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Letter from the Editor

In this issue, the *International Journal of Not-for-Profit Law* focuses on challenges to cross-border philanthropy. **Douglas Rutzen**, President and CEO of the International Center for Not-for-Profit Law, analyzes the rise of “philanthropic protectionism”: restrictions on cross-border philanthropy that governments have tried to justify in the name of state sovereignty, national security, civil society organization (CSO) accountability, and aid efficacy. **Dr. Oonagh B. Breen**, Senior Lecturer in Law at the Sutherland School of Law, University College Dublin, examines legal and policy aspects of the crackdowns on cross-border philanthropy and proposes ways in which CSOs can respond. Another perspective comes from **Barbara Lethem Ibrahim**, Senior Advisor and Founding Director of the John D. Gerhart Center for Philanthropy and Civic Engagement, American University in Cairo. Focusing on the Arab transitions, she assesses obstacles to cross-border philanthropy and outlines steps for ameliorating them.

This issue also features a summary of the tax provisions for supporting public benefit activities in Poland, written by **Grazyna Piechota, Ph.D.**, of the Faculty of Management and Social Communication, Andrzej Frycz Modrzewski Cracow University.

We gratefully acknowledge Professor Harvey P. Dale and Professor Jill Manny of the National Center on Philanthropy and the Law at New York University School of Law, who convened the conference at which the papers on cross-border philanthropy were presented. For help with manuscripts, we also thank Natalia Bourjaily, Emerson Sykes, and Ivana Rosenzweigova. We thank our authors for sharing their expertise, too. And we invite readers to share their own expertise: We welcome manuscripts addressing legal aspects of civil society, philanthropy, and not-for-profit organizations.

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Cross-Border Philanthropy

**AID BARRIERS AND THE RISE
OF PHILANTHROPIC PROTECTIONISM**

DOUGLAS RUTZEN¹

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

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

Background

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

¹ The author is President and CEO of the International Center for Not-for-Profit Law (ICNL, www.icnl.org). The author is grateful to Brittany Grabel, Betsy Buchalter Adler, Gabrielle Gould, Nilda Bullain, David Moore, Margaret Scotti, Rebecca Ullman, Dima Jweihan, Katerina Hadzi-Miceva Evans, Claudia Guadamuz, Jocelyn Nieva, and Emerson Sykes for their guidance and comments on this article.

An earlier version of this article was presented at the 2014 Annual Conference of the National Center on Philanthropy and the Law, New York University, on “Regulation or Repression: Government Policing of Cross-Border Charity,” October 26, 2014.

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

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

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

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

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

other publicly beneficial objectives. In addition, political theorists associated civil society with social justice, such as the civil rights movement in the United States, the dissident movement in Central Europe, and the anti-apartheid movement in South Africa.

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

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

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

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

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

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

The Orange Revolution caught the attention of other world leaders. While protesters were on the streets of Kiev, President Lukashenka of Belarus famously warned, “There will not be any

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

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

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

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

rose, orange, or banana revolutions in our country.” During the same period, Zimbabwe’s Parliament adopted a law restricting CSOs. Soon thereafter, Belarus enacted legislation restricting the freedoms of association and assembly. If there was a global “associational revolution” in 1994, by 2004 the global “associational counterrevolution”¹¹ had begun.

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

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

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

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

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

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

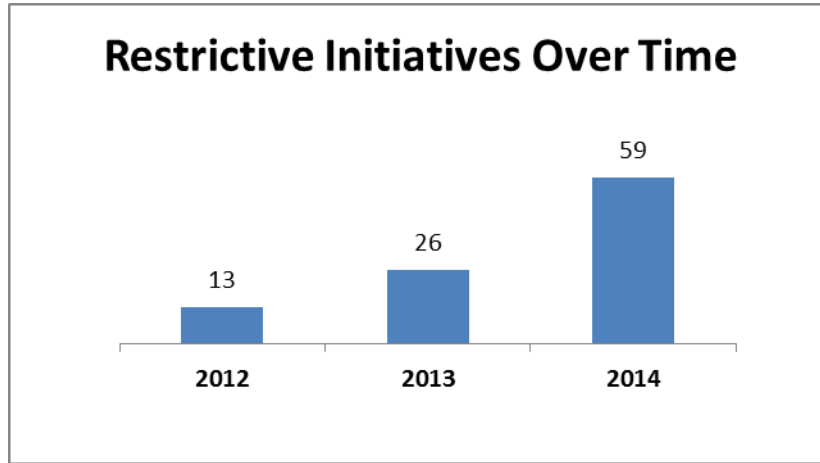
¹¹ Douglas Rutzen & Cathy Shea, “The Associational Counter-Revolution,” *Alliance*, September 2006, <http://www.alliancemagazine.org/en/content/associational-counter-revolution>.

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

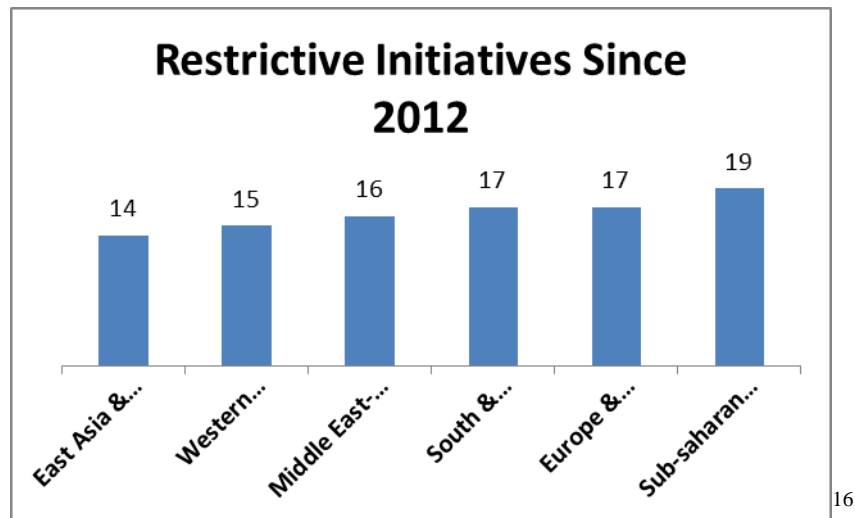
¹³ The Organisation for Economic Co-operation and Development (OECD), “The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action,” OECD, 2005/2008, 1, <http://www.oecd.org/dac/effectiveness/34428351.pdf>.

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

the ninth consecutive year of decline in freedom globally, with sixty-one countries showing overall declines.¹⁵ As demonstrated in the chart below based on ICNL’s tracking data, there was a spike in activity between 2012 and 2014, with the number of restrictive initiatives doubling each year:



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



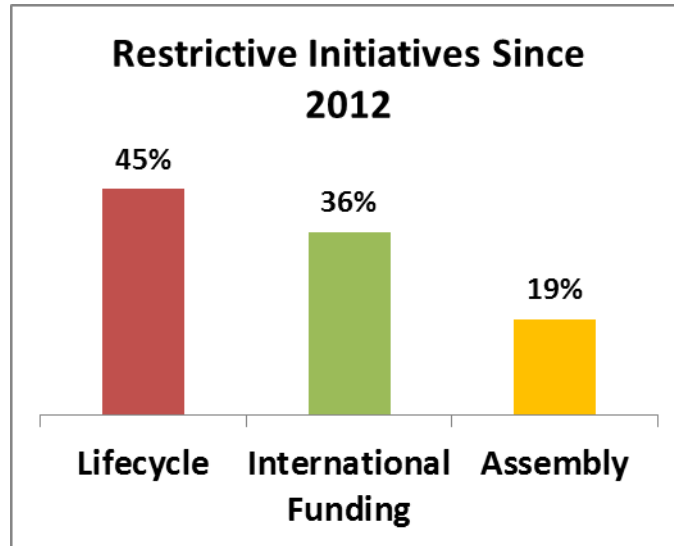
Among these restrictive initiatives, approximately half constrain the incorporation/registration,¹⁷ operation, and general lifecycle of CSOs (so-called “framework” legislation).¹⁸ Approximately

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

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

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

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



Parameters of This Article

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

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

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

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

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

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

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

Restrictions Impeding the Inflow of Philanthropy

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

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

Illustrative examples of each constraint are presented below.

1. Prior Government Approval

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

A. Prior Approval of Every Foreign Contribution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Prior Approval of Organizations Permitted to Receive Foreign Contributions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Caps on International Funding

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

“Income from foreign sources” is broadly defined as “a donation or delivery or transfer made from foreign source of any article, currency or security. Foreign sources include the government agency or company of any foreign country; international agency or any person in a foreign country.”⁴⁸

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

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

4. Mandatory Routing of Funding through Government-Controlled Channels

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

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

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

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

⁵⁰ *Ibid.*, 14.

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

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

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

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

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

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

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

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

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

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

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

5. Burdensome Reporting Requirements

After the receipt of funding from abroad, recipients may be subject to additional requirements—such as the obligation to notify the government or comply with burdensome reporting rules—which, while less severe than the requirement to secure advance governmental approval, may nonetheless impose administrative and other burdens on the receipt of international philanthropy. For example:

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

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

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

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

⁶² Executive Decree No. 57, accessed January 12, 2015, : http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDAQFjAC&url=http%3A%2F%2Fwww.impuestospanama.com%2Fleyes_fiscales%2FImpuestosPanama_2010_Ley_033.docx&ei=yzu0VInRK4KgwSC5IKYDw&usq=AFQjCNFTKANRImo6RUFwtLQrtjIHdzk2Q&bvm=bv.83339334.d.eXY

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

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

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

6. Restrictions on Activities Supported by International Funding

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

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

7. Restrictions on Funding from Certain Countries or Donors

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

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

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

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

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

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

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

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

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

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

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

8. Taxation of International Funding

In several countries, income from foreign grantmakers is subject to taxation unless the foreign grantmaker is included on a government-approved list. For example, in **Russia**, grants can be extended from foreign or international organizations to Russian citizens or CSOs on a tax-exempt basis only if the grantmaker is included on a list of organizations approved by the Russian Government and the grant is made for an approved public benefit purpose. The government list is tightly controlled and the number of approved organizations was reduced in 2008 by Decree #485. Before the issuance of Decree #485, approximately one hundred organizations were on the list, including several private foundations. The decree was subsequently amended to eliminate all private foundations. As a result, grants from private foundations are potentially liable to a 24 percent tax.⁷⁵

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

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

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

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

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

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

⁷⁶ Correspondence on file with the author.

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

9. Counterterrorism/Anti-Money Laundering

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

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

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

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

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

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

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

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

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

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

Laws Impeding the Formation and Operation of Recipient CSOs

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

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

1. Barriers to Formation of CSOs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Barriers to Operational Activity

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

- *Direct prohibitions on spheres of activity.* In **Nigeria**, the registration of any “gay club, society, organization” is banned. Any founder or member of a gay club may be jailed for up to 10 years.⁹³ In **Eritrea**, CSOs are limited to “relief and/or rehabilitation works,” thereby preventing CSOs from engaging in other issues that may be of interest to the philanthropic community.⁹⁴
- *Advance notification and approval.* In **Cambodia**, local CSOs that wish to conduct activities in a province other than where they are registered must inform the local authority five days in advance, according to Ministry of Interior guidelines; in some provinces the guidelines are interpreted as directives that require approval by provincial authorities.⁹⁵ CSOs in **Uganda** must provide the local government with seven days’ advance written notice before making any direct contact with people in rural areas.⁹⁶ A draft law in **Nigeria** would require approval before the implementation of a project or any variation from the project estimate. The bill imposes additional pre-approval requirements for projects addressing the needs of “targeted groups,” an undefined term.⁹⁷
- *Invasive supervisory oversight.* In **Senegal**, the Law on Foundations (Law No. 95-11 of 1995) authorizes the State to designate representatives who sit on the foundation councils (internal governing bodies) with a deliberative vote. These representatives are accountable to the administrative authority that named them. In **Ecuador**, the government may request any document related to the operations of CSOs.⁹⁸ In **Rwanda**, the government may intervene when there is a dispute among a CSO’s board members.⁹⁹ The government exercised this authority, most notably, in replacing the leadership of a prominent human rights organization, LIPRODHOR, in July 2013. In **Russia**, the law allows governmental representatives to attend all of the organization’s events, without restriction, including internal strategy sessions. The government also has the power to conduct audits and demand documents dealing with the details of an organization’s

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

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

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

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

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

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

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

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

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

3. Barriers to International Engagement

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

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

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

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

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

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

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

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

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

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

Government Justifications

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

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

1. State Sovereignty

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

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

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

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

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

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

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

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

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

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

¹¹¹ Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Transparency and Accountability

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

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

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

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

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

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

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

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

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

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

3. Aid Effectiveness and Coordination

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

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

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

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

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

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

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

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

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

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

¹⁴¹ Personal notes of author.

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

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

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

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

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

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

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

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

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

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

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

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

5. Hybrid Justifications

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

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

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

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

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

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

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

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

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

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

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

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

¹⁵³ Ibid.

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

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

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

International Legal Framework

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

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

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

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

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

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

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

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

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

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

¹⁶⁰ *Ibid.*, para. 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Restrictions Permitted Under International Law

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

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.¹⁷⁸

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

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

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

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

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

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

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

Moreover:

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

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

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

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

A. Prescribed by law

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

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

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

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

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

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

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

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

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

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

B. Legitimate aim

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

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

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

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

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

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

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

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

¹⁸⁸ *Ibid.*, para. 30.

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

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

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

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

C. Necessary in a Democratic Society

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

As stated by the UNSR:

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

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

¹⁹⁰ Ibid.

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

¹⁹² Ibid., para. 30

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁰⁴ *Ibid.*

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

²⁰⁶ *Ibid.*, 4.

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cross-Border Philanthropy

**ALLIES OR ADVERSARIES?
FOUNDATION RESPONSES TO GOVERNMENT POLICING OF
CROSS-BORDER CHARITY**

DR. OONAGH B. BREEN*

I. The Context for Cross-Border Philanthropy: Framing the Policy Issue

At what moment in time does government policing of cross-border charitable activities leave the realm of the regulation of civil society and enter the realm of civil society repression? Does the legitimacy of a measure restricting civil society action depend on the legal or political context in which it is made, or are such measures simply transplantable across jurisdictional lines? Research shows that authoritarian regimes are not alone in recent attempts to constrain civic space,¹ with examples of restrictive measures present in semi-authoritarian and democratic regimes alike. From east to west, new restrictions on the rights of NGOs to receive or use foreign funding in their philanthropic work are emerging. From Russia's foreign agents' laws² to Ethiopia's clampdown on human rights organizations supported by foreign aid³ to India's recent decision to disassociate itself from the UN HRC Consensus Resolution on Civil Society Space,⁴ there is growing evidence that countries are viewing NGOs as troublesome adversaries more than as supportive allies. This article seeks to explore the legal and policy underpinnings for these restrictions, which are often imposed in the name of enhancing development effectiveness or efficiency against a backdrop of the host country ownership of the deliberative space. Particular attention is paid to the drivers behind these restrictions and the context in which these measures arise.

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¹ *Second Thematic Report of the Special Rapporteur to the UN on the rights to freedom of peaceful assembly and of association*, Maina Kiai (April 2013), A/HRC 23/39; ICNL, *Legal and Regulatory Framework for Civil Society: Global Trends in 2012-2013* (Vol. 4, Iss. 2, October 2013).

² See Russian Federation Laws on Introducing Amendments to Certain Legislative Acts of the Russian Federation 2006; and *Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-commercial Organizations Performing the Function of Foreign Agents* 2012.

³ Proclamation to Provide for the Registration and Regulation of Charities and Societies 2009 (restricting NGOs that receive more than 10 percent of their financing from foreign sources from engaging in essentially all human rights and advocacy activities).

⁴ Permanent Mission of India, Geneva, Agenda Item 3: Resolution on Civil Society Space, Statement by India in explanation of vote before the vote (27th Session of the Human Rights Council, September 26, 2014).

Understanding the legal restrictions imposed in the name of host country ownership gives rise to two broader questions. First, to what extent should foreign foundations be free to fund their own development priorities when engaged in cross-border philanthropy, or should such donors be required to abide by the policy priorities set by the host country or government? This first question examines the thorny issue of national sovereignty and a nation's autonomy over its destiny and its ability to exclude "outside influence," on the one hand; and the place of civil society—both local and international—in negotiating that space, on the other. The second separate, albeit related, question considers the extent to which a host country should be able, in the name of good regulation, to control local philanthropic activity supported by foreign foundation funding. When does a legitimate regulatory tool in one jurisdiction become a regulatory tool of oppression in another? Can an apparently measured requirement have a far more invidious practical effect on foreign foundations or foundations that enjoy foreign funding than on those organizations enjoying government favor? If the regulatory framework indirectly discriminates against foreign donors or local NGOs enjoying their support, is there a policy mechanism through which these issues can be discussed and resolved?

The context for this "country ownership" debate in philanthropy circles has, in the past and with good reason, focused on the area of development aid. Development experts and economists have debated whether the billions spent on aid for developing countries, particularly in Africa, has helped or hindered those nations and the individual citizens who most need assistance. In his works, *The White Man's Burden*⁵ and *The Tyranny of Experts*,⁶ Bill Easterly makes a strong case that the approach of those he refers to as the "development technocrats" or the "planners" (in short, the aid agencies, the NGOs, the development experts sent out to the field) has been far from successful. He argues that growth comes from within a nation and not from development, and he has urged donors to be much more modest about what they can achieve, bearing in mind the risk that in providing aid, a foreign donor may do more harm than good if such aid undermines the host country's ability to deliver on its national development strategy. Perhaps a more interesting critique, which follows in Easterly's vein, comes from Dambisa Moyo, a Zambian economist who, in her book *Dead Aid*,⁷ argues that development assistance has failed demonstrably and has in fact contributed to poverty in Africa. Moyo makes the case that there are more effective ways of accelerating development outside of foreign aid/philanthropy. The debate to date in this arena has focused very much on larger development/economic growth issues in teasing out the interplay between host country autonomy and foreign donor freedom. This article revisits the development arena but attempts to look at existing problems through a legal lens.

There are other spheres in which the ownership questions at the heart of this paper are equally relevant – for instance, in the sphere that I will call the "non-development arena." A foundation does not have to be operating in a development context before encountering legal restrictions that adversely affect cross-border philanthropic activity. In a first-world context, a foundation established in one country but wishing to operate in the territory of another state may

⁵ William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (OUP, 2007).

⁶ William Easterly, *The Tyranny of Experts: Economists, Dictators, and the Forgotten Rights of the Poor* (Basic Books, 2014).

⁷ Dambisa Moyo, *Dead Aid: Why Aid Is Not Working and How There Is a Better Way for Africa* (FSG, 2010).

find itself subject to restrictions that hinder or undermine its organization's ability to work or, at least, to work as effectively as it might otherwise do. These restrictions may arise in relation to issues of establishment or registration, or in the area of taxation or accountability. On occasion, they may spring from a governmental concern over state sovereignty or security or differing views on the role of democracy and the legitimacy and value of an unelected and perhaps "uncontrollable" civil society. Depending on the context, these restrictions can have serious consequences – sometimes unintended, sometimes very much intended – on a foreign NGO's ability to fund or carry out activities in a host country. Consideration of these issues common to both the development and non-development spheres is important, as it forces us to adopt a critical and hopefully more honest approach to the feasibility of policy proposals.

Part II of this article focuses on the development aid arena, acknowledging the problems that have given rise to a loss of political momentum and the steps taken to reset the international development agenda. Moving away from development, Part III explores briefly the cross-border restrictions hampering philanthropic engagement in the areas of European and international law. To this end, attention is first focused on the European Commission's ill-fated proposal to develop the European Foundation Statute ("EFS") to facilitate greater foundation cross-border interaction within the EU and the legal and political difficulties that this proposal has encountered. Second, and more briefly, consideration is given to the policy reasons advanced to justify emerging, increasingly endemic government constraints on NGOs (whether foreign or foreign-supported) active in the area of democracy promotion and rights-based advocacy. Underlying all three case studies – development and non-development – is the common thread of "host country ownership" and autonomy. Part IV turns to this specific concept in light of the case studies and seeks to understand which institutions represent "the host country" and whether there is an agreed understanding of "ownership" – its scope and its limitations. This article concludes with a review of whether the balance of rights between country ownership and stakeholder/civil society participation therein has been properly struck, and provides a tentative outline of some of the possible tools open to recalibrate the balance between government and civil society power. Judicious use of these tools requires, in the spirit of the Serenity Prayer, knowledge of all avenues and their relationships to each other so that we might have the serenity to appreciate the things that we cannot change, the courage to change the things we can, and the all-important wisdom to know the difference.

II. Contextualizing the Development Aid Agenda – Identifying the Problems

The last forty years have seen dramatic changes in the traditional list of development aid recipient countries. Between 1970 and 2010, 15 new countries joined the list of OECD/DAC supported countries, with a further 35 leaving the aid recipient list during this period.⁸ This shift can be attributed both to the improved rate of economic development and rise in country income level (of those leaving) and to the emergence of new states in need of independent assistance

⁸ OECD/DAC, Development Cooperation Report 2011 (50th anniversary ed., Paris) at 225. Among those joining the recipient list for the first time were China, Albania, Ukraine, and South Africa. Those leaving the list during this period included Cyprus, Singapore, Qatar, Portugal, and Korea.

upon the collapse of the former Soviet Union and the dismantling of the apartheid system in South Africa.⁹

The last ten years have witnessed growing concerns over the effectiveness of aid and the emergence of an international consensus that the aid system was in urgent need of reform. In the first instance, development aid was seen to be part of the problem that it wished to resolve. A proliferation in the number of donors to recipient countries led to a consequent fragmentation of projects.

For recipient host countries, this proliferation gave rise to a series of related problems. First, the large number of development actors increased transaction costs¹⁰ and administrative and reporting burdens on the recipient country.¹¹

Second, the sheer number of philanthropic and development projects (as opposed to more coherent programs) and the attendant complexity of interactions between foreign donors, local intermediaries, government agencies, and ultimate beneficiaries gave rise to principal-agent problems. Host country governments found it difficult to coordinate the various donors and to fully integrate them into the broader national development plan.¹² As effectiveness and efficiency were thereby adversely affected, so, too, ultimately was host country ownership.¹³

Third, aid conditionality could result in the host country being primarily answerable to the donor rather than through traditional parliamentary and budgetary processes of accountability, thereby unintentionally weakening further the domestic political infrastructure. In the words of Barder,

Donors can also have the perverse effect of reducing accountability by enabling line ministries to obtain resources in the form of projects and sector funding which releases ministers from the disciplines of the budget process. Neither the Parliament nor the Cabinet and Finance Ministry can effectively prioritize government spending or hold ministers to account for their performance if a substantial amount of discretionary spending is financed outside the fiscal systems that parliaments use to control the executive.¹⁴

⁹ Guido Ashoff and Stephan Klingebiel, *Transformation of a Policy Area: Development Policy is in a Systemic Crisis and Faces the Challenge of a More Complex System Environment* (German Development Institute Discussion Paper 9/2014) at 16.

¹⁰ William Easterly, "Are Aid Agencies Improving?" (2007), 52 *Economic Policy* 633, at 640-41; Arnab Acharya, Ana Teresa Fuzzo de Lima, & Mick Moore, "Proliferation and fragmentation: Transactions costs and the value of aid" (2006), 42(1) *Journal of Development Studies* 1.

¹¹ See Elliott Morss, "Institutional destruction resulting from donor and project proliferation in Sub-Saharan African countries" (1984), 12(4) *World Development* 465; Yutaka Arimoto and Hisaki Kono, "Foreign Aid and Recurrent Cost: Donor Competition, Aid Proliferation, and Budget Support" (2009), 13(2) *Review of Development Economics*, 276. In an effort to begin to address these issues, the OECD organised the first High Level Forum on Aid Effectiveness in Rome in 2003. It concluded with a commitment by donor governments to harmonize practices in view of reducing transaction costs for partner countries.

¹² Easterly, n. 5, above.

¹³ David Booth, "Aid effectiveness: bringing country ownership (and politics) back in" (2012), 12(5) *Conflict, Security & Development*, 537-558.

¹⁴ Owen Barder, *Are the planned increases in aid too much of a good thing?*, Centre for Global Development, Working Paper Number 90, July 2006, at 17. See also the work of Tony Killick, "Principals, Agents

This would present a problem in any well-developed economy but is particularly acute in the least-developed countries and lower-income countries that tend to be the traditional recipients of such aid.¹⁵ For recipient countries that rely heavily (or exclusively) on overseas development aid, such funding may diminish the host government's political and economic accountability.¹⁶ These countries share a plethora of problems characterized by an absence of working state structures and poorly functioning or insufficiently legitimate governments. The issues faced by fragile or failing states add further complexity to the picture, marked as they are by instability, insecurity, deficits in government, and limited implementation capacity.

Recent moves away from measuring development aid success solely in terms of development outputs ("bean-counting" donation amounts and the number of engagements through projects or otherwise with a host country) to a more systematic consideration of development outcomes achieved (such as achievement of the Millennium Development Goals) has both highlighted the very modest set of achievements made to date while simultaneously demonstrating the empirical difficulties of measuring effectiveness in host countries.¹⁷

In light of these acknowledged shortfalls in the development aid regime, international efforts to reform the aid system began in earnest in early 2000, and as outlined by Ashoff and Klingebiel,¹⁸ comprise four distinct aspects:

- 1) The development in 2000 of the UN's Millennium Development Goals ("MDGs"), representing for the first time goals as content-based yardsticks for measuring development;¹⁹
- 2) The provision of resources for achieving the MDGs in the form of the UN's 2002 Monterrey Consensus on Financing for Development and related EU measures;²⁰

and the Failings of Conditionality" (1997), 9(4) *Journal of International Development*, 483-495 (finding that "conditionality does not meet its promise of greater aid effectiveness . . . over-reliance on conditionality leads to major misallocations of resources and large-scale waste of public monies").

¹⁵ Dean Chahim and Aseem Prakash, "NGOization, Foreign Funding and the Nicaraguan Civil Society" (2014), 24 *Voluntas* 487-513.

¹⁶ German Development Institute, n. 9 above. C.f. Almuth Scholl, "Aid effectiveness and limited enforceable conditionality" (2009), 12 *Review of Economic Dynamics* 377-391.

¹⁷ OECD, *Better Aid: Aid Effectiveness Survey 2011: Progress in Implementing the Paris Declaration* at 15. The report, which reviews the progress made in implementing the targets set by the 2005 Paris Declaration, reveals that at the global level, only one out of the 13 targets established for 2010 was met, however, considerable progress had been made towards many of the remaining 12 targets.

¹⁸ Above, n. 9.

¹⁹ See <http://www.un.org/millenniumgoals/>. The Millennium Development Goals (MDGs) are eight international development goals, established following the Millennium Summit of the United Nations in 2000, following the adoption of the United Nations Millennium Declaration. All 189 United Nations member states (there are 193 currently) and at least 23 international organizations committed to help achieve these goals by 2015.

²⁰ See Monterrey Consensus (United Nations, 2003), <http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf> (last accessed September 18, 2014). See also EU Commission Communication to the Council and the European Parliament of March 5, 2004, Translating the Monterrey Consensus into practice: the contribution by the European Union, COM (2004), 150 final; and progress towards attaining the Millennium Development Goals - Financing for Development and Aid Effectiveness, COM (2005), 133 final.

- 3) The development and rollout of the Paris (2005), Accra (2008), and Busan (2011) Agendas,²¹ which set down principles and procedures designed to ensure effective resource deployment, thereby improving aid effectiveness;
- 4) The broader focus on creating greater policy coherence for international development.

A. *Highways and Byways from Paris to Busan*

From a legal policy perspective, the Paris Declaration, the Accra Agenda for Action, and the Busan Partnership attempt to renegotiate the “development contract” between donor and recipients countries in the first iteration, broadened in later instances to define “country” beyond an individual governing regime to include a role for parliament and civil society actors. The extent to which this latter broadening is fully accepted by all signatory stakeholders remains a question of some debate.²²

The 2005 Paris Declaration set down for the first time a framework of common principles to govern donor and recipient country government interaction, promoting the concept of “host country ownership.”²³ The idea behind this concept is not new – relating to the old principle of helping people to help themselves. The Paris Declaration expressed host country ownership as one of the key commitments of the OCED DAC donor, recipient country, and international organization signatories. Recipient governments agreed to exercise effective leadership over their development policies and strategies and to coordinate development actions, and, in return, donors committed to respect partner country leadership and help strengthen their capacity to exercise it.²⁴ The Paris Declaration, while emphasising the importance of host country ownership, did not spell out which institutions constituted the “host country,” leaving it open to states to define ownership very narrowly as being “host *government* ownership” to the exclusion of other relevant stakeholders. Moreover, it made no reference to the role of civil society in the delivery of effective aid.

The Accra Agenda for Action, which followed three years later in 2008 and again was initiated and driven by the OECD DAC countries, took a stronger political line than Paris. It highlighted the important roles that national parliaments and civil society play in host countries,²⁵ and it expressly called for more effective and inclusive partnerships to occur between civil society, the private sector, and host governments.²⁶ The Accra meeting was the

²¹ OECD, Paris Declaration on Aid Effectiveness (2005) and OECD, Accra Agenda for Action (2008), available at <http://www.oecd.org/dac/effectiveness/34428351.pdf>; and Busan Partnership for Effective Development Cooperation (2011), available at <http://www.oecd.org/dac/effectiveness/49650173.pdf> (last accessed September 18, 2014).

²² Carolyn Gibb Vogel and Mercedes Mas de Xaxás, Making Country Ownership a Reality: An NGO Perspective, (2007), 2(3) Population Action International, available at <http://populationaction.org/wp-content/uploads/2012/01/CountryOwnership.pdf> (last accessed February 3, 2015).

²³ The Paris High-Level Forum on Aid Effectiveness was not the first in the series. The first High-Level Forum took place in Rome in 2003, two years prior to the Paris forum. The Rome Forum discussions focused on why aid was not producing the desired results and how efforts to meet the MDG targets could be improved. It concluded with a commitment by donor governments to harmonize practices so as to reduce transaction costs for partner countries.

²⁴ Paris Declaration on Aid Effectiveness (2005) at [14]–[15].

²⁵ See Accra Agenda for Action (2008) at [13]–[15].

²⁶ *Ibid.* at [16].

first high-level forum to convene a parallel conference for 325 civil society organizations from more than 88 countries. The convening of civil society and the express recognition of its role in the Accra Agenda represented a deliberate attempt to overcome the latter's glaring omission from the Paris Declaration.

B. *The Emergence of Civil Society: From Advisory Groups to Open Forums*

The greater visibility of civil society at Accra was no accident; it had been carefully orchestrated in the intervening years following the Paris Declaration. It began in 2007 when a steering group of civil society organizations (CSOs) called "the BetterAid Coordinating Group" came together with the support of some donor governments to form a temporary multi-stakeholder Advisory Group on Civil Society and Aid Effectiveness (AG-CS). AG-CS provided civil society with a formal link to the OECD and enabled discussions to be held whereby a common understanding could be reached on the part played by civil society in the international development system. The holding of the parallel CSO conference at Accra reflected the achievements of the AG-CS in bringing these issues into the room, if not quite to the table, although many civil society representatives feared that the references to civil society in the Accra Agenda amounted merely to lip service.²⁷

The Accra Agenda for Action (AAA) prompted the civil society community to come together and to initiate a consensus process to define the role of civil society in international development and specifically "to reflect on how [CSOs] can apply the Paris principles of aid effectiveness from a CSO perspective."²⁸ Convening as the Open Forum for CSO Development Effectiveness, more than 70 CSO representatives embraced this challenge in 2008 by meeting to explore the roles played by CSOs in development and how these roles differed from those of official development institutions and donor governments. The objectives of the Open Forum for Development Effectiveness were threefold:

- To achieve a consensus on a set of global principles for development effectiveness;
- To develop guidelines for CSOs to implement these principles; and
- To advocate to governments for a more enabling environment for CSOs to operate.

Following a worldwide consultation process, involving thousands of CSOs in more 70 countries and two global assemblies (in Istanbul in 2010²⁹ and in Siem Reap in 2011), a consensus was reached on the content of the Principles and a Framework for Development Effectiveness. The Istanbul Principles, as they have become known, set out the conditions for effective CSO participation as development actors. They focus on civil society promotion of human rights, gender equality, people empowerment, and environmental sustainability. They

²⁷ See Tina Wallace, "On the road to Accra, via Canada and County Kerry" (2009), 19(6) *Development in Practice* 759, at 762 (noting that civil society the delegates "were reminded – gently at first but then more persistently – by some of the donors and members of the advisory group that there was no chance of challenging or changing the PD at Accra; politically there was very little room for manoeuvre. All that was possible was to bring forward an amendment or two, acknowledging the role of CSOs and the need for their inclusion in future PD work.").

²⁸ Accra Agenda for Action, [20].

²⁹ Involving the participation of 170 CSO delegates from 82 countries.

also commit CSOs to realizing positive sustainable change, practicing transparency and accountability, sharing knowledge and mutual learning, and pursuing equitable partnerships.³⁰

The International Framework for CSO Development Effectiveness, agreed at the Siem Reap Global Assembly in Cambodia in 2011, expanded on the Istanbul Principles by explaining the significance of each principle and elaborating on how civil society is already implementing them. Starting from the Accra Agenda recognition that CSOs are “independent development actors in their own right” and the commitment of AAA signatories to deepen their engagement with them,³¹ the framework for CSO Development Effectiveness sought to identify the critical conditions for enabling CSO involvement in the development of government policies and practices. The need for an enabling environment for CSOs is captured well by the framework agreement, which notes:

In almost all countries, CSOs, their staff and volunteers are experiencing political, financial and institutional vulnerability, arising from the changing policies and restrictive practices of their governments. CSOs are concerned about the impact of these restrictive policies on democratic and legal space for CSOs. This CSO vulnerability is exemplified in the use of pervasive anti-terrorism legislation, more restrictive government financial and regulatory regimes and the exercise of government power to limit “political” activity and sometimes repress CSOs and their leaders, who may be human rights defenders or critical of government policies.³²

Institutional recognition of the difficulties facing civil society came with the UN Human Rights Council’s passing of Resolution on the rights to freedom of peaceful assembly and of association in 2010,³³ which bestowed further international recognition and legitimacy on the role played by CSOs. This Resolution mandated the establishment of a UN Special Rapporteur to monitor these rights with subsequent UN Resolution 21/16 emphasizing “the critical role of the rights to freedom of peaceful assembly and of association for civil society, and recogniz[ing] that civil society facilitates the achievement of the purposes and principles of the United Nations.”

With the holding of the Fourth High Level Forum on Development Aid in Busan, Korea in 2011, a new milestone was reached with civil society actors participating in the negotiations as full and equal participants for the first time. The Busan Partnership expressly affirmed the work of the Open Forum for CSO Development Effectiveness in recognizing the vital role of these organizations in “enabling people to claim their rights, in promoting rights-based approaches, in shaping development policies and partnerships, and in overseeing their implementation.”³⁴ It

³⁰ See http://cso-effectiveness.org/IMG/pdf/final_istanbul_cso_development_effectiveness_principles_footnote_december_2010-2.pdf (last accessed September 25, 2014).

³¹ See n. 28 above.

³² See n. 30 above, at 22.

³³ A/HRC/RES/15/21, October 6, 2010. The Human Rights Council renewed its commitment to promote and protect the rights to freedom of peaceful assembly and of association, by adopting [resolution 21/16](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/21/16), http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/21/16 (October 2012) and [resolution 24/5](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/24/5), http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/24/5 (October 2013).

³⁴ Busan Partnership for Effective Development Co-Operation, Fourth High Level Forum on Aid Effectiveness, Busan, Republic of Korea, 29 November-1 December 2011, at [22], available at <http://www.oecd.org/dac/effectiveness/49650173.pdf>.

endorsed CSO usage of both the Istanbul Principles and the International Framework for CSO Development Effectiveness, and it called on signatories to Busan to:

implement fully our respective commitments to enable CSOs to exercise their roles as independent development actors, with a particular focus on an enabling environment, consistent with agreed international rights, that maximises the contributions of CSOs to development.³⁵

To a degree, the Busan Partnership agreement reset the stakeholder debate in more ways than one. Civil society was joined at the negotiation table by another set of new entrants in the form of the BRICS countries,³⁶ enabling the reform process to be called a truly global partnership and recognizing the changes in development partnerships beyond North-South aid to South-South cooperation.³⁷ Complementing this move beyond DAC donor countries, a second change, in part spurred by the growing South-South interactions, was reflected in a language shift in Busan away from “aid effectiveness” towards a broader platform of “development effectiveness.”³⁸

C. *Post Busan – Current Developments*

Three years on from Busan, giving full effects to the commitments agreed in the Partnership Agreement remains difficult. Civic space continues to contract in a number of countries – not just in authoritarian and semi-authoritarian states but also more worryingly in nations held out as more normally adhering to the principles of democracy.³⁹ Most recently, the UN Human Rights Council adopted by consensus a resolution on civil society, tabled by Ireland, which enjoyed the support of more than 66 cosponsors.⁴⁰ Drawing on existing principles of international law, the Resolution highlighted crucial points of principle regarding the workings of civil society, restating that:

- The ability of people to collectively solicit, receive and utilise resources is a key component of the right of freedom of association;⁴¹
- National security and counter-terrorism legislation and provisions on funding should not be abused to hinder the work or safety of civil society;⁴²

³⁵ Ibid.

³⁶ Brazil, Russia, India, China, and South Africa.

³⁷ This change is further evidenced by the replacement of the OECD/DAC secretariat, the Working Party for Aid Effectiveness (“WP-EFF” which oversaw Paris and Accra), with the Global Partnership for Effective Development Cooperation in 2012, the steering committee of which has one OECD and one civil society representative, and is charged with overseeing the Busan Partnership deliverables.

³⁸ Busan Partnership, [28]–[29]. On the difference between “aid effectiveness” and “development effectiveness” see Shannon Kindornay and Bill Morton, “Development Effectiveness: Towards New Understandings” in *Issues Brief* (North-South Institute, September 2009).

³⁹ See Douglas Rutzen, “Aid Barriers and the Rise of Philanthropic Protectionism,” in this issue; and Barbara L. Ibrahim, “States, Public Space and Cross-Border Philanthropy: Observations from within the Arab Transitions,” presented at Conference on Regulation or Repression: Government Policing of Cross-Border Charity, National Center on Philanthropy and the Law, New York University, October 23-24, 2014.

⁴⁰ UN Human Rights Council, Resolution on Civil Society Space, A/HRC/27/L.24 (September 23, 2014).

⁴¹ A/HRC/27/L.24 at 10.

- Civil society space is particularly important for minorities, the marginalised and other disadvantaged groups as well as those espousing minority or dissenting views or beliefs;⁴³
- The real and effective participation of people in decision-making processes should be secured, including at the domestic level in the development, implementation or review of legislation, but also at the regional and international levels.⁴⁴

Ten countries proposed ultimately unsuccessful amendments to the initial Irish draft which would have seriously weakened the Resolution had they been adopted. Included among those ten were India and South Africa.⁴⁵ In light of this, India chose to disassociate itself from the Consensus Resolution on September 26. Pinning its objections to the very issue of host country ownership and autonomy, the Indian explanation of its position before the vote declared that:

Civil society must operate within national laws. To treat national laws with condescension is not the best way to protect human rights, even by civil society with the best of intentions. We wish that caution should be exercised in advocacy of the causes of civil society. The Resolution is unduly prescriptive on what domestic legislation should do and should not do. This is the prerogative of the citizens of those countries.⁴⁶

Accusing the Resolution of “fallaciously seek[ing] to make civil society a subject of law,”⁴⁷ the Indian Statement went on to expressly dissociate India from the paragraphs of the Resolution concerning the valuable role played by civil society in the decision-making process regarding legislation; the need to ensure a legally enabling environment for civil society; the right for CSOs to solicit, receive, and utilize funds; the work of the office of the UN High Commissioner for Human Right in the promotion and protection of civil society space; and the right of civil society to unhindered access to regional and international bodies, including the UN.

The Indian perspective on civil society sits in stark contrast to the views expressed in the U.S. Presidential Memorandum to the heads of U.S. government executive departments and agencies, issued on the same day as the UN HRC Consensus Resolution. The memorandum, expressly acknowledging the participation of civil society as fundamental to democracy, directed U.S. agencies engaged abroad to “take actions that elevate and strengthen the role of civil society; challenge undue restrictions on civil society and foster constructive engagement between governments and civil society.”⁴⁸

⁴² A/HRC/27/L.24, Preamble.

⁴³ A/HRC/27/L.24 at 4.

⁴⁴ A/HRC/27/L.24 at 8, 12 and 13.

⁴⁵ The other states that proposed constraining amendments were Bahrain, China, Cuba, Egypt, Russia, the United Arab Emirates, and Venezuela.

⁴⁶ Permanent Mission of India, Geneva, Agenda Item 3: Resolution on Civil Society Space, Statement by India in explanation of vote before the vote (27th Session of the Human Rights Council, September 26, 2014).

⁴⁷ *Ibid.*, at [2].

⁴⁸ Office of the Press Secretary, Presidential Memorandum: Deepening US Government Efforts to Collaborate with and Strengthen Civil Society (The White House, September 23, 2014).

Making sense of these very different attitudes toward the role of civil society in development, the civic space accorded to such entities, and the scope of those rights guaranteed requires a look at the larger policy picture beyond the minutiae of regulation. To appreciate the bigger picture, it is therefore useful to shift the lens of inquiry away from the development sphere and to look instead at the non-development arena in the context of, first, the role of foundations in the European Union, and, second, the role of foundations in opening democratic spaces outside of the international development law field.

III. The Non-Development Arena: Squaring the Circle

The pushback against civil society autonomy and the space in which it operates extends far beyond the realm of development aid and is not limited to authoritarian regimes. Part III seeks to explore the policy drivers behind current trends toward disempowering civil society by examining, on the one hand, intentional pushback, and on the other, the apparently innocuous restrictions promoted in the name of good regulation and governance that have a disproportionately adverse effect on cross-border philanthropy.

A. The Proposal for a European Foundation Statute: Righting Unintentional Wrongs?

According to a 2009 European Commission Feasibility Study on a European Foundation Statute (EFS), an astonishingly high percentage of foundations based in the EU (in the region of 67 percent) engage in international activities.⁴⁹ Although doubts remain over the empirical reliability of the data,⁵⁰ the general trend towards increasing cross-border activities of national foundations in Europe is indisputable. With approximately 110,000 foundations in Europe holding assets in excess of €1,000bn and an approximate annual expenditure in the region of €153bn,⁵¹ it has been estimated that the economic importance of the sector outstrips that of the U.S. foundation sector.⁵² Notwithstanding its scale, foundations wishing to operate in more than one European Member State have faced legal and regulatory difficulties when it comes to establishment, registration, and operation from both a civil law and a tax law perspective. Apart from adversely affecting philanthropic activity, the associated legal costs of these legal barriers to foundations are substantial and estimated to cost foundations between €01m and €178m per annum.⁵³

Consequently, foundations face structural obstacles when they seek to operate on a cross-border basis across the EU. These obstacles take the form of differing legal and fiscal regimes that operate in each of the EU's Member States, with which foundations must comply if established in any of these States.⁵⁴ Imagine, for instance, a donor who wishes to establish a pan-European foundation enjoying charitable tax-exempt status in the EU Member States of Ireland,

⁴⁹ University of Heidelberg, Centre for Social Investment, *Feasibility Study on a European Foundation Statute – Final Report* (2009) at 149 available at http://ec.europa.eu/internal_market/company/docs/eufoundation/feasibilitystudy_en.pdf (last accessed March 11, 2013), hereinafter "*Feasibility Study*".

⁵⁰ *Ibid.*, at 150–2.

⁵¹ *Ibid.*, at 18.

⁵² *Ibid.*, at 2.

⁵³ *Ibid.*, at 178.

⁵⁴ Information for this comparison is drawn primarily from the European Foundation Centre, *Foundations' Legal and Fiscal Environments — Mapping the European Union of 27* (2007).

France, Germany, and Malta.⁵⁵ To establish the organization, French law requires both registration and State approval, and approval is subject in practice (although not in law) to a minimum capital requirement of €1 million. Germany also requires registration and State approval, but the State enjoys no discretion regarding approval; although there is no official minimum capital requirement for establishment, the foundation must have sufficient assets to carry out its purpose, which generally requires a minimum capital requirement of €50,000. Ireland requires registration with the Revenue Commissioners and the Charities Regulatory Authority, with no minimum capital requirement. An organization in Malta must register and, if it wishes to take the form of a “voluntary organization,” must seek State approval. There are *de minimis* Maltese minimum capital requirements, with the prescribed amount being €240 for social purpose foundations and €1,200 for all others.

Once an organization is established, it faces a variety of governance requirements. Ireland alone requires that a majority of the governing board reside within the jurisdiction. French law requires all foundations to appoint an auditor and a substitute and to file annual returns and financial statements with administrative authorities. These reports must be made publicly available only if the foundation receives annual gifts in excess of €153,000 or support from public authorities. By contrast, German law does not have any publication requirement, although if tax exemption is sought, dual filing is required both to State authorities and to the relevant financial authorities. Irish law requires all charities with an annual income of over €100,000 to prepare audited accounts, and until 2014, it imposed a public filing requirement only on incorporated charities.⁵⁶

Concerted efforts by a number of stakeholders in the EU over the past decade have made headway in dismantling existing obstacles to free movement of philanthropy.⁵⁷ The European Court of Justice’s growing jurisprudence has affirmed that the right of free movement of capital extends to non-profit entities.⁵⁸ The Court, spurred on by an active European Commission, has also prohibited tax discrimination between charities based on whether the donor/recipient is

⁵⁵ These four States are chosen simply to illustrate existing national regulatory divergences — a combination of other Member States might not provide the same logistical difficulties but would provide others. Thus as Dube, Rossi & Surmatz point out in *EFFECT* 13 (Summer, 2007), “While you need at least 3,000 Euros to start a foundation in Copenhagen, Denmark, just a short drive across the Oresund Bridge in Malmö, Sweden, there is no such fixed requirement, although your assets should be adequate to pursue your planned purpose for five years. And if you set up a foundation in Cieszyn, Poland, you can run a business activity to generate income for it, but you can’t do so if you set one up just across the Friendship Bridge in Tešín, Czech Republic.”

⁵⁶ Revised reporting requirements are currently being introduced in Ireland as a result of the newly commenced Charities Act 2009. The more stringent reporting requirements are expected to come into effect in late 2015.

⁵⁷ The EU is founded upon a series of fundamental freedoms laid down in the Treaty of Rome, namely free movement of workers, free movement of goods, free movement of capital and freedom of establishment, thereby creating a common market between European Member States in which goods, services, and people flow freely, uninhibited by country barriers. The term “free movement of philanthropy” is used in this vein to express the aspiration of inter-state free movement of charitable donations and activities unencumbered by legal or taxation barriers.

⁵⁸ See Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, [2006] ECR I-8203.

domestic or foreign-based.⁵⁹ As a result of Commission infringement actions since 2005, 28 cases have been successfully closed due to changes in Member State legislation, eliminating discriminatory tax treatment.⁶⁰ Private initiatives, in the form of the Transnational Giving Europe (TGE) Network, have also sought to assist donors in making tax-efficient charitable donations to foreign charities. Established in 1999 and covering 17 European countries, the TGE network assisted more than 6,800 donors to channel €8.5 million to chosen charities across Europe in 2013.⁶¹ Notwithstanding all of these initiatives, foundations across Europe have long called for the creation of a supranational legal form for public benefit foundations to enable them to operate seamlessly throughout the European Union.⁶²

In February 2012, the European Commission published its proposal for a Council Regulation for the EFS⁶³ which, if adopted, would establish a new European legal structure for certain public benefit organizations. Use of this new European form would enable foundations and other incorporated public benefit organizations (but not charitable trusts) to operate uniformly across EU Member States in a recognizable form, thereby dispensing with separate national legal and administrative establishment requirements and barriers to operation. The proposal for the Statute faced innumerable legal and political difficulties. To take effect, the Statute required the unanimous consent of all 28 Member State governments – a feat that the consecutive Irish, Greek, Lithuanian and Italian Presidencies of the European Council ultimately failed to bring about.

So, what made this proposal, concerning as it does a scheme to enable public benefit purposes to be advanced more freely across the EU, so controversial? Or to put the question another way, if it was generally agreed that the introduction of a European Foundation Statute would make philanthropy more effective in the EU, freeing up resources currently spent surmounting legal and fiscal obstacles so that they could be dedicated to achieving public benefit purposes instead, how could Member State objections to its introduction be justified?

⁵⁹ Case C-318/07 Hein Persche v. Finanzamt Lüdenscheid, [2009] ECR I-359; Case C-25/10 Missionswerk Werner Heukelbach v. Belgium, [2011] 2 C.M.L.R. 35; Case C-10/10 Re Taxation of Gifts to Research and Teaching Institutions: European Commission v. Austria, [2011] 3 C.M.L.R. 26.

⁶⁰ See European Foundation Centre and the Transnational Giving Europe network, *Taxation of cross-border philanthropy in Europe after Persche and Stauffer - From landlock to free movement?* (2014), at [3.1], available at http://www.efc.be/programmes_services/resources/Documents/TGE-web.pdf; see also F. Liberatore (2012), “Tax Aspects of the Commission’s Proposal for a European Foundation Statute,” presented at ERA, A New Legal Form for European Philanthropy: The Commission’s Proposal for a European Foundation (FE) Statute, Brussels, October 30–31.

⁶¹ See EFC and TGE, n. 60, above. See also <http://www.transnationalgiving.eu/tge/default.aspx?id=219948&langtype=1033> (last accessed January 30, 15).

⁶² See European Commission, DG for Internal Market and Services, *Report on Consultation and Hearing on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union* (2006) at 26, available at http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf; European Foundation Centre 18th Annual General Assembly (AGA) and Conference, *Why is a European statute for foundations needed?*, Madrid, June 1-3, 2007; University of Heidelberg, *Feasibility Study* (2009), supra n. 49; European Foundation Centre, *It’s Time for a European Statute* (2012a), available at http://www.efc.be/programmes_services/resources/Documents/EFS_brochure_2012_FINAL.pdf (last accessed March 21, 2013).

⁶³ Proposal for a Council Regulation on the Statute for a European Foundation (FE), COM(2012) 35 final.

Comprising 28 Member States of both common law and civil law legal systems, the EU's lack of a harmonized approach to charitable giving and the absence of a shared definition or indeed common understanding of "charitable purpose" or "public benefit" should not, perhaps, be surprising.⁶⁴ In many cases, the regulation of charitable foundations in a Member State is closely linked to valuable tax exemptions and deductions such that the right to claim this status is tightly regulated. Tax law is an area in which Member States have retained their sovereignty and so it follows that Member States are anxious to keep a firm control over which organizations can claim either tax-exempt status or tax rebate privileges. Traditionally, tax exemptions on charitable donations were reserved solely for donations to domestic charities. The European Court of Justice, however, in a series of judgments has ruled that when it comes to charitable tax exemptions or tax reliefs, a member state must treat EU charities – whether established domestically or established in another Member State but operating in that jurisdiction – equivalently. In other words, it cannot discriminate against a foreign charity (and I use this term narrowly to mean a charity coming from another EU Member State) for tax purposes if that charity is equivalent to the national charity in all other respects other than the place of its establishment.

As initially proposed, the European Foundation Statute would have provided for a new legal vehicle – a European Foundation (FE) – that could be established in any one Member State and be active in any other Member State, in line with the requirements of the EFS, without any further national formalities being required. In the initial Commission draft, the FE would have enjoyed, without any further proof being necessary, the same tax advantages bestowed on domestic charities in those host Member States in which it carried out its activities by virtue of its formation as an FE.⁶⁵ The proposed statute also allowed for the *de novo* creation of FEs and for the conversion of existing national foundations into FEs provided that certain requirements were met.⁶⁶

Although enjoying the support of the European Parliament, the European Committee of the Regions, and the European Economic and Social Council, the proposed statute met with opposition in the European Council, which began its scrutiny in 2012. For many Member States the automatic entitlement to tax relief by virtue of formation of an FE was a step too far. Taxation policy remains a matter within the competence of national member states and not an area in which the EU enjoys federal competence. The matter was complicated by the scope of the EFS's definition of what constituted a "public benefit purpose."⁶⁷ Representing the first attempt ever to define what constitutes public benefit activity at the European level, the scope of this definition proved to be an issue of extreme political sensitivity from the outset. When the rewards for qualifying as an FE under the EFS are borne in mind – automatic tax equivalency for tax exemption purposes with domestic public benefit entities – it is no wonder that this perceived backdoor to national charitable tax exemption was the subject of such scrutiny.

⁶⁴ For an informative discussion of the differing approaches of common law and civil law jurisdictions to the categorization of non-profit organizations, see *ECNL Study on Recent Public and Self-regulatory Initiatives Improving Transparency and Accountability of Non-profit Organisations in the European Union* (2009) at 123-125.

⁶⁵ European Commission, Proposal for a Council Regulation on the Statute for a European Foundation (FE), COM(2012) 35 final (Brussels, February 8, 2012).

⁶⁶ *Ibid.*, Article 12.

⁶⁷ *Ibid.*, Article 5.

The list of public benefit purposes in Article 5 of the EFS caused much concern in this regard given that in some instances it was both wider and narrower than existing national definitions.⁶⁸ Thus, on the one hand, the European definition included reference to the promotion of amateur sports, civil rights, and human rights, matters that were deliberately excluded from the Irish definition of charitable purpose. On the other hand, to garner the support of certain secular civil law states, the European definition excluded the advancement of religion as a public benefit purpose, a decision that did not sit well with the common law Member States (which recognize advancement of religion as charitable) or indeed with religious foundations operating in civil law jurisdictions. Moreover, the use of the wording “public benefit purpose” caused angst for the common law member states, which operate a two-stage test for charitable status under which an entity must both have a charitable purpose (akin to those listed in Article 5) *and* demonstrate sufficient public benefit (an entirely separate concept that looks to the emotional and obligational distance between the donor and donee and seeks to measure the negligibility of any related private benefit and the size of the benefitting class). The confusion caused by the truncated European public benefit definition approach made it particularly difficult for common law countries to see their way through to its ratification.

The widespread Member State discomfort with the proposed tax provisions ultimately resulted in the Lithuanian Presidency of the European Council agreeing to drop universal tax exemption entirely from the proposal in 2013. Without the tax albatross, one might have assumed that promulgation of the EFS would have been fairly plain sailing, but this turned out not to be the case. Host country ownership issues once more came to the fore with Member States experiencing difficulty agreeing on principles relating to minimum capital and formation requirements, and supervision of the new entity that differed from the current practice in their own home jurisdictions. A last-ditch attempt to salvage a compromise proposal by the Italian EU Presidency proved unsuccessful in November 2014, with some Member States rejecting entirely the principle of an EFS initiative while others were unhappy with the proposed compromise text.⁶⁹ In the face of such host country opposition, the European Commission decided to withdraw the EFS proposal from its legislative agenda in December 2014.⁷⁰

The journey of the EFS proposal is informative if we reflect upon the issues it raises for us in the broader theme of enhancing policy effectiveness and efficiency in the context of cross-border philanthropy. Here is an idea, which at its heart, sets out to tackle administrative, fiscal, and legal difficulties that national foundations experience when they wish to work internationally within the context of the EU’s common market. Provision of a new European legal structure for philanthropic cross-border purposes availing of universally recognized and coherent formation requirements that can operate effectively in any Member State would seem to be a positive development. And yet, even in its slimmed-down form (minus the up-front tax recognition that

⁶⁸ See Oonagh B. Breen, “The European Foundation Statute Proposal: Striking the Balance between Supervising and Supporting European Philanthropy?” (2013) 5(1) *Nonprofit Policy Forum*, 5-43.

⁶⁹ Gail Moss, “European Foundation Statute suffers setback,” *Investments & Pensions Europe* (November 28, 2014), available at <http://www.ipe.com/news/regulation/european-foundation-statute-suffers-setback/10005189.fullarticle> (last accessed January 29, 2015).

⁷⁰ European Foundation Centre Press Release, “European Commission halts negotiations on the European Foundation Statute – What’s next?” (December 16, 2014).

would have made it exceptionally appealing to foundations), the viability of the proposed Statute's hung in the balance⁷¹ before falling off the legislative agenda entirely.

Understanding the politics of the EFS provides a useful insight into the concept of host-country ownership principles in action in first-world states. Notwithstanding the broader societal benefits that might flow from the passage of the EFS, national priorities influenced each Member State's support or lack thereof for the proposal. Foundations throughout the EU, many of which are members of the European Foundation Centre, consistently lobbied Member State governments in seeking their support for the Statute.⁷² Introduction of the EFS would have required Member States to make a national agency responsible for the oversight and registration of these European entities formed in their jurisdiction. As the recognized supervisory authority, that national agency would bear responsibilities, if called upon by a neighbor state in which the FE was active, to investigate its activities and ensure its compliance with the foundation's own statutes, the FE statute and any other relevant governing law. At a time when the budgets of many state agencies are shrinking, the capacity-building required to take on additional monitoring responsibilities for a new European legal structure proved to be far from enticing.⁷³

Moreover, the proposed definition of "public benefit purpose entity" in the EFS would have excluded both charitable trusts and charitable companies (whether limited by guarantee or in the new CIO form) from becoming FEs. As originally drafted, Article 2(5) defined a public-benefit-purpose entity as "a foundation with a public benefit purpose and/or similar public benefit purpose corporate body without membership formed in accordance with the law of one of the Member States." The requirement of incorporation precluded charitable trusts from enjoying the benefits of the statute, whereas the insistence upon absence of members prevented charitable companies from constituting a public-benefit-purpose entity. With limited public budgets, there was little incentive for Member States with few foundations to expend time or money on an area

⁷¹ It is notable that no mention was made of the need to progress on the European Foundation Statute in the priority list of the Italian Presidency of the European Council. See "Italian Presidency Priorities Discussed by EP committees" (2014 0722 IPR53208), available at <http://www.europarl.europa.eu/news/en/news-room/content/20140722IPR53208/pdf>. By contrast in its full program for the Italian Presidency, the EFS merited a fleeting reference to the effect that "the Italian Presidency will pursue a thorough examination of the recently adopted Proposal for a Directive on single-member private limited liability companies, and will follow up on the work carried out by the Greek Presidency on the Regulation on the Statute of the European foundation" (emphasis added), in *Europe - A Fresh Start: Programme of the Italian Presidency of the Council of the European Union* at 50 (available at <http://italia2014.eu/en/presidency-and-eu/programme-and-priorities/programme-of-the-italian-presidency-of-the-council-of-the-european-union/>).

⁷² See Gerry Salole, "Why is the European Foundation Statute Needed?" (2008), 11(1) *International Journal for Not-for-Profit Law* 75, available at http://www.icnl.org/research/journal/vol11iss1/special_5.htm; European Foundation Centre, *Let's Move the European Foundation Statute Forward* (June 2012); EFC, *It's time for a European Foundation Statute* (2012), available at http://www.efc.be/programmes_services/resources/Documents/EFS_brochure_2012_FINAL.pdf (last accessed October 3, 2014); EFC, *Philanthropy sector urges Governments to adopt the European Foundation Statute* (November 19, 2013) available at http://www.efc.be/programmes_services/resources/Documents/EFSappeal_November2013.pdf

⁷³ In this regard, the Charity Commission for England and Wales, the likely statutory agency in the UK that would be assigned the task of overseeing the FE, has seen a budget cut of almost 50 percent in real terms since 2007-2008, when it received a settlement of £32.6m from the British government.

not viewed as a political priority.⁷⁴ Acceptance of the regulation, which would have been directly applicable in all Member States, would have required states to host and facilitate FEs with all the associated administrative costs of so doing (in terms of registration, supervision, and reporting), in a situation in which common-law domestic charities (in the forms of trusts and companies) would have been precluded from using the structure to further their philanthropic efforts abroad. Given that the Treaty basis for the EFS regulation is Article 352 TFEU, which requires Member State unanimity for the EFS to pass, it took only one uninterested or disengaged (as opposed to even hostile) Member State to veto the proposal.⁷⁵

In a nutshell, the difficulties encountered in the unsuccessful negotiation of the EFS reveal the delicacies of host-country ownership as a controlling concept. Each Member State has developed its own internally consistent way to regulate charitable foundations. Those rules, informed by the distinct culture and legal system of each Member State, differ from one another. From a foundational perspective, these variances in reporting and registration procedures are cumbersome, costly, and unnecessary. From a Member State perspective, the rationality of the variance or whether the underlying *raison d'être* can be achieved in a less administratively burdensome way matter less than the fact that each Member State individually controls the political process by which foundations are formed at present, but this control would be diluted if the EFS were to enter into force.

B. Forging Democracy in a Shrinking Civic Space: The Legal Repression of CSOs

In 2014, the Carnegie Endowment for International Peace published an influential report, *Closing Space: Democracy and Human Rights Support Under Fire*,⁷⁶ that sought to analyze current trends in governmental restrictions on civil society, as well as to identify the causes for such pushback and the underlying shifts in international politics fuelling this movement, before considering the responses of affected organizations, their relative success to date, and the need for a more coordinated coherent international response to these worrying developments. This report was not the first to highlight the shrinking legal space for civil society⁷⁷ but it does provide a thoughtful reflection on the broader political explanations for the current hostilities.

⁷⁴ In 1999, Ireland's foundation sector was rated by the European Foundation Centre to be the smallest in Europe, with just 0.7 grant-making foundations per 100,000 inhabitants. While the Celtic Tiger fuelled the growth of the sector by 257 percent, Ireland still lags behind the European average of 20 foundations per 100,000 inhabitants. See further Oonagh B. Breen, "In Search of Terra Firma: The Unpacking of Charitable Foundations in Ireland," in Chiara Prele (ed.), *Developments in Foundation Law in Europe* (Springer Publications, 2014). Equally, speaking under Chatham House Rules at a conference on the European Foundation Statute at the Office of the Attorney General for Northern Ireland, on February 14, 2014, an informed source made the point that British foundations had not been strongly lobbying Westminster in favor of the introduction of the EFS.

⁷⁵ In the end, there were far more than one: the UK, the Netherlands, Denmark, Austria, and Slovakia all rejected the principle of the EFS initiative.

⁷⁶ Thomas Carothers & Saskia Brechenmacher, *Closing Space: Democracy and Human Rights Support Under Fire* (Carnegie Endowment for International Peace, 2014).

⁷⁷ See, for instance, the individual reviews of 48 countries in the International Center for Not-for-Profit Law (ICNL) NGO Law Monitor series, available at <http://www.icnl.org/research/monitor/> (last accessed October 5, 2014); ICNL & World Movement for Democracy Secretariat at the National Endowment for Democracy, *Defending Civil Society Report* (2nd ed., June 2012); ICNL, "Barred from the Debate: Restrictions on NGO Public Policy Activities," in *Global Trends in NGO Law* (2009); ICNL, "Wave of Constraint: Recent Developments in Venezuela, Ecuador, Honduras, Iran, Bahrain, and Cambodia," in *Global Trends in NGO Law* (2010).

The global reach of the current political and legal pushback against CSOs transcends the usual suspects of authoritarian and semi-authoritarian⁷⁸ regimes, although the latter remain responsible for the introduction of the vast majority of new restrictions. The nature of the civic space available in semi-authoritarian regimes such as Venezuela, Cambodia, Azerbaijan, and Ethiopia is always tentative in nature – being a reluctantly conceded and bounded space that is liable to contract if government perceives any significant challenge to its political hold.⁷⁹ Authoritarian regimes such as Uzbekistan, the United Arab Emirates, Zimbabwe, and Belarus, by contrast, already severely restrict NGO freedom to engage in democratic rights programs within their territories, leaving little room for additional pressure other than to further restrict external funding.⁸⁰ More worrying still, many commentators note the growing tendency of relatively democratic governments to engage in similar restrictive sanctioning of NGOs' freedom of association.⁸¹

1. The Scope of Existing Restrictions

The authors of *Closing Space* identify many of the legal restrictions that have been the subject of discussion. Noting the reality that many countries that had previously allowed or even welcomed democracy and rights support activities inside their borders are now working to stop them, reference is made to the many measures to block external support for civil society through funding restrictions, the increased level of vilification and harassment of foreign-funded NGOs, and the creation of political climates in which foreign-funded civil society is viewed with suspicion, subject to intimidation in carrying out its activities, and publicly delegitimized.

The number of national governments imposing restrictions on foreign funding of NGOs has increased exponentially over the past decade. In a CIVICUS survey of civil society organizations in 33 countries in 2011, 87 percent identified national or internal factors constraining funding.⁸² More recent research has found that out of 98 countries for which comprehensive data was available, 39 countries now restrict foreign funding of NGOs and a further 12 countries prohibit it.⁸³ Examples cited in the *Closing Space* Report range from the

⁷⁸ Defined in *Closing Space Report*, n.76 above, at 6, as “a regime that attempts a continual balancing act between maintaining sufficient control over the political process to secure an indefinite hold on power while allowing enough pluralism and openness to preserve at least some international political legitimacy.”

⁷⁹ *Ibid.*

⁸⁰ Since 2004, Uzbekistan has required all foreign assistance of NGOs to be transmitted through one of two government-controlled banks and to be subject to additional government scrutiny. This regulation has enabled the Uzbek government to obstruct the transfer of more than 80 percent of foreign grants to local NGOs. See David Moore, “Civil Society Under Threat: Common Legal Barriers and Potential Responses,” *Briefing Paper* (DG for External Policy Affairs, European Parliament, Brussels, September 2006), at 8. Available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/civil_society_under_threat/civil_society_under_threat_en.pdf (last accessed October 5, 2014).

⁸¹ See *Closing Space Report*, above n. 76, at 7 referring to Bangladesh, Ecuador, Honduras, India, Kenya, Nicaragua, and Peru as all taking steps to limit external resources and support for civil society organizations, labelling such assistance as “foreign political meddling.” See also Moore, above n. 80, at 8, noting Latvian proposals to ban NGOs that receive foreign financing from participating in the political process or from receiving state financing for any research that could influence the choices of the electorate.

⁸² Cited in *Closing Space*, above n. 76, at 7.

⁸³ Darin Christensen and Jeremy Weinstein, “Defunding Dissent: Restrictions on Aid to NGOs” (April 2013), 24(2) *Journal of Democracy* 77-91.

Ethiopian Charities and Societies Proclamation 2009, which defines any NGO that receives more than 10 percent of its funding from a foreign source as a “foreign charity” and prohibits such bodies from implementing politically related activities or those related to human rights or rules of law; Algeria’s Law on Associations 2012, which precludes Algerian NGOs from receiving foreign funding outside of “official cooperation relationships,” a term left undefined by the Act; and India’s revised Foreign Contribution (Regulation) Act 2010, which prohibits foreign funding for “any organisations of a political nature” as defined by central government.⁸⁴

The restrictions go beyond funding. The governmental use of tax laws, registration laws, auditing, and reporting regulatory procedures are increasingly used to harass and stymie NGOs in receipt of foreign funding. Examples of such restrictions in action abound in Russia,⁸⁵ Egypt, and Uzbekistan.⁸⁶

2. The Drivers of Civic Space Constraint

What has triggered such endemic governmental hostility towards CSO activity in the sphere of democracy promotion and rights-based programs across such a broad range of political regimes? What are the underlying causes? Can they be classified as transitory hiccups in the evolution of new(er) nation states, perhaps attributable to personality clashes? Or should such developments be categorized as more deeply seated political problems that give rise not to a short-lived hiatus in the creation of civic space but rather to an ongoing, chronic political condition?

The *Closing Space* report provides valuable insights into the underlying causes for the rights retrenchment experienced by civil society organizations over the past decade. The 1990s ushered in the end of the Cold War and a rapid expansion in democracy and rights support, a phenomenon that was not lost on aid providers who began funding NGOs rather than government in aid-recipient countries in the name of civil society development. Recipient post-communist and developing countries tolerated this more politically focused aid for two reasons: first, many of them were attempting to transition from authoritarian rule; and second, the provision of aid to such scattered, small-scale NGO initiatives often appeared to lack significant organizational weight or coherence, with the result that recipient governments did not take

⁸⁴ According to the *Closing Space Report*, above n. 76, at 9, the Act has resulted in the revocation of foreign funding permission from more than 4,000 small NGOs since its introduction. Ironically, India’s revision of the Foreign Contributions Act was in response to an FATF finding that India was non-compliant with then Special Recommendation VIII of the FATF. According to Hayes, U.S. Treasury officials welcomed the Act’s 2010 reform as “an excellent example to other countries in South Asia region.” See Ben Hayes, “How International Rules on Countering the Financing of Terrorism Impact Civil Society,” in *State of Civil Society 2013: Creating an Enabling Environment*, 120 (CIVICUS, 2013), available at http://socs.civicus.org/wp-content/uploads/2013/04/2013StateofCivilSocietyReport_full.pdf.

⁸⁵ The Russian Federation Law on Introducing Amendments to Certain Legislative Acts of the Russian Federation (the 2006 Russian Non-Commercial Organizations Law) introduced burdensome and difficult-to-meet reporting requirements for NCOs, accompanied by severe penalties for non-compliance; new and similarly burdensome registration procedures for Russian and foreign NCOs operating in Russia; and new broad powers for the registration bodies to audit the activities of NCOs. President Putin took these measures further in 2012 and 2014, legislating to increase the extent of the restrictions that can be imposed. The law requires all NCOs to register in the registry of NCOs, which is maintained by the Ministry of Justice, before receiving funding from any foreign sources if they intend to conduct political activities. Such NCOs are called “NCOs carrying functions of a foreign agent.”

⁸⁶ See n. 80, above.

democracy and rights-support aid seriously. As Carothers and Brechenmacher put it, “resistance to international support for democracy and rights seemed out of synch with the prevailing global zeitgeist.”⁸⁷ With the fall of the Berlin Wall and disintegration of geopolitical superpowers, cross-border political interventionism in the developing world could no longer be automatically labelled as political manipulation.⁸⁸

With the turn of the 21st century, “democratic recession” set in,⁸⁹ leaving many former authoritarian regimes that were transitioning to democracy in the 1990s in a hybrid state of partial democratization. Into this political void, the Western-coordinated overthrow of Serbia’s Slobodan Milosevic and the success of the Color Revolutions in Georgia, the Ukraine, and Kyrgyzstan⁹⁰ led many power-holders in post-Soviet countries to question whether the innocuous agenda of democracy promotion was actually more closely related to invidious, Western-imposed attempts at regime change. The legitimacy of democracy assistance to civil society in developing countries was thus called into question and gained “the (inflated) reputation of being almost uncannily effective at helping civic and political opposition forces mobilize against undemocratic regimes.”⁹¹ Added to these factors were the growing concerns over development aid effectiveness and the new emphasis on host country ownership as a means to achieve better local development outcomes through greater recipient country control, an opening that encouraged some regimes to repress civil society under the banner of ensuring greater accountability and aid effectiveness. The emergence of social media and the ability of individuals (as well as CSOs) to share their grievances with the broader world in an uncensored and immediate fashion has also caused great unease among semi- and fully authoritarian regimes, giving rise to government fears of NGO-western government conspiracy theories (which in themselves are seen as justification for limiting foreign funding or influence). Social media also create new fears of the extreme vulnerability of what before were viewed as the impenetrable powers of the governing elite by the uncontrollable and unpredictable power of the citizenry, as evidenced during the Arab Spring.

IV. The Concept of Host Country Ownership

The concept of host country ownership – whether arising in the development or non-development arena, and whether defined narrowly to refer simply to “government or regime ownership” or more broadly to include stakeholder ownership of parliamentarians, civil society, and the private sector – is a central concept. Host country ownership envisages a state being responsible for its own policy direction and acting autonomously in its achievement. The flipside of “the country ownership” coin, however, is the assumption that a state has engaged in the necessary capacity building (whether political, organizational, or structural) to enable it to exercise this leadership role in a responsible, sustainable, and effective manner.⁹²

⁸⁷ *Closing Space Report*, n. 76 above, at 22.

⁸⁸ *Ibid.*, at 23.

⁸⁹ Larry Diamond, “The Democratic Rollback: The Resurgence of the Predatory State,” *Foreign Affairs* (March/April 2008); Diamond, “Democracy’s Deepening Recession” *Atlantic* (May 2, 2014).

⁹⁰ Georgia’s Rose Revolution occurred in 2003, followed by Ukraine’s Orange Revolution in 2004 and Kyrgyzstan’s Pink (or Tulip) Revolution in 2005.

⁹¹ *Closing Space Report*, n. 76 above, at 25.

⁹² Jessica Goldberg and Malcolm Bryant, “Country ownership and capacity building: the next buzzwords in

In the development context, the term came to the fore in the 2005 *Paris Declaration on Aid Effectiveness*. Countries, territories, and international organizations adhering to the Declaration agreed that partner countries would commit to exercise effective leadership over their development policies and strategies, and to coordinate development actions, while donors would commit to respect such country leadership and to help strengthen their capacity to exercise it.⁹³ The movement away from donor-driven aid relief was seen as part of the solution to the “failed aid” crisis in international development. If aid were now to be viewed as only one part of the development solution, its purpose would have to lead to recipient country self-sustainability rather than long-term over-reliance. This result, it was felt, was more likely to be achieved if the recipient country bought into its own development future and played a role in its attainment.

By loosening the bonds on the ownership of aid/development, the hope was that such aid would thus have a “crowding in” as opposed to a “crowding out” effect on other resources that might assist a state. The international support for a shift from donor-country-driven to recipient-country-driven development remains visible in both the Accra Agenda and the Busan Partnership Agreements. In prioritizing the importance of host-country ownership, the AAA declared:

Country ownership is key. Developing country governments will take stronger leadership of their own development policies, and will engage with their parliaments and citizens in shaping those policies. Donors will support them by respecting countries’ priorities, investing in their human resources and institutions, making greater use of their systems to deliver aid, and increasing the predictability of aid flows.⁹⁴

Thus, ownership of development was not to be the sole prerogative of the executive, a view further specifically elaborated upon in the Busan Partnership Agreement in relation to the roles of parliament and local government⁹⁵ but only implicitly referenced with regard to the role of civil society.⁹⁶ Nonetheless, the High Level Forum commitments indicate that ownership refers to wider national ownership of the decisions relating to how aid should be allocated. A well-intentioned principle, it nevertheless raises serious implementation challenges in practice. First, it requires a recipient country to develop a meaningful and useful statement of the country’s directions and priorities with regards to development and aid expenditure.⁹⁷ Second, it raises the related challenge of ensuring that the national plan, as presented, properly reflects the priorities of the whole country – including those who are the most marginalized or poor – and not just the

health systems strengthening or a truly new approach to development?” (2012), 12 *BMC Public Health* 531.

⁹³ Paris Declaration on Aid Effectiveness (2005).

⁹⁴ OECD, Accra Agenda for Action (2008) at [8].

⁹⁵ Busan Partnership Agreement 2011, at [21] noting “Parliaments and local governments play critical roles in linking citizens with government, and in ensuring broad-based and democratic ownership of countries’ development agendas”.

⁹⁶ Ibid. at [22], noting “Civil society organisations (CSOs) play a vital role in enabling people to claim their rights, in promoting rights-based approaches, in shaping development policies and partnerships, and in overseeing their implementation.

⁹⁷ See, in this regard, the World Bank Definition of “country ownership” as being the existence of “sufficient political support within a country to implement its developmental strategy, including the projects, programs, and policies for which external partners provide assistance,” at http://web.worldbank.org/archive/website01013/WEB/0_CON-5.HTM, defined within the context of the “comprehensive development framework” (last accessed on February 3, 2015).

views of the country's elite.⁹⁸ In the words of then-Secretary Hillary Rodham Clinton in 2012, "country ownership is about far more than funding. It is principally about building capacity to set priorities, manage resources, develop plans, and carry them out."⁹⁹

By their very nature, aid recipient countries rank among the least-developed and lowest-income countries. Giving effect to the principles of host-country ownership is difficult in an environment in which the government may be, at best, dysfunctional due to poor political or economic infrastructure, or, at worst, hostile to foreign assistance/influence. The capacity of a recipient country to develop a national development plan depends greatly on the availability of reliable empirical information on the extent of a country's problems, data which may be hard to come by.¹⁰⁰ If the government has newly come to power, it may lack experience but not want to show weakness and so keep its counsel close, excluding local stakeholders from participatory decision-making. If the government regime has long enjoyed unchallenged power, its ability to engage in creative or innovative policy planning may be paralyzed, either because it is heavily aid-dependent¹⁰¹ or because the regime is corrupt yet politically untouchable.

In either instance, there may not be a strong political opposition to challenge government decisions, or there may be no incentives to raise domestic funding through increased domestic taxation. In both cases, government may be suspicious of civil society input (even at the local level), viewing it as threat to government legitimacy (particularly if the incumbent government came to power through popular revolt or social movement agitation) or as a pseudo-opposition party, particularly if the latter is absent and civil society organizations fill this void by calling the government to account and advocating for social justice. Suspicions of civil society in this latter vein would equally be a cause for disenfranchisement in regimes where democracy assistance more than development assistance is on the agenda.

There is a very clear temptation for recipient countries to fund only those projects or programs that fall within their own bailiwick, ignoring perhaps the needs of more marginalized citizens whose activities are viewed with contempt or as criminal by the ruling party. This is a particular risk in aid areas relating to health, gender, and equality. Examples abound, with donors

⁹⁸ See to this effect the definitions of "country ownership" of InterAction Aid Effectiveness Working Group as "the full and effective participation of a country's population via legislative bodies, civil society, the private sector, and local, regional and national government in conceptualizing, implementing, monitoring and evaluating development policies, programs and processes," in *Country Ownership: Moving from Rhetoric to Action*. (InterAction, Washington DC, 2011); and the Millennium Challenge Corporation, "Country ownership ... occurs when a country's national government controls the prioritization process during compact development, is responsible for implementation, and is accountable to its domestic stakeholders for both decision-making and results," in *MCC's Approach to Country Ownership* (2009), Working Paper, MCC, Washington, DC.

⁹⁹ Remarks of Secretary of State Hillary Rodham Clinton, *A world in transition: charting a new path in global health*, June 1, 2012, Oslo, Norway, available at www.state.gov/secretary/rm/2012/06/191633.htm.

¹⁰⁰ See "The Power of Information: New Technologies for Philanthropy and Development" conference hosted by the Indigo Trust in collaboration with The Institute for Philanthropy and The Omidyar Network (September 15, 2011).

¹⁰¹ Ongoing aid dependence adversely impacts domestic accountability and can weaken existing parliamentary processes.

reporting cases in which recipient governments' own sense of beneficiary legitimacy controlled whether funded healthcare reached the intended target population.¹⁰²

In the non-development context, the concept of country ownership remains equally important. In the case of the EFS proposal, the fact that the legal basis for the proposal required unanimous support from Member States for the EFS to pass provided an extreme example of the effect of national government resistance to an idea which was broadly supported by CSOs in civil law countries and which enjoyed the backing of EU institutions. Capacity issues trumped the EFS proposal in a context in which country ownership ultimately was king.

V. Conclusion: Is Philanthropic Effectiveness in the Eye of the Beholder?

If we accept that the freedoms of association, assembly, and expression protect CSOs just as much as individuals, the importance of a legally enabled civic space within which these rights can be exercised becomes a *sine quo non*. If, at the same time, we accept and acknowledge the fact that national governments enjoy political sovereignty and are entitled to set limits on what outside actors can do to influence domestic political life, it follows that a contested space will emerge when civil society organizations working within a given nation state are either funded, supported, or influenced by "outsiders" that overstep this line. Reconciling these competing interests will not always be possible.¹⁰³ Deciding which right (national sovereignty versus foundational autonomy) takes precedence, and under what circumstances, and according to whom, are questions to which answers are not readily available; in fact, they may vary according to the vested interests of those asking the question. The democracy-aid community has not, for one, been very good at defining for itself or conveying to others what it believes those limits should be.¹⁰⁴

As philanthropic donors, knowing the limits of our knowledge is important. Even the most well-intentioned donor will not always know best, and the need to learn from past mistakes and from the indigenous philanthropic cultures and experiences of the recipient society are messages that resonate from commentators on both sides of the debate.¹⁰⁵ This matters as much if you are the European Commission hoping to introduce a new legal form that will be directly applicable in all European Member States but is not known as an existing legal concept in all, or if you are the Ford Foundation intent on introducing the alien concept of community foundations

¹⁰² See USAID, PEPFAR, AMFAR, Planned Parenthood, and IPPF, *Advancing Country Ownership: Civil Society's Role in Sustaining Public Health* (June 2013), drawing on examples from Romania, Peru, and other Latin American countries to illustrate the point that where at-risk populations (e.g., sex workers, people who use drugs, gay men) are criminalized in-country for their behaviors, the likelihood of a recipient country providing the necessary resources to target these populations was low and required continual international donor direct intervention.

¹⁰³ Some countries, for instance, do not grant the right to associate or form organizations, e.g., Saudi Arabia, Libya, and China. See ICNL, "Recent Laws and Legislative Proposals to Restrict Civil Society and Civil Society Organizations" (2006), 8(4) *International Journal for Not-for-Profit Law*, 76, at 78.

¹⁰⁴ *Closing Space Report*, n. 76, above.

¹⁰⁵ See Tade Akin Aina & Bhokinkosi Moyo, *Giving to Help, Helping to Give: The Context and Politics of African Philanthropy* (Trust Africa, 2013); Dambisa Moyo, *Dead Aid: Why Aid is Not Working and How There is a Better Way For Africa* (Penguin, 2009); William Easterly, *The White Man's Burden* (OUP, 2006).

in Africa where indigenous philanthropy has no analogue with which to compare.¹⁰⁶ In both instances, walking in the shoes of the recipient government/people and seeing the activity and its implications through their eyes is an important part of the process of successful collaboration.¹⁰⁷

To this end, what follows is a list of possible avenues to consider as one contemplates the balancing of rights and duties of stakeholders within a state in which the deepening of democratic ownership, the role of civil society within that process, and the special responsibilities of foreign foundations that become involved either directly in the field or through support of local NGOs on the ground are issues of concern.

Reserving the right not to follow local laws . . .

What if a host country imposes restrictive conditions on local NGOs working in its territory, making it difficult for them to register or to receive funding for the work they were set up to carry out? Should the donor respect the requirements of the local law? In what circumstances is it justifiable to ignore the law and to engage with or fund those organizations directly? Given the growing difficulties for NGOs to meet newly restrictive registration requirements in many countries, such quandaries are no longer merely hypothetical in nature. Is local law – in the name of the rule of law – sacrosanct? Some might argue that if one is sincerely concerned with legally enabling civil society, such enablement can only come about from within the legal system which requires respect for existing laws and a willingness to work for their reform from within, as opposed to without the system.¹⁰⁸

Another policy approach that eschews this softly incremental approach is that proposed by then U.S. Secretary of State Hillary Clinton, whereby the U.S. Government reserves the right not to respect local laws that it believes impede legitimate democracy and rights support.¹⁰⁹ Such a policy, if it is to have any legitimacy, would have to appeal to a higher source of rights as a justification for this stance, such as the Universal Declaration of Rights, and even then any such reliance could be subject to question if the same respect was not accorded to CSOs at home as abroad.

Taking the diplomatic route of sharing best practice . . .

Sharing best practices on the legal enablement of civil society, while engaging in better-coordinated diplomatic discouragement of restrictive NGO laws, can be a useful avenue. The diplomatic route, however, is a two-way street, and governments should be aware that it is not

¹⁰⁶ Christiana Akpilima-Atibil, Panel on *The Role of Philanthropy in Civil Society under Siege: Historical Perspectives for Contemporary Practice* at International Society for Third Sector Research Conference, Muenster Germany, July 2014.

¹⁰⁷ Bhekinkosi Moyo, Panel on *The Role of Philanthropy in Civil Society under Siege: Historical Perspectives for Contemporary Practice* at International Society for Third Sector Research Conference, Muenster Germany, July 2014.

¹⁰⁸ John Rawls, "Legal Obligation and the Duty of Fair Play," in *Law and Philosophy*, S. Hook (ed.), (New York: New York University Press, 1964).

¹⁰⁹ Cited in *Closing Space Report*, n. 76, at 52. Legal philosophers, like legal positivist Joseph Raz, have also made strong arguments in support of the right not to follow an unjust law. See Raz, *The Moral Authority of the Law* (Clarendon Press, 1979).

only best practice that is disseminated between nations.¹¹⁰ Broadly (or badly) drafted legislation to regulate political activity (whether in the form of pre-registration requirements for the funding of NGO advocacy or a complete prohibition on foreign funding of NGOs' domestic activities in areas such as right-based work) may be something that we more readily associate with repressive regimes.¹¹¹ Yet liberal democracies do not always have a clean slate in this regard and may have been the source of inspiration for the legislation that now actively restricts civil society in another jurisdiction.

It is thus interesting on the one hand to see Ireland tabling the UN HRC Resolution on Civil Society that respects the rights of CSOs to solicit and utilize (foreign) funds while simultaneously maintaining a provision on its own statute books that requires NGOs engaged in advocacy (where this falls within the definition of "political purposes" – a term not defined in the legislation) to register with the Standards in Public Office Commission and not only to account for all funding received in support of such activity but to be absolutely prohibited from accepting foreign funding in support of such activity by law.¹¹² Claims that the statutory provisions are not intended to dampen NGO activity and would not be interpreted in this manner have less resonance when NGOs claim that such provisions have a chilling effect on nonprofit advocacy.¹¹³ Thus, the stance of Department of Foreign Affairs (in promoting the protection of civic space at UN level) does not always tally with the domestic treatment of civil society by the Department of Justice (in charge of charity legislation that deliberately omits the promotion of human rights as a charity purpose) or the Department of Local Government, Heritage and the Environment (responsible for the Electoral Acts referred to above restricting funding for NGO advocacy).

Taking the economic route to shore up civil society . . .

Deciding in which pack of cards the "civil society" ace sits is another issue worth pondering. Is it better to channel development-aid funding through a bilateral agency or to house it under the control of the Department for Foreign Affairs? What message does the home of development aid send to recipient countries? And in the context of country diplomacy, what issues trump aid? To what extent are we even aware of the trade-offs made at the government level between competing trade or even competing security interests?¹¹⁴ These issues remain outside the current scope of this article, but it would be folly to ignore more broadly the impact and the relevance of agreements like Cotonou, which combines commitments between the EU

¹¹⁰ See ICNL, "Recent Laws and Legislative Proposals to Restrict Civil Society and Civil Society Organizations" (2006), 8(4) *International Journal for Not-for-Profit Law*, 76, at 77 (detailing the sharing of legislative restrictions on NGOs between sister regimes, such as Belarus, Russia and the Middle East).

¹¹¹ *Ibid.*

¹¹² Electoral (Amendment) Act 2001, (no. 38 of 2001), s.49, inserting s.23A in the Electoral Act 1997. See also Standards in Public Office Commission, *Third Parties and the Referendum on The Treaty of Lisbon: Report to the Minister for the Environment, Heritage and Local Government* (March 2009), at 19-24.

¹¹³ *Standards in Public Office Commission Report*, n. 112 above, at 20 (citing the charity Barnados, "the real effect of this legislation, whatever its purpose, will be to slowly stifle an important voice.... The Standards in Public Office Commission has pointed out that the flaw in the legislation is that it generates an unnecessary and undesirable impediment to that voice. What is surprising is that the Standards Commission has made its views known to Government, and the reaction of Government has so far been a deafening silence.").

¹¹⁴ Ngaire Woods, "Whose aid? Whose influence? China, emerging donors and the silent revolution in development assistance," (2008), 84(6) *International Affairs*, 1205-1221.

and ACP countries on development cooperation, peace and security, arms trade, and migration with commitments on trade cooperation.¹¹⁵

Within the economic sphere, if the political will existed, there would be potential to use bilateral investment treaties to protect NGO foreign funding by making it a breach of the treaty's obligations on permitting free investment-related transfers for a recipient government to prohibit or restrict foreign funding to a foreign NGO.¹¹⁶

Still in an economic vein, there is, as there was in the diplomatic setting, a need to avoid double standards when it comes to what we expect nonprofits to achieve when working abroad vis-à-vis our expectations around for-profit enterprise undertaken abroad. The latitude for failure in the for-profit arena is far more broadly accepted, and it is arguable that the freedom to fail accorded to for-profits is what ultimately contributes to their success. In the words of David Damberger, the problem with NGOs is that they do not fail often enough or learn from those failings.¹¹⁷ Foundations active in the field or funding those who are active can contribute to our understanding of development effectiveness by sharing not just stories of success but also, more importantly, stories of failure. Thus Engineers Without Borders' decision to publish an annual Failure Report since 2010, outlining matters that they could have handled better, as well as facilitating a website that seeks to learn from the failures of other NGOs is an innovative and brave decision.¹¹⁸

Taking account of cultural and historical backgrounds . . .

No country has a blank slate when it comes to matters of philanthropy and charitable giving. Foundations working outside of their home territory will arguably fare better when their actions are informed by an appreciation of the historical and cultural background that permeates the host country's understanding of that concept. Lack of awareness can adversely affect the ability to deliver cross-border philanthropy effectively.

In a European historical context, part of the rationale for the slow emergence and recognition of philanthropic mobility lies in the focus in the Rome Treaty on establishing the European Economic Community. The EEC, as established, was intended as an economic union.

¹¹⁵ See

http://europa.eu/legislation_summaries/development/african_caribbean_pacific_states/r12101_en.htm; for a critique of the Cotonou Agreement in terms of civil society interaction, see UN HRC Working Group on the Right to Development High Level Task Force on the Implementation of the Right to Development, fifth session, Geneva, April 1-9, 2009, A/HRC/12/WG.2/TF/CRP.3/Rev.1, at [6] (noting "From a Right to Development viewpoint, the [Economic Partnership Agreements (EPAs)] fall short of a number of set standards. This includes the manner in which the negotiation process was carried out, the lack of consultation with civil society organizations and the lack of ownership by the ACP states. It also includes the lack of evidence of positive impact predictions of EPAs on development and the lack of Human Rights benchmarks.").

¹¹⁶ See further Nick Gallus, "Protection of U.S. Nongovernmental Organizations in Egypt Under the Egypt-U.S. Bilateral Investment Treaty" (2012), 14(3) *International Journal for Not-for-Profit Law* 62; see also, CCIC, *Bilateral Investment Treaties: A Canadian Primer*, available at http://www.ccic.ca/files/en/what_we_do/trade_2010-04_investmt_treaties_primer_e.pdf; Nick Gallus & Luke Eric Peterson, "International Investment Treaty Protection of NGOs" (2006), 22(4) *Arbitration International* 527-548.

¹¹⁷ David Damberger, Engineers Without Borders, "Learning From Failure," at TEDxYYC 2011, available at <http://www.youtube.com/watch?v=HGihU-agsGY>. Engineers Without Borders maintains a website devoted to NGO failure stories and what can be learned from them at <http://www.admittingfailure.com/>.

¹¹⁸ Engineers Without Borders website, above n. 117.

Nowhere is this more apparent than in Article 58 EEC's exclusion of not-for-profit bodies from those bodies eligible to benefit from the right of establishment.¹¹⁹ The exclusion of nonprofit bodies lives on today in Article 54 TFEU.¹²⁰ This historical context has political implications when it comes to finding a valid legal basis from which to regulate nonprofits at a European level. From a cultural perspective, the differences between civil law and common law understanding of the nature of a foundation, coupled with a lack of European consensus on fundamental matters such as the meaning of public benefit, has made the achievement of European-wide regulation extremely difficult. That is not to imply the impossibility of building a European consensus on the regulation and/or facilitation of nonprofit activity within the EU, but rather to recognize that achievement of any such agenda is much more likely to occur slowly and incrementally over time rather than be ushered in with a legislative flurry.¹²¹

Similar issues arise in the context of development aid to Africa and the attempts of some foundations to transplant western concepts of philanthropy without necessarily appreciating the indigenous forms of and different approaches to strengthening philanthropy in these developing nations. Examples of the difficulties experienced in embedding community foundations in Africa¹²² point to the newness of the Community Foundation concept with case studies indicating the need to further adapt the community concept "to suit the context of different societies because the political, economic, and legal environment varies from country to country [resulting in] a lot of unexpected problems, and no roadmap to show the way."¹²³ Recognition at the 2014 High Level Meeting of the Global Partnership for Effective Development Cooperation in Mexico of the need for a mix of funding mechanisms that support locally owned and demand-driven objectives that draw on CSO-defined objectives alongside complementary government defined objectives further emphasizes the need to take cultural and historical perspectives into account.¹²⁴

Engaging academia . . .

Conference meetings hosted by ARNOVA, ISTR, and the National Centre on Philanthropy and the Law at New York University, which bring nonprofit academics from different disciplines, also play an important role in allowing all sides of the issue to be considered and enabling us to gain a better understanding of the complexity of the problem at hand. Sometimes the role of the academic may not be to find the answer but rather to pose or rephrase the question, thereby crystallizing the issue, perhaps, in a way that enables the

¹¹⁹ See Arts. 52 & 58 EEC. Article 58 EEC provided "'Companies or firms' means companies or firms constituted under civil or commercial law, including co-operative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

¹²⁰ Article 58 EEC became Article 48 EC before becoming Article 54 TFEU.

¹²¹ See Oonagh B. Breen, "EU Regulation of Charitable Organizations: The Politics of Legally Enabling Civil Society" (2008), 10(3) *International Journal of Not-for-Profit Law* 50.

¹²² See, for example, Joyce Malombe, *Community Development Foundations: Emerging Partnerships* (World Bank, 2000), at 37-64; and more generally Tade Akin Aina & Bhekinkosi Moyo (eds.), *Giving to Help, Helping to Give: The Context and Politics of African Philanthropy* (Trust Africa, 2013).

¹²³ Malombe, above n. 122, at 37.

¹²⁴ Task Team on Civil Society Development Effectiveness and Enabling Environment, Key Messages: An Extract for the 2014 Mexico High Level Meeting of the Global Partnership for Effective Development Cooperation (April 2014).

practitioner, policymaker, or foundation donor to reconsider the matter afresh. The role of the foundation in enhancing efficiency and development effectiveness will depend on whether one views foundation involvement as part of the problem or part of the solution. The larger questions concerning the role of civil society in making a better society – whether through development aid, democracy assistance, or public benefit enhancement – and how this role is undertaken and the principles underpinning it, are issues deserving constant analysis and discussion on an ongoing basis.

Cross-Border Philanthropy

**STATES, PUBLIC SPACE,
AND CROSS-BORDER PHILANTHROPY:
OBSERVATIONS FROM THE ARAB TRANSITIONS**

BARBARA LETHEM IBRAHIM¹

Overview

In a quiet announcement in the official Gazette, the government of Egypt amended its provisions on foreign funding in the Penal Code (Article 78) to provide much harsher punishments in cases involving the offer or receipt of foreign funding. This move, taken in fall of 2014, signals the intent of the military-dominated government to exercise tighter control over which non-state actors can receive funding and for what purposes. An assessment of the ways states are currently attempting to regulate capital flows across their borders is an important element of the power struggles that mark a transition process under way across the Arab region today.

After four years of chaotic and unpredictable politics, earlier euphoria over the fall of aging dictators has given way to a weary public who desire stability. At least for the time being, the majority appear willing to trade their short-lived freedoms for a modicum of order. Countries like Egypt have seen increased public support for measures to restrict the space for civil society, including arrest of peaceful demonstrators, journalists, and bloggers, and reduced access to cross-border funding. For those who fought and paid a high price to rid the region of dictatorial leaders, these are disheartening reversals. By 2013, articles began to appear arguing that civil liberties had become more limited under the post-uprising state than during the Mubarak years.²

In light of these and other developments, some observers have been ready to declare the Arab spring over and its uprisings a failure. But on closer analysis, irreversible changes are occurring in the relationship between the state and its citizens, a dynamic that has yet to play itself out fully. State leaders are now required to take account of their politically awakened citizenry in ways that were unthinkable before. The present analysis is a mid-course attempt to identify some of the key issues molding policy regulation of an important aspect of civic life, the mobilization of funds for public purposes, particularly international funding flows for philanthropic purposes. We examine the impact of policy changes on domestic civic life, as observed through the lens of recent developments in the Arab region. Many examples are drawn from Egypt, where the author has most experience, with additional material from Tunisia, where civil society has arguably maintained a freer status over the past four years.

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Special thanks are due to Rahma Ali for excellent assistance in tracking down elusive references for this paper.

² For example, see *Al-Ahram Online* (May 2013).

Three main premises are explored. The first is that when states restrict the flow of international philanthropic capital, the effects are felt most strongly by the citizen sector, predominately actors in civil society such as political parties, NGOs and more informal social action groups. This is because states reserve to themselves the right to accept foreign grants and donations with minimal or no oversight of how they are utilized. Furthermore, in recent years most countries have reduced restrictions on foreign direct investment in the private sector, a move necessary to remain competitive in the global economy. Thus it is predominately civil society that is weakened vis-à-vis the other sectors of society when policy restrictions are tightened.

Thomas Carothers has noted that more than 50 countries in recent years have enacted or seriously considered legislative or other restrictions on the ability of local NGOs to form and operate. At the core of many of these efforts are measures to impede or block foreign funding for civil society groups.³ Measures adopted include administrative and legal obstacles, propaganda campaigns against NGOs that accept foreign funding, and harassment or expulsion of external aid groups offering civil society support. The majority of governments engaged in pushback are semi-authoritarian regimes, a category applying to many Arab states before and during the Arab transitions.

The second premise is that it is generally agreed to be reasonable for contemporary governments to maintain some monitoring of and legal restrictions on the flow of capital and goods across their borders. As crime and terrorism have become increasingly globalized, these may constitute legitimate threats to public welfare when cash, weapons, drugs, or undocumented persons can move unimpeded across borders. Nonetheless, groups or individuals who are determined to use illicit means to send or receive funds across borders will be unlikely to be deterred by laws, which are notoriously difficult to enforce consistently. This leaves citizens and groups whose intent is to respect the law most likely to be disadvantaged when restrictive laws are passed.

In assessing restrictive cross-border funding policies and their implementation, some sort of means test is desirable that weighs the likely threat to basic public order or human welfare before judging those policies to be too harsh or lenient. Because such standards have yet to be agreed upon among western countries, let alone across the vastly different countries of the global south, there is ample room for debate and differences of opinion as to how these laws should be applied.

Thus a third premise of the paper is that one useful way to gauge the reasonableness of a law or policy restricting cross-border philanthropy is to apply a principle of proportionality: do the means of control and the punishments for noncompliance in a particular law match the purported severity of threats to society that it was designed to address? Are the laws precise enough to be effective in targeting harmful behavior, or are they written in such a way as to bring collateral damage to socially desirable entities or causes? A related problem is identified in the dearth of studies that measure concretely the societal good generated from those civil society programs and services supported by external funding. In the absence of empirical evidence of benefit, it becomes easier for governments to argue that blanket restrictions serve the public interest.

³ Carothers (2014).

Protection, Civic Freedoms, and the Social Contract

In liberal democracies, the basic pact between the government and the governed should be one of balanced power. Officials face popular elections on a regular basis, and in the interim period it is understood that a free and active citizen sector (including an independent media) acts as a watchdog to guarantee the proper functioning of government. Thus legislation to curtail the activities of civil society faces special scrutiny; in cases justified by special circumstances such as war or terrorist threats, laws typically include sunset clauses to limit the duration of application. In recent years, strong opposition to laws such as the U.S. Patriot Act or policies framed around protecting homeland security have received harsh and sustained public criticism as contested issues in election campaigns and elsewhere.

The situation in authoritarian states and in many transitioning countries of the global South is quite different. There the state assumes a position elevated above the people it governs, in a form of dominance that does not recognize inalienable rights of assembly or civic rights for citizens. In the Arab region in particular we can see a blend of this kind of state supremacy, which exists alongside a form of paternalism that is fundamentally hostile to a free and open civil society. In this view of correct governance, often spearheaded by security forces, citizens are incapable of acting for their own benefit in organizing civic life. They must therefore be regulated by agencies that take on the moral authority to decide what is beneficial and what brings harm. This fundamentally patronizing stance by governments toward their citizens is typically expressed in the language of “protection” or maintenance of order, with state media utilized to support policies through fear or mobilization of anger toward opposition groups. For example, throughout 2014 in Egypt, young activists and revolutionaries were blamed regularly by state-affiliated television and newspaper commentators for the state of the economy or the lack of order in society. This deflects attention from responsibility of the security forces to maintain order, and from state management of the economy and the transition process in general.

The patriarchal framework is applied to cross-border philanthropic giving in authoritarian settings through two official tenets, repeated throughout the state bureaucracy until large parts of the public accept their veracity as well. The first is that foreign donors never have helpful or altruistic motives for their donations, and in fact they are in the service of foreign governments and/or political groups. The second operating assumption is related—that those in the local society who accept foreign-sourced donations must therefore be working as external agents and cannot be patriotic citizens. These damaging assertions are made routinely and in multiple venues, so that they take on the air of invincible truths. State media, public statements of high officials, security prosecution investigations, and judicial verdicts all operate to reinforce these views.

Thus the place of “foreign funding” in political discourse in many if not all Arab states is to keep large parts of the organized citizen sector alienated from the broader public, constantly on the defensive, and fearful of legal action should their activities or budgets grow to have significant impact. This is possible, in turn, because of the underdevelopment of local philanthropic sources, especially in the sensitive areas of rights, democracy promotion, and protection of minorities.

It initially appeared that the anti-foreign funding discourse would lose its potency following the Arab uprisings beginning in 2010. Young revolutionaries were globally connected in terms of ideas and networks but not for the most part beholden to outside financing. These

were initially seen as largely domestic uprisings with domestic consequences, although in each case elements of external political influence eventually interceded, Bahrain being the most dramatic case in point. Regional and international influence became increasingly apparent in the transition period of early elections (in Egypt) or constitutional negotiations (in Tunisia). It was often unclear whether states or private actors were behind the money flows, especially in support of groups like the Salafists, which entered politics for the first time after 2011. In Egypt, the picture became increasingly murky, with Qatar, the U.S., and Turkey ultimately accused of supporting the election and subsequent conduct of the short-lived Mohamed Morsi regime in Egypt. A discourse of dangerous foreigners that had prevailed during the Mubarak years was once again installed as a way of mobilizing public support for the post-Morsi interim government and presidency of Abdel Fattah al Sisi.

Domestic Politics in Transition: The Case of Egypt

With that framework in mind, a quick review of Egypt's 2011 uprising and subsequent transition period illustrates how the dialectic between local and international politics has impacted the free expression of dissent and the funding of democratic forces in that country. This sets the backdrop for a closer look at restrictions on international or cross-border funding of civic and philanthropic entities that have emerged over the ensuing transition years.

The relationship of state, law, and civil society shifted multiple times during the four years following Egypt's January 25th revolution.⁴ That uprising was sparked by converging forces within the citizen sector, including labor unions, opposition parties and groups like Kefaya ("Enough"), and newer youth movements such as 6th of April and We are All Khaled Said. Within days the protests in Tahrir were joined by a range of Islamist factions, most prominently the Muslim Brotherhood. By the end of the dramatic 18 days, it was clear, however, that it was the armed forces who were firmly in control and behind the sudden departure of President Mubarak on February 11. Over the early months of rule by the Supreme Council of the Armed Forces, street protests and labor actions were continuous, and the army was initially reluctant to intervene. Then a sit-in in Tahrir square was aggressively removed mid-summer, and a peaceful march in support of Coptic Christians was violently dispersed with many deaths in October 2011.

As police forces began to reappear on the streets, and in response to a series of bloody protests, security forces steadily regained the upper hand. Presidential elections took place before a constitution was drafted and under an election law that did not stipulate or enforce transparency in campaign finance or equal access to media. Following the announcement of victory for Muslim Brotherhood leader Mohamed Morsi in June 2012, public demonstrations took on a sectarian tone, largely male and unfriendly to women, with flags of Gulf countries, al Qaida, and the Brotherhood appearing alongside the ubiquitous Egyptian flags of previous periods. However, as opposition to the policies of the Morsi regime mounted, huge street demonstrations reemerged, particularly following his unilateral decree increasing presidential powers at the expense of the judiciary. These were reminiscent of the original Tahrir protests, more diverse in terms of class and gender, but preyed upon violently by murky groups that were variously identified with the Brotherhood or remnants of the Mubarak regime. By July 2013 two huge

⁴ Egyptians tend to call the events of January and early February 2011 a revolution, while political scientists and others prefer to use the term uprising. In all cases, it will be several more years before we know definitively if those events result in profound governance changes.

opposing camps had gathered in major squares in Cairo, one supporting the elected government and the other challenging its legitimacy and calling for early elections.

Military and pro-Mubarak groups aligned with the young leaders of the Tamarod movement mounted a massive anti-Morsi recall petition and encouraged throngs to gather in Tahrir. State-controlled media kept sentiments high against the MB as the army once again stepped in to “save the nation,” calling on Morsi to negotiate. He refused, the military moved to arrest him and his top officials, and formal power transferred to the armed forces once again. Under a military “roadmap” for the country, an interim president was appointed along with a new prime minister and cabinet.

From that point onward and until early 2015, independent citizen action was progressively curtailed, whether it was initiated by pro-Morsi supporters or secular rights groups opposed to military actions they believed violated human rights or due process. The military regime accomplished this with little public outcry, using media campaigns around an official “war on terror,” and later by encouraging a “back to work” and normality campaign. These were welcomed by what appeared to be a majority of Egyptians, tired of the chaos and hopeful of restoring a seriously dysfunctional economy.

How are the tightening restrictions on domestic political expression linked to laws and regulations governing cross-border giving? Given the global communications and networks in which civil society operates now in all parts of the world, lines between domestic and international actions are increasingly blurred. Governments use this to their advantage to paint local citizen groups as unpatriotic for associating internationally, as noted above. In a sense, this might be seen as a validation of the strength and impact of empowered citizen-led initiatives. But a vibrant civil society sector can be quickly undermined by legal restrictions on cross-border relationships coupled with threats of prosecution and jail time. That is clearly illustrated in Egypt, both in the past by the overreactions of an aging Mubarak regime with a weak hold on power, and later during the uncertainties of a transition period. The means used by both governments are surprisingly similar, as described below. In that evolving context in Egypt, we can examine the three interlinked propositions.

Premise 1. Cross-border funding restrictions disproportionately impact civil society

This first premise may appear obvious; nonetheless, through examining the factors underpinning it, avenues for redress could become clearer. In the Arab region, a close reading of laws restricting access to cross-border partnership and funding suggest that behind state discourse around protecting national interests and public order are a set of alternative motivations. First, one can see a clear distinction between the application of laws to primarily development organizations—those providing social services like health care, education or childcare, for example, which are largely left to work unfettered—and those engaged in rights or democracy promotion. States selectively apply restrictive laws and regulations to civil organizations in those fields based on the perception that they exist to provoke opposition to the state or its policies. With no quarter allowed for the concept of loyal criticism, the fact that these organizations maintain foreign ties is in itself evidence of disloyalty. Proof of harm is rarely or never established except for guilt by association. Usually it is enough to publicly imply unpatriotic motives to the group under scrutiny and then subject it to legal prosecution.⁵

⁵ NGO Law Monitor: Egypt (2014).

Thus the Mubarak regime in Egypt repeatedly assured western governments that its anti-terror laws would never be used except to prosecute drug traffickers, armed groups, and avowed terror organizations. However, local human rights and democracy defenders were subjected to legal proceedings based on its provisions, including the provisions against accepting foreign funding without permission.⁶ Civil society organizations with close ties to the regime during the Mubarak years received large grants, including many from external sources, without being subject to review or prosecution.

Similarly, in the period immediately following the fall of Mubarak, international NGOs in the process of registering to operate in Egypt found themselves subject to prosecution for democracy-promotion activities that had been frequently and carefully coordinated with relevant officials. The line between civic education and politics is murky in transitioning countries, and when the military leaders wanted to stop those activities, it was enough to circulate rumors that NGOs were using foreign grants to “divide” the country and to carry out Israeli plots; arrests, trials, and prison sentences ensued. It stretches credulity that those who ordered these investigations really believed the NGOs capable of “undermining national sovereignty,” but it was convenient to use those charges for two reasons: to signal to other international groups that Egypt was not welcoming to cross-border philanthropy, and to intimidate local groups from developing independence through their funding sources. This case is discussed further below in the context of disproportionate punishment.

By 2014 there were heightened fears among the human rights and civic education community in Egypt that similar selective prosecution was on the increase. A directive from the Ministry of Social Solidarity over the summer of 2014 required all entities serving a social purpose, regardless of their current registration, to re-register with the Ministry and be subjected to its regulations. A 45-day deadline for registration was renewed until October, with notice that violators after that date would be prosecuted. The fact that similar requirements were not enforced for private companies, which routinely engage in social responsibility projects and grant-making, and whose foreign funding infusions are many multiples higher, suggest the targeting of civil society.

Taken together, selective application of laws and regulations create a crushing environment for the citizen sector and reduce much-needed support for Egypt’s transition at a time of economic crisis. Under the current trend to increase penalties and prison sentences for infractions of the foreign funding laws in Egypt, for example, organizations such as Oxfam UK, which has operated in the country for over 30 years, suspended its local operations and later closed down. Other western donors have shifted their programs to Tunisia, where the climate for international cooperation is more open. Egyptian human rights organizations have made arrangements to place staff on indefinite leave in order to protect them should an investigation take place, and some are moving their core operations to other countries in the region for an indefinite period.

This has the effect of further weakening a sector already suffering from the extreme polarization of politics that arose in 2013 around the removal of Mohamed Morsi’s Muslim Brotherhood government and subsequent prosecution of his followers. It removes from public

⁶ The case of the Ibn Khaldun Center and its 28 defendants shook Egyptian civil society over the period 2000 to 2003, when the state subjected its staff and chairman to three trials involving seven-year prison sentences, for accepting foreign funding without state permission.

life the very organizations with the leadership and values that could enable them to initiate reconciliation efforts across that deep divide.

Premise 2: Reasonable monitoring of and restrictions on the flow of capital and goods across borders are acceptable, but not selective application

Following the first parliamentary elections in Egypt in 2012, the Carter Center, which maintained an office in Cairo, commented on a range of issues it felt warranted concern, though it was unable to investigate them fully under its international observer mission. One was the apparent influx of unattributed outside funding to election campaigns and the lack of effective oversight of campaign contributions. Rights activists have long decried the practice of paying voters in cash or food for going to the polls. Further concerns were raised when raids on the Muqattam headquarters of the Muslim Brotherhood in 2013 allegedly turned up documents detailing large sums of Gulf funding allocated for specific individual candidates who were also members of that group. These appear to be legitimate instances of potential harm to the free and fair election process. It is an area where established democracies have labored for long to set limits on funding sources and amounts and to enforce them.

Outside campaign funding and lack of transparent accounting for campaign spending were the most frequently mentioned concern in transitioning Tunisia as well, as reported in a recent FRIDE study on foreign funding there.⁷ Opposition politicians and their supporters expressed the view that Ennahda's electoral victory was a result of the party's deeper financial coffers, which they were convinced came from abroad. Ennahda party's "funding from Qatar" is a recurrent theme that many in Tunisia take for granted, despite the lack of hard evidence.⁸ Interestingly, other civil society groups like human rights and community-based NGOs have mostly welcomed external donor support, noting that local philanthropy is almost completely lacking. When questions are raised, it is usually by community members who can be reassured by open sharing of information about the project in question and origin of funding.

Tunisia seems on the whole to have escaped the media-fed suspicion around external funding sources that is rampant in Egypt, and its interim government has encouraged international partners in the transition process. At least three major private donors that originally planned to establish programs in Egypt in 2011 have switched to working in Tunisia. The same is true of a consortium of European donors who wanted to contribute to the Arab spring opportunity but were discouraged by Egypt's unwelcoming climate and are now operating in rural Tunisia.

In Egypt, suspicions of possible cross-border funding of political candidates and parties rose to new heights in the period following Morsi's removal and the lead-up to presidential elections in 2014, with the arrest and prosecution of a number of foreign journalists on allegations of working for the Muslim Brotherhood. These cases, and the standards of evidence allowed during the ensuing court trials, have raised both local and international concern. A different area of media bias was raised by the Carter Center observer mission in 2014, which commented on the unequal access to local media during the presidential campaign, noting that one candidate had excessive access to state media through a position in the cabinet. Similar concerns have been raised by Egyptian authorities, who shut down a number of local private

⁷ FRIDE (2013).

⁸ Kausch (2013).

satellite channels for alleged ties to the MB, yet have little control over channels viewed in Egypt but licensed and broadcast from abroad. If non-Egyptian channels choose to promote a political viewpoint or party (as was the accusation against channels in the Al Jazeera group) there is very little legal recourse. These are the gray areas of cross-border funding and influence that bear further scrutiny and standards that are internationally accepted.

But what about cases where “harm” is a shifting matter and states change course in their views on cross-border cooperation? In the previously mentioned NGO trial case, accused organizations had early indications from Egyptian authorities that their activities were welcome. The prosecuted international organizations originated in the U.S. and Germany, two countries where Egypt has strong links through joint counterterrorism programs. During the protracted legal proceedings, prosecutors ignored attempts to convince them that NGO activities for democratic education and training, such as preparing women and youth to compete in legislative elections, are in fact one way of building a strong non-violent polity and civil sector, essential in the fight against terrorism.

Support for the view that these prosecutions and others like them may have intentions other than protection from harm comes from the case mounted against Dr. Amr Hamzawy, an activist, professor of political science and politician elected to the first short-lived parliament after January 25. In one tweet, he used his Twitter account to express dismay over the way evidence was marshaled and the verdict reached in the NGO case. As a result he was prevented from traveling to attend an overseas academic conference and charged with insulting the judiciary, a serious criminal act. Many similar Twitter comments by other irate Egyptians with less public prominence were ignored. In a letter to the Egyptian Minister of Justice concerning the case, the Academic Freedom Committee of the Middle East Studies Association stated in part:

... At the beginning of June 2013, an Egyptian court ruled that several Western-backed non-governmental organizations operating in Egypt aimed to “undermine Egypt’s national security and lay out a sectarian, political map that serves United States and Israeli interests” and were receiving funding from outside to pursue that aim. The ruling prompted critical responses from both inside and outside Egypt. Several critics suggested that insufficient evidence had been provided to prove the allegations and so, they appeared to be political in intent. Indeed, this was precisely what Dr. Hamzawy posted in a single tweet on June 5. It reads: “Verdict in case of foreign funding of CS shocking, transparency lacking, facts undocumented & politicization evident.” It is for these words that he is now being accused of insulting the Egyptian judiciary.

We are fully aware that insulting the judiciary is a crime in Egyptian law; however, we fail to see how the above words can be read as defamatory. Instead, the charges against Dr. Hamzawy appear to be part of a broader, systematic effort to stifle critical free expression....⁹

That legal case was eventually dropped against Dr. Hamzawy, who remains a critic of the government’s ban and prosecution of the Muslim Brotherhood, though himself an avowed secular liberal within the Egyptian political constellation. From past experience, however, it can be revived whenever his public statements run afoul of official positions.

⁹ Letter Concerning Charges Against Amr Hamzawy (2014).

The most direct threat to free citizen expression in Egypt came with the passage by presidential decree of a controversial Protest Law in November 2013. Public expressions of opposition to government policy or practice were effectively silenced through intensified arrests and prosecution of citizens who mount peaceful demonstrations. The stiff penalties in this law for any form of protest not directly approved in advance by the Interior ministry was the clearest indication to date that the same citizen mobilization that had enabled the military to topple Morsi was no longer to be tolerated.

Article 8 of the new law requires that organizers of any public assembly, whether a protest, march, or general meeting, submit a written notice to the nearest police station with their plans at least three working days in advance. Article 10 allows the Minister of Interior or the concerned security director to cancel, postpone, or change the route of a protest.¹⁰ The terms of this law will receive constitutional challenge in due time. They violate access to free association enshrined in the latest constitution of 2014, which grants rights for public demonstrations following “notification of the relevant authorities” only.

Currently, hundreds of activists are in prison, some held without charge, others serving three- to five-year prison sentences for violating the provisions of the new law. They view their actions as peaceful civil disobedience of an unconstitutional law. Many face deteriorating health following prolonged hunger strikes. However, public opinion appeared willing to accept these measures, along with others like the closure of private television channels and newspapers, and bringing security forces back onto university campuses. The approval rating for the performance of President Al Sissi ranged between 45 percent in early summer to 82 percent in September 2014 as terror threats against security forces escalated.¹¹ These are well beyond the actual numbers he garnered in the spring presidential ballot, where turnout was low. At least in the short run, a combination of suppression of dissent and fear of increasing violence trump public support for free expression.

Premise 3: Protecting domestic political space from external “harm”: is proportionality applied?

Whereas the previously mentioned registration directive and the Protest Law are aimed primarily toward curbing domestic political expression, the September amendments to Article 78 of the criminal code are a direct challenge to foreign funding and cross-border capital flows for philanthropic purposes. The new provisions impose life imprisonment and a fine of 500,000 LE (roughly US\$72,000) for anyone who solicits, assists, or receives funding or other support from a foreign source with the intent to “harm the national interest,” “compromise national sovereignty,” or “breach[] security or public peace.” A foreign source is defined in the law to include “a foreign country, any individual who works for it, a legal person, a local or foreign organization, or any other entity not affiliated or working for a foreign country.” The amended law likewise imposes the penalty of life imprisonment on anyone who gives or offers such funds, or “facilitates” their receipt.

That means in theory that the entire staff of an organization, whether a private foundation like the Ford Foundation or the semi-governmental Canadian International Research Center (IDRC), donor agencies operating in Egypt for over 50 years, could be subject to these draconian

¹⁰ Egypt’s Protest Law Nov (2013).

¹¹ The Egyptian Center for Public Opinion Research (Baseera) (2014).

punishments. Could an IDRC grant to teach research methods to young policy change advocates be seen as “harming the national interest?” Would the program officer who made the grant and the clerk who issued the check be liable to life sentences mandated under the new penalty clauses? Proportionality is absent in this law, both because of its vague wording and because it does not specify graduated penalties for differing degrees of responsibility and harm.

While the expressed intent of the law is to curtail funding for armed insurrection or terror organizations, such vague wording leaves open to wide interpretation those activities or causes that could be seen as harmful. Generic language such as “harm the national interest” or “compromise national sovereignty” gives prosecutors vast discretion to use the law selectively. The potential effect on fragile democratic practices is great, given that common acts—such as criticizing the indictment of individuals in political cases or sending observer missions to monitor national elections in Egypt—have been defined repeatedly by the state as infringements on sovereignty. The latter is invoked so regularly that most citizens believe monitoring—whether by local citizens or international observers—to be a suspicious political act. However, the Egyptian Ministry of Foreign Affairs routinely sends its own observer missions to monitor other countries’ elections. Consistency does not seem to be a high priority in these matters. Or perhaps, as was previously noted, the state takes for itself privileges that citizens are not felt to be capable of managing.

State sovereignty often emerges as the value that trumps all other values or rights in non-democratic states, especially during periods of military rule. It is a curiously elastic concept because on the one hand, state powers are free to define what are perceived as threats to sovereignty, while allowing themselves free access to the very resources or relationships that are described as “harmful.” So funding for citizen groups that originates beyond national borders is automatically suspect and subject to scrutiny or oversight in the laws of many Arab states. But government bodies have license to freely solicit huge amounts of foreign-sourced grants, loans, and in-kind supplies of weaponry and surveillance equipment, for example, for which there is no oversight or concern over potential harm.¹²

From the perspective of foreign donor states and organizations, the amended law has similarly dangerous implications, as their representatives may be held liable under the new provisions. The amendments state: “Anyone who gives, offers or promises any of the above mentioned things for the purpose of committing any of the crimes stated for in the previous paragraph shall be subject to the same penalties. Anyone who facilitates the commission of any of the above mentioned crimes shall be subject to the same penalties.” This puts donors as well as their Egyptian partners and employees at potential risk as well.

It has been noted by the International Center for Not-for-Profit Law and others that the new amendment specifies even stronger punishment for state employees than for private citizens who violate this law, including death sentences for public officials. Those provisions open the way for legitimate court challenges to members of regimes that solicit foreign donations if those can be shown to harm the vague concept of national interests. This double-edged sword aspect of

¹² Interestingly, however, a case brought against the state by rights groups in Egypt late in 2014 does appear to have halted, at least temporarily, the application of a sweeping effort to collect and review email and other internet communication using foreign-sourced equipment and software. The case is based on the new penalty clauses and the argument that such indiscriminate infringement of the privacy of normal citizens creates a form of national harm.

the law, clearly drafted with Morsi government officials in mind but capable of application to any subsequent government, may in fact be sufficient reason for its further amendment in the future.

Conclusion and Recommendations

The above assessment is bleak on a first reading, with wider implication in the Arab region given the historic role Egypt plays as an intellectual and political trend-setter. Tunisia presents a more hopeful case where pluralistic politics and openness to international cooperation mark for the most part their transitions period. Some historians of Egypt would balance the picture by noting that xenophobic tendencies have coexisted with periods of cosmopolitan assimilation for millennia in Egypt. And experiences in Latin America and elsewhere suggest that heightened nationalism and rejection of foreign influence were hallmarks of military regimes throughout the 1980s and 1990s. That did not prevent the ultimate ascendance of more democratic and open societies at the end of a transition period.

What efforts might local civil society and its partners internationally take to ease the current restrictive situation in Egypt and elsewhere in the region? The suggestions made here are an amalgam of observations from working inside the philanthropy sector and from studying the role of philanthropy in transition successes elsewhere. They are also indebted to an interesting set of ideas by Akrum Bastawi,¹³ who reviewed the methods utilized by Mubarak-era economic reformers in Egypt for possible lessons applicable to civil society and cross-border donors.

1. The international philanthropic community can help by developing codes of conduct for cross-border work based on respect for local cultures and legal traditions that also enshrine basic shared principles of human welfare as well as operating procedures that lend greater transparency and accountability to their endeavors. They also have a role to play in compiling and sharing effective practices with governments and lobbying through their global associations such as WINGS and the OECD Net-Forward group of private donors.
2. International donors would be well-served to work more collaboratively with each other in cross-border settings, especially during the unpredictable and fast-changing situations brought on by sudden regime change or the end of war or civil conflict. This would enable them to share credible insights on the political and social environment in which they hope to invest and therefore be more likely to “do no harm” when engaging with local counterparts. This would also increase chances that programs are sustained beyond the usual two- to three-year post-regime change period in which international enthusiasm is highest. Civil society development needs long incubation and steady support, especially in environments such as Libya or Yemen where the sector was severely restricted under an *ancien régime*.
3. Cross-border donors who are reluctant to take risks in a transition setting such as Egypt or Tunisia with direct grant-making have a number of alternatives. The one with longest-term potential impact is to support the growth and effectiveness of local philanthropy. Whether foundations, endowments, social businesses, or more informal citizen and community funds, local philanthropy has a better chance of staying the

¹³ Akrum Bastawi is a specialist in international economic relations and a former adviser to the Egyptian government.

course regardless of the restrictions that may be placed on external capital. When a flourishing and diverse local philanthropy sector emerges in the Arab region, foreign funding will recede as a political hot-button issue. It can then take its rightful place as one auxiliary source of support among others.

4. Consider support for (and the registration of) local for-profit entities that have both an income-generating and a social purpose. While an unusual move for most donors, this could have a dual advantage. Social businesses, as they are often called, can cross-subsidize their public benefit activities with the revenues from for-profit activities, whether fee-based social services, consulting, or a novel solution to a pressing societal problem. They may also be able to maintain company legal status and avoid the harsh measures applied currently to non-profits.
5. Civil society in local settings can begin a serious process of self-assessment and self-regulation. This begins with admitting that violations of law and ethical standards do occur, which hurt everyone else. Standards can be drawn up and education programs instituted within the sector that display to government bodies a seriousness of purpose about truly serving the public good.
6. Local civil society needs to take itself seriously in the coming period and act less like youthful rebels and more like professional partners in development. By this we mean that the strategies built around street politics and engagement have their place and will always be one of the tools in the struggle for civil liberties. But the waning support for young activists in countries like Egypt is a wake-up call that the important work of building broad constituencies, raising awareness beyond the urban centers, and providing tangible benefits to the public must also be part of the next phase of Arab civic life.
7. This does not in any way suggest a deflection from the essential watchdog and defense functions of rights and public policy groups. It will require, however, taking steps toward greater empathy with one's supposed "enemy." If security forces awake each day to deal with suicide bombers, drug lords, and fraudsters, and they see evidence that civic groups have no respect for their work, how can the wall of mistrust ever be lowered? What are the tactics for finding and working with individuals within state agencies who may be sympathetic and willing to show flexibility and innovation? How do we prepare "our" candidates for influential public office? There are lessons to be learned from other transition contexts where pressure to change institutions was exercised while also making concerted efforts to reduce levels of mistrust on both sides.
8. One data-driven lever for greater influence of the civil sector might come from a credible estimation of its total contribution to the GDP. Using economic models to monetize the services, information dissemination, and voluntary labor generated by the sector would shift the debate from one of liabilities to one of assets. In countries like Egypt where the sector is large, it could eventually shift the way government agencies negotiate with civic leaders and bring them to the policy table. An academic research team in Egypt is pursuing this project in 2015, on the assumption that once a new parliament is seated in the summer, its members will benefit from factual evidence to

enable them to evaluate a draconian NGO draft law which the government recently circulated.

9. Western governments need to do more to put teeth and consequences into their rhetoric about support for civil society around the globe. If the U.S., Canada, Japan, and EU countries were to work in tandem to impose meaningful consequences on governments that are happily receiving foreign aid but restricting their civil sector from doing the same, it is certain that changes would happen rapidly.
10. Perhaps with serious collective efforts at all levels, the unfortunate momentum of anti-civil society and anti-global cooperation legislation can be stemmed and reversed.

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Article

LEGISLATION ON FINANCING PUBLIC BENEFIT ACTIVITIES FROM TAX DESIGNATION IN POLAND

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Regulations concerning public benefit activities in Poland were adopted with the Act on Public Benefit Activity and Volunteerism of April 24, 2003 (the *Dziennik Ustaw* journal of laws of 2003 no. 96 item 873). In this way a special type of nongovernmental organization (NGO) was introduced into the legal system, known as the public benefit organization (PBO). PBOs had been operating in Poland long before the introduction of the Act, but it was only then that they received a special “public benefit status” that ensures legal recognition of organizations performing public benefit activities. Nongovernmental organizations of different legal forms (such as associations, foundations, and religious organizations) can get the public benefit status after meeting certain formal requirements. Such status gives them access to certain benefits reserved for PBOs. Should they lose this status, they can continue with their activities but no longer have access to these benefits.

The main benefit is the right to collect a 1 percent tax designation from personal income tax. Polish taxpayers have the right to assign part of their tax liability to public benefit organizations. Other CEE countries that adopted such solutions include Hungary, Slovakia, Lithuania, and Romania.

NGOs that carry out socially useful activity within the realm of public tasks and meet certain criteria can become PBOs. Organizations eligible to become PBOs include the following:

1. Nongovernmental organizations that are not units of the public-finance sector and do not act in order to achieve profit.
2. Legal persons and organizational units of churches or religious organizations.
3. Local government associations.
4. Social cooperatives.
5. Joint-stock companies and limited-liability companies and sports clubs that do not operate in order to achieve a profit and that assign all profits to the implementation of their statutory objectives.

The following entities cannot become PBOs:

- Political parties.
- Trade unions and organizations of employers.
- Professional associations.
- Foundations created by political parties.

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Thus public benefit organizations encompass institutions implementing social functions and not seeking profits. They may be both religious and secular.

Two groups of tasks qualify as public benefit activities in Poland. First are public tasks carried out by organizations themselves, including social aid and charity; activity for the benefit of national minorities; protection and promotion of health, science, education and upbringing; activities supporting the development of local communities; and promotion of voluntary service (Art. 4(1) of the Act). Another group includes activities that organizations implement in cooperation with public administration bodies, including the following:

1. Performing public tasks delegated by administrative bodies.
2. Sharing information and cooperation in order to harmonize planned activities.
3. Consulting draft legislation in areas concerning statutory activities of these organizations.
4. Creating joint advisory and initiative teams comprising representatives of NGOs, entities enumerated in Art. 3(3) of the Act, and representatives of bodies of public administration.
5. Concluding contracts and partnership agreements for the execution of local initiatives and development policies.

Public tasks may be outsourced to organizations in two ways: delegating the tasks with grants for financing them, or supporting the tasks with grants for co-financing them.

Statutory activity of organizations may be carried out as unpaid or paid activity. The difference lies in receiving remuneration for statutory activities of the organization.

Organizations that apply for public benefit status must meet the following criteria, defined in detail in Art. 20(1) of the Act:

- Carry out statutory activity to benefit the general public or a certain group of entities, on condition that such a group is singled out on the basis of a particularly difficult situation or material status.
- Carry out business activity only in addition to public benefit activity, and the excess of revenues over expenses must be spent on statutory activity.
- Have a statutory supervisory or control body and a statute containing the clauses required by the Act.
- Have a management authority whose members have not been convicted by a final judgment for a publicly prosecuted intentional offense or a fiscal offense.
- Have conducted uninterrupted operation concerning public benefit for at least two years before applying for public benefit status.

A nongovernmental organization receives public benefit status when entered into the National Court Register. It loses this status after being crossed off the register.

A PBO is obliged to file an annual narrative report from its activities. Since 2013, entities with an income of less than 100,000 zlotys may file simplified narrative reports (Art. 23(6c)–(6e) of the Act). Besides the narrative report (or simplified narrative report), the organization must

prepare financial reports. Both approved documents should be published by entities on their website or elsewhere. The organization is also obliged to publish both reports before July 15 of the following year on the website of the office of the minister for social welfare. If an organization fails to meet this condition, it loses the right to apply for 1 percent of tax. That is, the organization is excluded from the list of organizations to which taxpayers can dedicate their tax designation.

Financing Public Benefit Activities from Tax Designations

When the mechanism of financing public benefit activities from 1 percent designations was introduced into the Polish legal system, it was accompanied by a number of limitations. In the regulations for the years 2004-2007, the group of taxpayers who had the right to allocate 1 percent of their income tax was narrowed down: the right could not be exercised by entrepreneurs who paid their tax according to the so-called flat rate of 19 percent, or taxpayers of lump sum taxes or capital gains tax. Also, in order to effectively contribute the 1 percent, the taxpayer had to pay the chosen organization themselves, before filing a tax return. Amounts from the 1 percent of tax were returned to the taxpayer after the tax office settled the tax return. Another problem was requirement that the taxpayer provide complicated information about the beneficiary organization in the tax return.

Despite these problems, the number of organizations applying for the public benefit status rose annually. The number rose between 2004 and 2005 by 82 per cent, exceeding the rate of growth in the following years. Obtaining such a result was possible thanks to the large-scale conversion of NGOs into organizations with the public benefit status. There was also an annual increase in the number of taxpayers making 1 percent designations and in the amounts transferred to the accounts of organizations. In 2004 80,320 taxpayers jointly allocated 10,365,000 zlotys to organizations. In the following year, more than 680,541 taxpayers allocated 41,616,000 zlotys. Both the number of taxpayers and the amounts assigned from 1 percent of tax grew every year, despite the existing restrictions.²

In 2008 the mechanism for allocating the 1 percent was simplified. In 2008, as a result, 33 percent more organizations applied for PBO status than in 2007. Allocating 1 percent of tax was made easier by shifting the burden of the transfer of money from taxpayers to tax offices. Since 2008, taxpayers have been obliged only to mark in the tax return the organization to which they want to allocate the 1 percent and the amount that the tax office is to transfer. Also in 2008, more types of taxpayers were permitted to designate the 1 percent.

Changes introduced into the regulations on public benefit activity and voluntary service in the years 2008-2012 also concerned conditions that need to be met by organizations to apply for the 1 percent.³ In 2010 the obligation of filing annual narrative and financial reports to the minister responsible for social security was introduced, as a condition of placing an entity on the list of PBOs entitled to receive the tax designation, which is updated every year. In the narrative report, the organization must reveal the purposes for which the money from the 1 percent

² Summary of data elaborated on the basis of information from the Ministry of Finance for each year: http://pl.wikipedia.org/wiki/1%25_podatku (accessed on September 5, 2014).

³ Act on Public Benefit Activity and Volunteerism (Elaborated on the basis of: Dziennik Ustaw of 2010, no. 234, item 1536, of 2011 no. 112, item 654, no. 149, item 887, no. 205, item 1211, no. 208, item 1241, no. 209, item 1244, no. 232, item 137), consolidated text published <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20030960873> (accessed on September 6, 2014).

designation has been spent. The report must also be published on the organization's website. In addition, since 2011 organizations have been able to apply for public benefit status and gain the right to 1 percent allocations only if they have operated uninterruptedly for at least two years. Also funds obtained from the 1 percent may be used only to finance public benefit activity, so campaigns whose aim is to obtain the tax designation must be financed from other sources.

In 2013 simplified narrative reports were introduced that must only be published on the website of the office of the minister responsible for social security. This obligation concerns those PBOs whose profit did not exceed 100,000 zlotys in a given financial year.⁴

These legal changes were aimed at decreasing the number of PBOs operating primarily for activities funded by the 1 percent mechanism. Another goal was increasing financial transparency of organizations' activities. A step toward support for small, mainly local organizations was limiting the requirements of making and publishing reports.

Influence of Legal Regulations on Financing Public Benefit from Tax Designations

At the end of 2011, 8,669 organizations were registered as having public benefit status. Of them, 62 per cent were associations, 23 per cent foundations, and the rest were organizations with other legal structure. The largest number of organizations operate in the Mazowieckie (1,406) and Dolnośląskie (1,060) Voivodships, and the smallest in the Świętokrzyskie Voivodship (168). In the following years there were no significant changes in the number of organizations and in their activity in each voivodship.⁵

Table 1 – 1 percent of tax in each year

Year	Number of taxpayers allocating 1 percent	Taxpayers allocating 1 percent as percentage of taxpayers entitled to do so	Allocated amount in PLN
2004	80,320	0.33 percent	10,365,000
2005	680,541	2.78 percent	41,616,000
2006	1,156,510	4.71 percent	62,332,000
2007	1,604,142	6.49 percent	105,438,000
2008	5,134,675	no data	291,594,362.90
2009	7,324,953	no data	380,133,384.70
2010	8,623,928	33 percent	357,141,279.41
2011	10,134,625	38 percent	400,241,359.84
2012	11,165,578	43 percent	457,315,813.63
2013	11,537,414	44 percent	480,042,179.27

Figures: own elaboration on the basis of data published by the Ministry of Finance, <http://www.finanse.mf.gov.pl/pit/statystyki;jsessionid=A72ECE7A3B59C6228CBD6185B90AF975>

⁴ Art. 23 (6c–6e) of the Act on Public Benefit Activity and Volunteerism - consolidated text published <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20030960873> – access on 6 September 2014.

⁵ See <http://wiadomosci.ngo.pl/wiadomosci/933303.html> - access on 6 September 2014.

The above table presents the number of taxpayers making the tax designation each year and the amounts transferred to PBOs.

The number of taxpayers who allocate 1 percent of tax to a selected organization each year (and in the years 2004-2007 the money was transferred directly to organizations' accounts) increases each year. In the first year the tax designation was made by only 80,320 people, but in the following year it rose to 680,541 people. The highest increase occurred between 2007 and 2008, from 1,604,142 to 5,134,675 people. As previous research showed,⁶ the main reason for the growing number of taxpayers declaring 1 percent of tax between 2007 and 2008 was the change in regulations that made it easier to allocate money to organizations. (Organizations surveyed in the Silesia Voivodship declared that they carried out information and promotional activities before 2008, but they reported a significant increase in amounts obtained from the 1 percent allocation in 2008, after the introduction of changes in regulations.) Also, the amounts allocated to organizations increased. In 2004 a total amount of PLN 10,365,000 was allocated, in the following year it was PLN 41,616,000 and in 2008, after a change in the principles of allocating the tax designation, the amount increased to PLN 296,227,000. In each following year the amount was higher. The year 2010 was an exception; in tax returns filed for 2009, the adjustment of tax brackets was accounted for, which led to lower taxes due and as a consequence lower amounts of the 1 percent.

A specific solution allowed in the Polish legal system is creating individual accounts, called sub-accounts, by organizations for collecting funds for individuals and sometimes also for other organizations. By providing the possibility of creating an individual account, an organization can collect funds from a tax designation and then make them available to a particular person or organization. Such a solution really contradicts the idea of public benefit, because organizations in fact support the private benefit of certain beneficiaries. Also, they switch the responsibility for gathering and spending the obtained amounts to beneficiaries. In Poland, organizations that collect money on sub-accounts get the highest amounts every year.⁷ In the case of collecting money on sub-accounts, usually the beneficiaries must seek support in their environment, also using traditional or social media to collect money. Some people deal with collecting money on sub-accounts better than others. This approach may help people who are most resourceful rather than those with the greatest need. Purposes most often financed from tax designations via sub-accounts are healthcare and rehabilitation.

Summary

Regulations introduced in Poland concerning financing public benefit from amounts declared by citizens who allocate their tax designation to a certain organization changed the attitude of Poles to activities for the benefit of the third sector. In the first years after the Act was introduced, when allocating money required the taxpayer to take certain actions, much less money was transferred to organizations' accounts, but at the same time it was allocated to organizations the taxpayers identified with to some extent. After amendment of the regulations, the activities have become large-scale and declaring funds often became accidental (research

⁶ See chapter 5.1. (pp 59-78), G. Piechota, *Organizacje pożytku publicznego – w drodze do społeczeństwa obywatelskiego? (Public benefit organizations - on the way to a civil society?)*, <http://sbc.org.pl/dlibra/docmetadata?id=30220&from=publication> (accessed on September 12, 2014).

⁷ In 2013 one organization that collects money on sub-accounts received a total of 25 percent of the whole amount allocated in the year.

shows that many Poles do not pay attention to choosing an organization to which they declare their 1 percent, and a few weeks after the declaration they do not remember the organization they have chosen).⁸

The highest budget allocation is given to organizations that in fact execute tasks that belong to the state, including healthcare, rehabilitation of the disabled, and social assistance. This happens mainly due to the possibility of creating sub-accounts for individuals. The legal possibility of creating sub-accounts and allocating tax designations to certain people, rarely organizations, additionally leads to a situation in which private benefit, not public benefit, is supported.

The main purpose of introducing the regulations, included in the justification of the draft Act,⁹ was to create a mechanism independent of state and local authority for financing NGOs that perform public benefit tasks. The regulations also ought to create incentives for citizens to support organizations that contribute to common benefit with their tax designation, at the same time shaping habits of civil engagement of individuals in other areas. In sum, the tax designation was intended to support the development of civil society, particularly in the local dimension. But the construction of legal regulations concerning public benefit activity and the established practice of executing them have not so far provided any indications that civil society in Poland has been strengthened.

The Act, however, significantly influenced the growing professionalism of NGOs that have public benefit status and apply for tax designations. Due to the social advertisements and other activities that are carried out every year in order to encourage people to declare their tax designations, the organizations have become an important subject of public life. Also, communications competence in organizations grew, as well as transparency of activities. These two elements are particularly important because, as research shows, Poles are interested in how funds from their tax designations are spent. Therefore, organizations are obliged to communicate their aims and expenditures.

It should also be added that such a construction of the existing regulations has indirectly led to the increase of the level of healthcare in Poland, which is financed from the state budget. Thanks to allocation of funds to organizations of public benefit that implement tasks concerning healthcare or rehabilitation of people who are ill or disabled, Polish NGOs are able to save lives and increase the quality of life of the ill and the disabled as well as their families.

To sum up, regulations concerning the tax designation in Poland have not fulfilled the basic goals that had been set: locally active public benefit organizations have not been supported. Social effects of the regulations have been obtained in other areas, which should lead to reflecting upon amending the regulations.

⁸ More in *Organizacje pożytku publicznego – w drodze do społeczeństwa obywatelskiego? (Public benefit organizations - on the way to a civil society?)*, e-book, Śląska Biblioteka Cyfrowa, Katowice 2011, http://www.sbc.org.pl/dlibra/docmetadata?id=30220&from=&dirids=1&ver_id=&lp=1&QI= (accessed on September 30, 2014).

⁹ See [http://orka.sejm.gov.pl/Druki4ka.nsf/\(\\$vAllByUnid\)/BCA6153FDEC2F609C1256B660044D29F/\\$file/263.pdf](http://orka.sejm.gov.pl/Druki4ka.nsf/($vAllByUnid)/BCA6153FDEC2F609C1256B660044D29F/$file/263.pdf) – (accessed on September 30, 2014).