.

The growing skepticism and hostility surrounding the NGO sector led, in 2005, to pressures to enact a new law as quickly as possible, rather than through a balanced, deliberative, participatory approach. Compared with the 2003 law drafting process (which led to a progressive draft law that was not enacted), there was less opportunity during the 2005 drafting process for NGO input and participation. The final recommendations made by the U.N. and other donor agencies were not given the consideration they deserved. The Minister of Rural Reconstruction and Development commented at the time that it was too late for many to approach reform rationally.

iii. Ongoing Delay in Serbia

In the initial period following Milosevic's ouster in 2000, NGOs were optimistic about an improved environment. Since that time, however, legal reform efforts have stagnated. Multiple draft laws have been produced and discussed, but none has been enacted. Perhaps Serbia is closer now than ever before to the adoption of a new framework law for associations; but past experience makes many skeptical. For the time being, the NGO legal and fiscal framework in Serbia still awaits transformation.

The current regulatory framework for NGOs remains outdated and inadequate, and falls short of international standards and regional best practices in a number of significant areas. For example:

- The scope of the Constitutional freedom of association is ambiguous, as it may be interpreted to apply to every person, regardless of his or her nationality and domicile, or to citizens only;
- Registration of associations is mandatory, thus precluding various forms of civic initiatives from operating;
- Foreign persons, in addition to minors and legal entities, may not be the founders of an association;
- The ability of persons convicted of crimes to found associations is restricted;
- The prescribed minimum number of founders of an association (ten) is unduly high;
- The registration authority is given broad discretionary power in the process of registration and dissolution of associations and foundations; and
- Foreign NGOs operate in a legal vacuum and are in fact unable to establish a branch office in Serbia; their activities are currently governed by practice that has no support in law.

The tax framework for NGOs also needs to be modernized, in order to provide more incentives for philanthropic giving. The notion of "public benefit" in the Corporate Income Tax Law is construed narrowly and does not include a number of activities that are typically deemed "public benefit," such as consumer protection, the rule of law, human and minority rights, and social and economic development. In addition, there are no tax incentives for individual giving to NGOs. Finally, the VAT Law may have serious

ramifications for the sustainability of NGOs in the long term, in that it fails to provide for exemptions on certain transactions (in which NGOs are commonly engaged) that are allowed by the EU Sixth Directive on VAT.

The delay in revising and updating the basic framework legislation has also retarded the development of meaningful partnership between the sectors. NGOs have not only failed to build partnerships with the Serbian government, but have on occasion been met with open hostility from numerous officials. The overarching question for the sector is whether the past failures to realize needed reforms, exemplified by delays in the passage of the draft Law on Associations, will be overcome with the enactment of the current draft Law, or will give way to yet more delay, thereby leading to a further deterioration of the current situation.

The delay in NGO legal reform has potentially even broader consequences for Serbia: Serbia's relation with the EU and chances for accession. Notably, in a 2004 report on the feasibility for accession of Serbia and Montenegro to the EU, the Secretary General of the Council of Europe stated that "...Serbia still lacks the legal framework for functioning of the NGO sector", and that "...After the military police intrusion into the premises of the Helsinki Committee for Human Rights in Serbia, a special concern arises of possible political pressure on NGOs that are dealing with protection of human rights."²² It is difficult to judge how direct the connection is between the lack of an adequate legal framework and the intrusive governmental actions cited in the EU report. Regardless, however, the Helsinki Committee incident underscores the urgent and, as yet, unmet need for legal reform in Serbia.

B) Impact of Legal Reform

What are the impacts of reform of the legal framework governing NGOs?

i. Enabling Framework in Kosovo?

The enactment of Regulation 1999/22 helped answer many of the outstanding questions swirling in the immediate post-conflict legal vacuum in Kosovo. The Regulation immediately enabled the creation of and set the terms of operation for the many relief organizations dealing with returning refugees and others needing food, shelter, medicine, post-war reconstruction, and other humanitarian efforts. Perhaps more significantly, the Regulation legitimized associational activities of Kosovo-based organizations and gave them the protections of law – those rights and protections that were unavailable only a few months earlier. It further created the basis for the development of well-governed, accountable, and financially sustainable organizations with the introduction of rules regarding internal governance, external oversight, and income generation, as well as tax and other benefits.

While admittedly an incomplete measure of the vibrancy of the NGO sector, the number of NGOs does serve as one important indicator of the ease of registration and the health of the sector. The NGO Regulation opened the door to the immediate growth of the NGO sector in Kosovo. The number of NGOs registered in Kosovo grew from

²² See article: Valter Švimer zabrinut za slobodu medija u Srbiji, *anterfile Pritisici na NVO*, daily Danas, April 22-23, 2004. News transmitted through FONET media agency.

approximately 10 registered as of the close of the war, to 250 by the end of 1999, and to more than 2500 at present.

More importantly, however, as the survey revealed, the revised legal framework positively affected the ability of NGOs to carry out their missions, and is believed by many to have positively influenced their ability to sustain themselves financially. The new legal framework clearly defined NGOs, provided for easy registration, set out basic rules of internal governance and accountability, created a public benefit status for NGOs (the basis for tax exemptions), and allowed NGOs to engage in economic activities.

While NGO/government relations are reportedly strained, the tension apparently flows less from the legal framework per se, and more from the transfer of regulatory authority from UNMIK to the PISG, and from the uncertain political status of Kosovo itself. While there are positive examples of cooperation (in the form of government grants and cooperative ventures) between the sectors, tensions are fueled also by a lack of effective communication between governmental institutions and more effective cooperation between the sectors.

ii. Better Late than Never in Afghanistan?

The enactment of the Law on NGOs in June 2005 has generally been welcomed as a positive development for Afghanistan. Certainly the survey revealed that the new Law is perceived to be an improvement over the prior legal framework. That said, with so much depending on implementation, and the survey conducted so soon after the Law was enacted, it is difficult to say with certainty how, and to what extent, the new law will positively impact Afghanistan and the NGO sector. The re-registration process, being the first regulatory impact that the Law has made in the operating lives of most NGOs, was viewed positively by some and negatively by others. On the positive side, the re-registration process led to the termination of approximately 1600 NGOs, which were perceived by many to be false NGOs (that is, businesses masquerading as NGOs) or inactive NGOs. On the negative side, the implementation of re-registration was criticized by many for being inconsistent, inefficient and wasteful of resources.

As for other issues, the new Law has clearly redressed some of the outstanding problems festering under the prior framework, left others unresolved, and introduced new issues of concern. On the positive side, the new Law clarified the definition of 'NGO', prescribed a liberal framework for establishment and procedural safeguards for registration, and clarified the reporting and monitoring requirements. On the negative side, the Law still largely fails to address internal governance standards, missing an important opportunity to improve NGO transparency and accountability. Problematic provisions, also highlighted above, prohibit construction activity and require advance project approval, among other issues. The ability of the improved legal framework to restore NGO credibility and establish more trust with the government remains to be seen.

To consider alternative scenarios, it does seem likely that the NGO sector in Afghanistan would have benefited from either (1) the enactment of the progressive draft Law of 2003 (according to NGOs interviewed, the 2003 draft, if enacted, would have been far more enabling for the sector) or (2) the earlier enactment of the Law that was ultimately enacted in June 2005 (which, while not as enabling as the 2003 draft Law, was nonetheless welcomed). NGO interviewees agreed that the earlier enactment of either the

2003 draft Law or the actually enacted Law would have prevented much of the negative criticism directed at the sector and improved their credibility and public image.

While the new Law has been generally welcomed, there is some question as to its ability to substantially improve the operating atmosphere for NGOs. Subsequent developments have made many skeptical. For example, the Ministry of Economy issued implementing regulations (largely focused on re-registration) which confused, rather than clarified, the re-registration process. In addition, implementation in the first two years following the enactment of the Law has proved inconsistent and unpredictable. Furthermore, the Law remains pending before the Afghan National Assembly; as with all other legislation issued by the Karzai government prior to the seating of the Assembly, the Assembly has authority to accept, reject, or revise the Law as it deems appropriate.

iii. Restrictive Reform in Iraq

While Serbia does not provide an example of reform, Iraq, a more recent post-conflict (or current conflict) environment, does. There, like Kosovo, the provisional government (the Coalition Provisional Authority or CPA) enacted, reasonably quickly, an ordinance which set the legal framework for NGOs. In November 2003, without the participation of civil society, the CPA issued Order #45 on the Regulation of Nongovernmental Organizations. The order was motivated by the CPA's interest in enhancing security, and in particular, in making sure that NGOs operating in Iraq were registered, and their operations and sources of funding closely monitored.

Order #45, however, unlike the Kosovo Regulation, was largely restrictive, burdensome, and controlling. Problematic regulatory approaches included the following:

- A burdensome registration procedure, requiring substantially more information, than is required in most countries to register an NGO, which may effectively serve as a barrier to the establishment of small, nascent Iraqi NGOs;
- A mandatory registration requirement for all NGOs, embracing informal groups within its sweep, which would mean that even small neighborhood groups must register to carry out their activities, in clear violation of the right to freedom of association as protected by international law;
- A staff disclosure rule, requiring the identification of foreign staff and the address of the organization to be made public in a register, which many organizations felt would put them at risk for attack, given the dangerous security situation in the country; and
- Extensive powers given to the supervising Ministry to investigate and deny or suspend registration of organizations.

Not surprisingly, the Order was met with opposition and criticism both within Iraq and internationally. Some organizations threatened to disobey the Order, or at least some of its provisions, and called on other NGOs to do the same. Initially, NGOs experienced serious difficulties in registering. By May 2004, despite the submission of over 100 applications to register, not a single application had been granted. Ultimately however, the registration office began to register organizations, and today many are registered and carrying out their missions.

Despite reform efforts in 2004 (prior to the transfer of power from the CPA to the Iraqi transitional government), and more recent initiatives (for example, a draft law was prepared but rejected in 2006), Order 45 continues to remain in effect. Reportedly, however, the thousands of registered NGOs are carrying out a wide range of activities, despite the restrictive governing framework and continuing violence.

C) The Capacity and Sustainability of the NGO Sector

What is the impact of the legal framework on the capacity and sustainability of NGOs in post-conflict environments?

i. Strong Sector in Kosovo?

The legal framework, based on a majority consensus, has positively affected the ability of NGOs to carry out their missions, and is believed by many to have positively influenced their ability to sustain themselves financially. Of the countries surveyed, it is Kosovo that boasts that most enabling framework, and this has had a directly positive impact on the sector.

Of most concern to the NGO sector is the fiscal framework: tax laws, and specifically the VAT law (which typically has a disproportionate impact on NGOs). Of the organizations surveyed, 58% felt that the laws for NGOs should better clarify the relationship between the private sector and NGOs connected to the financial support of their activities and applicability of the tax law and VAT. These problems affecting the financial sustainability of the sector are reflected in the 2005 USAID Sustainability Index, which assigned this dimension the lowest score for Kosovo.

The funding sources for NGOs, while still predominantly drawn from foundations or international organizations, as well as foreign governments, are beginning to become more diversified. It appears, as found in the USAID Sustainability Index (2004), that while NGOs have started raising funds from local sources, few see local funding as a source of financial viability in the near future. Although volunteerism is deeply rooted in Kosovo (recognizing the enormous volunteer efforts, including the voluntary taxes paid, that supported Kosovar society prior to 1999), neither the culture of philanthropic giving nor the practice of government funding has yet developed to a point of significant support for the formal NGO sector. Thus, despite a positively enabling basic framework regulation, NGOs in Kosovo remain in an uncertain period of development.

The organizations also expressed concerns about the current negative governmental attitude towards NGOs and their work. While mechanisms are in place to distribute funds from the government to NGOs, many organizations explained that these grants only went to organizations concerned with certain activities and with close relations with the government. In addition, according to the survey, distrust between the government and NGO sector has increased as a result of poor communication and misunderstanding of the role of NGOs. The Government is apparently as apt to treat NGOs as opponents rather than partners. Thus, the more positive legal framework in Kosovo has not led to clearly improved relations with the Government. That said, the poor relationship, as noted previously, can be blamed on the other factors beyond the legal framework, specific to Kosovo's transition. Moreover, there is no indication that the

NGO/government relationship in Kosovo has reached the depths it has in either Afghanistan or Serbia.

In sum, the legal framework in Kosovo has enabled NGOs to participate constructively in the transition process in Kosovo. The NGO sector, despite the sometimes negative influence of donor-driven agendas, has grown in numbers and developed its overall capacity during the post-conflict period. Yet while the underlying framework legislation for NGOs is positive, NGOs are greatly concerned about other laws affecting their work and their disintegrating relationship with the government. The state of the NGO sector in Kosovo thus remains in a fragile state, and faces significant challenges in the future. It will be important to ensure that the situation for NGOs in Kosovo does not decline with the enactment of regressive legislation or inhibiting tax regulations.

ii. Recovering Sector in Afghanistan?

The delay in reforming the legal framework for NGOs has indisputably had a negative impact on the atmosphere and environment in which NGOs operate in Afghanistan. NGOs' role in Afghanistan's reconstruction process has been undermined by the distrust and suspicion surrounding their activities. The atmosphere of distrust has hindered the ability of NGOs to carry out their mission in several concrete ways: (1) by requiring advance approval for projects and/or proof of approval with the line ministries (creating project implementation delay), (2) through multiple follow-up requests for documentation and reporting, which are not clearly specified in the law (distracting the NGO from actual project implementation), and (3) by reducing opportunities for partnership with government.

With the new Law on NGOs, there is some indication that the situation is improving. About half of the surveyed NGOs indicated that the legal framework positively affected their ability to carry out their mission, and half noted a continuing negative impact. There was an equally divided response to the question of how the legal framework affected their ability to sustain themselves financially.

The fiscal framework – that is, the tax law and provisions in the NGO Law affecting funding – presents NGOs with both obstacles and opportunities. As for opportunities, the NGO Law does allow NGOs to engage directly in economic activities. In addition, the tax law, which is in the early stages of implementation, does provide for exemptions for those NGOs pursuing certain specified (public benefit) activities. Both of these regulatory approaches are considered good practice, and if implemented progressively, should prove important for NGO sustainability. As for obstacles, some NGOs have practical difficulties in receiving funding from government. Moreover, Article 8.8 of the NGO Law, which prohibits the participation of NGOs in construction projects, presents a direct legal barrier to any activity – and therefore funding support – in this field of work. It is premature to judge the full impact of the fiscal framework on NGOs, but early indications present a mixed picture.

The predominant funding sources for NGOs in Afghanistan are foreign donors, in the form of foundations, international organizations or other grant-making organizations, as well as directly from foreign government donors. This is not surprising. What is somewhat surprising is that NGOs in Afghanistan already are developing more

diversified funding sources, with a substantial number receiving support from individual donors (50%) and from the Afghan Government (40%). Nearly one-quarter of those surveyed generate their own income through fees-for-services. These findings indicate both that NGOs are becoming rooted in their communities and that their opportunities for financial sustainability are relatively diverse.

The single greatest obstacle to the development of civil society and the role of NGOs in the transition process has been the hostile NGO/government relationship, which has increased over time (at least through 2005). Indeed, opportunities for partnership with government have been weakened by the increasingly hostile atmosphere. The Ministry of Economy, in drafting the Law on NGOs in 2005, originally included a provision to prohibit NGOs from *bidding on all government projects*. The government concern stemmed from the perception that NGOs were preventing the growth of the private sector, by competing with for-profit organizations and contracting with the Afghan Government on projects which for-profits are better qualified to complete. Indeed, despite the fact that the Ministry of Health and Ministry of Education had close relations with many NGOs in meeting the needs within their respective fields, the bidding exclusion still received the support of the Cabinet. Fortunately, before the Law was enacted, the bidding exclusion was watered down into an exclusion from construction activity only – thereby leaving NGOs free to bid on government projects in other areas.

In sum, the legal framework in Afghanistan – at least until the new Law was enacted in June 2005 – created confusion and uncertainty among NGOs, and distrust and suspicion between the NGO sector and government. The resulting environment hindered NGOs from participating more constructively in the transition process in Afghanistan. The NGO sector grew rapidly during the post-conflict period, with up to 2355 organizations registered by the time of the moratorium in late 2004. With the new Law, most of these organizations (more than 1600), however, were terminated as a result of their failure to file for re-registration under the new Law, seemingly indicating a disproportionately large number of ‘false’ NGOs or, at least, inactive NGOs. The new Law may be a turning point, helping to restore some clarity to the regulatory framework and some trust between the sectors, but that will depend on implementation. The state of the NGO sector in Afghanistan thus remains in an uncertain state, especially in light of the now deteriorating security situation.²³ Significant challenges facing the NGO sector include questions of capacity and mission delivery, financial sustainability, and especially NGO/government relations.

iii. Stagnating Sector in Serbia?

Since the applicable laws are not consistent with the Serbian Constitution, NGOs operate in an environment of ambiguity and uncertainty. Moreover, the existing laws are not consistent with each other; the FRY and Serbian laws governing registration of associations establish alternative procedures; despite the fact that the federal republic

²³ One should not, however, view the state of civil society in isolation. The capacity and stability of the Government itself, and of Parliament, are both highly uncertain. At the time of writing, President Karzai is highly unpopular in the country, the judicial branch is weak, and Parliament is struggling to establish its credibility. Even the authority of the central government outside of Kabul is highly questionable.

gave way in 2003 to the Union of Serbia and Montenegro, the federal registration procedures is still available. The survey results revealed mixed feelings about the impact of the current legal framework; more NGOs, however, believe the legal framework has a negative rather than a positive impact on their ability to carry out their mission and to attain financial sustainability.

Of substantially greater concern to NGOs than the impact of the law on carrying out their missions or the registration process is the impact of the fiscal framework on financial sustainability. Most organizations surveyed indicated that the laws and regulations, and especially the tax laws, are a major constraint in obtaining funding. Limited tax exemptions, limited donor incentives, confusing VAT exemption procedures, and non-transparent government funding procedures all act to inhibit, rather than sustain, the development of the NGO sector in Serbia. With the legal framework still in need of reform, the government and NGO sectors in Serbia are much further from addressing secondary (but equally important) reform issues, relating to taxation and government funding relationships.

The funding for Serbian NGOs, as is the case in Kosovo and Afghanistan, is still primarily drawn from foundations, international organizations or other grant-making organizations, as well as foreign governments. There are differences, however. In fact, fewer organizations are receiving government funding in Serbia than in Afghanistan, and little support is derived from private donors in Serbia (unlike Afghanistan, at least in the case of individual donors). The lack of diversification in this snapshot of NGO funding is reflective of the lack of legal changes.

Current relations between NGOs and the state are in a precarious, and arguably deteriorating, condition. On the positive side, the preparation of a draft Law on Associations, if enacted, could open a new and improved era for NGOs (and especially associations) operating in Serbia. On the negative side, however, government rhetoric has indicated interest in tightening control over NGOs, along the lines of the recent restrictive reforms in Russia. Moreover, it is not clear that the current government is inclined to enact the draft Law. Until the basic framework legislation is reformed, it is highly unlikely that the government will prioritize regulatory improvements in areas concerning fiscal rules and partnership.

In sum, the current legal framework for NGOs in Serbia negatively influences the ability of the NGOs to operate effectively and to contribute to Serbia's transition. The post-conflict period in Serbia has not witnessed a demonstrable growth of capacity within the NGO sector. Reform to the underlying framework legislation for NGOs is still urgently needed; NGOs are greatly concerned about their fiscal treatment and the potentially disintegrating relationship with government. The state of the NGO sector in Serbia is perhaps best described as stagnant; its growth depends in large measure on the creation of a more enabling legal environment.

II. The Role of NGOs in Supporting Transition and Promoting Stability

A) NGOs in Transition

What is the role of the legal environment in improving NGO capacity as a country transitions from post-conflict to greater stability?

The post-conflict period can be divided into distinct (but overlapping) phases. The first phase, immediately following the conflict, can be called the emergency or crisis phase, in which the primary objective is to provide emergency relief and to respond to humanitarian needs. Second, the crisis phase gives way to the reconstruction phase, in which the primary objective is to re-build and begin to address longer-term needs. Finally, a post-conflict country should transition to a consolidation phase, in which the civil sector strives for a higher level of development and maturity.

During the emergency or crisis phase, NGOs are a primary vehicle for short-term funding to meet emergency and humanitarian needs. Consequently, the predominant concern of both NGOs and donors is ensuring that NGOs are easily able to form and become registered as legal entities or branch offices, thereby enabling donors to provide funding with greater assurance. Most donors are loathe, or at least reluctant, to provide funding to individuals or unregistered groups, as the risks of financial abuse are significantly greater. The legal framework defines the criteria for formation and the procedures for registration that NGOs must follow. It is critical, at this stage, for the law to allow humanitarian groups, foreign organizations, and other NGOs to easily set up offices and launch their activities during the emergency post-conflict period.

As the country transitions from crisis to reconstruction and consolidation, a maturing NGO sector will move quickly beyond humanitarian activities to a broader range of activities, often with a focus on long-term or ongoing needs, including social services, advocacy activities, sector development, etc. Coincident with this natural growth is the need to secure sustainable income sources. The legal framework during these later phases must therefore address a far wider range of needs than those of humanitarian groups. It must be responsive to social service providers, to advocacy groups, to both associations and foundations and possibly other organizational forms, and must provide appropriate mechanisms for partnership and financial sustainability.

In light of the different needs of the different phases of the post-conflict period, it is worth asking if a basic starter law would be helpful at the outset of the emergency, crisis phase, to be followed by a more detailed legal framework to support the sustainability of a diversifying sector during the consolidation phase. On the one hand, the answer may be yes. At the crisis phase, the need for clear, simple rules is clearly preferential to having no rules or vague and ambiguous procedures; a basic starter law would perhaps be easier to get in place to provide these clear rules. A starter law might envision, for example, a centralized registration process in the capital city, since most of the crisis NGOs would likely become established in the capital. Subsequently, with more NGOs forming in the regions and addressing a greater diversity of needs, with more NGOs concerned about sustainability beyond donor funding, clear, simple rules alone may not be sufficient. The legal framework must be revised to respond to the full diversity of the sector's needs and ensure full compliance with good regulatory

approaches. Turning back to our example, the revised regulatory framework might perhaps allow for decentralized registration.

On the other hand, there is risk in such a bifurcated approach. That risk lies in part in the vested interests that may be developed under the starter framework and resist subsequent law reform as threatening to their position. It is certainly natural for privileged groups to seek to preserve their preferred position. For example, in Romania, the adoption of public benefit status in the Ordinance on Associations and Foundations (2000) resulted in those few organizations with public benefit status resisting any reform which would make a broader circle of organizations eligible for this status. Similarly, in Latvia, the few NGOs which were approved to receive tax benefits in an earlier regulatory system later opposed the expansion of the tax benefits to a broader group of NGOs. In East Timor, ICNL was surprised to learn that NGOs that had been previously disadvantaged under restrictive Indonesian laws, when subsequently empowered, opposed law reform, as they wanted to use the same restrictive laws to secure their own advantage over others. Vested interests form within government bureaucracy as well, as has happened in Afghanistan, where the Ministry of Foreign Affairs was determined to preserve its role in reviewing registration applications of foreign NGOs, despite the fact that his review was largely duplicative and unnecessary. Thus, the risk of vested interests arguably cuts against the starter law approach and militates in favor of enacting a more comprehensive enabling law as early as possible in the reform process.

In Kosovo, the enactment of an enabling law early on in the post-conflict period, while empowering the sector in many ways (described above), may have inadvertently lulled the NGO sector into complacency. With the enabling UNMIK Regulation in place, the NGO sector seemed to take the legal framework for granted and failed to invest in increasing its capacity on NGO legal issues. One Prishtina-based resource center – IKDO – was dedicated to providing legal services, but IKDO closed down in 2005, leaving the sector with no legal resource center. Since that time, the NGO sector has found itself without a legal expert organization prepared to provide expertise in support of advocacy efforts against proposed restrictions.

In Afghanistan, NGOs, both foreign and domestic, were able to register under the ambiguous NGO Regulation in place immediately following the conflict (and which remained in place until June 2005). One of the key problems, however, as highlighted above, was that the legal framework failed to clearly define an “NGO” and did not require NGOs to adhere to the non-distribution constraint. As a direct result, a significant percentage (perhaps as many as two-thirds) of organizations registered under the Regulation was actually engaged in for-profit activity, fueling the negative perceptions of the sector as a whole. The failure to clearly define NGOs thus helped undermine the credibility and capacity of the sector overall.

In Serbia, despite the outdated and overlapping laws and the lack of reform, operating NGOs report that the registration process is and has been relatively straightforward and quick. As previously mentioned, the registration procedures under the FRY Law are notably easier than the procedures under the Serbian Law, and therefore most NGOs have opted to register under the former. Thus, NGOs have been able to play a role in the crisis phase of Serbia’s post-conflict period. The NGO sector, however, has never effectively transitioned out of the crisis phase. While the repression of the

Milosevic period has passed, the current government's attitude is still suspicious and sometimes hostile of civil society. Moreover, the NGO sector remains engaged in issues of reconciliation and has not diversified to address a significantly broader set of issues. This may be due in part to the fact that the country as a whole has remained entrenched in the crisis phase and in part to the fact that there has never been any legal reform which would support the maturation and growth in the capacity of the sector. Of course these two causes are closely related; the maturation of the NGO sector is inextricably linked to the development of society overall.

B) NGOs' Role in Stability

How does the legal environment help promote the role of NGOs as a stabilizing force in post-conflict states?

The Hungarian thinker and activist Andras Biro has called NGOs the "schools of democracy."²⁴ Certainly, much has been written on the link between civil society and democracy (as well as the link between civil society and a market economy); we do not intend to address this theme in detail here. Briefly put, laws enable the formation and operation of NGOs and other civil society organizations, which in turn serve as vehicles for people to associate, to express themselves, and to address a wide range of needs in a collective fashion. By acting together through collective entities, citizens have direct experience with consensus decision-making, tolerating multiple points of view, and other behavior consistent with pluralistic, democratic societies. Moreover, through NGOs, individuals have supported ethnic reconciliation, provided basic social services, and contributed more broadly to a range of reconstruction needs – all of which, in turn, contributes to the stability of society.²⁵

More specifically, the legal framework governing NGOs promotes the role of NGOs as a stabilizing force in a number of concrete ways, including the following:

- By clearing defining NGOs;
- By allowing NGOs to be easily formed and registered;
- By helping to ensure appropriate levels of transparency and accountability;

²⁴ According to Nilda Bullain, Executive Director of the European Center for Not-for-Profit Law (ECNL), and former Director of the Civil Society Development Foundation (CSDF) Hungary, Biro made the statement at a CSDF Board meeting.

²⁵ Indeed, it has been suggested that a strong civil society is essential to a strong state and vice versa. "In effect, it is hard to conceive of civil society functioning successfully actually without the state. The citizen, the agent and subject of politics, is simultaneously constrained by the state and protected by it. The state plays an important role in providing the integrative framework within which civil society operates and the latter cannot function properly without that. That framework, which must include a solemnised set of rules by which the political contest is played out, must be accepted as valid by all and must be administered in as neutral a fashion as is consistent with the shared culture of the society in question. This would clearly include the rule of law and the ability of the state to create a degree of coherence without which civil society would rapidly become uncivil and potentially decline into chaos or anomie. But equally, civil society must be free to challenge the state in order to preclude the bureaucratic rationality of state action from attaining the kind of paramountcy that would generate rigidity." George Schopflin, *Civil Society, Ethnicity and the State: A Threefold Relationship*, paper delivered at the conference, Civil Society in Austria, Vienna, 20-21 June 1997.

- By facilitating the flow of funding from donors to NGOs;
- By providing mechanisms for NGOs to partner with the government;
- By protecting the ability of NGOs to engage in advocacy and public policy activities; and
- By supporting the financial sustainability of NGOs.

Of course, the law can serve to enable or hinder the existence and activities of NGOs. Legal barriers to formation and registration, legal gaps relating to governance and transparency, legal barriers to foreign funding, financial sustainability, public policy activity and partnership with government are all too common in many countries. As one example, the Government of Afghanistan, fearing that donor funding was being wasted by NGO recipients, in the Law on NGOs enacted in June 2005, restricted NGOs from engaging in certain areas of activity, including participation in construction projects. This legal barrier has caused much consternation among donors and NGOs in Afghanistan as it at least potentially embraces not only large-scale infrastructure projects, but also community development projects, which envision the construction of a school or health clinic or neighborhood well.

Looking at the phases of the post-conflict period outlined in the prior section, we note how the legal environment can contribute to stability throughout the transition period. First, by enabling NGOs to form and operate quickly, the law helps ensure that the emergency and humanitarian needs of the crisis phase are being met, for it is often NGOs that are best positioned to respond to such needs quickly and effectively. Second, as the country moves toward consolidation, NGOs are able to meet longer-term needs of the population, from social services to health to education; the legal framework can facilitate such activities by supporting constructive partnerships with government and by facilitating financial sustainability. Third, by protecting the expressive rights of NGOs, the law can support the maturation of advocacy NGOs into watchdogs and monitors of government behavior, thereby supporting government accountability, and ultimately the integrity of the state.

C) The Development of Organizational Best Practices

How does the legal framework contribute to the organizational development of NGOs?

The legal framework makes a direct contribution to the organizational development of NGOs by laying the framework – that is, by setting minimum standards – for good internal organizational practices. Internal governance standards and clear procedures to ensure accountability, if defined in the law and implemented accordingly, require NGOs to comply with some defined minimum standard of good behavior. The law can thus be a critical tool to encourage good practices and to develop good governance throughout the sector. “Good governance established early sets a positive course for an NGO’s development for years to come, by encouraging organizational stability and balanced decision-making.”²⁶

²⁶ Marilyn Wyatt, *A Handbook of NGO Governance*, European Center for Not-for-Profit Law, © Marilyn Wyatt 2004.

Concretely, a sound legal framework can use the following legal requirements, among others, to help promote healthy organizational development:

- NGOs must include certain minimum provisions necessary to the operation and governance of the organization in the governing documents of the NGO (e.g., the highest governing body, the minimum number of times it must meet per year);
- The highest governing body must receive and approve reports on the finances and operations of the NGO, at least annually;
- Officers and board members have a duty to exercise loyalty to the organization, to execute their responsibilities with care and diligence, and to maintain the confidentiality of non-public information;
- Founders, officers, board members, and employees of NGOs must avoid any actual or potential conflict between their personal or business interests and the interests of the NGO; and
- No earnings or profits of an NGO may be distributed to founders, members, officers, board members or employees.

Indeed, if minimum standards are not legally required early on in the post-conflict transition process, there will likely be a detrimental impact on the sector over the long term. An inexperienced sector will likely develop poor or inadequate organizational practices, which become more embedded into the culture of the sector over time. Without clear rules relating to conflict of interest, for example, the sector will likely grow accustomed to engaging in self-dealing and to making decisions tainted by conflict. Once embedded as an organizational practice, the challenge to reform such practices through subsequent law reform – or through voluntary codes of behavior – becomes tremendously more difficult.

That said, in the crisis phase of the post-conflict period, it is not unusual for the law to set low barriers to entry to the NGO sector and to fail to include detailed governance rules. As the legal framework develops over time, and embraces a public benefit or tax-exempt status corresponding to fiscal benefits, law and policy makers may consciously link the emerging benefits with more stringent governance and accountability requirements. In this way, early gaps in the legal framework can be addressed through later stages of reform, and organizations will be motivated – by the desire for preferred status and accompanying benefits – to confront and overcome poor organizational practices.

III. Lessons Learned and Recommendations

It is perhaps implicit in this report that countries emerging from conflict face widely differing circumstances as they begin their journeys towards greater stability. The nature of the conflict, local culture, reconstruction needs, and the level of development of civil society pre-conflict, among other things, will differ and will affect a country's approach to the laws governing civil society as part of its post-conflict response. Nonetheless, both the field research and observations from ICNL's work suggest several common lessons that can be taken regarding the role of NGO law reform initiatives in post-conflict societies.

What is the preferred timing of law reform affecting NGOs?

- This study produced evidence that suggests that the enactment of an enabling law governing NGOs early on in the post-conflict period has a positive impact on the capacity and sustainability of the NGO sector. However, the positive impact is dependent on a number of other variables, including how well the law is implemented, the overall political and economic situation, and other factors. This suggests that it is not enough simply to support early development of a progressive new law. In addition, support is needed for implementation of the law, including training of government officials, and development of regulations, forms, and processes that will support fair, consistent and non-partisan application of the law. Moreover, both implementation and NGO capacity building efforts must be designed in light of the conditions in which NGOs and government institutions actually operate during the reconstruction period.

Even where a good law is enacted early on, it is important to continue the process of educating both NGOs leaders and government officials lest the enabling legal environment be taken for granted, leading to a failure to develop a sufficient number of skilled local institutions capable of carrying forward law reform initiatives, or worse, backsliding, as the example of Kosovo demonstrated.

- Delays in law reform, which leave in place an outdated and conflicting legal framework (as in Serbia) or an inadequate legal framework (as in Afghanistan), have negative impacts on the capacity and sustainability of the NGO sector. Not only can poor laws impinge on the ability of NGOs to form, carry out their activities and sustain themselves, but also, they can foster distrust between the government and NGOs sectors, impeding aid and service provision and otherwise impeding reconstruction efforts.

What type of NGO laws are most appropriate in a post-conflict setting?

- Perhaps one way to think about this question is to consider its opposite: what types of laws are clearly inappropriate for NGOs in a post-conflict setting. We have seen in this study at least two types of inappropriate laws governing NGOs. First is the law that is overly restrictive and in clear violation of international norms, such as the law in Serbia. Such laws, in addition to placing a country at odds with its obligations to protect the right to free association under the international conventions to which it is a member, stifle the formation and operation of NGOs and the development of the sector. In Serbia, one consequence has been the failure of the sector to mature.

The second type are those laws, as in Afghanistan, that are overbroad and vague and ambiguous, thereby inviting on the one hand poor organizational behavior (which in turn could lead to a regulatory backlash) or on the other hand arbitrary implementation (which stifles the development of the sector).

At a minimum, then, laws initiated in a post-conflict environment, as in other environments, should comport with international norms governing the right to free association. In addition, it is important to give attention, as the Afghanistan example illustrates, to issues of definition. NGO laws that are precise as to which

type of organizations are covered, and what their basic characteristics are, limit the government discretion to determine ad hoc who may or may not be covered by a law and facilitate better implementation practices.

A third principle is also worth noting. The study has noted that in the wake of a conflict, NGO capacity is often weak for a variety of reasons. Among others, there may have been few formal NGOs prior to a conflict because of repressive practices, or NGOs may not have been able to develop fully. It is often necessary, in drafting an NGO law, to ensure that it is not overly complex and can be applied by small and newly formed NGOs. The case of Iraq is illustrative. In a country where association was discouraged for decades, the CPA introduced a law in which the criteria to form and register an organization were based on the criteria for tax exempt status in the United States. The substantial paperwork required proved burdensome for NGOs to provide and for the newly formed registration body to administer. New NGO laws in a post-conflict environment often benefit, then, from simplicity.

What affects the sequencing of law reform initiatives?

- As the discussion above illustrates, a key factor with respect to the sequencing of post-conflict law reform initiatives is the phase of post-conflict recovery. In the emergency or crisis phase, NGOs serve as a vehicle for short-term funding to meet emergency and humanitarian needs. Consequently, the predominant concern of both NGOs and donors is ensuring that NGOs are easily able to form and become registered as legal entities or branch offices, thereby enabling donors to provide funding with greater assurance. As the country transitions from crisis to reconstruction and consolidation, a maturing NGO sector will move quickly beyond humanitarian activities to a broader range of activities, often with a focus on long-term or ongoing needs, including social services, advocacy activities, sector development, etc. Coincident with this natural growth is the need to secure sustainable income sources. The legal framework during these later phases must therefore address a far wider range of needs than those of humanitarian groups. It must be responsive to social service providers, to advocacy groups, to both associations and foundations and possibly other organizational forms, and must provide appropriate mechanisms for partnership and financial sustainability.

What is the role of NGOs in the law reform process?

- The inclusion of NGOs into a participatory drafting process is critical to the preparation of a law that is fully responsive to practical realities and the needs of those governed by the law. NGO participation can occur in a variety of forms: through cross-sectoral law drafting groups, through the solicitation of comments and feedback on draft laws, made available via email or Internet, or through public discussions, seminars and roundtable events, just to name a few. A fully inclusive process will also support the proper implementation of the law following enactment.

What are the challenges to a participatory law reform process?

- In post-conflict environments, at least initially, there are often limited formal mechanisms for encouraging public participation. For example, where an international authority assumes governing responsibilities, it likely does not have public participation mechanisms in place initially. Where the government in place pre-conflict continues, it may never have had adequate participation mechanisms. The absence of formal mechanisms for engaging public opinion may be further complicated by disruptions in the transportation and communications infrastructure that make conflict with the population difficult.

Where there are limited formal mechanisms for participation, then key stakeholders should support the formation of an informal working group, or legislative drafting group, in which representatives from both sectors participate. In addition, drafters may need to be creative about the ways in which they approach the NGO community; in some instances, NGO laws have been hand-carried to one or more NGOs for comment. In others, regular NGO coordination meetings organized by the governing authority have served as a vehicle for engaging comment about the law. Other informal mechanisms include those mentioned in answer to the question above.

- In most post-conflict settings, civic participation is not deeply embedded in the culture and is not necessarily seen as a useful component of law drafting. The challenges in supporting a multi-stakeholder participatory process are significant in such contexts. Even where law reform is conducted in a participatory way, with the inclusion of NGO representatives alongside government officials, the benefits may be limited where there is frequent turnover of government personnel and NGO staff, as is common in post-conflict countries. This underscores the need for ongoing broad-based education relating to a multi-stakeholder participatory process.
- Another challenge relating to the participatory process is the lack of expertise and legal capacity. NGO representatives have been known to advocate for positions detrimental to the sector and government drafters will often have no understanding either of basic principles of legal drafting or of NGO legal issues specifically. This underscores the need for ongoing broad-based education relating to legal drafting skills and the substance of NGO law.

When are laws to encourage sustainability best addressed?

- Laws to encourage sustainability – that is, laws addressing taxation and public benefit status, regulations affecting public financing, mechanisms supporting partnership – are generally best addressed as ‘second-tier’ issues, after the basic legal framework has been set in place.
- As the situation in Serbia shows, meaningful tax reform is made more difficult when the underlying framework laws are not yet in place.

How can good organizational practices be developed through progressive law?

- By clearly defining NGO organizational forms;

- By clearly setting the minimum standards of internal governance to ensure the transparency of NGOs;
- By clearly defining the means of external government supervision to ensure the accountability of NGOs, as well as appropriate limitations on government supervisory authority.

Conclusion

ICNL appreciates the support of USAID/PVC-ASHA for this project for the opportunity to document and capture the learning of its staff and its partners regarding NGO law reform initiatives in post-conflict environments.

APPENDIX

Methodology Note

This paper is the result of a study of the ways in which the adoption or failure to adopt an NGO law has affected the development and sustainability of the NGO sector in Kosovo, Serbia, and Afghanistan, all jurisdictions that have emerged in the past decade from a significant military conflict. Field data was collected between October 2005 and March 2006.

The methodology for collection of field data was as follows:

- Desk research. ICNL's research team collected written information relevant to the project. This included:
 - A survey of the literature on the role of NGOs in post-conflict reconstruction and on laws affecting NGOs.
 - The relevant laws in each jurisdiction. These included laws in place at the time of the conflict regarding the formation and operation of NGOs and affecting their sustainability (e.g., corporate or profit tax laws, VAT law, laws on government contracts and other government sources of funding), as well as any new laws on the same topics put in place after the conflict.
 - Other sources reflecting on the law reform process in the three jurisdictions, including ICNL reports, USAID Fragile States Strategy; and Counterpart's Afghanistan survey.
- Survey of NGOs. ICNL engaged a local partner in each jurisdiction to conduct a survey of a small sample of NGOs. The purpose of engaging the local partner was to (1) ensure local input into the design and implementation of the survey so that it was tailored to local circumstances; and (2) strengthen the capacity of the partner to contribute to similar field research efforts. The local partner, after a pilot test of the survey, distributed it and collected responses from 30 NGOs with varying missions. The partner collated the responses, and compiled a report summarizing the survey responses.

- Interviews with NGO representatives. ICNL's local partners interviewed six key NGO leaders in each jurisdiction using an interview template supplied by ICNL to obtain further, more qualitative evaluations of how the legal environment post-conflict had affected his or her organization and the sector at large. This information was summarized in the local partner's report.
- Analysis and Drafting. ICNL then compiled and analyzed the information collected, in particular, comparing the survey and interview results from each jurisdiction to determine whether any significant similarities or differences could be identified. We then drafted the report incorporating the key findings from the field research.
- Organizational Learning Workshop. ICNL devoted a meeting of its staff to review of the report, with a focus on capturing organizational experience in a variety of post-conflict environments.

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CIVIL SOCIETY IN POST-CONFLICT SITUATIONS

Transitional Justice, Civil Society, and the Development of the Rule of Law in Post-Conflict Societies

Eric Brahm¹

Looking Forward, Looking Back

Typically, post-conflict reconstruction efforts rightly pay close attention to (re)building institutions that will effectively support the rule of law. Increasingly, the conventional wisdom holds that an important element in establishing these conditions is to seek some form of accountability for gross human rights violations that occurred during the conflict. The field of transitional justice encompasses these efforts, such as trials, truth commissions, and reparations programs, that seek to address past human rights abuses in the post-conflict setting. Uncovering the details of the past may provide both a primer on what conditions permitted the violations of the rule of law in the past and a deterrent to would-be human rights abusers of the future. Therefore, by examining the crimes of the past via such mechanisms as trials and truth commissions, many argue that transitional justice can help develop the institutional basis and the cultural norms to support the rule of law.

Not surprisingly, civil society organizations have often played important roles in promoting and supporting transitional justice experiments around the world. Unfortunately, civil society is often weak, disorganized, and lacking independence in post-conflict nations.² However, where the decision has been made to establish some form of accountability for past human rights abuses, it often reflects the relative strength of human rights groups and organized survivors' groups in pressing the new government to act.³ Increasingly, transnational human rights activists provide additional pressure on states to confront their pasts, as well as expertise on transitional justice to advise governments how to do so. For a peace process to succeed, it also must incorporate not just the combatants and victims, but the society generally. As such, civil society can play a central role in attempts to address past human rights violations by mobilizing broader sections of society to participate and then disseminating the lessons of the transitional justice experience to a wider national audience.

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² Clarke, Gerard (1998). "Non-governmental organizations (NGOs) and politics in the developing world." *Political Studies* 46:36–52.

³ Backer, David (2003). "Civil Society and Transitional Justice: Possibilities, Patterns and Prospects." *Journal of Human Rights* 2:297-313. Skaar, Elin (1999) "Truth Commissions, Trials – or Nothing? Policy Options in Democratic Transitions." *Third World Quarterly* 20:1109-28.

This article provides an overview of the contribution of NGOs and civil society more broadly to efforts to achieve transitional justice around the world. The first section concentrates on civil society within post-conflict states. While conflict conditions often impose severe constraints, the persistence of civil society groups both during and after the conflict goes a long way toward gauging the prospects for transitional justice. Although civil society groups are often the most vocal advocates of transitional justice, their relationship with governments seeking accountability for past abuses is frequently rocky. Second, I examine the role of global civil society in the pursuit of transitional justice after a conflict. Indeed, a growing stratum of activism and expertise has developed in the area of human rights, and these groups have been potent advocates of transitional justice. At the same time, international pressure may sometimes be unwelcome and even counterproductive to the broader goal of social reconciliation that motivates transitional justice. I conclude with some reflections on the relationship between civil society, transitional justice, and the rule of law in post-conflict societies.

Domestic Civil Society and Transitional Justice

Civil society tends to be closely intertwined with the fate of transitional justice. NGOs have often been instrumental in documenting human rights abuses during civil conflict or counterinsurgency actions, which justify transitional justice efforts once the conflict is over. In the post-conflict environment, civil society frequently is a prime advocate of accountability for the past. At the same time, though, civil society has often been a powerful critic of the government's pursuit of transitional justice. In fact, where government action has been insufficient or nonexistent, civil society has sometimes conducted its own investigations into past human rights abuses.

In the midst of civil war or under government repression, civil society commonly suffers. However, many courageous groups have refused to be cowed. At the risk of torture and death, the Mothers of the Plaza de Mayo, for instance, marched in central Buenos Aires demanding that the Argentine military junta reveal the fate of their loved ones who had "disappeared." In the face of government denials, the Mothers drew attention to the government's human rights violations and developed links to the global human rights community. The resulting publicity, in turn, hindered the junta's international diplomacy.

At much risk to themselves, civil society groups have also often worked to document human rights violations under repressive governments. In the Southern Cone, for example, the Chilean Catholic Church-based *Vicaría de la Solidaridad*, the Center for Legal and Social Studies (CELS) and the Mothers of the Plaza de Mayo of Argentina, and Uruguay's office of the regional Service for Peace and Justice (SERPAJ) put pressure on governments before and after their respective democratic transitions, by publicizing the evidence of human rights violations they had collected.⁴ This information

⁴ Bickford, L. (2000). "Human Rights Archives and Research on Historical Memory: Argentina, Chile, and Uruguay." *Latin American Research Review* 35:160-182. Sutil, Jorge Correa (1997). "'No Victorious Army Has Ever Been Prosecuted...': The Unsettled Story of Transitional Justice in Chile." In *Transitional Justice and the Rule of Law in New Democracies*, edited by A. J. McAdams, pp. 123-154. Notre Dame, IN: University of Notre Dame Press.

has often figured prominently in efforts to achieve accountability via trials or truth commissions during the political transition and after.

In the post-conflict environment, civil society continues to serve a vital role in attaining some form of justice for past human rights violations. Where NGOs have been able to survive or revive after the conflict, they can pressure the transitional government to investigate past human rights abuses and to do so in a robust way. Where they have not done so already, victims' groups often emerge in the context of transitions. They clearly have a strong interest in investigation and punishment and, in some instances, wield considerable influence. "Mothers" groups, for example, have been a powerful response to many cases of widespread, systematic violence. At times, civil society can provide a sort of counterweight to perpetrators in the post-conflict context. The latter often retain significant power and have a clear incentive to limit the extent of transitional justice.

Where they exist, domestic groups frequently play a significant role in shaping transitional justice mechanisms. For instance, human rights groups often bring legal expertise and courageous, dogged lawyers who press the judicial system to act upon past human rights violations. In such places as Argentina and Chile, they have crafted innovative legal arguments, such as defining disappearances as kidnappings, in order to get around amnesties and statutes of limitations that had previously obstructed prosecutorial efforts. In Guatemala, the Alliance Against Impunity also worked to ensure that the National Reconciliation Law crafted there would exclude amnesty for gross human rights violations such as genocide.⁵ In addition, civil society has frequently played a role in the construction of truth commissions. In South Africa, NGOs helped draft the legislation that established the Truth and Reconciliation Commission (TRC).⁶ The selection process for commissioners also involved a panel of representatives from government and civil society, and the nominees were widely debated amongst human rights and survivors' groups.⁷ In Guatemala, the Assembly of Civil Society played a crucial role in getting the government and the rebels to agree to a truth commission as part of their UN-brokered peace agreement.⁸ In designing compensation measures, finally, civil society can help ensure that needs will be met and that compensation will be received in the spirit the government intended. South Africa's reparations program, for instance, was established after extensive consultation with survivors' groups, community organizations, and religious groups, as well as South African and international NGOs.⁹ More generally, the strength of human rights organizations and the Church has been

⁵ Popkin, Margaret L., and Nehal Bhuta (1999). "Latin American Amnesties in Comparative Perspective: Can the Past Be Buried?" *Ethics & International Affairs* 13:99. p.116.

⁶ Hayner, Priscilla B. (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. New York: Routledge. p. 235.

⁷ Sarkin, Jeremy (1996). "The Trials and Tribulations of South Africa's Truth and Reconciliation." *South African Journal on Human Rights* 12:617-640.

⁸ Whitfield, Teresa (1999). "The Role of the United Nations in El Salvador and Guatemala: A Preliminary Comparison." In *Comparative Peace Processes in Latin America*, edited by C. J. Arns. Washington, DC: Woodrow Wilson Center Press. p. 271.

⁹ Graybill, Lyn S. (1998). "Pursuit of Truth and Reconciliation in South Africa." *Africa Today* 45.

implicated in explaining the differences in transitional justice policies in the Southern Cone.¹⁰

Post-conflict situations increasingly involve external powers in different capacities. The United Nations has been intimately involved in a number of transitional justice experiments. For example, it contributed heavily to the truth commissions in El Salvador and Guatemala and the hybrid tribunals in East Timor and Sierra Leone. The American invasion of Iraq also created an opportunity to achieve accountability for Saddam Hussein's mistreatment of his own people. In these situations, domestic groups can provide a bridge and a local perspective to international actors attempting to aid post-conflict reconstruction.¹¹ The willingness of the external actors to heed this advice, however, is highly variable.

Even after the form(s) of transitional justice are selected, civil society often continues to play an important role. Groups pressure governments to continue investigations, to fund truth commissions and reparations programs, and to fully cooperate with investigations. Groups pressure governments to continue investigations, to fund truth commissions and reparations programs, and to fully cooperate with investigations. Civil society groups also frequently help with investigations by turning over information they have collected.¹² In addition, given that they tend to enjoy greater credibility in communities, local organizations can sometimes win the cooperation of those who may not trust a governmental entity. Communities' trust also allows NGOs to rally support and resources for exhumation and reburial efforts. As a result, truth commissions or criminal investigators are able to obtain more information than they otherwise would have. Finally, civic leaders frequently serve as commissioners and staff of truth commissions. Commissioners are commonly drawn from a pool of neutral, widely respected members of society, which may include clergy, lawyers, and activists.

Both during and after conflict, civil society groups often provide crucial trauma-support services for victims of human rights violations. Truth commissions and trials rely on the testimony of survivors, but frequently provide little in the way of support to facilitate physical and psychological healing. For many victims, recalling their sufferings can be painful and induce post-traumatic stress. Professional associations and religious organizations in particular often play key roles in this regard. In South Africa, the Centre for the Study of Violence and Reconciliation (CSV) Trauma Clinic and the Trauma Centre for Survivors of Violence and Torture provided counseling and care. Argentina's

¹⁰ Barahona de Brito, Alexandra (1997). *Human Rights and Democratization in Latin America: Uruguay and Chile*, *Oxford Studies in Democratization*. New York: Oxford University Press.

¹¹ Roht-Arriaza, Naomi (2002). "Civil Society in Processes of Accountability." In *Post-Conflict Justice*, edited by M. C. Bassiouni, pp. Ardsley, N.Y.: Transnational Publishers. p. 99.

¹² Investigators, however, sometimes are reluctant to accept help from civil society groups, for fear that it may tarnish the perceived impartiality of the investigation. Boraine, Alex (2000). *A Country Unmasked*. New York: Oxford University Press. p. 65. Hayner, Priscilla B. (2000). "Same Species, Different Animal: How South Africa Compares to Truth Commissions Worldwide." In *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, edited by C. Villa-Vicencio and W. Verwoerd, pp. 32-41. London: Zed Books. p. 38.

Movimiento Ecu  nico por los Derechos Humanos played a similar role there.¹³ Other victims' groups coalesced to provide support for members, including South Africa's KwaZulu-Natal Project for Survivors of Violence and the Khulumani Support Group.

As temporary bodies, truth commissions do not survive long enough to see whether governments act upon their findings. Therefore, civil society often provides helpful pressure to implement the commission's reform recommendations. Private groups also frequently print and distribute truth commission reports when the government does not take an interest. As such, transitional justice efforts focused on reconstructing society can help reenergize civil society groups and refocus their efforts in new directions.¹⁴ NGOs also are significant in developing symbolic reparations programs for victims, such as memorials and other remembrances, both by pressing governments to follow through with plans and by developing projects on their own when government does not act.¹⁵

The relationship between NGOs and trials or truth commissions is not always smooth.¹⁶ In fact, civil society does not always support transitional justice efforts. In Argentina, for example, the Mothers of the Plaza de Mayo wanted nothing to do with the truth commission, because they perceived it as an attempt to avoid full disclosure and accountability for what had been done to their loved ones. What is more, they rejected all proposals for reparations, dismissing it as blood money.¹⁷ In South Africa, different groups had competing ideas about appropriate reconciliation strategies.¹⁸ Groups within both Guatemala and South Africa disagreed as to whether amnesties were appropriate and whether truth commissions were an acceptable substitute for trials.¹⁹ Moreover, van der Merwe notes that, in the South African context, the TRC's goal of national reconciliation sometimes clashed with local groups' focus on community-level healing.²⁰ Finally, in

¹³ Brysk, Alison (1994). *The Politics of Human Rights in Argentina : Protest, Change, and Democratization*. Stanford, CA: Stanford University Press. p. 51.

¹⁴ Roht-Arriaza, Naomi (2002). "Civil Society in Processes of Accountability." In *Post-Conflict Justice*, edited by M. C. Bassiouni. Ardsley, NY: Transnational Publishers. p. 100.

¹⁵ For an overview of the South African case, see Rasool, Ciraj, Leslie Witz, and Gary Minkley (2001). "Burying and Memorialising the Body of Truth: The TRC and National Heritage." In *After the TRC: Reflections on Truth and Reconciliation in South Africa*, edited by W. G. James and L. van de Vijver, pp. 115-127. Athens: Ohio University Press.

¹⁶ Hayner, Priscilla B. (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. New York: Routledge. p. 237-38.

¹⁷ Lutz, Ellen (1989). "After the Elections: Compensating Victims of Human Rights Abuses." In *New Directions in Human Rights*, edited by E. L. Lutz, H. Hannum and K. Burke. Philadelphia: University of Pennsylvania Press.

¹⁸ Van der Merwe, Hugo (2001). "National and Community Reconciliation: Competing Agendas in South African Truth and Reconciliation Commission." In *Burying the Past: Making Peace and Doing Justice after Civil Conflict*, edited by N. Biggar. Washington, DC: Georgetown University Press.

¹⁹ Wilson, Richard (1997). *The People's Conscience? Civil Groups, Peace and Justice in the South African and Guatemalan Transitions*. London: Catholic Institute for International Relations.

²⁰ Van der Merwe, Hugo (2001). "National and Community Reconciliation: Competing Agendas in South African Truth and Reconciliation Commission." In *Burying the Past : Making Peace and Doing Justice after Civil Conflict*, edited by N. Biggar. Washington, D.C.: Georgetown University Press.

South Africa, many civil society groups felt threatened, because they viewed changing funding patterns as evidence that the TRC was robbing them of financial support.

Where governments are unwilling to investigate human rights violations, civil society groups sometimes go beyond documenting wrongdoing and conduct truth commission-like investigations of their own. For example, beginning in 1979, the Archbishop of Sao Paulo and the World Council of Churches sponsored a clandestine nongovernmental investigation of human rights abuses by the military. Lawyers connected to the Catholic Church checked out documents, which they were legally authorized to do, related to more than 700 cases before military courts and photocopied more than a million pages of records, which were immediately microfilmed with copies sent abroad for safekeeping.²¹ Ultimately, in August 1985, the Sao Paulo diocese published *Brazil: Nunca Mas*, a collection of allegations of torture and murder by government forces since the military takeover in 1964. It became an instant bestseller and kept past human rights abuses in the public eye during the democratic transition.²² In Uruguay, a 1985 SERPAJ report documented the military's human rights abuses from 1973 to 1982 more thoroughly than the government's own truth commission had done, and its findings were more widely distributed.²³ The parliament responded by creating a new truth commission while simultaneously passing a general amnesty.²⁴ In the late 1990s, the Archdiocese of Guatemala City's human rights office conducted its own investigation of human rights violations during the civil war, called the Project for the Recovery of Historical Memory (REMHI), when the UN-sponsored truth commission appeared to be too weak.²⁵ Unfortunately, NGO-gathered evidence of past human rights violations has not often prompted governments to act.²⁶

Global Civil Society and Transitional Justice

The prospect of transitional justice for past human rights abuses is also influenced significantly by transnational activist networks. Before transitions, the global human rights community pressures authoritarian governments on the treatment of their own citizens when domestic groups are unable to do so, in what has been called the "boomerang effect."²⁷ In the post-conflict context, international groups lend support and

²¹ Catholic Church, Archdiocese of São Paulo (Brazil), and Joan Dassin (1986). *Torture in Brazil: A Report [English Translation of Brazil: Nunca Mas]*. 1st American ed. New York: Vintage Books.

²² Pereira, Anthony (2000). "An Ugly Democracy? State Violence and the Rule of Law in Brazil." In *Democratic Brazil: Actors, Institutions, and Processes*, edited by P. R. Kingstone and T. J. Power. Pittsburgh: University of Pittsburgh Press.

²³ Hayner, Priscilla B. (1994). "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study." *Human Rights Quarterly* 16:597-655.

²⁴ Weschler, Lawrence (1990). *A Miracle, a Universe: Settling Accounts with Torturers*. 1st ed. New York: Pantheon Books.

²⁵ Proyecto Interdiocesano Recuperación de la Memoria Histórica (Guatemala) (1999). *Guatemala: Never Again!* Maryknoll, NY: Orbis Books.

²⁶ Backer, David (2003). "Civil Society and Transitional Justice: Possibilities, Patterns and Prospects." *Journal of Human Rights* 2:297-313. pp. 308-9.

²⁷ Keck, Margaret E., and Kathryn Sikkink (1998). *Activists Beyond Borders: Advocacy Networks in International Politics*. Ithaca, NY: Cornell University Press.

legitimacy to domestic NGOs, as well as fledgling transitional governments, in their attempts to achieve accountability for past human rights violations.²⁸ In addition, global civil society can provide expertise and lessons from other countries' experiences with transitional justice, help in raising funds, and lend legitimacy and moral support. Groups such as Amnesty International and Human Rights Watch also have a prominent Internet presence, so their monitoring of efforts to achieve accountability can be disseminated broadly. The international community also can provide technical expertise, as the American Association for the Advancement of Science (AAAS) has in constructing databases for the truth commissions in South Africa, Guatemala, Haiti, and El Salvador.²⁹

For most of the global human rights movement, the optimal end to transitional justice is to punish those responsible for gross human rights violations. Aside from pressuring governments to act, international human rights activists increasingly serve an important role in facilitating the pursuit of human rights trials in other venues when domestic prosecution is not likely. Amnesties, judicial obstacles, or military intransigence may leave few outlets for victims in the fragile post-conflict environment. However, the growth of universal jurisdiction for human rights abuses has provided new venues. Universal jurisdiction principles allow cases to be brought in the courts of other countries without any territorial or nationality basis for jurisdiction.³⁰ When domestic trials were not possible in Chile and Argentina, for example, groups such as CELS and SERPAJ worked with Amnesty International and sympathetic lawyers to bring cases in a number of European countries.³¹

The global human rights community is also embracing a broader array of transitional justice mechanisms. In terms of global civil society's effects on transitional justice, none has been more dramatic than the rapid spread of the truth commission. The truth commission entered the human rights vernacular in the 1980s, as an increasing number of countries experimented with democracy. Many of the earliest experiments with truth commissions were isolated efforts. Although there is some disagreement as to the earliest truth commission,³² they appear to have emerged in Latin America in the early 1980s as Bolivia, Uruguay, and Argentina transitioned to democracy. While activists engaged in regional discussions about constructing the respective truth commissions, the global activist community was just beginning to pay attention. A few more truth-seeking experiments were undertaken in other parts of the world in the late

²⁸ Roht-Arriaza, Naomi (1995). "Conclusion: Combating Impunity." In *Impunity and Human Rights in International Law and Practice*, edited by N. Roht-Arriaza. New York: Oxford University Press. p. 302.

²⁹ Ball, Patrick, Herbert F. Spierer, and Louise Spierer (2000). *Making the Case: Investigating Large-Scale Human Rights Violations Using Information Systems and Data Analysis*. Washington, DC: American Association for the Advancement of Science.

³⁰ For a general overview of universal jurisdiction, see Macedo, Stephen, ed. (2004). *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, *Pennsylvania Studies in Human Rights*. Philadelphia: University of Pennsylvania Press.

³¹ See Roht-Arriaza, Naomi (2005). *The Pinochet Effect: Transnational Justice in the Age of Human Rights*.

³² See Brahm, Eric (n.d.) "What is a Truth Commission? Defining the Universe of Cases." Manuscript.

1980s, but they appeared to be largely independent reinventions of the model. However, by the end of the decade, a limited stratum of international truth commission expertise had developed for promoting commissions in post-conflict circumstances.

The end of the Cold War prompted the expansion of transitional justice in several respects. The number of democratic transitions that accompanied the Cold War's demise presented opportunities to examine past human rights abuses in many countries. In addition, the rhetoric of human rights was no longer hostage to superpower politics. Finally, the Cold War's end unleashed a number of long-simmering conflicts, many of which became ripe for transitional justice later in the decade. As a result, throughout the 1990s, what has been termed the "justice cascade"³³ produced an expansion of global transitional justice expertise. Lutz and Sikkink characterize the justice cascade as the work of nongovernmental actors promoting accountability for human rights violations, acting partly as activists and partly as legal and technical experts. In particular, the expanded use of the truth commission produced a number of commissioners and staff who subsequently became persuasive truth commission advocates on the global level. Although in the early 1990s, the head of the Chadian truth commission could credibly claim that he "had scarcely known that this type of investigation existed in other countries,"³⁴ the explosion of truth commission cases during the subsequent decade made such a claim increasingly implausible.

The Chilean truth commission, known as the Rettig Commission, in the early 1990s served as a bridge to earlier truth commission experiences, in part because it reflected the growing role of global civil society. The new Aylwin government in Chile explicitly drew upon the earlier experiences of Argentina and Uruguay in determining how to approach the human rights violations of the Pinochet era.³⁵ Activists and governments in other Latin American countries, in turn, drew upon Chile's example. Governments and rebel groups in El Salvador and Guatemala agreed to truth commissions as part of United Nations-sponsored negotiations in large part due to the examples of Chile and other Latin American countries.³⁶ There were broader, global consequences as well.

Of the many truth commission experiments around the world, none have proven as important in contributing to the justice cascade and promoting the truth commission model as South Africa. While South Africans have viewed it more critically,³⁷ the South African Truth and Reconciliation Commission (TRC) has received near universal

³³ Lutz, Ellen, and Kathryn Sikkink (2001). "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America." *Chicago Journal of International Law* 2:1-33.

³⁴ Bronkhorst, Daan (1995). *Truth and Reconciliation, Obstacles and Opportunities for Human Rights*. Amsterdam: Amnesty International Dutch Section.

³⁵ Barahona de Brito, Alexandra (2001). "Passion, Constraint, Law, and *Fortuna*: The Human Rights Challenge to Chilean Democracy." In *Burying the Past: Making Peace and Doing Justice after Civil Conflict*, edited by N. Biggar, pp. 177-208. Washington, DC: Georgetown University Press.

³⁶ Hayner, Priscilla B. (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. New York: Routledge.

³⁷ See for example Jeffery, Anthea (1999). *The Truth About the Truth Commission*. Braamfontein, Johannesburg, South Africa: South African Institute of Race Relations.

international acclaim. Its widespread publicity has made it the blueprint for subsequent discussions of truth commission the world over. In fact, though, global civil society helped South Africa craft its commission by learning from earlier experiences. In particular, international experts and truth commission veterans shared their insights at two conferences. Those involved in truth commissions in Argentina and Chile, as well as those involved in transitional justice efforts in Eastern Europe, contributed to South Africa's discussions as to how to deal with the past.³⁸

With the attention paid to South Africa's TRC, it is not surprising that many associated with it have become influential advocates amongst global civil society. TRC Chair Desmond Tutu already had a high profile as a Nobel Prize winner; he has spoken extensively on the benefits of a truth-seeking approach. Commissioners from the South African, Chilean, and Guatemalan commissions helped recalibrate the Nigerian truth commission after its mandate was initially drawn too broadly.³⁹ Some TRC veterans have even gone on to establish nongovernmental organizations that consult with countries on transitional justice issues. As a result, there is a substantial global epistemic community to support the further spread and refinement of the truth commission idea and transitional justice more broadly.

Two organizations in particular that emerged from the South African experience have been crucial in promoting truth commissions globally: the International Center for Transitional Justice (ICTJ) and the Institute for Justice and Reconciliation (IJR). The ICTJ is by far the higher-profile organization. After opening its first office in New York City in 2001, the ICTJ was working in more than a dozen countries within six months.⁴⁰ Initially led by Alex Boraine, a TRC commissioner, and supported by Paul van Zyl, executive secretary of the TRC, and leading truth commission expert Priscilla Hayner, the organization now has four offices around the world. Consulting with governments and civil society groups, the ICTJ promotes a comprehensive approach to transitional justice that includes not only truth commissions, but also prosecution, reparations, reconciliation processes, and institutional reform. Its size is both strength and weakness: while it has a global reach, there is the risk that it will adopt a one-size-fits-all approach, a potential problem that its officials recognize. The IJR, by contrast, has more quietly advanced the cause of transitional justice, reconciliation, and democratic development since 2000. Restricting its work to Africa, the IJR explicitly draws lessons from South Africa's transitional experience to suggest a path for other post-conflict societies.

International involvement with a nation's transitional justice is not always a plus. It may give those who oppose transitional justice the chance to dismiss the effort as foreign. Support from international civil society may also keep governments from paying

³⁸ The conferences resulted in two books: Boraine, Alex, and Janet Levy, eds. (1995). *The Healing of a Nation?* Cape Town: Justice in Transition. Boraine, Alex, Janet Levy, and Ronel Scheffer, eds. (1997). *Dealing with the Past: Truth and Reconciliation in South Africa*. Cape Town: IDASA (Institute for a Democratic Alternative for South Africa).

³⁹ Hayner, Priscilla B. (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. New York: Routledge.

⁴⁰ The number has risen to more than thirty, including virtually every country in which a truth commission has been created since South Africa's TRC completed its work. See <http://ictj.org/en/where/overview/> [accessed September 8, 2006].

heed to domestic civil society. In South Africa, for example, the TRC responded to critics by pointing to its international supporters.⁴¹ Active international interest in transitional justice may also produce a confrontation with the past before the society is ready. For example, investigations are unlikely to be effective when fighting is ongoing, which may discredit transitional justice and make it unfeasible at a later, more suitable time.⁴²

Conclusion

The fates of civil society and transitional justice are often closely tied in post-conflict situations. Particularly in concert with transnational activists, a robust civil society is better able to press for transitional justice. At the same time, where civil society is weak, trials, truth commissions, or reparations programs might serve as a catalyst to develop civil society organizations. Of course, it is less likely that any form of transitional justice will exist without pressure from local and global civil society. The lack of transitional justice in the immediate post-conflict period, however, may prompt survivors' groups and human rights activists to mobilize for action in the future.

Transitional justice can strengthen the future rule of law. For instance, accountability for past human rights abuses sends a message to potential human rights abusers of the future that they will face sanction should they proceed. In addition, perpetrators may lose their military or political support as a result of exposure. A clear condemnation of past human rights violations may also make such behaviors less socially acceptable. While digging up the past poses a risk of angering perpetrators and disrupting transitions,⁴³ demands for justice, with civil society often playing an instrumental role, tend to persist if victims are not satisfied, as the cases of Chile and Argentina illustrate. Victims, too, may resort to vigilantism should legal outlets be completely cut off.

In fact, how transitional justice measures affect post-conflict societies is not yet clear. Although such measures hold strong moral appeal, the empirical evidence is rather thin. The spottiness of trials for human rights violations suggests a weak deterrent effect. Conducting trials rather than summary executions, however, demonstrates a commitment to the rule of law.⁴⁴ Beyond sending a message to those in power and punishing perpetrators, the effects of trials are frequently limited. Truth commissions may be more effective in this regard. For instance, truth commissions recommend reforms intended to prevent any future repetition of such abuses. These recommendations have often targeted

⁴¹ Crocker, David A. (2000). "Truth Commissions, Transitional Justice, and Civil Society." In *Truth v. Justice: The Morality of Truth Commissions*, edited by R. I. Rotberg and D. Thompson, pp. 99-121. Princeton: Princeton University Press. p. 117. Isaacs, Anita (1996). "International Support for Democratization: A Map and Some Policy Guidelines Derived from the Four Case Studies." In *Beyond Sovereignty : Collectively Defending Democracy in the Americas*, edited by T. J. Farer. Baltimore: Johns Hopkins University Press. pp. 281-2. Nino, C. S. (1991). "The Duty to Punish Past Abuses of Human Rights Put into Context – The Case of Argentina." *Yale Law Journal* 100:2619-2640.

⁴² Hayner, Priscilla B. (1996). "Commissioning the Truth: Further Research Questions." *Third World Quarterly* 17:19-29.

⁴³ Snyder, Jack L., and Leslie Vinjamuri (2003). "Trials and Errors: Principle and Pragmatism in Strategies of International Justice." *International Security* 28:5-44.

⁴⁴ Minow, Martha (1998). *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston: Beacon Press. Ch. 3.

the judiciary, police, and armed forces. Although the overall implementation record of such recommendations is not good,⁴⁵ in some instances the recommendations appear to have prompted significant police and judicial reform.⁴⁶ By producing an authoritative history of the conflict, truth commission reports may also serve an educational role: on the individual level, South Africans who more closely followed the TRC's work were more supportive of the rule of law.⁴⁷ In general, however, the consequences of transitional justice for future social and political development require further study.

⁴⁵ Hayner, Priscilla B. (1996). "Commissioning the Truth: Further Research Questions." *Third World Quarterly* 17:19-29.

⁴⁶ Brahm, Eric (2006). *Truth and Consequences: The Impact of Truth Commissions in Transitional Societies*. Ph.D. diss., University of Colorado at Boulder. See especially chs. 5-8.

⁴⁷ Gibson, J. L. (2004) "Truth, Reconciliation, and the Creation of a Human Rights Culture in South Africa." *Law & Society Review* 38:5-40.

CIVIL SOCIETY IN POST-CONFLICT SITUATIONS

A Role for Young People in Building Post-Conflict Civil Society

Donald J. Eberly and Reuven Gal¹

Young people in national youth service organizations can play a vital role in post-war community reconstruction, in maintaining peace in tense situations, and perhaps in preventing post-conflict sequelae. Nigeria offers an excellent example of the utility of youthful participation in effecting post-conflict reconciliation. In the late 1960s Nigeria was plunged into civil war when one region – called Biafra – tried to break away from the rest of the country. The attempted breakaway can be traced directly to the fact that Nigeria is not a natural country, formed from within. Rather, its borders were drawn by the European powers meeting in Berlin late in the 19th century. They divided people of common language and culture, and they joined people of different cultures.

Biafra failed in its effort to secede, but Nigeria decided it must endeavor to foster national unity. University students and other youth groups called for a national youth scheme, whose first project would be providing relief in war-torn areas. The Committee of Vice-Chancellors called for one year of service by all university students following their first year. After much debate and considerable controversy, Head of State General Yakubu Gowon issued a decree in 1973 creating the National Youth Service Corps (NYSC) to develop “common ties among the youths of Nigerian and to promote national unity.”

In Nigeria in 1962 I dropped in on a biology class in a high school in Benin being taught by a Peace Corps volunteer. I was enthralled by his description of the disease kwashiorkor – as were his students – and stayed for the whole class period. Only a few teachers I had had over the years measured up to his standard. In 2004 I dropped in on a high school geography class in Ikenne being taught by a member of the National Youth Service Corps and was equally impressed. I also met with 16 other NYSC cadets serving in the same area; all were from other parts of Nigeria, most were teachers, a few worked in village administration and one was a physician. All were serving in the fields in which they received their university degrees. (DJE)

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Mr. Eberly and Dr. Gal are the authors of the newly published book *Service Without Guns*, available at www.lulu.com, from which this article is adapted. Copyright 2006 by Donald J. Eberly and Reuven Gal. Reprinted by permission.

The NYSC requires all university graduates to serve for one year in a part of the country different from where they grew up. Following a quasi-military orientation period, Corps members are posted to their places of assignment where they are expected not only to work for eleven months in a regular job, but also to initiate community development projects in the areas they serve.

Corps members serve in their professional areas. Agricultural graduates advise farmers on crops and pesticides, while English majors teach high school English. The government provides stipends for them. After service, Corps members are brought together again to discuss their experiences, participate in a parade, and receive Certificates of National Service that entitle them to be employed in Nigeria. Although neither entering members nor their families like postings to distant parts of Nigeria, a study of ex-Corps members posted away from home showed that in retrospect, only one in ten viewed the experience as negative, with the rest judging it positive (Enegwea, 1993). A summary of an account given by former Corps member Alhaji Sani Garba portrays life in the community-development aspect of NYSC. Garba's summons to NYSC duty saddened him, "as he viewed it as a year of suffering and hardship, and did not want to be deployed from the north to the southwest – it was a long way from his parents." The summary continues (Community Service Volunteers, 1998):

Following his three-week-orientation, he was posted to a remote village with no transport, no electricity, no clean water, and poor sanitation. He had to stay and learn how to survive, because the assigned location could not be changed. Money was minimal, so he used his elementary school carpentry skills to build a bed, and make a mattress from the grasses. His demonstration of mattress-making inspired the whole village to make mattresses. As sanitation was poor, he worried he would get sick, so he built a pit latrine (there were no facilities prior to this). He also helped the villagers to dig mini-wells to find clean water. He said, "The community learnt a lot from me and I learnt a lot from the community.... I went in a Northerner and came out a Nigerian."

While nearly all university graduates serve in the NYSC – there are a few exemptions based on such factors as age and army service – the annual enrollment of about 100,000 suggests the magnitude of its impact, both on societal needs in areas such as health and education, and on the promotion of understanding among the Yorubas, Ibos, Hausas, and other cultural groups.

Although the Nigerian case is perhaps the most direct example of utilizing youth participation to foster post-conflict reconciliation, service by young people appears to be a common element in the various patterns of building post-conflict civil societies.

While still under British mandate and before the Jewish state was created in 1947, Jewish leaders had established various paramilitary groups and pioneer youth movements, which they described to the British overlords as nothing more than Boy Scout troops. In truth, much of the underlying rationale for these youth groups was to develop a cadre of young people trained in military discipline, capable of going on long marches through the desert, and ready to defend the nation state when the time came. Those cadres, known as PALMACH ("Striking Squads"), played a major role in Israel's War of Independence (1947-1948). With the birth of Israel, and its subsequent wars with

its neighbors, Israel has maintained a high state of readiness combined with a high level of participation by young people.

Both young men and women are conscripted into the Israeli armed forces. As recently as the 1980s, more than 75 percent of Israeli young people did military service. But by 2000, the number had declined to almost 50 percent as the army became increasingly professionalized. The low participation rate concerned many Israelis, who viewed service by young people as vital to national development and as a rite of passage to adulthood.

A number of civic service programs – called Sherut Leumi – have developed over the years in response. An example is Bat Ami, an NGO that recruits some 3,000 religious young women for a year or two of social service. Another 1,000 young women of varied beliefs serve in Shlomit, which by 2000 had expanded to include a few Arabs and young men in their service projects too. The Israeli army assigns the women to civilian service activities, sometimes alongside those in Bat Ami and Shlomit. Together, the various civic service programs in Sherut Leumi include some 7,000 young people in full-time, year-round service. Since all but a few of them are women, that equals about 12 percent of the single-year cohort of young women.

The proportion of young Israelis performing civic service would increase if a proposal made by one of the authors (Reuven Gal) and others were adopted. The proposal calls for universal civic youth service on the part of all Arab and Jewish citizens in Israel who, for whatever reason, were not called into military service. A 1995 survey of Arab high school students revealed that 60 percent would readily enter such a program (Gal, 1995).

Another variation is found in Cuba. The successful military revolution segued into what was termed the “continuing revolution.” The leaders recognized the importance not just of overthrowing Fulgencio Batista's government, but of improving the lives of citizens. The most widely acclaimed accomplishment of Fidel Castro's Cuba was the near-elimination of illiteracy in 1961, largely through the efforts of 100,000 young people who went to the countryside and taught people how to read and write. Although the literacy campaign was a short-term effort, the linkage between school and community has continued:

In Cuba in 1977, I visited a kindergarten where students were weeding the lettuce and radish plants they had planted a few weeks earlier, an elementary school where the children were packaging tea into small bags for sale, a high school where students were making baseballs, a dairy farm which doubled as a residential high school where students took regular high school classes and learned farming by doing chores, and a university where medical students were serving in a clinic. (DJE)

Young Americans' tremendous interest in the Peace Corps was motivated in part by antipathy toward war and conscription for military service, as reflected in the motto of the times, “We want to build, not burn.” They wanted to show that American young people could and should serve on the frontiers of human need rather than the frontiers of battle.

The programs in Nigeria, Israel, Cuba, and the United States are examples of what we refer to as National Youth Service (NYS), by which we mean an organized activity in which young people serve others and the environment in ways that contribute to society. NYS participants normally serve full-time for between six months and two years, receive government or NGO support sufficient to enable them to serve, and have opportunities for reflection. NYS also embraces service-learning, where students use their education to serve others and, at the same time, reflect on their service experiences to inform their learning.

It is worth noting that each of the youth service programs described above is more than 30 years old and is still going strong. It is also worth noting that similar NYS programs have developed in a variety of countries for a variety of reasons. For example, Canada's Katimavik seeks to improve cross-cultural understanding; Chile's Servicio Pais, to give university graduates firsthand experience in rural communities; China's Poverty Alleviation Relay Project, to foster education and development in the rural and western parts of the nation; and India's National Service Scheme and Costa Rica's Trabajo Comunal Universitario, to acquaint university students with national needs while broadening their education. Perhaps most noteworthy is Germany's Zivildienst. It began in the late 1950s, as an alternative to required military service for a handful of conscientious objectors. By 2000 – following a number of changes that virtually let young men choose between military and civilian service – 38 percent of young men planned to enter Zivildienst, compared to 30 percent who planned for military service.

The relevance of these examples of NYS to building post-conflict civil societies is fortified by an analysis of the ways in which societies can recover from the effects of conflicts.

The Nature of Wars and Their Aftermath

There is congruence between the characteristics of certain wars and the characteristics of their aftermaths and recovery periods.

Total wars, between two or more states or between coalitions of state-allies, can end in a decisive victory or in a more ambiguous conclusion. Thereafter, each side licks its wounds and engages in its own postwar reconstruction.

By contrast, *civil wars*, or *protracted conflicts between neighboring entities*, last a long time, rarely produce clear winners and losers, and typically end because of a stalemate, both sides' exhaustion, external intervention, or some combination of these factors. A civil war often involves countless communities where neighbors suddenly find themselves fighting one another. It is frequently not a war between longstanding enemies, but a war between those who were once friends, neighbors, and colleagues. The conflict and resulting distrust can quickly destroy any social norms of civic-minded behavior.

Furthermore: typically a total war is identified with the top leaders – as was the case in World War II with Hitler, Stalin, Churchill and Roosevelt – and centrally organized military corps, fully obedient to a clear hierarchy of authority, conduct the war itself. The entire population, across all its communities, feels strong identification with the “collective” homeland.

By contrast, in almost all civil wars, the leadership is not clearly distinct, the fighting is frequently conducted by different militia groups varying in their ideological reasoning, and the local and communal identity many times exceeds the collective identification. Again, the historical illustration could be seen at the turn of the 21st century in the Middle East, among both Palestinians and Israelis. These characteristics of civil wars were also very apparent among the Catholics and Protestants in Northern Ireland, in the civil wars in Nigeria and South Africa, and also in the former Yugoslav states.

When the fighting stops, community rehabilitation is as critical as individual rehabilitation. Rebuilding the social fabric and the mechanisms for civic engagement can be singularly challenging. Enemies during the recent ethnic or religious conflict must learn to be neighbors, friends, and colleagues once again. Communities must again create a sense of joint purpose, with networks of trust and mechanisms for citizens to involve themselves in collaborative problem-solving.

The cause of the war, then, determines the conduct of the war – which, in turn, shapes what happens after the war. It is not only “*la guerre comme la guerre*,” but also “*la post-guerre comme la guerre*.”

So, in the period following a civil war or a protracted ethnic conflict, the communal, grass-roots, civic level becomes crucial. Restoring the civic infrastructure is no less important than restoring the physical infrastructure. Furthermore, when one adversary group in the civil war emerges with a confident self-identity, it seemingly becomes more tolerant toward the “other.” Confidence breeds tolerance; insecurity breeds intolerance. Sturdy senses of self-identity, then, can help bring about a stronger, more equitable solution to the conflict. This was indeed the case in Northern Ireland and in South Africa; and this will happen in the Middle East and in Southeast Europe. In some respects, events in the former Yugoslav countries reflect that process, albeit predominantly at the national rather than the communal level. The election outcomes in Croatia, Serbia, and to a certain extent Bosnia-Herzegovina show people turning from extreme nationalism to more tolerant positions.

Modes of Recovery and Community Reconstruction

After (or during) mass disasters, mental-health professionals seek to help affected civilians, especially children, recover from the trauma and prevent any long-term impairments such as post-traumatic stress disorder. Ordinarily, this help comprises mental support, expressions of empathy, and acknowledgment of legitimate post-distress difficulties. In more serious cases, the treatment seeks to strengthen idiosyncratic coping mechanisms. Depending on the individual, these coping modes can fall into one or more of the following categories:

- *affect/emotional processing*, addressed through such methods as enabling the expression of unconscious or repressed emotions (“abreaction”) and transforming uncontrollable anxieties into tolerable fears;
- *cognitive processing*, addressed through such methods as reframing the situation and manipulating the person’s cognitive appraisal; and

- *active-behavioral processing*, addressed through such methods as encouraging active behavior and practicing preferred behavioral patterns.

Nowadays, both local and international projects mobilize to provide such help in areas undergoing severe trauma, whether the trauma originates in manmade evil, such as a war, act of terrorism, or series of atrocities, or natural disaster, such as a hurricane, earthquake, or tsunami. Typically, however, these psychosocial programs limit themselves to traumatized individuals and shattered families.

Only rarely do they expand beyond the family and into the community, the larger society, or the region – but when they do, these more holistic approaches can help the civic fabric. In the wake of a disaster, affect processing, cognitive processing, and active-behavioral processing can and should apply to whole communities, not just to individuals and families. NYS programs, manned by young and typically healthy men and women, can become a major source of help here, in restoring not just community services but the sense of community

In the last twenty years, several key concepts have emerged within the social sciences that shift the focus from individual-based to community-based modes of post-stress recovery. We would like to focus on three examples: Social Capital, Citizenship Behavior, and Service-Learning.

Social Capital. Though occasionally heard earlier, the term *social capital* became widely used only in the 1990s, mostly through the fascinating field research conducted by Robert Putnam. Putnam defines social capital as "features of social organization, such as trust, norms, and networks, that can improve the efficiency of society by facilitating coordinated actions" (1993a, p. 167). James Coleman describes it in greater detail: "The more extensively persons call on one another for aid, the greater will be the quantity of social capital generated.... Social relationships die out if not maintained: expectations and obligations wither over time; and norms depend on regular communication" (1990, p. 321). Coleman also provides *in-vivo* examples that illustrate how social capital can become a powerful basic resource. Here is one (1990, p. 303):

A mother of six children, who moved with her husband and children from suburban Detroit to Jerusalem, describes as one reason for doing so the greater freedom her young children have in Jerusalem. She feels it is safe to let her eight-year-old take the six-year-old across town to school on the city bus and to let her children play without supervision in a city park, neither of which did she feel able to allow where she lived before. The reason for this difference can be described as a difference in the social capital available in Jerusalem and in suburban Detroit. In Jerusalem the normative structure ensures that unattended children will be looked after by adults in the vicinity, but no such normative structure exists in most metropolitan areas of the United States. One can say that families in Jerusalem have available to them social capital that does not exist in metropolitan areas of the United States.

Social capital, then, stands atop social norms, habits, and traditions. But at the day-to-day level, it wields (and gains) its strength through such simple communal

activities as citizens' meetings, neighborhood gatherings, voluntary teamwork, support groups, and social clubs for dancing, music, and games.

A classic way of enhancing social capital is by instituting voluntary youth service within a community or within the diverse communities of a society. Following William James's famous call for a "moral equivalent of war" (1910), numerous youth volunteers, operating through different frameworks in different countries around the world, now serve to foster social capital in their communities. In addition to the examples cited above, American organizations include New York's City Volunteer Corps and Boston's City Year (Goldsmith, 1993).

The NYSC cadets working in remote villages in the post-traumatized Nigeria; the volunteers undertaking psycho-social projects in earthquake-stricken areas of Japan, Armenia, and Turkey; the massive volunteer activities initiated after the 2004 southeast Asia tsunami – all these illustrate young volunteers enhancing social capital and community resilience following a major disaster. The major international aid bodies with which young volunteers work include UNICEF, Medecins Sans Frontieres, Catholic Relief Service, and the Red Cross and the Red Crescent.

In many countries with strife between ethnic or religious minorities, volunteer youth organizations can help minimize civil tension and promote common identity simply by example: they show that youth from all demographic categories can work effectively together, the melting pot in action (Eberly & Sherraden, 1990). Such is the case, for example, with Canada's Katimavik organization, where youth of French and English background serve together in different provinces, as well as Nigeria's NYSC. Only recently in Israel, young Jews and Arabs have started to serve together in volunteer groups with the aim of easing political and religious tensions, as will be discussed further below.

But *how* does social capital become a strengthening force for community reconstruction?

A huge body of literature, encompassing many field research and systematic observations, decisively answers this question (see, for example, Putnam, 1993(a), 1993(b); Coleman, 1990). These civic engagements and social connections called social capital clearly produce better schools, faster economic development, lower crime rates, and more effective government services. Furthermore, social capital is positively associated with people's health and with the welfare of children (Putnam, 2000). All these findings indicate that a community can recover from conflict or war far more easily if the community has substantial social capital. Its members share higher mutual trust and collaboration, and they exhibit higher levels of well-being.

Citizenship Behavior. Although not as operationally defined as social capital, citizenship behavior is marked, above all, by active participation in the public affairs of one's community (Walzer, 1980). This modern notion of citizenship diverges from traditional *republican citizenship*, embedded in the classical republics of Greece and Rome, which emphasizes loyalty toward the homeland and the performance of civic duties. By contrast, the *liberal tradition* of citizenship, originating in the philosophy of Locke and Jefferson, focuses more on the rights of the citizen, and highly values civic involvement without characterizing it as a duty.

Stemming from this perspective, citizenship behavior means “being familiar with the basic tenets of [one’s] state and respecting them, especially those tenets concerning the effective working of a democracy: the separation of powers, the supremacy of the law, the democratic procedure for electing a government and for legislating, and for reviewing government activities” (Hareven, 1996). Another expression of a liberal version of citizenship behavior is civic initiative. These initiatives can take place in many fields, such as politics, economic enterprise, environmental protection, civil rights, education, and culture. Finally, a higher level of citizenship behavior may involve ameliorating other citizens’ miseries and attending to others’ needs.

Reflecting such a view of citizenship behavior is the proliferation of NGOs in democratic countries. The rise of NGOs and of citizenship involvement in general attests to a growing recognition that “in a civil society not everything depends on government, but citizens can assume a great deal of initiative for change, independently of government, or in cooperation with it.” (Hareven, 1996)

This is exactly the *raison d’être* of most NYS programs: before devoting several years to self-development – whether through higher education, job training, or some other self-interest initiative – a young citizen can model the right “citizenship behavior” by giving a year or two of time and energy to the society. And while the society undoubtedly gains, the youth does, too.

Citizenship behavior, thus, produces two valuable outcomes: a stronger and more effective community, and individuals who feel a sense of empowerment and self-efficacy.

Service-Learning. “Civil society will not survive without a new generation of engaged citizens. Bringing up youth with more entertainment or possessions has produced neither gratitude nor enlightenment. Regulating and controlling has led to rebellion and destructive acts. Dead-end jobs paying little and teaching less are not the answer ... [only] the wisdom of combining service and schooling ... provides a better path” (Kielsmeier, 1998, p. 28). These were the fervent words of James C. Kielsmeier, one of the world’s leading advocates of service-learning. Service-learning is a form of experiential education that combines structured opportunities for acquiring academic skills, reflection on the normative dimensions of civic life, and activity that addresses community needs or assists individuals or families in need (Hunter, 2000).

Service-learning programs are widespread today at all levels of schooling. About 83 percent of schools and universities in Argentina have them, as do about half of schools and universities in the United States. Typically, students at all levels rank these programs among of the most significant parts of their education (Gray et. al., 1999). Furthermore, students who participate in service-learning programs often change their perceptions of democratic governance and the practice of politics, become more willing and more likely to participate in voluntary programs, and gain an enhanced sense of competence and commitment. For illustration, here is one example (Rattanamuk, 2003):

Thammasat University in Thailand instituted the Graduate Volunteer Diploma Program in 1969. Its aim is to help cadets “see their service in the larger context of social justice and social policy rather than simple charity.” Following four months of classroom study related to sociology and rural

development, cadets serve for seven months in rural areas on projects related to such topics as nutrition and soil improvement. The service period includes five days to get together with fellow cadets to reflect on the service experiences, and after service cadets submit a mini-thesis integrating their classroom studies with the learning gained from their field experiences. In 2002, the Thai government was devising a plan to use the GVDP as the basis for engaging some 70,000 university graduates to serve as development volunteers.

To summarize, then, the expanding implementation of service-learning programs throughout the world is transforming many thousands of students from passive members to active participants, from help-seekers to help-providers, from at-risk to at-strength, and from self-centered youth to service-oriented leaders (Eberly & Kielsmeier, 1991).

An Israeli Example

Israel exists under the pressure of continuous wars and struggles. While the repeated wars are between Israel and its Arab neighbors, the struggles mostly relate to Israel's diverse population and minorities. Twenty percent of the population of the Jewish state of Israel are Arabs (both Muslims and Christians). Although citizens, these Israeli Arabs are not allowed to serve in the Israeli conscription-based military (Gal & Sherraden, 1990), nor do they enjoy fully equal rights. This situation has generated repeated tensions throughout the years.

Since the mid-1990s, a major effort has been launched to include Arab youth, between the ages of 18 and 22, in the existing frameworks of voluntary youth service (Gal, 1999). Most of these Arab volunteers, predominantly women, serve in their communities, among their own people. A small number, however, have preferred to serve alongside Jewish women. Researchers at Carmel Institute interviewed these young volunteers after the first year of mixed teams (2000-2001). All the volunteers who served together said that the experience had changed their attitudes. They no longer saw the "others" as a monolithic stereotype, but rather as individuals.

As one Arab girl who, after initial apprehensiveness of serving in a Jewish school and being the only Arab, summarized: "Everyone is equal, and we must move on with life, move past the political situation and continue with our lives."

Several Arab girls reported that serving together "turns your head upside down," that it helps very much to change stigmas and stereotypes. One Jewish girl said about her close Arab friend serving with her: "before anything, she is an individual." (RG)

Arab girls who reported on successfully integrating into the Jewish setting (such as a school) expressed a new sense of connection to the state and a sense of the importance of their contributions, as well as a feeling of being accepted by the greater society and positive feelings about their contributions to it.

The Arab volunteers speak about their desire to feel as part of the country, an attachment to the country, that they gained through their service. As one girl explained: "The actual 'doing' of the national service gave me a certain

connection to the country, a connection which is no longer expressed in words only.” (RG)

One should keep in mind that these testimonies were made only six months after some terrible clashes between police forces and Arab citizens, in the northern region (Galil) of Israel. Thirteen Israeli-Arabs were killed in these riots, many were wounded, and almost all were traumatized. Yet mixed community service prevailed. We hope to see it expand further, and thereby help lead the way toward communal recovery and peaceful coexistence.

Conclusion

Regional tensions, civil wars, and ethnic conflict – as well as natural disasters – are usually handled by military forces or political interventions, on the one hand, or by professional health-care givers, on the other. Another resource, that of NYS, can be brought to bear in these situations. Further, all of those involved in rescue, relief, and rehabilitation must keep in mind the concepts of social capital, service-learning, and citizenship behavior. These resources, in turn, can develop and empower local forces – such as lay leaders, social networks, and support groups – in the crisis aftermath, and thus provide crucial leverage for community reconstruction.

Though the strength of a chain depends on the individual links, the opposite can be true when it comes to recovering communities: the well-being of each individual depends in part on the health of the civic community. The still-developing concepts of social capital, citizenship behavior, and service-learning can significantly contribute to post-conflict and post-disaster recovery.

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ARTICLE

Flat Taxes, Santa Claus, and Charity: The Need to Strengthen Civil Society in Mexico

Michael D. Layton¹

Since the 5th of July the issue of tax reform and its impact on philanthropy and civil society in Mexico has been front-page news in Mexican newspapers. That day one of the leading daily newspapers, *Reforma*, published a story, “Reform Hits Altruism Hard,”² and for weeks the issue has stayed alive in the press and on the airwaves, revealing important cleavages and misunderstandings about the nature of philanthropy, the role of civil society, and the importance of fiscal incentives among the three major sectors – government, private enterprise, and civil society – as well as the political left.

The administration of President Felipe Calderon is proposing a series of reforms to the tax system with the complementary aims of increasing revenue, facilitating tax compliance while cracking down on informality and tax evasion, and strengthening fiscal federalism. Fiscal reform is an urgent issue for the Mexican government, as its tax collection as a percentage of GDP is one of the lowest in Latin America and nearly a third of its revenue comes from the state oil company, PEMEX. These factors severely limit the ability of the state to address pressing social problems.³ The centerpiece of the fiscal reform package presented by the administration is the Business Activity Flat Tax, widely referred to in Mexico by its Spanish acronym, CETU.⁴

In a meeting with business leaders shortly after the *Reforma* article appeared, the head of the Mexican Foundation for Rural Development complained to the President that the new tax did not permit donations to be tax deductible. President Calderon stated that social justice must come before charity as a cardinal virtue and that philanthropic actions were not sufficient to meet the challenge of reducing poverty and inequality in Mexico.⁵

A few months earlier Carlos Slim, the richest man in Mexico and perhaps the world, made a similar assertion. In an interview that was widely reported, he stated, “Our

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² “Golpea reforma altruismo: Dejarán donaciones sin exentar,” *Reforma* (Mexico City) July 5, 2007.

³ “The Business Activity Flat Tax (CETU) Proposal and Its Impact upon Charitable Organizations in Mexico,” www.agendafiscalsociedadcivil.org. For the government’s position, see <http://www.aplicaciones.hacienda.gob.mx/ucs/reformahacendaria/index.html>.

⁴ Ley de la Contribución Empresarial a Tasa Única (CETU), <http://www.aplicaciones.hacienda.gob.mx/ucs/reformahacendaria/index.html>.

⁵ “Inconforma a FCH queja de filántropos,” *Reforma* (Mexico City) July 6, 2007.

concept is more to accomplish and solve things, rather than giving; that is, not going around like Santa Claus.... Poverty isn't solved with donations.”⁶

In a sense, the words of these two leaders, Mexico's most powerful political leader and its most important economic leader and philanthropist, can be taken as representative of the opinion of government and the private sector. Both of these assertions reflect a limited understanding of what civil society organizations do, what their aspirations are, and what impact they can have in the promotion of equitable development in Mexico and in the world.

In Mexico the word charity invokes the Biblical injunction to “feed the hungry and clothe the naked.” I believe that to the extent that a modern, democratic state fails to do these things, such that this responsibility falls into the hands of the church and civil society organizations, it is a social injustice. While it is undeniable that traditional social service organizations (referred to in Mexico as *asistencialistas*) predominate in Mexico, they are not the only members of organized civil society. Nor is the membership of civil society exhausted by the social movements that often block public thoroughfares and governmental offices in the capital.

President Calderon and former President Vincente Fox owe their elections not only to the own political talent and hard work, but also to the creation of the Federal Election Institute (IFE). This institution was created and free and fair elections were brought about in Mexico by civil society organizations like Alianza Cívica, which, together with opposition parties, made it impossible for the authoritarian regime to deny Mexicans the basic right to free and fair elections – which was the motivating force behind the Mexican Revolution in 1910.

But the contribution of organized civil society to Mexico's process of democratization did not end there. While most Mexicans remember the media reports of how the anti-abortion organization Pro Vida abused public resources by buying luxury items, including lingerie, very few recall how this abuse came to light. First, civil society organizations together with leading academics not only demanded that the federal government become more transparent, but also drafted the legislation that became the Federal Law for Access to Public Information, drawing on international experience and allies.⁷ Second, these same key actors have used the law to make sure that government actions, in terms of public policy and spending, correspond to their rhetoric and campaign promises. And they have systematically revealed abuses.⁸

Very few would argue with Mr. Slim's assertion that poverty cannot be ended by donations. Clearly private enterprise generates employment and wealth, while the state has the capacity to tax businesses and individuals and thereby undertake the kind of

⁶ “Billionaire Pokes Fun at Philanthropy,” Mexico City, March 13, 2007 (Associated Press), <http://www.cbsnews.com/stories/2007/03/13/business/printable2563316.shtml>.

⁷ Juan Francisco Escobedo, “El caso del Grupo Oaxaca y de la Ley Federal de Acceso a la Información Pública,” <http://www.saladeprensa.org>, February 2003, Year IV, Vol. 2.

⁸ Presentation by Alejandro Ortiz, Fundar, Centro de Investigación, “International Workshop on Resources, Citizen Engagement, and Democratic Local Governance,” Porto Alegre, Brazil, 6-9 December 2004. <http://www.ids.ac.uk/logolink/resources/downloads/Recite%20writeups/FUNDAR.pdf>.

massive social programs like *Oportunidades* in Mexico necessary to reduce poverty in the long run.

But who holds government accountable to living up to its commitments on this front? Who advocates for greater accountability from the public institutions charged with the responsibility of educating Mexico's children? Where have poverty alleviation innovations, like micro-enterprise, come from? Who has demanded that the private enterprise live up to its rhetoric of being socially responsible by protecting the environment, treating its workers justly, and respecting the rule of law? Too often the private sector sees social responsibility as public relations and a photo opportunity, rather than a means to contribute to the development of the community where it does business.

Civil society organizations play an indispensable role in modern society by inspiring innovation for the public good and by holding public and private institutions accountable for their actions. The statements by the two most politically and economically powerful men in Mexico symbolize the failure of both the private and public sectors to appreciate fully the value and contribution of civil society in bringing about social justice and alleviating poverty. Each of these three sectors has a solemn responsibility and makes a distinct contribution to promoting a more prosperous and just society.

In my view, the President ought to widen his perspective on what civil society has contributed to Mexico's democratization and development. Then he would see this sector as an important ally worthy of his recognition and the support of his administration, as expressed in the aspiration of the Federal Law to Encourage the Activities of Civil Society Organizations.⁹

A recent profile in the *New York Times* said that Carlos Slim likes to boil down his analysis of a business undertaking or the strength of big-league sluggers to a single page, so that all the information most critical to making an investment decision is available at a glance.¹⁰ Ironically he made his "Santa Claus" comment shortly after announcing the creation of a \$450 million foundation for health research and care.¹¹ Two months later Slim made a \$100 million contribution to the Clinton Giustra Sustainable Growth Initiative (CGSGI) in Latin America, an effort to promote sustainable development throughout the developing world, spearheaded by the William J. Clinton Foundation.¹² I truly hope that Mr. Slim has applied the same rigorous analysis to his social investments, and that his philanthropic actions enjoy a "social return on investment" equal to that of his private ones.

⁹ Published in the nation's *Diario Oficial* on February 9, 2004 as "Ley Federal de Fomento a Las Actividades Realizadas por Organizaciones de la Sociedad Civil".

¹⁰ Elisabeth Malkin, "New Commitment to Charity by Mexican Phone Tycoon," *New York Times*, June 28, 2007.

¹¹ "Billionaire Pokes Fun At Philanthropy," Mexico City, March 13, 2007 (Associated Press), <http://www.cbsnews.com/stories/2007/03/13/business/printable2563316.shtml>.

¹² See Philanthropy News Digest, June 23, 2007, "Clinton Foundation Establishes Sustainable Development Initiative in Latin America," <http://foundationcenter.org/pnd/news/story.jhtml?id=181000045>.

During this debate a third front has emerged: the political left. Critics of philanthropy on the left often misunderstand the importance of fiscal incentives in creating a culture of giving. Often pointing to the examples of Bill Gates and Warren Buffett, they criticize the lack of philanthropic giving on the part of Mexico's wealthy, and find in their activities a combination of tax evasion and self-promotion. But these commentators ignore or misrepresent the impact that fiscal incentives have on charitable giving in the United States.¹³ At present the largest inheritances face an estate tax of 45 percent. When Republicans in the country proposed to abolish what they termed the "death tax," a Congressional Budget Office analysis revealed that its elimination would undermine this form of giving, which has led to some of the largest endowments and the creation of the most important foundations in the United States.¹⁴ Some of the wealthiest and most generous Americans – including Bill Gates and George Soros – led a counter-campaign. During the debate in the 1990s over the adoption of a flat tax and the possible elimination of income tax deductibility of donations, an analysis by Price Waterhouse and Caplin & Drysdale came to a similar conclusion: tax incentives are a key factor in motivating charitable donations in the U.S.¹⁵ At the global level there is near universal agreement that providing fiscal incentives to promote donations to public benefit organizations is a best practice.

Only by overcoming the lack of understanding and underestimation of civil society by both political and business leaders can Mexico hope to advance toward a more prosperous and just future. It is clear that civil society organizations in Mexico have a legislative struggle on their hands to promote a legal and fiscal framework more favorable to their activities and financial sustainability; they also have a public relations fight to change perceptions so that political and economic leaders, as well as the political left, better understand the important contributions that organized civil society makes to the social and political development of the nation and the importance of fiscal incentives to promote and fund their activities.

¹³ Enrique del Val Blanco, "¿Filantropía o elusión fiscal?" *El Universal*, July 12, 2007.

¹⁴ Congress of the United States, Congressional Budget Office, "The Estate Tax and Charitable Giving," July 2004.

¹⁵ Price Waterhouse LLP and Caplin & Drysdale, Chartered, "Impact of Tax Restructuring on Tax-Exempt Organizations," April 28, 1997. Commissioned by the Council on Foundations and Independent Sector.