



The Observatory
for the Protection
of Human Rights Defenders

Violations of the right of NGOs to funding: from harassment to criminalisation

Foreword by Maina Kiai

ANNUAL REPORT 2013



fidh

**“Violations of the right of NGOs to funding:
from harassment to criminalisation”**

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**OBSERVATORY FOR THE PROTECTION
OF HUMAN RIGHTS DEFENDERS**

OMCT / FIDH



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ACRONYMS MOST FREQUENTLY USED IN THIS REPORT

OBSERVATORY FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS
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ACHPR	African Commission on Human and Peoples' Rights
CAT	Committee against Torture
CCPR	Human Rights Committee
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Committee on the Rights of the Child
EU	European Union
FIDH	International Federation for Human Rights
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LGBTI	Lesbians, Gays, Bisexuals, Transgenders and Intersex
NGOs	Non-Governmental Organisations
OMCT	World Organisation Against Torture
OSCE	Organisation for Security and Co-operation in Europe

FOREWORD BY MAINA KIAI

UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION

OBSERVATORY FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS
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It gives me great pleasure to write the foreword for this year's Annual Report of the Observatory, a programme which I have known for many years and whose important advocacy work, since its establishment in 1997, has benefited countless human rights defenders, including myself in 2008 in Kenya before I took up my functions as Special Rapporteur.

My mandate was established by the Human Rights Council in October 2010, primarily in response to the shrinking space for civil society expression and participation in several parts of the world. Its establishment proved to be particularly timely in light of the unfolding historical events in the Arab region (the so-called Arab Spring) and beyond. While the rights to freedom of peaceful assembly and of association are to be distinguished, they are interdependent and mutually reinforcing, and, as recognized by the Council, are essential components of democracy and important for the enjoyment of all human rights.

The topic of this year's report is most pertinent as lately we have witnessed increased stigmatization and undue restrictions in relation to access to funding and resources for civil society organizations, in an attempt to stifle any forms of criticism, especially calls for democratic change or accountability for human rights violations. In fact, since the inception of my mandate, I have sent numerous communications in this regard¹. I am particularly dismayed about laws or policies stigmatizing recipients due to their sources of funding, which have been adopted in the past months or are under consideration, in several countries across the world.

As highlighted in my first thematic report, the "ability for associations to access funding and resources is *an integral and vital part of the right to freedom of association* [...]. Any associations, both registered or unreg-

1/ See my observations on communications transmitted to Governments and replies received in UN Human Rights Council, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, Maina Kiai - Addendum, UN Document A/HRC/20/27/Add.3, June 19, 2012.

istered, should have the right to seek and secure funding and resources from domestic, foreign, and international entities, including individuals, businesses, civil society organizations, Governments and international organizations”². This is all the more relevant in the context of on-going discussions on the post-2015 Millennium Development Goals Agenda. Member States should more than ever facilitate, and not restrict, access to funding for civil society organizations which undertake development activities, as well as those that seek to increase transparency and accountability in their countries.

In light of persisting challenges surrounding access to funding and resources in general, I will be devoting a significant part of my 2013 thematic report to the Human Rights Council to this pressing issue³. I will certainly continue to pay attention to this question in my communications to Governments and during my country visits. I am confident that the Observatory report and my work in this field will be complementary and mutually beneficial.

I hope our joint efforts will succeed and will pave the way for better respect of the right to freedom of association, especially its core component, the access to funding and resources, in all parts of the world. It is ultimately the obligation of Member States to fully protect this right, which shall be enjoyed by everyone.

Mr. Maina Kiai

United Nations Special Rapporteur on the Rights to
Freedom of Peaceful Assembly and of Association

2/ See UN Human Rights Council, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, UN Document A/HRC/20/27, paragraphs 67-68, May 21, 2012 (emphasis added).

3/ See UN Human Rights Council, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, UN Document A/HRC/23/39, May 2013.

INTRODUCTION

OBSERVATORY FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS
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Access to funding for non-governmental organisations (NGOs) defending human rights is a right – a universal right. This postulate is not binding but reflects an often overlooked legal reality that this report recalls in a context of unprecedented development of the associative sector, both in terms of quantity – with the considerable increase in the number of NGOs – and quality. The sophistication of their strategies and means of action, coupled with their expertise in international law and use of new communication technologies to strengthen synergies between them, should herald a period in which NGOs flourish.

Unfortunately, however, in many countries this development potential is largely suppressed by the multiplication of obstacles impeding access to funding for NGOs posed by authorities, including restrictive legal frameworks and smear campaigns.

In addition, this development potential is also affected by the global economic crisis that reduces funding possibilities for the associative sector, notably at national level, where grants are often negligible. As a result, many NGOs seek financial support from foreign donors, who are themselves also affected by the crisis. But in many countries what should be a straightforward process between donors and recipients is transformed into repressive State control that seeks purely and simply to stifle NGOs by partially or completely cutting off their funding.

The repression of human rights defenders can take many forms, ranging from administrative harassment and extrajudicial executions to arrest and torture amongst others – human rights violations that often attract unwelcome global attention to offending States in search of international recognition. The repression of defenders acting within the framework of an NGO can entail more devious restrictions affecting access to both local and foreign funding. Rather than simply ban an NGO considered hostile to the regime and thus risk incurring a high political cost, many States multiply obstacles to block access to funding, especially from external sources. In so doing, they draw on a sophisticated arsenal of restrictive legal, administrative or practical measures that are less visible than other forms of human rights abuses, and therefore are less likely to incite international condemnation.

Certain States also resort to using their vast repertory of defamatory tactics whereby defenders are labelled “foreign agents” manipulated by cross-border entities necessarily regarded as hostile to the government, or “subversive” elements, or are accused of associating with “terrorists” or committing other offences, including criminal acts, allegations intended to discredit them in the public eye. These tactics not only endanger defenders but also often have a pernicious impact on access to funding for NGOs. In a historical and political environment that is witnessing the overthrow of authoritarian regimes and the emergence of popular calls for democratic governance, it is not surprising that some States are adopting a nationalist, xenophobic or anti-Western stance in order to demonise foreign funding of NGOs. As they persist in refusing to accept any questioning of their political system as well as the legitimate demands of human rights NGOs, repressive regimes are creating and maintaining an amalgam between defenders and political opponents.

But these restrictions on access to funding, which are more or less embedded in national legislation, together with the defamatory manoeuvres of States that often rely on pro-government media, contravene international law and the obligations of States. As stated earlier, access to funding for NGOs is a right, and any State applying restrictions on the exercise of that right that are unjustifiable under international law are in violation of the latter. Restrictions on this right to funding are indissociable from those that impede the right to freedom of association because the former is a component of the latter.

The right of NGOs to access funding is as valid as the right of individuals to benefit from the presumption of innocence until proven guilty, and all NGOs should be free to solicit, obtain and use resources as they see fit, except confirmation of any suspected malpractice or criminal activity. Because NGOs have both rights and responsibilities, and the exercise of freedom of association entails respect for the basic rights enshrined in the Universal Declaration of Human Rights, and the pursuit of such activities by peaceful means. States have a legitimate right to counter activities that endanger security or that are contrary to the public interest, but the measures put in place should not be transformed into a pervasive system of preventive control that affects all human rights NGOs.

However, an analysis of the different forms of criminalisation of funding for NGOs shows that in many countries the fight against terrorism and money laundering is instrumentalised by authorities to neutralise NGOs and silence critics. The funding restrictions mainly target national NGOs engaged in the promotion and protection of civil and political rights, but

also affect some national branches of international NGOs. In addition, the impact of funding restrictions is not only noticeable in the activities of national NGOs, but also affects the regional and international solidarity networks of human rights NGOs.

The capacity of NGOs to obtain funds obviously pre-supposes that these entities exist, and therefore that freedom of association is respected. An overview of the state of the associative sector shows, however, that this right is violated in a flagrant manner in many countries. Whether the denial of the right of association stems from an outright ban or a more oblique approach such as the application of dilatory, expensive or overly bureaucratic registration procedures, the outcome is almost always the same: a violation of the right to access funding. Consequently, any analysis of the multifaceted restrictions that impede access to funding and the formulation of effective responses should necessarily take into account constraints affecting freedom of association.

But the institutional, legal and practical responses aimed at resolving the problem of barriers blocking access to funding are still in their infancy, both with regard to intergovernmental organisations for the protection of human rights and the entities mainly affected, namely NGOs, as well as foreign donors confronted by laws that criminalise their grants.

It is imperative that States realise that restrictions on access to funding are not to be equated with accessory control measures or other possible forms of legitimate and legal regulation, but represent a blatant violation of the right to freedom of association. A State that is offended by the arbitrary banning of an NGO in a third country must be able to condemn with equal vigour any impediment to access funding, as the two transgressions are essentially part of the same problem: the violation of the right to freedom of association.

The climate of international solidarity that characterised the work of human rights NGOs around a common vision of promoting compliance with these rights has given way to doubt and suspicion. States that practice such restrictions must radically transform their perception and treatment of this issue: this entails moving from a system wherein the State assumes the *right* to control access to funding to one wherein the State fulfils its *obligation* to support, directly or indirectly, the funding of civil society activities – no more, no less. This radical change of course implies that States recognise the crucial role played in society by NGOs to ensure better compliance with international law. And this can only be achieved if donors and human rights defenders work together with the States concerned.

This report is based on the experience of partner organisations of the Observatory for the Protection of Human Rights Defenders, on their responses to a questionnaire on this issue, and on the Observatory's daily work in support of defenders. It provides a detailed picture of this as yet little studied problem, the growing dimension of which is a worrying concern. While recalling the legal basis of the right of access to funding, as well as its organic relationship with the right to freedom of association and the embryonic jurisprudence on this subject, the report stimulates deep reflection on the negative impacts of these restrictive measures and makes concrete recommendations to all stakeholders – beneficiaries, donors, governments and intergovernmental organisations working on the protection of human rights.

CHAPTER I

THE RIGHT OF NGOS TO ACCESS FUNDING, INCLUDING FOREIGN FUNDING – INTERNATIONAL AND REGIONAL INSTRUMENTS

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A. Access to funding: a component of freedom of association

The right to freedom of association, along with the right to freedom of expression, opinion and peaceful reunion, is enshrined in all international and regional human rights instruments. It plays a vital role in the exercise of many other rights, such as civil, cultural, economic, political and social rights. Because of this interdependence, it is a valuable indicator of the extent to which a State respects the enjoyment of many other human rights.

Access to funds and resources is essential for NGOs, and is an integral component of the right to freedom of association. Without funding, NGOs obviously cannot effectively engage in the defence and promotion of human rights.

Many human rights bodies and special procedures, particularly those within the United Nations system, have emphasised the principle that access to funding is an integral part of the right to freedom of association, and that NGOs should have free access to funds, including foreign funds.

International level

The right to freedom of association is a fundamental and universal right enshrined in numerous international treaties and standards, especially Article 22 of the International Covenant on Civil and Political Rights (ICCPR). In its Communication No. 1274/2004, the United Nations Human Rights Committee (CCPR) observed: “The right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by article 22 extends to all activities

of an association [...].”¹ This means that fundraising activities are also protected by Article 22.

Moreover, under its Convention No. 87 on the Freedom of Association and Protection of the Right to Organise, adopted nearly 20 years before the ICCPR, the International Labour Organisation (ILO) also recognised this right. Although the Convention protects freedom of association from a trade union perspective and essentially advocates for the defence of trade unionists, it constitutes a reference instrument of international law. The Convention states: “Workers’ and employers’ organisations shall have the right to [...] organise their administration and activities and to formulate their programmes.” It also stipulates: “The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof” (Articles 3.1 and 3.2). This right of trade unions to manage their own affairs as they see fit implicitly includes the right to determine their mode of financing.

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief adopted by the United Nations General Assembly in 1981 contains the first explicit reference to the right to access funding. It states: “The right to freedom of thought, conscience, religion or belief shall include, inter alia, [the right to] solicit and receive voluntary financial and other contributions from individuals and institutions” (Article 6f).

The Declaration on the right and responsibility of individuals, groups and organs of society to promote and defend universally recognised human rights and fundamental freedoms (hereafter Declaration on Human Rights Defenders) adopted by the United Nations General Assembly in 1998 explicitly grants human rights defenders the right to access funding.

Article 13 of this Declaration states: *“Everyone 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, in accordance with article 3 of the present Declaration”*.

It should be noted that while the Declaration on Human Rights Defenders protects the right to solicit, receive and utilize funds, it does not place restrictions on the sources of the funding (public / private, local /

1/ See CCPR, *Communication No. 1274/2004 - Belarus*, United Nations (UN) Document CCPR/C/88/D/1274/2004, November 10, 2006, paragraph 7.2.

foreign). Therefore, it implicitly includes in its scope the right of NGOs to access funds from foreign donors. Moreover, the United Nations Special Rapporteur on the situation of human rights defenders emphasised that the Declaration protects the right to “receive funding from different sources, including foreign ones”². The Special Rapporteur, like the Special Representative of the United Nations Secretary-General on the situation of human rights defenders before her³, considered that “Governments should allow access by human rights defenders, in particular non-governmental organizations, to foreign funding as a part of international cooperation, to which civil society is entitled to the same extent as Governments”⁴.

Moreover, the Special Rapporteur stressed that access to funding “is an inherent element of the right to freedom of association”, and that “in order for human rights organizations to be able to carry out their activities, it is indispensable that they are able to discharge their functions without any impediments, including funding restrictions”⁵.

“The Special Rapporteur on the rights to freedom of peaceful assembly and of association took up these recommendations in his first report to the Human Rights Council, and added that “[a]ny associations, both registered or unregistered, should have the right to seek and secure funding and resources from domestic, foreign, and international entities, including individuals, businesses, civil society organizations, Governments and international organizations”. He also emphasised that States should not resort to fiscal pressures to discourage association from receiving funds, in particular foreign funding⁶.

States should therefore promote and guarantee the right of NGOs to access funding – including foreign funding – as an integral part of their obligation to respect and promote the right to freedom of association.

2/ See UN General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, UN Document A/66/203, July 28, 2011, paragraph 70.

3/ See UN General Assembly, *Report of the Special Representative of the Secretary-General on the situation of human rights defenders*, UN Document A/59/401, October 1, 2004, paragraph 82.

4/ See UN General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, UN Document A/66/203, July 28, 2011, paragraph 70.

5/ See UN General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, UN Document A/64/226, August 4, 2009, paragraph 61.

6/ See UN Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, UN Document A/HRC/20/27, May 21, 2012, paragraphs 67-72.

Regional level

At regional level, the right to freedom of association is guaranteed by Article 11 of the European Convention on Human Rights, Article 10 of the African Charter on Human and Peoples' Rights, Article 16 of the American Convention on Human Rights and Article 24.e of the Arab Charter on Human Rights.

In 2007, the Committee of Ministers of the *Council of Europe* adopted a recommendation which established the framework for the legal status of NGOs in the region. Recommendation CM/Rec(2007)14 devotes a specific section to the question of funding ("Fundraising"), in which it notably reaffirms the right of NGOs to access funding, without restrictions regarding its sourcing⁷. In addition, it stipulates that "NGOs should be free to engage in any lawful economic, business or commercial activities in order to support their not-for-profit activities without any special authorisation being required, but subject to any licensing or regulatory requirements generally applicable to the activities concerned"⁸.

This recommendation furthermore identifies facilities that should be available to NGOs in terms of funding. It states that NGOs with legal personality should have "access to banking facilities" and benefit from assistance in the form of "public funding and other forms of support, such as exemption from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies"⁹.

In 2008, following adoption of the recommendation, the Conference of NGOs of the Council of Europe created an "Expert Council on NGO Law" tasked with promoting a favourable environment for NGOs in the region through the study of national legislation on NGOs, monitoring implementation, and advocating for respect of Council of Europe norms and European best practices in relation to NGOs. In its second Annual Report, the Expert Council noted that in certain member States of the Council of Europe "the scope of obligations with respect to the auditing of accounts and reporting on activities is not always entirely clear and may not always be appropriate", and that "there appears to be some significant influence exercised over NGO decision-making through the power of authorities to grant or withdraw public funding and through the

7/ See Recommendation CM/Rec(2007)14 of the Committee of Ministers of the Council of Europe, paragraph 50.

8/ *Idem*, paragraph 14.

9/ *Idem*, paragraphs 51 and 57.

participation of officials as board members, which does not always seem to be connected with legitimate public interests related to the regulation of NGOs". Consequently, "[...] there is a need to ensure that the scope of obligations relating to the auditing of accounts and reporting on activities is clarified and does not place an undue burden on NGOs" and "[...] public authorities should not use their powers to grant or withdraw funding or the participation of officials in meetings of NGO decision-making bodies to exercise undue influence on the decisions being taken by NGOs"¹⁰.

It should also be noted that the Office for Democratic Institutions and Human Rights (ODIHR) of the *Organization for Security and Cooperation in Europe* (OSCE) has produced an interactive guide on freedom of association entitled "AssociatiOnline", which lists the international norms and basic principles regarding this fundamental right. AssociatiOnline also compiles existing case law on this subject and presents examples of good practices in legislation on NGOs in the OSCE region¹¹.

Staying at the European level, the *European Union* "Guidelines on Human Rights Defenders" refer to the issue of foreign funding of NGOs active in countries where EU diplomatic missions are present. The Guidelines propose that missions adopt concrete measures in support of defenders, in particular in the framework of the EU development policy. They recommend that missions strive to "ensure that human rights defenders in third countries have access to resources, including funding, from abroad and that they are informed of the availability of resources and the means to secure them" (paragraph 14).

For its part, the *Inter-American Commission on Human Rights* (IACHR), which has ruled on several cases of restrictions on access to funding from abroad, notably in its two reports on the situation of human rights defenders, considers that "One of the State's duties stemming from freedom of association is to refrain from restricting the means of financing of human rights organizations"¹².

10 / See Council of Europe, *Expert Council on NGO Law, Second annual report on the internal governance of non-governmental organizations*, January 2010, paragraphs 388, 389, 397 and 398.

11 / See <http://associationline.org> for further information on challenges identified by the ODIHR in terms of funding of NGOs.

12 / See IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, Document OEA/Ser.L/V/II. Doc. 66, December 31, 2011, paragraph 179.

The *African Commission on Human and Peoples' Rights* (ACHPR) also expressed its concern on the issue of funding for NGOs. The Special Rapporteur on the situation of Human Rights Defenders in Africa notably recommended that States “[...] continue providing both financial and material support to Human Rights Defenders to facilitate the realization of their mandate of human rights promotion and protection in Africa”¹³.

B. Financial support to NGOs: a primary responsibility of the State

With the adoption of the Declaration on Human Rights Defenders and the increasing focus on obstacles faced by NGOs in their work to promote and protect fundamental freedoms, the issue of access to foreign funding has become more pressing. This situation, as well as the numerous complaints submitted by NGOs affected by restrictive practices or laws hampering United Nations institutions or treaty bodies, has prompted the latter to adopt decisions, opinions or recommendations on this matter. These measures are not limited to defending the right to access funding, including foreign funding, but also reflect the growing sophistication of the means used by States to limit the exercise of this right and to silence the daily work of NGOs.

The Declaration on Human Rights Defenders outlines the responsibility of the State to adopt the necessary measures “[...] to ensure that all persons under its jurisdiction are able to enjoy all social, economic, political and other rights and freedoms in practice” (Article 2). However, the reference to “economic conditions” is very general.

Article 13 of the Declaration on Human Rights Defenders¹⁴ must therefore be read in conjunction with Article 12.2 of the said Declaration, which stipulates the following: “The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against [...] arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration”, and in light of the more general law on freedom of association.

States therefore have a double obligation: on the one hand, the negative obligation to refrain from interference in access to funding, and on the other hand, the positive obligation to establish a legal and administrative framework as well as a practice that facilitate access to and the use of

13/ See ACHPR, *Intersession Report*, November 2011 - April 2012, paragraph 50.

14/ See above.

such funding by NGOs. This analysis is reflected in the jurisprudence of numerous United Nations human rights bodies.

On many occasions, *United Nations Committees* have stressed the crucial role that States should play in supporting NGOs directly or indirectly to access funding, in particular by creating a conducive legal framework, institutional environment and effective practices in this regard. United Nations Committees have not only denounced cases of flagrant violations by States parties of the right to freedom of association, such as limiting access to foreign funds or arbitrarily imposing prior authorisations or excessive taxes on NGOs. More generally, they have also reminded States of the importance of financial support for institutions and organisations active in the promotion and protection of human rights.

In this regard, for example, the Committee on the Elimination of Racial Discrimination (CERD) called on Ireland to financially support human rights organisations in the country¹⁵. Similarly, the Committee on the Rights of the Child (CRC) recommended that the Democratic Republic of the Congo (DRC) “[...] encourage the active and systematic involvement of civil society, including NGOs, by providing financial assistance [...]”¹⁶, and that Malawi “[...] provide civil society organizations, including NGOs, with adequate financial and other resources to enable them to contribute to the implementation of the Convention”¹⁷.

The Committee against Torture (CAT) recommended that Belarus acknowledge the “crucial role” played by NGOs and that it “[...] enable them to seek and receive adequate funding to carry out their peaceful human rights activities”¹⁸.

The Committee on the Elimination of Discrimination against Women (CEDAW) recommended that Lithuania “develop clear criteria for rendering and ensuring sustained and sufficient governmental financial support at the national and local level for the work of women’s NGOs to increase their

15/ See CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: – Ireland*, UN Document CERD/C/IRL/CO/2, April 14, 2005, paragraph 12.

16/ See CRC, *Concluding Observations of the Committee on the Rights of the Child – Democratic Republic of the Congo*, UN Document CRC/C/COD/CO/2, February 10, 2009, paragraph 25.

17/ See CRC, *Concluding Observations of the Committee on the Rights of the Child – Malawi*, UN Document CRC/C/MWI/CO/2, March 27, 2009, paragraph 25.

18/ See CAT, *Concluding Observations of the Committee against Torture – Belarus*, UN Document CAT/C/BLR/CO/4, December 7, 2011, paragraph 25.

capacity to support women's human rights"¹⁹. It also urged the Netherlands "[...] to reconsider the funding of organizations working in the field of women's rights, including organizations of black and migrant women, in order to contribute in an efficient manner to the continuing implementation of the Convention"²⁰. Finally, it recommended Denmark to "ensure that an adequate level of funding is made available for the non-governmental organizations to carry out their work, including to contribute to the work"²¹.

The CRC also emphasised the necessity for NGOs to receive adequate funding to conduct their activities. It furthermore called on the Central African Republic to do its utmost to "[...] strengthen the role played by civil society [through] the provision of support to civil society in accessing resources [...]"²².

The *IACHR* considered that States "[...] should allow and facilitate human rights organizations' access to foreign funds in the context of international cooperation, in transparent conditions"²³, and, more generally, that they should "[...] respect this right without any restrictions that go beyond those allowed by the right to freedom of association"²⁴.

These few examples illustrate the importance the Committees and the IACHR attach to the responsibility of States to promote funding for NGOs. They confirm that respect for the right of freedom of association entails support for a conducive environment in terms of access to funding, including from abroad, as well as respect for NGOs to manage their funding strategies free from interference by authorities.

The right of civil society organisations to manage and use their financial resources as they see fit to conduct their activities has also been recognised as applicable to unions. Thus, according to the *Committee on Freedom of Association* of the ILO: "It is for the organizations themselves to decide whether they shall receive funding for legitimate activities to promote and

19/ See CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination against Women – Lithuania*, UN Document CEDAW/C/LTU/CO/4, July 8, 2008, paragraph 83.

20/ See CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination against Women – Netherlands*, UN Document CEDAW/C/NLD/CO/5, February 5, 2010, paragraph 21.

21/ See CEDAW, *Concluding Observations of the Committee on the Elimination of Racial Discrimination – Denmark*, UN Document CERD/C/DNK/CO/18, August 27, 2010, paragraph 43.

22/ See CRC, *Concluding Observations of the Committee on the Rights of the Child – Central African Republic*, UN Document CRC/C/15/Add.138, October 18, 2000, paragraphs 22 and 23.

23/ See IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, Document OEA/Ser.L/V/II.124 Doc. 5 rev.17, March 2006, recommendation 19.

24/ See IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, Document OEA/Ser.L/V/II. Doc. 66, December 31, 2011, paragraph 186.

defend human rights and trade union rights”. The Committee found that: “Provisions which give the authorities the right to restrict the freedom of a trade union to administer and utilize its funds as it wishes for normal and lawful trade union purposes are incompatible with the principles of freedom of association”²⁵.

C. Elimination of obstacles to access to funding: a requirement of the right to freedom of association

Several human rights bodies have called for the elimination of obstacles to access to funding by NGOs.

Restrictions on foreign funding

IACHR has defined its position regarding cases where there are special funds managed by government international cooperation agencies for collecting monies received in the context of international cooperation. In some cases local NGOs receiving funds from abroad have to register with such government agencies, give them advance notice of funding received (public and private), and align their action programmes on national development priorities laid down by the government. In such cases, *IACHR* considers that the right to freedom of association includes the right for NGOs to set in motion “their internal structure, activities and action programme, without any intervention by the public authorities that could limit or impair the exercise of the respective right, regardless of whether the goals they are pursuing are being carried out with foreign or domestic funding”²⁶. *IACHR* also considers that defenders should be able to exercise the right to freedom of association and fulfil their own objectives, with both national and international funding²⁷.

The *United Nations Committees* have not only condemned restrictive legislation on foreign funding, but also taken a stand on upstream attempts to restrict access to such funding. In January 2011, for instance, CEDAW warned Israel against a plan to set up a parliamentary commission to investigate the foreign funding of Israeli NGOs. The purpose of the initiative was to silence NGOs that had denounced acts committed by the army, in particular during Israel’s military offensive against the Gaza Strip in December 2008-January 2009²⁸. CEDAW called on the authorities

25 / See ILO, *Freedom of association – Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fifth (revised) edition, 2006, paragraphs 494 and 485.

26 / See IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, Document OEA/Ser.L/V/II. Doc. 66, December 31, 2011, paragraph 183.

27 / *Idem*.

28 / For further information, see Chapter 4.

to “ensure that civil society organizations and women’s non-governmental organizations are not restricted with respect to their establishment and operations and that they are able to function independently of the government”²⁹.

Restrictions on the type of activity financed by foreign funding

The *United Nations Committees* also addressed the question of restrictions imposed on NGOs concerning programmes specifically financed through foreign funding. In the case of Turkmenistan, for instance, CEDAW deplored restrictions imposed on NGOs, in particular regarding programmes and projects financed by foreign donors. It also urged the authorities “to provide an enabling and conducive environment for the establishment and active involvement of women’s and human rights organizations in enhancing the implementation of the Convention in the State party”³⁰.

Prior authorisation, control of foreign grants and freezing of bank accounts

Several *United Nations Committees* have taken a stand on the issue of prior authorisation being required for receiving and using funds from abroad.

CCPR, for instance, expressed concern that failure to obtain prior authorisation from the authorities could lead to criminal prosecution. It considers that NGOs should be able “to discharge their functions without impediments which are inconsistent with the provisions of article 22 [freedom of association] of the Covenant, such as prior authorization, funding controls and administrative dissolution”³¹. It called on Egypt to review its legislation and practice accordingly.

The question of the obligation to obtain prior authorisation was also addressed by CRC, which recommended, *inter alia*, that Nepal should “remove all legal, practical and administrative obstacles to the free functioning of [NGOs]”³².

29/ See CEDAW, *Concluding observations of the Committee on the Elimination of Discrimination against Women – Israel*, UN Document CEDAW/C/ISR/CO/5, April 5, 2011, paragraph 51.

30/ See CEDAW, *Concluding observations of the Committee on the Elimination of Discrimination against Women – Turkmenistan*, UN Document CEDAW/C/TKM/CO/3-4, unedited version, October 24, 2012.

31/ See CCPR, *Concluding observations of the Human Rights Committee – Egypt*, UN Document CCPR/CO/76/EGY, November 28, 2002, paragraph 21.

32/ See CRC, *Concluding observations of the Committee on the Rights of the Child – Nepal*, UN Document CRC/C/15/Add.261, September 21, 2005, paragraphs 33 and 34.

During consideration of the reports submitted by Algeria several Committees, such as CRC and CEDAW, also noted the potentially restrictive impact of the prior authorisation requirement on NGO activities. CEDAW in particular recommended that the State should “enable the associations working on gender equality and empowerment in a developmental context to receive funding from international donors without unnecessary administrative requirements, which may impair such activities”³³.

The Committee on Economic, Social and Cultural Rights (CESCR) has clearly denounced the incompatibility between fulfilling the obligation to respect freedom of association and restrictions imposed on NGO financing, concluding that legislation that “gives the Government control over the right of NGOs to manage their own activities, including seeking external funding” does not “conform” to Article 8 [on freedom of association] of the International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁴. It recommended that Egypt amend or repeal the law imposing such controls, which are contrary to its obligations under ICESCR (Article 8).

Concerning the freezing of assets, in the case of Ethiopia, for instance, CESCR “[was] also concerned that the Charities and Societies Agency has frozen [the] assets of some of those organizations, including the Ethiopian Women Lawyers Association, forcing them to downsize, close regional offices and suspend some of their services”. CESCR recommended that the State party “lift the funding restrictions, and unblock all the assets of local human rights NGOs”³⁵.

ILO has also made its position clear concerning several cases in which trade union bank accounts have been frozen. The Committee on Freedom of Association considers that such a measure may constitute “serious interference” by the authorities in trade union activities³⁶.

33/ See CEDAW, *Concluding observations of the Committee on the Elimination of Discrimination against Women – Algeria*, UN Document CEDAW/C/DZA/CO/3-4, March 23, 2012, paragraph 20.

34/ See CESCR, *Concluding observations of the Committee on Economic, Social and Cultural Rights – Egypt*, UN Document E/C.12/1/Add.44, May 23, 2000, paragraph 19.

35/ See CESCR, *Concluding observations of the Committee on Economic, Social and Cultural Rights – Ethiopia*, UN Document E/C.12/ETH/CO/1-3, May 31, 2012, paragraph 7.

36/ See ILO, *Freedom of association – Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fifth (revised) edition, 2006, paragraph 486.

Unfavourable tax regime

The *United Nations Committees* have also denounced discriminatory legislation and tax practices that, far from helping NGOs, aim at penalising them indirectly for the nature of their activities.

CCPR, for instance, deplored the significant fall in foreign funds received by NGOs after Russia had reduced the number of international donors eligible for tax exemption. The Committee noted that such measures affected enjoyment of the rights afforded by Articles 19, 21 and 22 of the ICCPR, and cautioned the State party against “adopting any policy measures that directly or indirectly restrict or hamper the ability of non-governmental organizations to operate freely and effectively”³⁷.

Several Committees also drew attention to the prejudicial consequences of the absence of favourable tax regimes for NGOs, in view of the special nature of the work they carry out in the public interest by helping States to promote and protect human rights, in accordance with their obligations under international and regional instruments, and where applicable, the relevant constitutions and charters.

CRC, for instance, was concerned that commercial entities and non-profit organisations were subjected to the same tax regime. It urged Bosnia-Herzegovina “to consider according civil society and NGOs a more conducive context for their work, *inter alia*, through funding and lower tax rates”³⁸.

IACHR, for its part, considers that respect for freedom of association requires that human rights organisations be exempted from taxation. Noting that the benefit of tax exemption is often subject to the discretion of the authorities, it believes that “those benefits should be clearly defined in laws or programs and should be administered with no discrimination whatsoever”³⁹.

37/ See CCPR, *Concluding observations of the Human Rights Committee – Russian Federation*, UN Document CCPR/C/RUS/CO/6, November 24, 2009, paragraph 27.

38/ See CRC, *Concluding observations of the Committee on the Rights of the Child – Bosnia and Herzegovina*, UN Document CRC/C/BIH/CO/2-4, November 29, 2012, paragraph 26.

39/ See IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, Document OEA/Ser.L/V/II. Doc. 66, December 31, 2011, paragraph 187.

Funding restrictions on contributions from foreign donors

The *United Nations Committees* have also taken a stand on the question of a maximum percentage being put on foreign funding in the total budget of NGOs.

When in January 2009 Ethiopia passed a law that, *inter alia*, placed a 10% limit on the foreign funding of national NGOs⁴⁰, several Committees (CAT, CEDAW, CERD, CESC) condemned the measure and unanimously called on Ethiopia to abolish such restrictions⁴¹. More specifically, CESC noted with concern that “certain provisions of the Charities and Societies Proclamation (No. 621/2009) have had a profound obstructive effect on the operation of human rights organizations”. It recommended that the State party “amend [that] Proclamation [...], with a view to omitting provisions restricting the work of human rights organizations and lifting the funding restrictions”⁴².

D. Limits to a fundamental right: admissible restrictions

The right to freedom of association, including the right to have access to funding, is not absolute, and may be limited in accordance with the criteria specified in ICCPR, Article 22.2. While certain restrictions may be imposed, it should be emphasised that freedom should be the rule, and restrictions the exception.

The only restrictions admissible under ICCPR are 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” (Article 22.2).

In its General Comment No. 27 (1999), *CCPR* stipulated that “in adopting laws providing for restrictions [...] States should always be guided by the principle that the restrictions must not impair the essence of the right [...]; the relation between right and restriction, between norm

40 / See Chapters 2 and 3.

41 / See CAT, *Concluding observations of the Committee against Torture – Ethiopia*, UN Document CAT/C/ETH/CO/1, January 20, 2011, paragraph 34; CEDAW, *Concluding observations of the Committee on the Elimination of Discrimination against Women – Ethiopia*, UN Document CEDAW/C/ETH/CO/6-7, July 27, 2011; CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination – Ethiopia*, UN Document CERD/C/ETH/CO/7-16, September 8, 2009, paragraph 14; CESC, *Concluding observations of the Committee on Economic, Social and Cultural Rights – Ethiopia*, UN Document E/C.12/ETH/CO/1-3, May 31, 2012, paragraph 7.

42 / See CESC, *Concluding observations of the Committee on Economic, Social and Cultural Rights – Ethiopia*, UN Document E/C.12/ETH/CO/1-3, May 31, 2012, paragraph 7.

and exception, must not be reversed”. When, therefore, States contemplate a restriction of such rights, they must be sure to comply with the above conditions. Any restriction must therefore be motivated by one of the interests specified, be on firm legal grounds (i.e. imposed “in accordance with the law”, which implies that the law must be accessible and that it is sufficiently precisely worded), and be “necessary in a democratic society”.

In its Communication No. 1119/2002, CCPR stressed that “the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State Party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals for membership in such organizations are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose”⁴³.

Reacting to the criminalisation of defenders belonging to organisations receiving funds from abroad, *IACHR* has also taken a stand on admissible restrictions to access to funding. It concluded that “the right to receive international funds in the context of international cooperation for the defence and promotion of human rights is protected by freedom of association, and the State is obligated to respect this right without any restrictions that go beyond those allowed by the right to freedom of association”⁴⁴.

Furthermore, as pointed out by the *Special Rapporteur on the rights to freedom of peaceful assembly and of association*, while some restrictions to access to foreign funding may be legitimate in the context of the fight against money-laundering and terrorism, “this should never be used as a justification to undermine the credibility of the concerned association, nor to unduly impede its legitimate work”⁴⁵. He recommended that States should use alternative mechanisms, such as banking laws and criminal laws that prohibit acts of terrorism, as long they conform to international human rights legislation, including the principle of legality, and include effective guarantees of respect for the right to freedom of association⁴⁶.

43/ See CCPR, *Communication No. 1119/2002: Republic of Korea*, 23/08/2005, UN Document CCPR/C/84/D/1119/2002, August 23, 2005, paragraph 7.2.

44/ See IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, Document OEA/Ser.L/V/II. Doc. 66, December 31, 2011, paragraph 186.

45/ See UN Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, Maina Kiai, UN Document A/HRC/20/27, May 21, 2012, paragraph 94.

46/ *Idem*.

The *Special Rapporteur on the situation of human rights defenders* has upheld the same position. While noting that “there may be various reasons for a Government to restrict foreign funding, including the prevention of money-laundering and terrorist financing, or increasing the effectiveness of foreign aid”⁴⁷, she stressed that “in many cases such justifications are merely rhetorical and the real intention of Governments is to restrict the ability of human rights organizations to carry out their legitimate work in defence of human rights”⁴⁸.

And indeed, as this report purports to analyse and illustrate, in a large number of countries the authorities misuse such legitimate reasons to impose restrictions.

⁴⁷ / See UN General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, UN Document A/64/226, August 4, 2009, paragraph 94.

⁴⁸ / *Idem*.

CHAPTER II

FREEDOM OF ASSOCIATION: AN ESSENTIAL PRECONDITION FOR NGO ACCESS TO FUNDING

OBSERVATORY FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS
2013 ANNUAL REPORT

Respect for the right to freedom of association is an essential precondition for human rights defenders to be able to solicit, receive and use funding for their work of promoting and protecting fundamental rights. Defenders and NGOs must be able to enjoy the right to operate legally in the country in which they carry out their activities and to decide what form their organization will take. The issue of access to funding is closely linked to the legal recognition of NGOs, to the various forms of authorisation and registration, and to the possible existence of obstacles to the life of an association.

However, NGO access to funding is fraught with a great many challenges, in both legal and practical terms. Whether the problem is one of the complexity or the slowness of registration procedures, arbitrary application of the law, exclusion of certain areas of NGO activities or those who benefit from them, obstacles to opening a bank account, or, what is more serious, the criminalisation of some organisations, defenders are faced with a multitude of restrictions - implicit or explicit, legal or practical - that undermine their right and ability to finance themselves. This chapter looks at the legal framework and the practices of certain States relating to freedom of association, which affect the ability of NGOs to exercise their right to solicit, receive and use funding.

The right to freedom of association is generally defined as the right to associate with other individuals and entities in the pursuit of a common interest. As mentioned previously¹, the right to freedom of association is firmly anchored in positive law, at international as well as regional and national level. It is enshrined in ICCPR Article 22, which stipulates that “Everyone shall have the right to freedom of association with others,

including the right to form and join trade unions for the protection of his interests”. Article 5 of the Declaration on Human Rights Defenders is even more specific: “Everyone has the right, individually and in association with others, at the national and international levels: to meet or assemble peacefully; to form, join and participate in non-governmental organizations, associations or groups; to communicate with non-governmental or intergovernmental organizations”. Everyone therefore has the right to form or to join an association, organisation or group to collectively express, promote, work for and defend human rights. The right to freedom of association includes the right to form any legal group or body, independently and free from any interference by the authorities.

Admissible restrictions to the exercise of this right are clearly identified in positive law. The only restrictions admissible are those “prescribed by law” and that are “necessary in a democratic society”². Indeed, democracy, which is founded on the pre-eminence of the rule of law, presupposes the respect and protection of human rights defenders. The right to freedom of association may only be restricted in relation to the legitimate interests of a State to protect its citizens’ rights. As a result, the criteria to be met to limit this right are very restrictive. Yet, in many countries, the authorities distort and misuse the notion of “admissible restrictions” in order to justify repressive policies, at the same time maintaining a gloss of apparent legitimacy.

Although the constitutions of most States guarantee the right to freedom of association, many countries limit exercise of the right through restrictive and ambiguous provisions, or provisions that go beyond legally permitted restrictions. In addition, administrative or judicial authorities often deliberately misinterpret the reasons for restrictions. An adverse context (for example, a climate of insecurity, a situation of armed conflict or political crisis) is also likely to be an obstacle to enjoyment of this right. A growing number of countries prefer to use illiberal laws or abusive administrative procedures, which are also contrary to the obligations and the spirit of international human rights norms, to restrict the work of the NGOs, rather than simply banning them.

In this way, many States use a variety of measures to restrict freedom of association, such as banning informal groups; establishing complex, inaccessible and ill-defined registration procedures; using discretionary or discriminatory practices in the recognition of freedom of association; and interfering in the functioning of associations. All these obstacles, applied

2/ *Idem*.

separately or together, often undermine freedom of association and, directly or indirectly, affect the ability of NGOs to access funding to carry out their work of promotion and protection of human rights.

A. Banning of informal groups

Members of associations must be free to carry out their activities, either within the framework of an informal structure, or within the framework of a formal structure with a legal status.

The right to freedom of association makes no distinction between formal and informal groups and is applicable to both types. The founders of an association are free to decide whether or not to register their NGO with the competent authorities in order to obtain legal status. Defenders should have the right to form groups in order to carry out legal activities, without the obligation to register as legal entities, in accordance with ICCPR Article 22 and Article 5 of the Declaration on Human Rights Defenders.

NGOs sometimes decide not to register formally for different reasons, for example so as not to be subjected to pressure – or even repression – by illiberal authorities, or to avoid a complex registration procedure that will inevitably become bogged down, or because their structure is not yet stable. Finally, the difficulty or the cost of the registration process in some countries is not suited to the infrastructure of an association, as in the case of small associations that have very limited resources. Failure to register may turn out to be particularly problematic when access to funding is made impossible by the lack of legal status. In some situations it also means that NGOs may not enjoy certain privileges, such as tax deductions or exemptions, for example.

Furthermore, some countries require organisations to be formally registered to be entitled to carry out their work. The insistence of some governments that all groups must register- whatever their size or their degree of sophistication – is evidence of their desire to systematically control all NGO activities and screen groups that are likely to criticize their human rights record. The obligation to register is frequently accompanied by the adoption of laws that criminalise the activities of unregistered groups, as, for example, in *Algeria, Bahrain, Belarus, Burma, Egypt, Uganda and Syria*. This criminalisation is one of the most disturbing trends and has the greatest impact on defenders. In some cases, criminal penalties can be up to seven years imprisonment, accompanied by high fines. This kind of criminalisation is all the more problematic because it violates the right to solicit and obtain funding. Incidentally, it also discourages potential donors, precisely as often unregistered NGOs only survive thanks to such funding,

including from abroad. In these countries, organisations are therefore doubly vulnerable. Furthermore, this type of criminalisation puts current and possible future donors in a difficult position, since it bans them from indirectly funding unregistered NGOs, and carries the threat of possible acts of punishment.

The requirement to register, coupled with the ban on carrying out a broad range of activities³ and extremely harsh penalties, results in associations being considerably vulnerable in many countries. This repressive environment obviously has an extremely dissuasive effect on the creation of new NGOs. It is equivalent to a serious violation of the right to freedom of association and, by the same token, undermines the foundations of the right of access to funding.

B. Notification or registration? Procedures for constitution are complex and inaccessible

The constitution of an association should be subject to a system of notification. The procedure for creating an association should be simple, easily accessible, non-discriminatory and inexpensive, or even free. In the case of compulsory registration, reasons must be given for any rejection, and the bodies that take the decision must provide detailed, written justification within a reasonable time. Associations should be able to contest rejection before an impartial, independent tribunal.

The granting of legal status to an NGO enables it to increase its ability to act and its impact. A registered NGO may, for example, rent offices, employ staff, benefit from tax breaks, seize the courts and open an account in the name of the association so that it may receive subsidies. It is vital for many NGOs to be able to have a bank account, as some funding bodies only subsidise registered associations. In addition, without legal status, NGOs may not, for example, register for international cooperation funding programmes or maintain official relations with national authorities.

Two types of system are applied to civil society organisations that wish to acquire legal status: the so-called simple “notification” system and the system of “prior authorisation”.

The most liberal legislations have provision for the notification system, also called the system of “declaration”. Under this regime associations automatically have legal status as soon as the authorities are notified by the

3/ See above.

founder members. It is not a prerequisite for the creation of an association, but a communication that enables the administration to take note of its constitution.

The declaration procedure is preferable to other forms of registration. However, although it is apparently simple, this procedure may sometimes be misapplied by an over-scrupulous bureaucracy or one that makes excessive use of its discretionary powers.

→ In **Mexico**, civil society organisations may register as a civil association by making a declaration to the public register of legal entities. This system of declaration nevertheless obliges NGOs to follow a complex procedure that generally ends only after several months. The NGO must register its name and its business name and file its statutes with a notary public, before registering with the Federal District Chamber of Commerce, then as a legal entity with the Secretariat of Finance and Public Credit, which finally issues the inscription on the federal register of tax payers in the form of a unique inscription code (*Clave Única de Inscripción* - CLUNI). Although inscription on the public register is not compulsory for the NGO to be able to operate, it is nonetheless essential to be able to access public and private funding or to open a bank account.

The complexity of the notification procedure that is common in some countries can delay official recognition of the creation of an NGO and directly affect the availability of resources necessary for its work.

Unfortunately, the system of notification does not always lead to the successful conclusion of the accreditation procedures. In some countries – and for some NGOs – the obstructionism of the authorities corresponds to a blunt rejection and violates the right of NGOs to their legal existence.

→ In **Venezuela**, associations are subject to a simple system of declaration and are only required to file their act of constitution with the Public Registration Office in the town where they have been set up. Although the law makes no provision for any formal restriction on the registration of associations, in practice, especially since 2000, several have been faced with discretionary, arbitrary rulings by the authorities.

For example, the Forum for Life (*Foro por la Vida*), a Venezuelan leading network created in 1997 and formed of around twenty human rights NGOs, has since 2009 followed all the procedures required to register officially with the Public Registration Office, with no result to date.

→ This is also the case in **Cambodia** where, despite the existence of a system of declaration, the Human Rights and Development Association (ADHOC) has been waiting to be registered since 2000.

In the system of prior authorisation, on the other hand, association members must wait for the competent public body to make a ruling on a request for registration. In general, the authorities are required to rule on a request within a reasonable period. In the meantime, the administrative authority may grant a temporary registration certificate.

Refusal to register constitutes one of the main obstacles to the right to freedom of association and, for many human rights NGOs, represents the most extreme measure taken by governments to erode this right. The consequences of a refusal to register are even worse in the case when activities carried out by non-registered bodies result in criminal penalties. In some countries, the public authorities refuse to issue a receipt, or even to accept registration documents. An authority frequently takes its time to make a decision concerning the request and delays can be extremely long.

Non-respect of the obligation to register is sometimes punished by a fine (for example in *Nepal*). However, in many countries the laws provide for prison sentences, as in *Belarus* for example (from six months to two years in the case of a repeated offence), in *Algeria* (from three to six months), in *Bahrain* (up to six months) and in *Egypt* (up to one year in prison).

→ In the **Syrian Arab Republic**, Law No. 93 of 1958 on associations and institutions requires all organisations to obtain permission to register from the Ministry of Social Affairs and Labour. Any organisation set up without prior authorisation may be penalised by the Criminal Code, which contains multiple provisions to repress numerous activities that human rights organizations are likely to carry out, and which the authorities use arbitrarily. The Criminal Code in particular provides for imprisonment or house arrest for between three months and three years for the members of political and social organisations of an “international nature”.

In some countries, legislation establishes an explicit relationship between the “illegality” of an NGO (in other words its failure to register) and the criminalisation of members who contribute to its funding.

→ In **Burma**, where a prior authorisation registration system is in force, the 1908 Unlawful Associations Act provides for prison sentences of between two to three years and a fine for people who are members of an “illegal association” and who take part in its meetings, contribute to its funding or participate in any way in its activities (Article 17).

In addition, a complex procedure, the arbitrary nature of the examination of the application for registration and the cost of the procedure may be serious obstacles to NGO activities. Many NGOs are affected by frequently unwieldy administration, coupled with ill-defined registration procedures. The slowness of registration procedures mean that NGOs that apply for official authorisation may not operate legally during the waiting period, and if they do they defy the law at their own risk and peril. While the application is being considered, it is therefore practically impossible, and even dangerous, to solicit and obtain financial support, especially from foreign donors.

In some countries, associations sometimes wait for several years before receiving a response to their application for registration. In *Rwanda*, for example, organisations must wait patiently, in some cases for several months, before receiving a reply from the Rwandan Governance Board and obtaining the legal status that is essential to be able to carry out their activities legally and fund themselves.

Even when they receive a negative response, many NGOs are not informed of the reasons for rejection, although this should be given in detail in writing within a reasonable period of time.

→ In *Algeria*, the new Law No. 12-06 on Associations, adopted on January 12, 2012, replaces the system of simple notification with compulsory prior authorisation. It provides that the NGO should obtain prior agreement from the Communal Popular Assembly, the Wilaya or the Interior Ministry, depending on the territorial level at which the association is created (Article 7).

On October 29, 2012, the National Association for the Fight against Corruption (*Association nationale de lutte contre la corruption* - ANLC) was informed of the Interior Ministry's refusal to issue a registration receipt, equivalent to accreditation of the association, without giving any reason for the refusal, although the law provides that reasons for the decision are required (Article 10). Formal notification of the refusal merely refers to "non-respect of the Law on Associations", with no other information, therefore preventing the ANLC from either correcting its application or contesting the refusal before a court.

In some cases, approval for an application for registration is not only deferred, but is arbitrarily rejected. In *Belarus*, for example, human rights NGOs regularly encounter rejection of their registration applications, making them vulnerable to criminal penalties if they still continue their activities. These regular rejections have come following the authorities' closure of several associations in 2003-2004.

For defenders who have managed to overcome registration problems, other obstacles may arise later on. In several countries, the law has been changed in order to extend the discretionary powers of the authorities, in particular by requiring NGOs that are already registered and operational to re-register, or by imposing an even more restrictive system of authorisation. Bureaucratisation of the procedure and the increase in the number of levels of authorisation slow down the authorisation procedure and paralyse NGO activities. They find themselves in an administrative limbo in which their status is vague. This situation is obviously highly detrimental to their ability to solicit and obtain funding.

In some countries, in fact, NGOs are forced to re-register. Re-registration may be periodic, as in *Uganda* (yearly) or in *Burma* (every two years), or introduced when a new law is adopted, or in reaction to a change in an NGO mandate (as in *Tajikistan*). Compulsory re-registration gives the authorities the opportunity to place obstacles in the way of the operations of groups whose activities they do not approve of, without having to explicitly ban or dissolve them.

→ In *Tajikistan*, the Law on Public Associations, adopted in 2007, requires existing NGOs to re-register.

The Association of Young Lawyers “Amparo”, an active member of the Coalition against Torture, officially registered in 2005, had to re-register in 2007. Furthermore, as the Law provides that any modification to the association’s charter of constitution requires it to re-register, in July 2012 the NGO submitted to the Justice Ministry the documents required for the procedure after it decided to extend its regional mandate to a national mandate. However, on October 24, 2012, a court in the city of Khujand ordered the dissolution and closure of Amparo. This legal ruling related to a motion filed in June 2012 by the Justice Ministry following a civil service audit of Amparo’s offices in Khujand. This motion accused the organisation of multiple breaches of its legal and administrative obligations, including the fact that it had changed its address without re-registering (which is incorrect), and of leading courses on human rights issues without permission (which is also incorrect, since such courses have taken place with the agreement of the Ministry of Education and/or local officials). The organisation’s dissolution therefore appears to be arbitrary. On January 15, 2013, the Sogdiane District Court confirmed the decision to close the organisation at an appeal hearing.

As this example illustrates, the obligation to re-register gives the authorities a pretext to suspend the activities of an NGO by refusing its accreditation.

Furthermore, in some countries, as in *India* for example, NGOs eligible for foreign funding are also required to submit to a re-registration

procedure⁴. In some cases, the obligation to re-register is coupled with a complex procedure that requires a report to be submitted that includes an audit and an annual plan for the next accounting period, as in *Nepal*, for example. Non-respect of this administrative requirement leads to progressive monetary penalties.

Imposition of new, periodic registration also contributes to a growing feeling of insecurity amongst human rights organisations and a climate of intimidation may be detrimental to their activity planning, and promote self-censorship.

The cost of the registration procedure may also be a hindrance to the creation of an NGO.

→ In **Burma**, the process of registration through an authorisation issued by the Ministry of Internal Affairs may be extremely long and prohibitively expensive: it starts at municipal level and ends with central government, and involves costs of up to 500,000 kyat (around 460 euros) – a considerable amount for a small NGO. The obligation to register is in addition to the criminalisation of unregistered NGOs⁵. The procedures and criteria for being given authorisation are unclear, and the vague nature of the appeal procedure leaves the NGOs concerned with little room for manoeuvre to contest the authorities' decisions.

As the examples above illustrate, the length of the procedure, rejection of registration, the obligation to re-register (which often comes on top of allegations of breaking the law) and the dissolution of NGOs are some of the variants the authorities use to paralyse associations and considerably undermine their ability to solicit and receive funding.

In some countries, it is all of the above techniques together that prevent independent human rights organisations to register.

→ In **China**, NGOs are subject to an extremely unwieldy system of registration, which in reality allows the authorities to exercise tight control over them. Some groups consequently chose to work without official status, or they opt for legal forms other than the status of NGO, with the accompanying problems this may entail. No independent human rights NGOs are currently officially registered in China.

4/ See Chapter 3.

5/ See above.

→ In **Iran**, the Iranian Constitution recognises freedom of association provided that the principles of independence, freedom, national unity, the criteria of Islam, and the basis of the Islamic Republic are respected (Article 26). Restrictions are vaguely formulated and largely exceed the restrictions on freedom of association admissible under international law. In addition, no independent human rights NGO has existed since the closure in 2008 of the Defenders of Human Rights Centre (DHRC), the Centre for the Defence of Prisoners' Rights (CDPR) and the Journalists' Association. In addition, the Law on Associations explicitly prohibits any foreign funding.

C. Discriminatory practices in the recognition of freedom of association

National legislation should not include any restriction based on the identity of association members, its operating methods and the nature of the rights it defends.

Everyone should be able to benefit from the right to create an association, without any kind of discrimination. For example, civil servants, foreigners, women, lesbian, gay, bisexual, transgender and intersex (LGBTI) people, and minors must all be able to enjoy their right to found an NGO.

However, in many countries, some laws prohibit specific categories of society from creating an association. For example, in several countries in the Gulf (such as *the United Arab Emirates, Kuwait, Qatar*) and Asia (for example *Malaysia, Thailand*), only citizens of the country may found an association. As a result, migrant workers, refugees and stateless persons may not form authorised groups. The implications of this ban are particularly serious in countries such as *Qatar*, for example, where migrant workers represent 80% of the population. This means that hundreds of thousands of people may not, via an association, collectively denounce the grave violations to which they are subject, and are not able to follow the procedures necessary at national, regional or international level in order to call for improved respect for their rights. This restriction violates the State's obligations to respect freedom of association for all persons under its jurisdiction, whatever their nationality.

→ In **Kuwait**, the law that applies to NGO activities (Law No. 24 of 1962 on Clubs and Associations of Public Interest) provides that only citizens of Kuwait may found an association, prohibiting de facto migrants from creating associations (Article 4). This law specifies that migrants may only join an association as active members or associates who do not have the right and are not eligible to vote, and the general assembly may only be made up of Kuwaiti members (Article 13).

Discrimination may also concern the types of activity that NGOs are authorised to carry out. In fact, in some countries, laws prohibiting associations from carrying out programmes related to subjects that are often considered to be sensitive, such as human rights, election observation, the rights of LGBTI individuals, reproductive and gender rights, the rights of migrants, of women, of ethnic or religious minorities, etc. Some legislations justify restrictions using vague concepts such as “national values”, “public order”, “standards of behaviour”, “morality”, “common peace”, “tranquillity”, “secure communications”, or the “regular functioning of the State”. The legislation of many countries (such as *Algeria, Azerbaijan, Bahrain, Burma, the Russian Federation, Malaysia, Turkey*) facilitates the authorities’ discretionary practices with regard to NGOs.

Associations that actively protect the rights of women and ethnic or religious minorities are particularly subject to the restrictive interpretation of these laws. The reference to “morality” as a reason for banning associations particularly affects NGOs that are active in the area of the rights of LGBTI people.

→ In **Uganda**, a draft “anti-homosexuality” law was presented for the first time in October 2009 before Parliament, which adjourned the vote in May 2011, then again in October 2011. The draft law was finally reintroduced in its original version in February 2012. At the end of 2012, the Parliamentary President promised a vote on the law before the end of the year as a “Christmas present”. Although this schedule has not been adhered to, it is likely that the draft will once more be on the agenda when Parliament meets again in February 2013. If it is adopted, it will formally ban all assistance to homosexual people. Associations that work to defend LGBTI rights are particularly targeted by this draft law, which provides for the withdrawal of their registration certificate and exposes their legal representative to a seven year prison sentence.

→ Similarly, in the **Russian Federation**, a law criminalising the promotion of homosexuality was due to be examined in January 2013 by the lower chamber of the Federal Assembly. Similar laws have already been adopted in many regions of the Federation, such as Saint-Petersburg, Ryazan, Archangel and Kostroma. These provisions, combined with the provisions that came into force in January 2013 prohibiting NGOs that carry out “political” activities from benefiting from financial support from American individuals or organisations⁶, risk infringing the right to freedom of association, including access to funding for LGBTI NGOs.

In several countries, the ban on activities relating to particular categories of right is not limited to a specific domain, as in the example of Uganda referred to above, but can be extended to almost unlimited fields. These very general bans on certain activities lead to the paralysis of civil society. Not only do they violate the right to freedom of association but they are often symptomatic of massive violations of human rights within the country.

→ In the **Syrian Arab Republic**, the Criminal Code penalises membership of an association established “for the purpose of changing the economic, social or political character of the State”. It provides for the closure of the association, and sentences to hard labour for a minimum term of seven years for the founders and directors of these organisations (Article 306). The Syrian authorities frequently use the provisions of this article to pass heavy sentences on association activists.

The Syrian Criminal Code therefore contravenes international law, which permits associations to carry out any activity that complies with the Declaration on Human Rights Defenders and the Universal Declaration of Human Rights, especially including the promotion and protection of economic, social and cultural rights – domains that are explicitly referred to in the Syrian Criminal Code. This general ban nips in the bud any desire to create an NGO whose goals could – misguidedly – be considered to “change the economic, social or political character of the State”. By denying the right to freedom of association, it annuls the basic condition for funding.

Discrimination may also concern the original nationality of an NGO whose headquarters are in a third party country. As an example, in *Egypt*, although the last draft law presented by the Minister of Insurance and Social Affairs in October 2012 reinstates a system of simple notification, several provisions in particular place foreign organisations and funding from foreign sources under strict government control. Non-Egyptian NGOs are still subject to the obligation to obtain authorisation to continue their activities.

Discrimination may also relate to the minimum size of an NGO, by imposing a lower limit on the number of members. As an example, in *Turkmenistan*, the law requires that an NGO should have at least 500 members before it can be established. This requirement is indirectly equivalent to a pure and simple negation of the right of association. In a repressive political environment that tolerates no opposition or criticism, the requirement for a minimum number indirectly favours the emergence of pro-government NGOs (or GONGOs), which the authorities have no problem in setting up, thanks to their many partisans.

Discriminatory practices with regard to the identity or number of individuals who wish to exercise their right to freedom of association or to the categories of rights that an NGO may defend and promote are therefore subterfuges to ban the existence of associations. NGOs affected by such discrimination may not be set up and obviously may not solicit and receive funds to carry out their promotion and protection activities.

D. Interference in the operation of associations

The right to freedom of association applies throughout the life of an association. Associations must be free to determine their statutes, their structure and their activities, and to make decisions without interference from the State.

Whether or not they have legal status, once they have been created, associations must be free to determine their statutes, their structure and their activities, and to make decisions without interference from the State. Associations must enjoy the right to express an opinion, to publish information, to address the people, to protest peacefully and to interact with foreign governments and international organisations and bodies.

However, in practice the public authorities often monitor the work of an association in an intrusive and discretionary manner. Such interference takes various forms, in particular the requirement to be notified of the decisions adopted by the board, the obligation to submit periodic activity reports and financial reports, repeated and plainly abusive audits, interference in the make-up of the board or management, etc. The law and administrative regulations may also impose obtaining prior authorisation for the organisation of all sorts of public events, especially for the collection of funds or the adoption of a code of conduct by associations.

Furthermore, in some countries the authorities force NGOs to comply with the programming priorities set by the government.

→ In **The Gambia**, NGOs are forced to adhere to an NGO Code of Conduct signed with ministries, departments or competent agencies. This Code lays down the conditions within which they must “participate in the development of activities that are in line with government policies and priorities for which [the NGO] has the appropriate resources and expertise” (Article 12 of Decree No. 81). In other words, the NGO Affairs Agency (NGOAA) strictly monitors the activities of the NGOs, which are bound by the principles set by the Government.

→ In **Bahrain**, too, the Government may refuse to register an association if it considers that “society does not need its services or if another association in the same sector of activity already exists and fulfils the needs of society”.

These governments assume the right to decide on the validity of the activities that NGOs propose to carry out, and knowingly violate the right to freedom of association. They force defenders who wish to create an NGO in a field of activity they consider to be “pointless” or superfluous to give up their project. This means that NGOs may not carry out the activities they consider necessary in line with their analysis of the needs and priorities identified, and they may not solicit and obtain funding to carry out priority programmes.

In addition, other forms of interference are likely to hinder NGO access to funding. In fact, the authorities may, directly or indirectly, oppose the receipt of funds from certain donors (for example *Bangladesh, Ethiopia*)⁷. In other cases, government bodies may require, abusively, the submission of a great many documents and supporting material relating to private funding or from foreign organisations. When they are without foundation, these requirements contribute to establishing a permanent climate of insecurity, preventing NGOs from continuing their work of protecting victims’ rights, and dissuading the most fragile NGOs from soliciting financial support to carry out their activities.

→ In **Malaysia**, in a context of harassment of the members and employees of the human rights NGO Suara Rakyat Malaysia (SUARAM), the authorities, since July 2012, have demanded the submission, within very short time limits, of numerous documents and information concerning the association’s activities and accounts. For example, on October 2, 2012, an administrative agency requested SUARAM to present, in less than 24 hours, a large number of documents relating to all the subsidy contracts and project proposals with the National Endowment for Democracy (NED) and the Open Society Institute (OSI), as well as all the receipts relating to campaign expenses between 2006 and 2011.

This administrative obstinacy is equivalent to taking reprisals against SUARAM for having solicited and obtained outside funding, with the aim of dissuading the NGO from renewing its requests for financial support in the future.

7/ See Chapter 3.

The suspension of an association and its forcible dissolution constitute one of the most serious attacks on freedom of association. Consequently, the authorities should only resort to this in the case of clear and imminent danger resulting from the flagrant violation of national legislation, in accordance with international human rights law. Measures of this kind must be in strict proportion to the legitimate objective that they seek to achieve.

However, in some countries, the authorities carry out abusive dissolutions whose sole aim is to eliminate NGOs they consider to be too critical of them.

To justify a threat of dissolution, or the actual dissolution of an NGO, the authorities often refer to offences against tax laws and administrative procedures – offences that in most cases turn out to be unfounded. The case of *Tajikistan* has already been mentioned⁸, but *Belarus* has also recently made use of this practice.

→ In **Belarus**, on October 9, 2012, the Minsk Economic Court ordered the closure of Platforma, a human rights organisation that specialises in the protection of prisoners' rights. This ruling followed a complaint filed by the Tax Office in the Savestki district of Minsk, accusing the organisation of not submitting its tax declaration within the required time and not informing it of its change of address. These allegations turned out to be unfounded, as the lack of a tax receipt was probably due to the Tax Office in Minsk losing the document. In the months before the dissolution ruling, Platforma had been the target of repeated judicial harassment by the authorities, aimed in particular at its Director, Mr. Andrei Bandarenka.

Whether the issue is that of the obligation to respect a code of conduct, of following government priorities, administrative harassment – especially relating to applications for foreign funding – or purely and simply the dissolution of an NGO, the authorities impose constraints that violate the provisions of the right to freedom of association and prevent the emergence of human rights NGOs. They cause a great many to disappear. By disqualifying these NGOs, the authorities deprive them of the basic conditions for the fulfilment of their right to solicit, receive and use funding, whether its source is local or foreign.

CHAPTER III

DIRECT RESTRICTIONS ON ACCESS TO FUNDING, INCLUDING FOREIGN FUNDING

OBSERVATORY FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS
2013 ANNUAL REPORT

As stated earlier, the right of access to funding, including foreign funding, is a fundamental right. States are nonetheless within their legitimate rights to regulate the local or foreign funding of human rights NGOs, in accordance with the principle of transparency, in particular to combat certain forms of international crime such as corruption, money laundering, drug trafficking, human trafficking and terrorism. Indeed, it is not only their legitimate right but essential for States to investigate such crimes, in compliance with the principles of the rule of law and the right to a fair trial.

However, as stipulated in Article 22.2 of the ICCPR, no restriction may be placed on the exercise of the right to freedom of association – and therefore to funding – “other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order [...], public health or morals [...] or the rights and freedoms of others”¹.

A registration system in itself does not necessarily violate the right to freedom of association, provided it is not the only applicable system (i.e. defenders are also able to associate themselves without being obliged to register), and that the principle of proportionality is respected. Under this principle it is imperative that the scope of measures applied is proportionate to the specific reasons invoked for their justification. It therefore follows that a prior authorisation procedure that is unduly burdensome and slow constitutes a disproportionate measure that violates the right to freedom of association. But in many cases, the real goal of legislation or administrative measures on funding is to obstruct the activities of human rights defenders, in violation of international law.

1/ See Chapter 1.

Restrictions on access to financing can affect both local and foreign sources. Various types of restrictions may target local funding: a State may decide to restrict public funding available in the associative sector, or to fund only NGOs that comply with policies set by the authorities, or to hamper fundraising activities at national level. Smear campaigns against NGOs can also affect fundraising activities. In addition, barriers impeding access to local funding are often concomitant to insufficient, scarce or even non-existent public or private funding available to local human rights NGOs.

Consequently, in a large majority of countries, human rights NGOs survive through the support they receive from foreign donors (intergovernmental organisations such as the UN, NGOs or foundations, and foreign government institutions, such as funds managed by a ministry, or private individuals). In this context, more and more States are resorting to an arsenal of legislative and administrative measures to legitimise unjustified or disproportionate restrictions on NGO access to foreign funds, thus jeopardising their ability to function and sometimes even their very survival.

Means to restrict access to foreign financing are manifold. Legislation in some countries effectively prohibits or renders impossible all foreign funding (e.g. *Algeria, Bahrain, Belarus, Iran*). Certain countries forbid foreign funding of certain activities and/or organisations (e.g. *Ethiopia*), while in others access to foreign funding is subject to specific authorisation from the government or a government agency (e.g. *Bangladesh, Egypt, India*). The law in some countries requires that foreign funds be transferred through financial institutions or banks controlled by the government (e.g. *Bangladesh, Sierra Leone, Uzbekistan*). In some cases, NGOs that receive foreign funding are given special status (*Russian Federation*). Finally, tax systems sometimes constitute potent weapons of dissuasion targeting human rights organisations (e.g. *Azerbaijan, Belarus, Mexico, Russian Federation*).

A. Examples of authorisation systems that impede all access to foreign funding

The authorities in some countries prohibit or impede NGO access to funding from abroad.

Thus, for example, in *Algeria, Bahrain* and *Belarus* almost all NGOs are refused registration, and all foreign funding for NGOs must be registered and approved by the authorities, making it virtually impossible for NGOs to receive such funding. Under these conditions, human rights NGOs have no other choice but to disband or breach these regulatory constraints.

Belarus: the de facto impossibility of receiving funding from abroad

→ In Belarus, all foreign funding must be registered and approved by the authorities. In November 2011, controls against unauthorised foreign funding were tightened. Thus, Article 21 of the Law on Public Associations categorically prohibits Belarusian NGOs from holding an account in a bank or a financial institution located abroad, and any use of unauthorised foreign funds is criminalised. The law provides for administrative and criminal sanctions to punish NGOs and their management personnel who receive foreign funds without authorisation.

These new provisions were adopted at a time when Mr. **Ales Bialiatski**, President of the Human Rights Centre Viasna and Vice President of the FIDH, was sentenced to four and a half years imprisonment in an unfair trial for failing to report foreign funds in his personal bank accounts in Lithuania and Poland utilised to finance Viasna's activities in Belarus. This indicates a clear link between the "Bialiatski Case" and the introduction of the new provisions.

Any violation of the regulatory provisions on foreign funding for NGOs can lead to the confiscation of unauthorised funds and the payment of a fine equal to the amount of the latter (Article 23.24 of the Code on Administrative Offences). Individuals risk confiscation of an unauthorised grant and a fine of 450 to 1,800 euros. If an offence is repeated within 12 months, the offending NGO staff or individual are liable to a two-year prison sentence (Article 369.2 of the Criminal Code).

This legislation, coupled with the fact that almost all human rights NGOs have been closed or denied registration², renders all foreign funding of human rights NGOs impossible.

It is on the basis of this finding that the United Nations Working Group on Arbitrary Detention (WGAD) qualified the detention of Mr. Bialiatski as arbitrary in that it results from the exercise of the right to freedom of association. Indeed, to fund the activities of Viasna, Mr. Bialiatski had no other choice but to open foreign bank accounts and not to report the funds to the Belarusian authorities. The WGAD added that States parties to the ICCPR "[...] are not only under a negative obligation not to interfere with the founding of associations or their activities" but are also under a "positive obligation" to facilitate "the tasks of associations by public funding or allowing tax exemptions for funding received from outside the country [...]"³.

It should also be noted that after examining the report submitted by Belarus in November 2011, CAT called on Belarus authorities to acknowledge "the crucial role"

2/ See Chapter 2.

3/ See UN Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fourth session, August 27–31, 2012 - No. 39/2012 (Belarus)*, United Nations Document A/HRC/WGAD/2012/39, November 23, 2012, paragraph 48.

of NGOs and to “[...] enable them to seek and receive adequate funding to carry out their peaceful human rights activities”⁴.

Algeria: de facto ban on all foreign funding

→ In **Algeria**, Law No. 12-06 on Associations, adopted in January 2012, contains numerous restrictions, in particular in relation to the search, collection and utilisation of funds from abroad. It prohibits “all associations from receiving funds from the legations and foreign non-governmental organisations” (Article 30), except in cases of “cooperative relations duly established with foreign associations and [international NGOs]” authorised by the competent authorities, or “express agreement of the competent authority”. Articles 40 and 43 provide that any funding from “foreign legations” obtained in violation of Article 30 may result in suspension or dissolution of the NGO by the administrative court.

NGOs fear discretionary interpretation of this law by the authorities. Moreover, the vagueness of its provisions, coupled with the impossibility for most NGOs to register, severely constrains their ability to finance themselves and to benefit from overseas funding.

After Algeria presented its report to CEDAW in March 2012, the latter expressed its concern regarding “[...]the provisions of the Law on Associations, adopted in January 2012, stipulating a requirement of specific authorisation for an association so that it can receive funding from international donors, which may negatively impact the activities of those associations working on gender equality and empowerment in a developmental context”⁵.

Bahrain: de facto ban on all foreign funding

→ In **Bahrain**, only one human rights NGO – the Bahrain Human Rights Society (BHRS) – is registered and can therefore claim access to foreign funding. Decree-Law No. 21/1989 on associations, social clubs and cultural institutions as well as on youth and sports bodies requires that prior authorisation must be given by the Ministry of Social Development for all foreign funding (Article 20). In recent years, BHRS has been denied access by the authorities to public and private funds, both domestic and foreign. The organisation has challenged these refusals before the courts since 2001, as yet to no avail.

4/ See CAT, *Concluding observations of the Committee against Torture - Belarus*, United Nations Document CAT/C/BLR/CO/4, December 7, 2011, paragraph 25.

5/ See CEDAW, *Concluding observations of the Committee on the Elimination of Discrimination against Women - Algeria*, United Nations Document CEDAW/C/DZA/CO/3-4, March 23, 2012, paragraph 19.

B. Examples of bans on foreign funding for certain activities/ organisations

In some countries, such as *Ethiopia* and *Zimbabwe*, legislation explicitly prohibits foreign funding for certain activities and / or certain types of organisations.

Ethiopia: restrictions on access to foreign funding for certain activities/ organisations

→ In **Ethiopia**, the Charities and Societies Proclamation (No. 621/2009) has created a highly restrictive environment for human rights organisations, forcing them to significantly reduce their activities, in particular because of draconian measures that restrict their funding sources.

Indeed, this Proclamation applies the definition of “foreign association” to all domestic NGOs that receive more than 10% of their funding from foreign sources, and also prohibits them from engaging in numerous human rights activities, in particular those in relation to the rights of women and children, handicapped persons, ethnic issues, conflict resolution, governance and democratisation.

In a country where 95% of local NGOs received more than 10% of their funding from abroad in 2009, and in which local sources of funding are virtually non-existent, this doubly restrictive legislation directly affected the ability of domestic human rights NGOs to conduct their activities.

A dozen NGOs have had to abandon their activities due to their “suspension” ordered by the authorities⁶. Others have been forced to operate from abroad, making it more difficult for them to document violations of human rights in the country.

Moreover, several NGOs have had their funds blocked by the Charities and Societies Agency (ChSA), including the Human Rights Council (HRC), which was forced to close nine of its twelve local offices in December 2009, and its Nekemte office in 2011, due to lack of funding. The ChSA decided to freeze HRC foreign funds even though this financial support was granted before the entry into force of Proclamation No. 621/2009 and some of the funds were not from foreign sources. In February 2011, the ChSA rejected an appeal submitted by the HRC, arguing wrongly that the latter had not provided documents proving the domestic source of some of the funds, even

6/ They include the African Initiative for a Democratic World Order (AIDWO), the Action Professionals Association for People (APAP), the Organisation for Social Justice in Ethiopia (OSJE), the Society for the Advancement of Human Rights Education (SAHRE), the Ethiopian Human Right & Civic Education Promotion Association (EHRCEPA), the Centre for the Advancement of Peace & Democracy in Ethiopia (CAPDE), the Ethiopian Federation of Persons with Disabilities (EFPD), the Research Centre for Civic & Human Rights Education, “Hundee” (Roots), “Zega le-Idget”, “Zema Setoch Leftitih”, and Kembatta Women’s Self-Help Center Ethiopia Association.

though the HRC had submitted relevant extracts of its 18 most recent audited annual reports. On October 19, 2012, the Supreme Court rejected HRC's appeal.

Several United Nations Committees have voiced their concern regarding Proclamation No. 621/2009, in particular concerning the 10% ceiling on funding from abroad. In January 2011, CAT expressed "serious concern" about this law and demanded that Ethiopia "unblock any frozen assets" of NGOs⁷. Similarly, in August 2011, CCPR noted: "This legislation impedes the realisation of the freedom of association and assembly as illustrated by the fact that many NGOs and professional associations were not authorised to register under the new Proclamation or had to change their area of activity" (Arts. 21 and 22). It recommended that Ethiopia in particular "[...] should reconsider the funding restrictions on local NGOs in the light of the Covenant and it should authorise all NGOs to work in the field of human rights"⁸. These recommendations were renewed by the CESCR in May 2012⁹.

Zimbabwe: ban on foreign funding for activities related to voting rights education and risk of similar ban on activities related to governance

→ In **Zimbabwe**, there is no general ban preventing NGOs from receiving funding from abroad. However, activities related to civic rights education or governance, as defined by Article 16 of the 2005 Zimbabwe Electoral Commission law¹⁰ and Article 17 of the 2004 NGO Bill¹¹ (if it enters into force)¹², may not benefit from foreign funding. Consequently, human rights NGOs may not rely on foreign funding of their projects related to free and transparent election rights or the fight against corruption.

C. Authorisation systems that delay access to foreign funding

While some States no longer require NGOs to obtain prior permission to receive foreign funding, numerous others continue to apply this procedure.

7/ See CAT, *Concluding observations of the Committee against Torture - Ethiopia*, United Nations Document CAT/C/ETH/CO/1, January 20, 2011, paragraph 34.

8/ See CCPR, *Concluding observations of the Human Rights Committee - Ethiopia*, United Nations Document CCPR/C/ETH/CO/1, August 19, 2011, paragraph 25.

9/ See CESCR, *Concluding observations of the Committee on Economic, Social and Cultural Rights - Ethiopia*, United Nations Document E/C.12/ETH/CO/1-3, May 31, 2012, paragraph 7.

10/ "The Zimbabwe Electoral Commission Act (ZEC Act) prohibits the receipt of foreign funding for conducting voter education," but allows foreign contributions or donations to the Electoral Commission.

11/ Local NGOs are prohibited from receiving any foreign funding to carry out activities involving or including "issues of governance".

12/ This draft law was adopted by Parliament in December 2004, but has not been signed by the President.

One of the main arguments put forward by many national authorities to justify registration is the need to “preserve national security”. Government authorisation may be an obstacle in itself for certain groups promoting freedom of expression (*India*). In other cases, the lack of government response to registration applications can jeopardise the pursuit of human rights activities (*Bangladesh*).

India: prior authorisation is mandatory, subject to renewal, and refused for certain activities

→ In *India*, Article II of the 1976 Foreign Contribution Regulation Act (FCRA), as amended in 2010, requires all persons “[...] having a definite cultural, economic, educational, religious or social programme” to register with the Government before it may receive foreign grants. The law also states that non-registered NGOs can access foreign financial support on condition that they obtain prior permission from the Government. Therefore, whatever the case, authorisation is required to receive foreign funding. The FCRA, as amended, states that any “[...] correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper” is prohibited from receiving foreign funding. Certain human rights activities could be affected by this provision. Worse still, the FCRA now requires NGOs to renew their registration under this Act every five years, although already registered NGOs may be exempted from re-registering during the five years following the entry into force of the amended FCRA. The latter also provides that any NGO whose registration certificate has been cancelled or revoked may register or obtain prior authorisation for a maximum period of three years from the date of cancellation. Moreover, the registration certificate may be cancelled for various reasons, for example in the event that the NGO concerned has not conducted any activities for the past two years.

The impact of this law on Indian NGOs that receive external funding is very harmful. In particular, the requirement of NGOs receiving foreign grants to re-register results in an insecure situation detrimental to the pursuit of their activities and can lead to a form of self-censorship, while providing an opportunity for authorities to suspend organisations that conduct activities they dislike. The FCRA, as amended, is not consistent with the recommendations of the Special Rapporteur on human rights defenders, which noted that existing laws “should not require that organisations re-register periodically”¹³.

13/ See United Nations 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, p. 46.

Egypt: funding conditioned upon prior authorisation by the Ministry of Solidarity and Social Justice

→ In **Egypt**, Law No. 84 of 2002 governing the formation, funding, and operation of associations and foundations prohibits any association from receiving funds from domestic or foreign sources without the authorisation of the Ministry of Solidarity and Social Justice. Obtaining such funds without authorisation is punishable by a prison sentence of up to six months and a fine of up to 2,000 Egyptian pounds (about 246 euros). On April 27, 2009, the Egyptian Organisation for Human Rights (EOHR) received written notification from the Ministry of Solidarity and Social Justice threatening it with dissolution and closure on the basis of Articles 42 and 17 of Law No. 84. This was in response to the organisation by EOHR, in partnership with the Centre for Media Freedom in the Middle East and North Africa (CMF MENA), of a conference in Cairo on January 27 and 28, 2009 on the topic “Information is a right for all”. Earlier, on July 31, 2008, EOHR had requested permission from the authorities to receive CMF MENA funds to cover the costs of the conference. The request was never answered. Following an international outcry and mobilisation in favour of EOHR, the latter was formally notified by the Ministry of Solidarity and Social Justice on May 10, 2009 that no measures had been taken to dissolve or close the organisation, and that the previous notification of the ministry was merely a reminder of the legal procedure governing grants from abroad.

The fall of President Hosni Mubarak in February 2011 was not accompanied by any improvement in this regard. On July 6, 2011, the Minister of Solidarity and Social Justice, Dr. Gouda Abdel Khaliq, warned civil society organisations and NGOs against “[...] any attempt to seek foreign funds” and said he considered any direct funding provided by the United States to Egyptian NGOs a violation of Egypt’s sovereignty. During the summer of 2011, in an obvious move to try to collect incriminating evidence against these organisations, he also announced that he had asked the Central Bank of Egypt to inform him of all banking transactions on accounts held by NGOs in Egypt.

In December 2011, heavily armed Egyptian security forces conducted search raids on the premises of 17 Egyptian and international NGOs, including the Arab Center for Independence of Justice and Legal Professions (ACIJP); the Budgetary and Human Rights Observatory; the Cairo and Assiut offices of the National Democratic Institute (NDI), an American organisation close to the Democrat Party; the International Republic Institute (IRI), an American organisation close to the Republican Party; Freedom House (an American NGO); and the Konrad Adenauer Foundation. On February 6, 2012, a list of 43 people facing possible prosecution for “illegal acquisition of foreign funds” was made public. The list comprised only local and international employees of foreign NGOs - seven from Freedom House, 14 from the IRI, five from the International Center for Journalists (ICFJ), two from the Konrad Adenauer Foundation, and 5 NDI staff. Legal proceedings were initiated against them on February 26, 2012, and the trial, which is ongoing, is expected to resume in June 2013. This example demonstrates the determination of the Egyptian authorities

to sanction members of Egyptian or foreign organisations who receive funds from American or European sources to finance their activities.

It is in the context of these raids that in late 2011, the Minister of Solidarity and Social Justice reiterated his intention to revise the law on associations. It is feared that even more drastic restrictions will be imposed on access to funding. This process of tightening restrictions on NGOs was still underway by the end of 2012, and the latest draft law upholds constraints on foreign funding.

Some States use the technique of “restriction by omission” to prevent human rights NGOs’ access to funding. By not applying the procedure laid down by their own laws and regulations, the authorities deny NGOs the ability to carry out projects funded by organisations or foreign countries (*Bangladesh*).

Bangladesh: excessive delays in obtaining authorisations obstruct NGO activities

→ In **Bangladesh**, the Foreign Donations (Voluntary Activities) Regulation Rules of 1978 prohibit NGOs operating in the country from receiving foreign funding without governmental approval¹⁴.

For example, since 2009, access to foreign funding for the human rights NGO Odhikar has continued to be hampered by administrative measures. Indeed, the NGO Affairs Bureau (NGO AB), under the aegis of the Ministry of Interior, only replied on January 25, 2012 to the submission made by Odhikar on December 28, 2010 of a project called “Education on the additional Protocol to the Convention against Torture (OPCAT)” funded by the European Union. Odhikar had to wait for over 13 months to get permission to conduct this project. This was in clear breach of NGO AB regulations, which require that replies should normally be issued within 45 days from the date of receipt of the submission. Meanwhile, since the period covered by the funding had lapsed, Odhikar had to re-submit the same project, which it did on February 16, 2012. This time, NGO AB notified authorisation on July 7, 2012, nearly five months later.

In August 2009, the Government refused an Odhikar project called “Training and advocacy for human rights defenders in Bangladesh”, funded by the Danish branch of the Research Centre for Torture Victims (RCT). Odhikar challenged this decision before the High Court Division of the Supreme Court of Bangladesh, and obtained an order of suspension of the decision. However, when RCT Denmark requested Odhikar to extend the duration of the project by three months, the Ministry of

14/ See Article 4 of the Foreign Donations Regulation Rules of 1978, which states: “No person or organisation [...] shall receive or operate any foreign donation without prior approval or permission of the Government for such receipt or undertaking”.

Internal Affairs raised the same objections. Odhikar was finally not able to implement the project because it was de facto impossible to access the RCT Denmark funds. Other NGOs are subjected to the same restrictions and authorisation delays.

D. The Russian example: a specific system aimed at stigmatising human rights organisations that receive foreign funding

Since November 2012, the system of barriers erected by the Russian Federation to restrict the foreign funding of NGOs has become much more pernicious. Although the law does not explicitly prohibit foreign funding, any NGO that receives funding from abroad to conduct what the authorities call “political” activities” is now considered a “foreign agent” by the Russian authorities.

Russian Federation: a specific system to regulate organisations “carrying functions of a foreign agent”

→ In the **Russian Federation**, a law adopted in July 2012 amending the status of “non-commercial organisations” entered into force in November 2012. This new law requires all NGOs that receive funds from abroad and that conduct “political activities” to register with a government agency. Such NGOs are now categorised as “non-commercial organisations carrying functions of a foreign agent”. “Political activities” are defined by the new law as “participation in the organisation and conduct of political actions for the purposes of influencing decision-making by governmental bodies aiming to change the governmental policies implemented by them, as well as in the formation of public opinion in said purposes”. This extremely vague definition enables the authorities to target human rights organisations which, by their very nature, contribute towards influencing authorities and public opinion on public affairs.

Under these new provisions, an NGO that receives foreign funding will be subject to tighter control: annual audits, separate accounts on the use of foreign funds, half-yearly activity reports and quarterly financial reports the format and content of which have yet to be defined.

Moreover, “special controls” apply to all money transfers exceeding 2,000 roubles (about 50 euros) received by NGOs based in Russia. The form that these special controls will take is as yet unknown.

Finally, the failure of an NGO that receives foreign funding to register with the said government agency is punishable by suspension of its activities, and its failure to “provide information required by the law” by a fine of up to 50,000 rubles (about 1,200 euros) for its members and 1 million rubles (about 25,000 euros) for the NGO itself.

A few days before the adoption of the bill by the Duma, the United Nations High Commissioner for Human Rights and three United Nations Special Rapporteurs (on freedom of association, freedom of expression, and the situation of human rights defenders) expressed deep concern over the likely major negative implications of this reform for civil society in the country, and urged the Russian authorities not to adopt it, but their appeal was disregarded⁴⁵.

In addition, on January 1, 2013, further provisions restricting access to financing came into force. Henceforth, Russian NGOs conducting “political activities” will no longer be authorised to receive financial support from United States nationals and organisations, under the pretext that such support constitutes a “threat to the interests of the Russian Federation”. NGOs that violate this provision are subject to suspension by decision of the administrative body in charge of NGO registration and confiscation of their funds and property by court order. In a context where the notion of “political activity” is interpreted very broadly, this new provision may further stigmatise and criminalise human rights activities in the country.

E. Obligation to transfer foreign funds via a government fund or via bank accounts controlled by the authorities

In some countries (*Bangladesh, Sierra Leone, Uzbekistan*), NGOs must ensure that grants they receive transit via a government agency or a bank controlled by the authorities. These measures are also designed to control or limit the ability of NGOs to function. In most cases, these restrictions apply solely to funds received from foreign sources.

→ In **Uzbekistan**, for example, all foreign funding approved by the commission controlled by the ministerial cabinet must transit via one of the two State banks – Akasa or the National Bank of Uzbekistan. These banks then decide whether or not to pass on the funds to the NGO beneficiaries. In most cases, the funds remain blocked in the accounts of the State banks, thus affecting the capability of the NGOs concerned to function.

→ In **Bangladesh**, the NGO Affairs Bureau (NGO AB) demands that NGOs deposit funds they receive in a bank designated by the authorities. No NGO can receive funding without a certificate of authorisation issued by the NGO AB, and no bank is permitted to release such funds without prior government approval.

A similar system whereby an authorisation certificate or prior government approval is required exists in **India**, as provided for under Article

15 / See United Nations Press Releases, July 12 and 18, 2012.

17 of the 1976 Foreign Contribution Regulation Act (FCRA), with the difference that NGOs in this country are free to designate the bank of their choice to receive the funds.

→ In **Sierra Leone**, the 2009 Revised NGO Policy Regulations require NGOs to route their assets through the Sierra Leone Association of Non-governmental Organisations (SLANGO), an umbrella organisation, and the Ministry of Finance and Economic Development (MoFED). The Government has sought to justify this measure by claiming that it aims to align the work of NGOs with public policy.

F. Complex procedures and burdensome tax systems

Human rights defenders naturally have both rights and responsibilities, including those incumbent on them as citizens of a State, in particular with regard to their obligation to pay taxes. NGOs must also fulfil their obligations in relation to bookkeeping, social charges and taxation in a transparent and honest manner, in accordance with the administrative provisions in force in each country.

As emphasised by the Special Rapporteur on the situation of human rights defenders: “The registration and supervisory organs should have the right to examine the books, records and activities of civil society organisations only during ordinary business hours, with adequate advance notice. Such auditing and supervisory powers should not be used arbitrarily and for the harassment or intimidation of organisations”¹⁶.

Meeting the requirements of the taxation system is an important component of the overall obligations of NGOs. However, in many countries restrictive tax systems constitute another way of limiting the ability of NGOs to function. The absence of tax exemptions or reductions for non-profit activities, coupled with cumbersome and complicated regulatory procedures and burdensome controls, hampers the work of NGOs.

Foreign donors supporting human rights NGOs are sometimes specifically targeted by such obstacles (*Russian Federation*).

16/ See United Nations Special Rapporteur on the situation of human rights defenders, *Commentary to the Declaration on Human Rights Defenders*, July 2011, p. 46.

Russian Federation: tax exemptions limited to certain donors identified by decree

→ In the **Russian Federation**, the legal framework is imposing more and more obstacles impeding access to foreign funding for NGOs through regulatory texts on taxation. Indeed, the law stipulates that all foreign funding must have prior government approval in order to benefit from tax exemption. Presidential Decree No. 485 of June 28, 2008 radically shortened the list of international organisations whose grants to NGOs benefit from tax exemptions approved by the Government¹⁷. In all other cases, NGOs may not claim tax exemptions for funds they receive from organisations not included on this list.

The regulations imposed on foreign funding contrast with those applicable to national funding sources. In the latter case, the Tax Code (Article 149 (2)) grants VAT exemptions to certain non-profit organisations on services they provide in the fields of culture, health, education or assistance to the population. Nonetheless, it is deplorable that activities in defence of human rights are excluded from this exemption, even in the case of locally generated funds.

The authorities in some countries with laws that provide for tax cuts deliberately misinterpret these laws in order to sanction the work of NGOs. This may even result in a tax increase (*Azerbaijan*), or a restriction of their right to a tax reduction, *de jure* or *de facto* (*Mexico*), or criminalisation of their activities on the grounds that they failed to comply with the laws on taxation (*Belarus*)¹⁸.

Azerbaijan: NGOs subject to highly dissuasive tax regime

→ In **Azerbaijan**, the Tax Code provides that “charitable organisations” benefit from tax exemptions, except on revenues derived from their economic activities. However, no law deals with the status of these “charitable organisations”, and there is no procedure in either the Tax Code or any other law that defines what type of entity should be granted this status. These legal and procedural gaps leave NGOs in the dark as to whether they are entitled to benefit from a tax exemption, or whether they are eligible to one on condition that all or some of their activities are “charitable”. This lack of clarity encourages arbitrary taxation. NGOs may carry out economic activities and the profits are taxed in the same way as commercial entities. In addition, funds from foreign donors are subject to an additional tax of 22% on wages, raising total social charges to 39%, but is not applied in case of

17/ This list is established by “the Ministry of Finance [...] jointly with the Ministry of Education and Science, [...] the Ministry of Culture, the Ministry of Health and Social Development [...] and other relevant Federal bodies, and is then submitted to the Russian Government for approval”, Article 2, Presidential Decree No. 485, June 28, 2008.

18/ See above.

agreement between the Government and a donor, as is the case, for example, with the European Commission. This legislation strongly discourages any foreign donor from providing – and any NGO from soliciting – such funds.

Mexico: NGOs subject to a complex and extremely dissuasive tax regime

→ In **Mexico**, non-profit organisations are exempt from taxation and tax reductions can be claimed on donations. However, the tax system is extremely complex and sometimes contradictory for individuals, NGOs and businesses alike. This complexity impairs the ability of NGOs to carry out their activities effectively because they must often surround themselves with experts in the fields of taxation – sometimes on a full-time basis – to monitor and control compliance with the tax regulations and procedures in place. The result can be particularly harmful to the development of small NGOs and can even threaten their very institutional survival.

CHAPTER IV

FUNDING, A PRETEXT TO DISCREDIT NGOs

OBSERVATORY FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS
2013 ANNUAL REPORT

The defamation of NGOs in relation to funding – notably its sources – is a particular form of denigration of defenders. It almost always occurs in countries where laws restrict access to funding from external sources.

Smear campaigns and unfounded accusations against defenders constitute attacks on their honour and reputation, and violate Article 12 of the Universal Declaration of Human Rights, which stipulates: “No one shall be subjected to [...] attacks upon [their] honour and reputation”. In addition, Article 12.2 of the Declaration on Human Rights Defenders states that authorities have an obligation to protect human rights defenders from “[...] violence, [...] pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights” enshrined in the Declaration. But defamation is effectively an arbitrary act – regardless of the author – against which defenders should be protected because, in the worst case scenario, it can foster the emergence of an environment of violence against them.

The Special Rapporteur on the situation of human rights defenders has repeatedly expressed concern about “the growing characterization” of human rights defenders as “terrorists”, “enemies of the State” or “political opponents” by State authorities and State-owned media. She described it as a particularly “worrying trend” because “it is regularly used to delegitimise the work of defenders and to increase their vulnerability”, contributing to “the perception that defenders are legitimate targets for abuse by State and non-State actors”¹.

The link between defamation and the instigation of violence against defenders has also been observed at regional level, notably by the IACHR, which considers that “the statements by State representatives, expressed in the context of political violence, sharp polarization, or high levels of social conflict, puts out the message that acts of violence aimed at suppressing

1/ See UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders, Mrs Margaret Sekaggya*, UN Document A/HRC/13/22, December 30, 2009, paragraph 27.

human rights defenders and their organisations enjoy the acquiescence of the government. For this reason, indiscriminate and unfounded criticisms that help create adverse conditions for the work of human rights defenders are profoundly harmful to the democracies of the hemisphere”².

The IACHR has also expressed the following concerns: “In public statements, state agents have identified the work done by human rights defenders as illegal, or they have been publicly accused of being criminals, subversives or terrorists merely because of providing legal defence to persons accused of committing certain crimes, or merely out of a desire to publicly stigmatize them”³. It recommended that “public officials must refrain from making statements that stigmatize human rights defenders or that suggest that human rights organizations act improperly or illegally, merely because of engaging in their work to promote and protect human rights”⁴.

In its ruling on a Mexican case, the IACHR observed that the Mexican authorities “made statements and issued communiques in which General [Jose Francisco] Gallardo is blamed for deeds not proven, as a result of which it is considered that his honour and dignity have been attacked, for his good name and reputation have been injured, particularly considering that there are judicial decisions acquitting him, which demonstrates that he has been subjected to public harassment”⁵. It also reiterated that, based on the principle of the presumption of innocence, “cases in which state authorities make statements or issue communiqués publicly incriminating a human rights defender of acts that have not been legally proven constitute a violation of the human rights defender’s right to honour”⁶.

However, in a globalised world where information – and misinformation – often circulate instantly, authorities in many countries initiate or encourage smear campaigns against NGOs. They call into question their honesty and credibility in order to deny the legitimacy of their activities in defence of human rights, in particular their criticism of human rights violations committed by the authorities. The forms of denigration employed

2/ See IACHR, *Report on the situation of human rights defenders in the Americas*, Document OEA/Ser.L/V/II.124 Doc. 5 rev.1, March 7, 2006, paragraph 177.

3/ *Idem*, paragraph 175.

4/ *Idem*, recommendation 10.

5/ See IACHR, *Report 43/96, case 11.430, Jose Francisco Gallardo (Mexico)*, October 15, 1996, paragraph 76. Cited in: IACHR, *Second Report on the situation of human rights defenders in the Americas*, Document OEA/Ser.L/V/II.Doc. 6631, December 2011, paragraph 123.

6/ See IACHR, *Democracy and Human Rights in Venezuela*, paragraph 616; IACHR, *Report 43/96, case 11.430, Jose Francisco Gallardo (Mexico)*, October 15, 1996, paragraph 76.

are numerous, ranging from simple criticism of the functioning of NGOs to far more serious charges such as “treason”, “espionage”, or “terrorism”.

In the specific context of smear campaigns in relation to funding, many States accuse NGOs, without any evidence, of offences ranging from plotting against the State, foreign interference, espionage, treason, attempted destabilisation, collusion with organised crime, funding terrorist or armed opposition groups, or other acts perceived as hostile to the authorities or in violation of the law. Such charges or false claims are sometimes made directly by senior State officials, or even by a State President in public speeches or through written communiqués, and are often relayed by pro-government media. In other cases, criticism is more insidious, and is channelled by the authorities through media outlets that are only too willing to publish the accusations.

One can generally identify two types of defamation: one is based on the conspiracy theory or external interference, while the other raises the spectre of a threat of internal subversion. The choice of which of the two contrived defamatory attacks to initiate is determined by the political context.

A. Invoking the spectre of foreign interference

Due to lack of financial resources available at national level, many organisations very often have no other option than to solicit foreign funds. This provides many States with an easy pretext to demonise NGOs because of the nationality or geographical location of their donors. Thus, via official media, political leaders develop discourses on external interference or plot conspiracies, inciting xenophobic and nationalistic sentiment against foreign entities perceived to be meddling in internal State affairs by trying to impose their values and foreign policy objectives through local NGOs. These fallacious claims aim to create in the public eye an amalgamation between “foreign funding” and “foreign intervention in the affairs of the country”. This link between vague but emotionally charged concepts enables the authorities to depict foreign donors as destabilising forces endangering the country, and local NGOs as their agents.

Defamation in relation to funding sources threatens to undermine the principle of international solidarity in the movement for the defence of human rights that prevailed until recently. Indeed, the positive reaffirmation of the right of defendants to benefit from international support – including financial support – in the common pursuit of improved respect for human rights, which should be a universal goal shared by the whole international community, has given way to a negative environment marked by suspicion of criminal activity and foreign interference.

The criminalisation of foreign funding and the resulting sanctions against the NGOs concerned, in particular the arrest and detention of their members, contribute towards delegitimising the work of defenders in the eyes of the public. The Special Rapporteur on the situation of human rights defenders deplored this phenomenon and emphasised that “the multitude of arrests and detentions of defenders also contributes to their stigmatization since they are depicted and perceived as troublemakers by the population”⁷.

As far back as 2006, IACHR condemned this contrived link between the foreign funding of NGOs and interference in the internal affairs of a State. Thus, after reviewing the situation in *Venezuela*, it noted that “broad criminal law definitions have been adopted and broadly applied to criminalize persons who belong to organizations that receive foreign financing. Based on the notion that organizations that receive foreign funding support foreign intervention in domestic political affairs, some States have enshrined criminal law definitions in their legislations such as the conspiracy to destabilise the State, and similar crimes. The IACHR has received several complaints from human rights defenders who have been tried on these charges, or harassed because of their source of financing”⁸.

The case of the *Russian Federation* provides a very disturbing illustration of this recourse to accusations of foreign interference.

→ As mentioned earlier⁹, in 2012 the **Russian Federation** notably adopted a “Law on Non-Commercial Organisations” which obliges NGOs that receive foreign funding to register as “foreign agents”. Under this law, registration is mandatory for all organisations engaged in activities considered “political” by the authorities – though they do not define what they mean by “political” – and this has led to de facto tighter controls over them.

This law was passed in haste just two months after the inauguration of President Vladimir Putin on May 7, 2012. It was drafted in the wake of large anti-Kremlin demonstrations during the winter of 2011-2012. President Putin accused the United States and, more generally, foreign governments of instigating these protests and defended the draft law on the grounds that it was necessary to protect the country from foreign intervention in domestic political affairs.

7/ See UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders, Mrs Margaret Sekaggya*, UN Document A/HRC/13/22, December 30, 2009, paragraph 32.

8/ See IACHR, *Report on the situation of human rights defenders in the Americas 2006*, Document OEA/Ser.L/V/II.124 Doc. 5 rev.1, March 7, 2006, paragraph 200.

9/ See Chapters 2 and 3.

One parliamentarian defending the draft law said it was a response to attempts to influence Russian domestic politics. During a parliamentary session, he strongly attacked the NGO Golos – the only independent election monitoring body in Russia – for allegedly receiving “two million dollars [...] in 2011 to smear the Russian authorities”. Golos reported widespread violations during parliamentary elections in December 2011.

Local NGOs consider that this law seeks to erode their credibility in the public eye and to facilitate their repression by State organs, and that their categorisation as “foreign agents” will, at best, discredit them and, at worst, depict them as spies working for an “enemy”. The term “foreign agent” has a very negative connotation in Russia, given police practice at the time of the Soviet Union when spying and repression by the State police were widespread. In Russian, in fact, the word “agent” has a meaning close to the word “spy”, and several NGOs fear that if they register as a “foreign agent”, they will exclude themselves from society, become suspect in the public eye, and that any contact they seek with official interlocutors will be denied.

Reaction to the adoption of this law was immediate. On the very day of its entry into force on November 21, 2012, the Centre for Human Rights Memorial discovered graffiti with the inscription “Foreign Agent. I ♥ USA” spray-painted on the walls of its headquarters office building in Moscow. On the same day, the NGO For Human Rights was also tagged with the words “foreign agent”.

In November 2012, during its consideration of the report of the Russian Federation, CAT held the view that “foreign agent” is a term “that seems negative and threatening to human rights defenders, including organizations that receive funding from the United Nations Voluntary Fund for Victims of Torture”¹⁰. It therefore called on the Russian authorities to repeal this provision of the law.

Attempts to delegitimise NGOs continued in October 2012 with the adoption by the lower house of Parliament of a series of amendments to the laws on treason and espionage that introduced new provisions in the Criminal Code. The new legislation broadens the definition of treason to include “providing financial, technical, advisory or other assistance to a foreign state or international organization [...] directed at harming Russia’s security”. Under its provisions contacts with a foreign entity are subject to de facto criminalisation and can lead to a 20-year prison sentence. The use of very vague terms such as “assistance of another nature” allows for arbitrary application of these provisions.

The activities of many NGOs naturally lead them to interact regularly with very different kinds of organisations located abroad (e.g., international organisa-

10/ See CAT, *Concluding observations on the fifth periodic report of the Russian Federation*, adopted by the Committee at its forty-ninth session (October 29-November 23, 2012), UN Document CAT/C/RUS/CO/5, December 11, 2012, paragraph 12.

tions, multilateral bodies, national NGOs, representatives of foreign States, etc.). This amended law can therefore seriously affect the ability of NGOs to maintain contacts with such partners abroad.

For example, in November 2012, CAT considered that the law “could affect persons providing information to the Committee against Torture, the Sub-Committee on Prevention of Torture or the United Nations Voluntary Fund for Victims of Torture, which the Committee is concerned could be interpreted as prohibiting the sharing of information on the human rights situation in the Russian Federation with the Committee or other United Nations human rights organs.”¹¹ CAT called on the Russian authorities to repeal the amended definition of the crime of treason in the Criminal Code and to “review its practice and legislation”.

The authorities have also stepped up direct efforts to stigmatise NGOs and their work. For example, the Federal Security Service (FSB) has claimed, in an explanatory memorandum accompanying the new legislation on treason and espionage, that foreign intelligence services were “actively” using foreign governmental and non-governmental organisations to undermine the security of the State.

This claim has been defended by an FSB Deputy Director, Yury Gorbunov, who reportedly asserted before the Duma on September 21, 2012 that “classic definitions of espionage and treason had to be broadened to include cooperation with international organizations, which might include NGOs and media groups, because the world has become more dangerous. We should include international organizations on the list of agents that can be charged with treason due to the fact that foreign intelligence agencies actively use them to camouflage their spying activity”¹². In this country, the fabrication of theories of foreign infiltration via NGOs to discredit the latter is a growing trend.

Beyond the legal scope of this unjust legislation and the damage that could result from its potential application, the laws concerned appear to have another more insidious objective, namely to enable the FSB to monitor NGOs, including outside the framework of any criminal proceedings, and to instil within Russian society a general climate of suspicion vis-à-vis NGOs. Citizens find themselves progressively more and more confined to a space strictly dominated by the discourse of the authorities who wish to eliminate any criticism against them, in particular regarding human rights violations in the country.

11/ *Idem*.

12/ See Christian Science Monitor, *Russian NGOs in panic mode over proposed “high treason” law*, September 26, 2012.

The case of *Egypt* is a further illustration of attempts by authorities to tarnish the reputation of defenders in the eyes of the public. Authorities' conspiracy theories of foreign interference serve to silence NGOs.

→ In **Egypt**, tensions between the authorities and NGOs, which were permanent during the Mubarak era, persisted after his fall in February 2011 and during the period of political transition managed by the Supreme Council of Armed Forces (SCAF). The SCAF military sought to depict foreigners and international organisations as subversive agents bent on shaping post-revolutionary Egypt according to Western interests, especially those of the United States. The political instability favoured SCAF criticism of NGOs, especially those receiving funds from abroad, in particular from the United States. These organisations were accused of destabilising the country and acting as agents of American political interests. Most Egyptian media outlets gave widespread coverage to these slanderous attacks.

In January-February 2012, the smear campaign focused on civil society organisations, despite the important role they played in the revolution and in denouncing violations committed by the Mubarak regime.

For example, on January 2, 2012, the Arab Media Network, Moheet, and the electronic portal, *Al Wafd*, published an article entitled "On Wikileaks, the foreign funding scandal" that undermined the reputation of several NGO leaders, intellectuals and Egyptian personalities¹³. The article claimed that Wikileaks had published cables on the secret funding in recent years of Egyptian human rights defenders by the United States embassy in Cairo, and hinted at secret meetings between NGO personnel and representatives of the embassy.

Several senior NGO officials targeted in the article filed a complaint against Moheet and *Al Wafd*, and requested an investigation, judging that the article fanned hatred and prejudice against them, and constituted slander. The complainants considered that the information published was false, inaccurate and did not include any content of the cables released by Wikileaks.

Repression reached its highest level in February 2012, when authorities announced their intention to prosecute 43 defenders, active in the promotion of civil and political rights, including 19 Americans¹⁴.

13/ The article cited, among others, the Arab Center for Independence of Justice and Legal Professions (ACIJP); the Arab Center for Independence of the Judiciary and the Legal Profession; the Egyptian Organization for Human Rights (EOHR); and various public figures, including the founder of the newspaper *Al Masry Al-Youm*, Mr. Hisjam Kassem; a member of the journalists' union; a journalist from *Al Ahrām*; and a member of the National Council for Human Rights.

14/ See Chapter 3.

This action mainly targeted four foreign-based NGOs receiving funds from the United States government. The charges notably included the pursuit of activities such as “research for the United States” and “serving foreign interests.”

Against this inauspicious backdrop, numerous NGOs stopped soliciting or accepting foreign funding. In addition, several local NGOs had to return donations received from abroad, including for example grants from the American organisation Freedom House and from the United Nations Democracy Fund – UNDEF. Indeed, in November 2012, in the absence of a response from the Ministry of Solidarity and Social Justice to their request to return the funds they allocated in May, these two organisations asked the Arab Programme for Human Rights Activists to intercede to ensure reimbursement.

Azerbaijan also links NGOs to foreign interference theories.

→ In *Azerbaijan*, the media often describe NGOs that receive funding from abroad as foreign agents. For example, in 2011-2012, pro-government media such as *Yeni Azerbaijan* and *Merkez* ran a smear campaign against the Institute for Reporters’ Freedom and Safety – RATI after the latter received a warning from the Ministry of Justice for alleged violations of the Law on NGOs. In particular, the media accused RATI of using its funding to conduct anti-State activities and to finance mass protests, such as for example the “Sing for Democracy” campaign launched in the context of the Eurovision Song Contest held in Baku in May 2012.

The authorities have continued to create and foster a contrived link between NGOs and political interests in order to depict defenders as subversives, criminals or traitors. In June 2012, the newspaper *Yeni Azerbaijan* published an article entitled “Foreign sources and traces of criminal funding for AXCP” (Azerbaijan Popular Front, one of the main opposition parties). The article published the names of several NGOs that it claimed had donated more than 800,000 USD in 2011-2012 to AXCP. These included the NGO Free Person, the Azerbaijan Lawyers’ Association, the Azerbaijan Foundation for the Development of Democracy, the Centre for the Observation of Elections and Democracy Education, the Public Social Union of Strategic Research and Analytical Investigation, and the NGO Support of Free Economy. Two days later, the same newspaper published an article entitled “The Soros Foundation is the mainstay of the fifth column”, in which it described the beneficiaries of the Open Society Institute (a Soros-funded Foundation) as an “anti-Azerbaijan network”.

In a country like Azerbaijan, where freedom of the press is severely constrained, and where such claims are uncontested, these smear campaigns against NGOs seriously contribute to the stigmatisation of these organisations and defenders by depicting them as “traitors to the nation”.

One of the most serious examples of the denigration of NGOs that receive donations from abroad and their resulting marginalisation in society is illustrated by the case of *Venezuela*.

→ Article 1 of the **Venezuela** Constitution stipulates: “Independence, liberty, sovereignty, immunity, territorial integrity and national self-determination are unrenounceable rights of the Nation”.

This article was improperly invoked to justify the denial of the civil and political rights of defenders and to brand them as “foreign agents”. For example, on May 16, 2012, the President of the Permanent Financial Commission of the National Assembly proposed that the commission should investigate the origin of the resources of the Venezuelan NGOs “*Transparencia Venezuela*” (the national chapter of Transparency International) and “*Monitor Legislativo*”. He affirmed that NGOs “never work to eradicate the problems of society”, because their budgets increase in proportion to the problems at hand, and they therefore have no incentive to solve them. Moreover, he maintained that foreign funding of domestic political activities appeared to represent a “violation of Article 1 of the Constitution of Venezuela, which stipulates that “foreign agents” must not interfere in the political life of the State to undermine its independence and sovereignty”¹⁵. It should be recalled that in its reports for 2009 and 2011, *Transparencia Venezuela* identified Venezuela as one of the most corrupt countries in the world.

The IACHR has observed a deterioration in the situation of human rights defenders in the country since 2003, characterised notably by “a policy to confront and publicly discredit defenders and their organizations, which has had consequences on their work”¹⁶. “State officials have persisted in publicly discrediting human rights defenders so as to delegitimise any complaint they may present regarding violations to human rights, in some cases accusing them of being part of a destabilisation plan and of acting ‘against the revolution’ for having received funds from foreign organisations and countries for their financing”¹⁷.

This smear campaign has been relayed by the media, which has not hesitated to use aggressive language. For example, during a radio broadcast on June 21, 2011, a journalist with the State-run *Venezolano de Televisión* (VTV) called **Carlos Correa**, Executive Director of the human rights organisation Public Space (*Espacio Público*) a “mercenary, traitor to the nation, an individual who prostitutes himself with the empire – the United States – that gives him money. He himself admits it”¹⁸.

15/ See Article of *Agencia Venezolana de Noticias, Proponen investigar origen de recursos de la ONG Transparencia Venezuela y Monitoreo Legislativo*, May 16, 2012. Unofficial translation.

16/ See IACHR, *Democracy and human rights in Venezuela*, Document OEA/Ser.L/V/II. Doc. 54, December 30, 2009, paragraph 590.

17/ *Idem*, paragraphs 591 and 592.

18/ See *Radio Nacional de Venezuela, Caso El Rodeo: El Pran Humberto Prado*, June 21, 2011.

The following day, *Diario Vea* published an editorial entitled “the Department of State [of the United States] came [to solve] the prison problem”, in which it accuses several NGOs of being manipulated by and in the pay of the United States¹⁹.

NGOs that receive funding from the United States are indeed subject to strong defamatory verbal abuse, and are notably accused of “spying”, “conspiracy”, “destabilization” and “crime”.

Following this campaign, several criminal investigations were launched against NGOs that have received funds from the United States in the framework of international cooperation. As of the beginning of 2013, the NGOs concerned had not been informed of any follow-up action in relation to these investigations. It should be noted that the Supreme Court of Justice had already ruled in 2010 that NGOs that received funding in the framework of international cooperation were guilty of the crime of “treason”²⁰.

In December 2010, a Law on the protection of political freedom and national self-determination entered into force. It targets NGOs active in the field of “the defence of political rights” or other “political objectives” and prohibits them from holding or receiving donations from foreign sources. This law therefore regards these NGOs as entities that oppose national “self-determination” – in itself a defamatory claim.

The theory of foreign interference through NGOs funded by foreign donors has also been propagated by States as a pretext in support of the adoption of laws restricting the work of NGOs.

→ Thus, on November 13, 2011 in **Israel** for example, the Ministerial Legislative Committee approved two draft law proposals intended to significantly limit the funding of human rights NGOs by governments and foreign entities.

The first bill sought to impose a 45% tax on donations from “foreign state entities” to “public institutions”, with the exception of “sponsored” institutions (as defined in the Foundation Budget Act, 1985). To justify the proposal, the parliamentarian behind it stated that “several organisations that operate in the country sought to defame the State of Israel in the eyes of the world and to encourage the persecution of officers and soldiers [from Israel Defense Forces – IDF] by attacking their reputation. These entities, which present themselves as ‘organisations defending human rights’, are funded by States and other obscure sources that seek only to harm and alter the political discourse of Israel from inside the country”. The parliamentarian referred to the contributions of NGOs to the conclusions of the Goldstone Report

19 / See *Diario Vea*, *El Problema carcelario le llegó el Departamento de Estado*, June 22, 2011.

20 / See Decision of the Constitutional Chamber of the Supreme Court of Justice No. 796, file No. 09-0555, July 22, 2010.

mandated by the United Nations, which criticised the conduct of the IDF during Israel's Operation Cast Lead military offensive in Gaza in December 2008-January 2009. Regarding the complaints lodged by certain NGOs against senior Israeli civil servants and senior army officers, the parliamentarian said that these NGOs had attempted to "present IDF soldiers as war criminals, to encourage people to refuse military service, and to call for an economic and political boycott of Israel". She explained, as if it were a crime, that these organisations had "revealed" that they were funded by European governments and that she considered that the latter "were intervening in the internal Israeli political discourse in an attempt to delegitimise IDF activities and soldiers. Foreign money pays for the actions that these organizations are waging against the IDF". This bill sought to punish NGOs for their positions considered contrary to the interests of the State. Thus, its author clearly stated that she aimed to "deny the right" of these NGOs to benefit from a tax exemption granted by the State – an exemption that would nevertheless continue to benefit organisations "working to advance Israeli society in areas such as welfare and education"²¹.

The author of a second draft law²², a member of the party in power, was even more direct and proposed an outright ban on associations that receive donations from foreign governments or international bodies such as the United Nations or the European Union, "given the activities of incitement conducted by many organizations that claim to be organizations in defence of human rights and that aim to influence the political discourse, the nature and policies of the State of Israel"²³. Stating that the bill was intended to prevent foreign States from intervening in Israeli politics via their support for associations of a "political nature"²⁴, this parliamentarian considered "intolerable" that Israel allows other States to freely "intervene in its domestic affairs.

The two parliamentarians subsequently introduced only one bill, combining the two aforementioned proposals and establishing three categories of NGOs: the first category would not be allowed to receive foreign funding; those in the second category would be authorised to receive such donations on condition that they currently receive funding from the Israeli government; and those in the third category would be subject to a 45% tax on donations or grants from abroad. Following a national and international outcry this draft law was never put to the vote²⁵. In December 2011, the Attorney General warned Prime Minister Binyamin Netanyahu that the

21 / Bill for Amendment of the Income Tax Order (Taxation of Public Institutions that Receive Donations from a Foreign State Entity) – 2011, presented by Knesset member Fania Kirschenbaum (Yisrael Beiteinu). Unofficial translation.

22 / The Association Act Banning Foreign Diplomatic Entities' Support of Political Associations in Israel. Draft law submitted by Knesset member Ofir Akunis. Unofficial translation.

23 / *Idem*.

24 / The Association Act Banning Foreign Diplomatic Entities' Support of Political Associations in Israel), submitted by Knesset member Ofir Akunis. Unofficial translation.

25 / The investiture of the new Knesset following elections in January 2013 moreover nullified this draft law.

proposal was unconstitutional. In addition, as mentioned above²⁶, CEDAW also cautioned Israel in January 2011 against the creation of a parliamentary commission with a mandate to investigate the foreign funding of Israeli NGOs.

Under the pretext of fighting against the “delegitimisation of Israel”, the parliamentarians sought to delegitimise NGOs that denounce human rights violations – especially those committed by army personnel – and considered by their detractors as vectors of the foreign policy of third States. The NGOs targeted were clearly those that denounced human rights violations committed by Israel in the Occupied Palestinian Territory or that defend the rights of the Arab minority in Israel.

It should also be noted that on February 21, 2011, the Knesset passed a bill in its final reading to restrict funding from abroad for Israeli NGOs²⁷. This law states that in all their public speeches and public documents the NGOs concerned are required to declare that they receive funding from a “foreign political entity”. In addition, they must disclose on their websites the names of their donors and the destination of the funds they receive, and submit a quarterly report to the authorities containing information on donations from foreign governments. Non-observance of this provision is punishable by fines and imprisonment.

Foreign plot theories exist in numerous countries.

→ In **Malaysia**, for example, several newspapers close to the Barisan Nasional (BN – the largest political coalition in the country), including *The Malaysian Insider* and *New Straits Times*, published articles on September 21, 2012 alleging that NGOs such as Suara Rakyat Malaysia (SUARAM) and the Coalition for Clean and Fair Elections (Bersih) had received foreign funding in the context of a plot to destabilise the country. Similarly, in an article published on the front page of *New Straits Times*, the newspaper of the largest party in Parliament, the United Malays National Organization – UMNO), entitled “Conspiracy to destabilise the government,” the author claimed that the government had foiled a foreign destabilisation plot. It added that the National Endowment for Democracy (NED) had donated up to 400,000 euros to the NGO SUARAM between 2005 and 2011. Suspecting SUARAM of receiving funds from NGOs based abroad, the Minister for Internal Trade in September 2012 requested the Central Bank of Malaysia, *Bank Negara Malaysia*, to investigate SUARAM in the framework of a 2001 law on the fight against money laundering and the funding of terrorism. The investigation was ongoing at the end of 2012.

The article did not provide any detail on how these NGOs planned to “destabilise” the country. It mentioned in particular that the billionaire George Soros, whose Open

26 / See Chapter 1.

27 / This refers to the law stipulating the information disclosure obligations of beneficiaries of support from a foreign political entity.

Society Institute (OSI) had allegedly also funded SUARAM, was the mastermind of a plot to “ruin the economy of the country”.

This smear campaign emerged in an environment wherein several of the NGOs targeted had been engaged in recent years in the promotion of electoral reform and the fight against the abuse of power and corruption.

B. Invoking the spectre of internal threats to the nation

If their accusations do not relate to foreign meddling in internal political affairs, States determined to rein in NGOs they feel are too critical of national authorities invoke their participation in or support for internal threats to national stability and security. The authorities in these countries target NGOs directly or via pro-government media, and conduct smear campaigns equating NGOs with criminal groups, armed movements or other illegal entities opposed to the government. By alleging – without any evidence – that these NGOs are supported or funded by illegal armed groups in conflict with the State, the authorities are fostering – as is also the case in some other countries – a contrived amalgamation to discredit them.

→ **Mexico**, which is experiencing a severe political crisis marked by the militarisation of society and growing insecurity, provides a good illustration of this trend. The “total war” launched by the authorities against drug traffickers is accompanied by serious human rights violations, including extrajudicial executions, unfair trials, and arbitrary detention. In this environment, characterised by the weakening of the rule of law, some media and State actors have helped to spread the perception that human rights defenders protect delinquents. They have also propagated the idea that some NGOs are financed by organised crime.

For example, in a document entitled “Programme of Strategic Studies 2010” the Centre for Investigation and National Security (*Centro de Investigación y Seguridad Nacional* – CISEN), NGO activities are depicted in the same categories as corruption, migration and “naturally” organised crime as a risk to national stability. This assimilation between human rights defenders and threats against national stability not only constitutes flagrant defamation but also increases the vulnerability of human rights defenders, in a country where many State and non-State actors are responsible for acts of violence against people deemed “subversive”.

In yet another example, the newspaper *Mi Ambiente* published an article on August 9, 2009 claiming that the authorities’ fight against crime was being thwarted by NGOs “waving the banner of human rights” that had become “reckless accomplices”

of drug traffickers, and that sympathise with delinquency and therefore weaken the government structures²⁸.

The impact of defamatory attacks against NGOs can also be felt at the level of donors, disrupting their funding strategies.

→ In **Guatemala**, for example, NGOs engaged in the defence of environmental law and the rights of indigenous peoples, or that provide legal assistance, have been the target of a smear campaign relayed by national media since June 2010. Editorials and television reports have stated that the international community was supporting terrorists and murderers. Several embassies of European countries that support local NGOs through financial grants or acts of solidarity have also been targeted. The first phase of this campaign led to the suspension of relations of several embassies with NGOs. In 2011, following initiation of this campaign, the embassies of two European countries²⁹ suspended official cooperation with a local NGO active in the field of environmental protection.

In February and March 2012, the media campaign attacked the embassies of two Nordic countries in relation to a project in support of indigenous peoples. In view of the absence of reaction from the government, despite its previous approval of this programme of activities, one of the embassies demanded the reformulation of eight projects on legal support, human rights education, and capacity building on communication. In addition, in July 2012, representatives of local institutions wrongly accused an NGO defending the rights of peasant communities of having armed elements in its ranks. These allegations prompted a foreign embassy to withdraw its funding for two projects (job creation for communities and legal support) implemented by the NGO, despite an assertion by the Office of the United Nations High Commissioner for Human Rights confirming the peaceful nature of the NGO concerned.

These examples illustrate the impact in real terms of smear campaigns on the ability of the NGOs targeted to access foreign funding.

Depending on the context, smear campaigns that equate NGOs with armed opposition movements can jeopardise the physical safety of their personnel and their families.

28 / See *Mi Ambiente* article, August 9, 2009.

29 / The source requested that the identity of the NGOs and countries concerned remain confidential.

→ In **Colombia**, for example, the authorities' strategy, which equates armed guerrilla movements with NGOs that promote civil and political rights, not only serves to discredit the NGOs. It also endangers the personnel of these organisations by depicting them as enemies of the State and subversive elements, and contributes to undermining their meagre funding opportunities at local level. For instance, the Defence Minister declared on August 10, 2012 that the Patriotic March (*Marcha Patriótica*) social movement³⁰ was financed by the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia* - FARC) movement. In a context of armed confrontation between the FARC and the Colombian army, in which many State and non-State actors resort to violence against people deemed "subversive", this has the effect of greatly increasing the physical vulnerability of members of the Patriotic March movement.

The assimilation of NGOs to terrorist groups represents another facet of defamation, but involves the same potential dangers as other situations mentioned above.

→ In **Turkey**, for example, defenders who denounce human rights violations committed in the context of the fight against terrorism and those who engage in the defence of Kurdish minority rights are regarded by the authorities in the same way as terrorist groups. Dozens of them have been arrested and prosecuted in the framework of anti-terrorist operations. The pro-government media relays information about these procedures and the unfounded accusations against human rights defenders. These judicial and media campaigns contribute to discredit NGOs in the eyes of both the public and national and foreign potential donors, and at the same time endangers defenders' personal safety.

C. Donors and legal constraints

In addition, in donor countries, the actual ability of donors to finance foreign NGOs may be seriously affected by the legal framework in place. Indeed, in some countries, laws impose restrictions on the financing of entities considered hostile to the interests of the State. This is particularly the case of legislation relating to terrorism or national security, which prohibits, among other things, financing or material support to groups regarded as "terrorists". Although it is perfectly legitimate to fight against terrorism, including by criminalising its financing, the objectives of such legislation are sometimes diverted to paralyse the work of human rights defenders. Thus, numerous pieces of legislation and practices do not comply with international human rights conventions.

30 / The Patriotic March is a social movement grouping student, union, peasant, indigenous, Afro-Colombian, women's and workers' organisations that denounce political corruption and cronyism, and that defend the sovereignty of local populations over natural resources, among other causes.

In situations of armed conflict or security or political crises, NGOs and human rights defenders are frequently wrongly accused of giving “support” to or “sympathising” with terrorist causes because, as mentioned above, they denounce human rights violations committed in the contexts of such crises as well as in the framework of the fight against terrorism. This can put them in serious physical danger. Indeed, the application of certain anti-terrorism laws can cause human rights defenders problems and endanger their security. Since 2001, in particular, a large number of human rights defenders in numerous countries have been subjected to unwarranted criminal proceedings for allegedly belonging to or supporting a terrorist organisation, regardless of whether or not they were involved in or provided support for terrorist acts.

Indeed, the descriptions of offences related to “material support” to “terrorist activities”, and to the “financing of terrorism”, are vague and can allow for the inclusion of activities unrelated to terrorism, such as the promotion and defence of human rights.

In some cases, the executive authorities use the qualification “terrorist” improperly without a determination by the judiciary. Such practices violate the principle of the presumption of innocence. The United Nations Special Rapporteur on human rights and terrorism recommended that anyone suspected of affiliation, association or providing support to a terrorist organisation should not be prosecuted as a member of a terrorist organisation unless the terrorist nature of that organisation has been previously determined by a judicial organ³¹. During hearings of witnesses by the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, the panel observed that the absence of a clear definition of “terrorism” was aggravated by the fact that the national legislation in question was not in compliance with international standards. For instance, at the hearing on *Canada* – a country that in 2001 created the offence of “facilitating” a terrorist activity – one witness declared that the formulation of the offence was so vague that it could deter charities from supporting humanitarian work in conflict areas where armed groups, characterised as “terrorist”, operate³².

Restrictions on the funding of NGOs under the guise of the fight against terrorism or money laundering have unfortunately become widespread in

31/ See UN General Assembly, *Report of the Special Rapporteur on human rights and terrorism*, UN Document A/61/267, August 16, 2006, pages 11-12.

32/ See International Commission of Jurists (ICJ), *Assessing damage, urging action, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, 2009, page 133.

recent years, and even affect donor countries, whose traditional support in the humanitarian and human rights fields is now potentially restricted.

This worrying trend was notably confirmed by the Financial Action Task Force (FATF), which recommended States to “ensure that [NGOs] cannot be misused: (a) by terrorist organisations posing as legitimate entities; (b) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and (c) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations”³³. The potential prejudicial character of this recommendation on the work of NGOs is aggravated by the fact that it is not accompanied by explicit guaranties of the right of NGOs to access funding.

→ In the **United States**, three federal laws prohibit “material support” to and the financing of terrorism, including the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act of 2001). This Act reinforces offences already provided for under the Presidential Decree signed by the President at the time, George W. Bush, and sanctions any person that knowingly or intentionally provides “expertise, training or any other service”³⁴ to a Foreign Terrorist Organisation (FTO). Thus, donors supporting foreign organisations can potentially be considered to have knowingly or intentionally provided support to groups regarded as terrorist organisations, regardless of whether or not this support is material.

The risk of excessive interpretation of these provisions became a reality in June 2010, when the United States Supreme Court considered that the prohibition of the provision of support to terrorist groups also extends to peaceful activities conducted in the framework of international humanitarian law³⁵. The case concerned the American NGO Humanitarian Law Project (HLP), which advised that it wanted to provide support for the humanitarian and political activities of the Kurdistan Workers Party (PKK) – listed as a terrorist organisation by the United States and the European Union – in the form of legal assistance, and training in United Nations special appeal procedures and peaceful measures for conflict resolution. The Court concluded that in adopting the Patriot Act the United States

33/ See FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, February 2012, Recommendation VIII, page 13.

34/ See 2001 Patriot Act, USC, Title 18, Part I, Chapter 113B, § 2339A 18 USC § 2339A – *Providing material support to terrorists*.

35/ See Judgement of the United States Supreme Court, Eric H. Holder, Jr., Attorney General, et al., Petitioners, v. Humanitarian Law Project et al., June 21, 2010 and the Center for Constitutional Rights CCR: <http://www.ccrjustice.org/holder-v-humanitarian-law-project>.

Congress had sought to prohibit this type of support to “terrorist” groups because it could serve to “legitimise” them.

It is noteworthy that the Supreme Court judges’ decision was far from unanimous³⁶. It followed several judgements of the lower courts, which had considered that the provisions of the Patriot Act were vague. The Supreme Court, however, held that the law was clear, and that it did not violate the right to freedom of expression or association. It should also be noted that in August 2009, a federal court for the first time considered that the government could not freeze the assets of an organisation without first obtaining legal authorisation.

The jurisprudence of the Supreme Court implies that donors cannot finance consultancy services, training or other services for the peaceful resolution of conflicts involving a terrorist organisation, even if the goals and modes of action defined are consistent with the Universal Declaration of Human Rights, without exposing themselves to prosecution for “supporting terrorism”. NGOs and human rights defenders conducting such activities would also be exposed to prosecution, which would obviously have the direct consequence of making it impossible for NGOs to solicit funds for their activities. This furthermore amounts to a serious attack on donor integrity. In this sense, application of this abusive law represents a form of “legitimised” defamation of the donor-defenders concerned.

Beyond the risk of the criminalisation of donors for providing material assistance to terrorist groups, this jurisprudence – which is counter-productive and detrimental to the promotion of human rights – has a much more serious consequence because of its more general impact: it deters potential donors, who will in future not take the risk of financing not only HLP, but also other NGOs that seek to implement similar programme activities whose goals are perfectly peaceful and consistent with international instruments, particularly in contexts of open or festering conflicts, or occupation, in which defenders are often accused by the authorities of supporting the opposition.

Thus, such provisions may lead to paradoxical situations wherein a State that promotes human rights and condemns restrictions on foreign NGOs to access funds from abroad adopts legislation prohibiting the funding of programmes for the implementation of international law.

D. Consequences of smear campaigns against human rights NGOs and defenders

The examples above show that smear campaign strategies against human rights NGOs and defenders, regardless of whether they are based on accusations of foreign interference or support for internal destabilisation plots, are extremely harmful. The consequences of this stigmatisation generally fall into the following categories:

Defamation in relation to funding:

- as mentioned above, constitutes a violation of the right to preservation of defenders' honour and reputation enshrined in Article 12 of the Universal Declaration of Human Rights;
- seriously endangers the physical safety of defenders. By depicting them as traitors or enemies of the State in countries plagued by violence committed by State and non-State actors, they become potential targets of physical attacks;
- leads some NGOs to practice a form of auto-censorship and to refrain from submitting funding requests to potential donors. In this context, authorities no longer have to apply visible pressure to achieve their objective, for example by enacting unpopular and more restrictive laws or administrative measures (such auto-censorship has been noted for example in the case of several countries in the Euro-Mediterranean basin)³⁷;
- can in certain cases prompt active donors to terminate their funding. This disastrous consequence for the work of the NGOs concerned represents a victory for the authorities who no longer have to bear the direct political cost and responsibility for the suspension or suppression of foreign funding;
- undermines NGOs in the eyes of the public and saps the ability of defenders to encourage public and private local donors to contribute financially to NGO budgets – paradoxically at a time when they need this financing more than ever before due to the increasing restrictions on access to foreign funding;

37/ See Euro-Mediterranean Human Rights Network (EMHRN), *EMHRN Annual Review of freedom of association in the Euro-Mediterranean region – 2010: Civil society in danger*, chapter on the funding of associations in the Euro-Mediterranean region, 2010.

– leads certain NGOs to revise the definition of their programmes and their level of engagement in the debate on the promotion and protection of human rights in society, which result in a reduction of their activities. The IACHR declared that in some States of the Americas human rights defenders “have seen their work limited by forms of discourse that characterize their work in a negative light”³⁸.

Moreover, in the context of consideration of the report submitted by *Venezuela*, the IACHR has concluded: “Disparaging human rights defenders and their organizations could cause them, out of fear of possible reprisals, to hold back from making public statements critical of government policies, which in turn hampers debate and the ability to reach basic agreements regarding the problems that afflict the Venezuelan people”³⁹.

The consequences of these different forms of slander against defenders in connection with financing are therefore not limited to the issue of funding for their activities, but also affect other key areas of the life of NGOs and human rights defenders, in particular their right to physical integrity and respect for their privacy.

38/ See IACHR, *Report on the situation of human rights defenders in the Americas*, Document OEA/Ser.L/V/II.124 Doc. 5 rev.1, March 7, 2006, paragraph 175.

39/ See IACHR, *Democracy and human rights in Venezuela*, Document OEA/Ser.L/V/II. Doc. 54, December 30, 2009, paragraph 603.

CONCLUSION AND RECOMMENDATIONS

OBSERVATORY FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS
2013 ANNUAL REPORT

A. Conclusion

Although the right to access funding is an integral part of the right to freedom of association – itself a universally recognised right enshrined in numerous international and regional instruments – many States are guilty of placing abusive restrictions on this right.

Limitations or even the outright denial of the right to freedom of association constitute the most radical restriction on access to funding. Such measures can have an impact on the conditions for the establishment or management of an NGO, which should be guaranteed without any interference or pressure from the authorities.

The right of NGOs to access funding is violated either indirectly by restricting the ability of defenders to operate openly in the framework of an NGO, or directly through legislation, regulations or administrative practices that explicitly restrict or prohibit access to funding. Whatever the strategies adopted by States, they have a devastating impact on the ability of NGOs to conduct activities to promote and protect human rights, as provided for in the Declaration on Human Rights Defenders.

Even worse, smear campaigns related to the issue of funding for NGOs pervert and demonise the concept of solidarity or international cooperation to the detriment of the movement in defence of human rights and the advancement of democratic principles. In the process, the issue of international solidarity is degraded to the level of a breach of national sovereignty, and defenders are portrayed as criminals.

Yet, the right of NGOs to solicit, obtain and use funding places States under a dual obligation: on the one hand, a negative obligation not to impede and to fully respect the exercise of this right, and on the other hand, a positive obligation to create a framework that facilitates NGO access to funding. The State must establish and ensure favourable conditions enabling NGOs to achieve this goal, for example by creating a legal and administrative framework conducive to the enjoyment of this right. By promoting access to funding for NGOs the State is not granting

any privilege to defenders – it is merely assuming its responsibility. This double obligation should be reflected in national legislation, which must allow NGOs to solicit, receive and utilise funds from both domestic and foreign sources. In many cases, however, States adopt a contrary approach by imposing improper controls over NGO funding rather than actively supporting the latter.

This right of NGOs to access and use funds, especially funds from abroad, is naturally accompanied by certain responsibilities on their part, especially in terms of transparency and good governance, as in any other sector of society. Still, the State should not impose a general system of prior authorisation for access to foreign funding. In general, and to the extent that States have a legitimate interest to control illegal sources of funding, for example in the context of the fight against money laundering, such concerns are addressed through criminal or administrative investigations conducted on the basis of suspected acts of embezzlement or other violations of the law.

From a legal perspective, legitimate restrictions on the right of access to funding are the same as those admitted with regard to the right to freedom of association: they are only authorised under strict and cumulative conditions. They must be “prescribed by law” and “necessary in a democratic society”, and respect the primacy of the general interest and the principle of proportionality.

In some countries, the authorities impose a system of prior authorisation for the establishment of an association or even prohibit or criminalise unregistered NGOs. The absence of a legal status blocks NGO access to some funding, regardless of whether it is public, private, domestic or foreign. The situation is more serious in countries where the activities of unregistered NGOs are prohibited, or heavily penalised, and where defenders, as well as persons or entities that support NGOs – including financially – are exposed to fines or imprisonment.

The official reasons given by authorities for denying the right to freedom of association, including the right to access funding, are based notably on vague concepts – defined diversely in different national legislations – such as “public order”, “tranquillity”, “morality”, “political activities” or – even worse – amalgamations that portray defenders as being close to or sympathising with supporters of “terrorism”. The reasons put forward may also include discriminatory criteria based, for example, on the nationality of defenders.

In some (including Western) countries, anti-terrorism or national security laws contain provisions (mostly introduced in the wake of the terrorist attacks of September 11, 2001 and based on United Nations Security Council Resolution 1373) which pose problems for the proper functioning of NGOs. Indeed, some of these provisions, if interpreted broadly, could wrongly impede the right of NGOs to access funding for activities in situations where certain parties to a conflict are considered supporters or members of terrorist organisations. This may occur even if the said activities are consistent with the goals of the Universal Declaration of Human Rights and seek, as a priority, to promote political dialogue or a cessation of the violence. In some cases, these provisions also impede the ability of donors to finance human rights-related projects for fear of prosecution or proceedings against them based on an anti-terrorist law.

Even when defenders are able to register their NGO they can face a second type of impediment directly related to their ability to access funding. Indeed, in many countries, NGOs often have no choice but to seek financial support from foreign organisations and it is these external sources of funding that certain States seek to drain as a priority. These States thus limit access to foreign funding either by: explicitly prohibiting it altogether; imposing unfavourable taxation rates on such funding; limiting the types of activities or NGOs that can benefit from foreign funding; imposing a prior official authorisation requirement; or forcing donors to transfer funds exclusively via institutions approved by the State. Very recently, the Russian Federation introduced legislation that classifies NGOs that receive funding from abroad as “foreign agents”, thus adding a new category to the manifold means of repression that could be described as “legalised defamation”.

The specious nature of the reasons invoked by certain States to restrict access to funding is especially well illustrated by their contradictory approach in relation to the categories of recipients of grants from foreign sources. Indeed, many States that restrict NGO access to foreign funding very often receive international aid themselves. This is not only paradoxical, but above all reflects the application of an unacceptable double standard, both vis-à-vis the law and from the standpoint of ethics and equitable practice.

This report shows that the limitations imposed by State authorities in many countries on NGO access to funding are not consistent with the applicable legal criteria, and therefore constitute a violation of their international obligations. The reasons authorities invoke for restricting this right are fallacious and unjustified in law, and are in reality intended to stifle the activities of defenders considered hostile and overly critical.

The impact on defenders of funding restrictions targeting NGOs is evident at several levels:

First, financial restrictions obviously jeopardise the very survival of NGOs. Such restrictions become all the more damaging in situations where international funding is prohibited or severely constrained and, for numerous reasons, only limited funding is available from domestic sources. In addition, smear campaigns that accuse NGOs of supporting “foreign interests” further undermine their prospects of obtaining funding at local and national levels because they discredit them in the eyes of the public. In yet other cases – especially in conflict zones – donors apply self-imposed censorship on grants or adopt strategies to minimise their exposure to potential risks. They may be tempted, for example, to finance only activities considered “inoffensive” by the authorities, or entities or organisations that work in close cooperation with the government. Moreover, the mere risk of being exposed to charges of illegal funding, whether as a recipient or a donor, often prompts donors to end financial support to NGOs. In such cases, the scope of activities of the NGOs affected have to be cut back drastically.

At the moral and ethical levels, smear campaigns inhibit the development of a culture of human rights in the country. By accusing NGOs that receive external funding of serving foreign interests, States implicitly disqualify the cause of human rights by suggesting that the latter are not in the national interest and are even contradictory. This denigration of NGOs and their work can invalidate any potential criticism that defenders may make with regard to the authorities’ lack of respect for human rights: statements made by NGOs depreciated in the eyes of the public have little impact. NGOs thereby disqualified become isolated from their national, regional and / or international networks of defenders. The impact is not only felt by local NGOs that would like to carry out joint activities with regional and international NGO partners, but also by the latter which generally benefit from the experience and first-hand information provided by the former.

The defamation of NGOs related to their use of foreign funding is only one form among others of the defamatory assaults made against human rights defenders in many countries – assaults that in reality violate their right to respect for their honour. In most cases, smear campaigns are based on accusations of foreign interference. But in some countries facing a political crisis, armed rebellion or widespread criminality repressive regimes manipulate categorisations to portray defenders as subversive elements or criminals, thus endangering – including physically – the NGOs and defenders concerned. The devaluation of NGOs, mentioned above,

has another even more corrosive impact because it not only affects those NGOs that are explicitly targeted, but also the entire community of human rights defenders, including defenders engaged in areas perceived as less sensitive by the authorities. The adoption of certain laws, whose purpose is not so much their application as the creation of a general climate of self-censorship by defenders, further extends this more widespread secondary impact.

Finally, on a general level, barriers to funding are often erected in the context of a pervasive climate of repression in which restrictive laws combine with smear campaigns and legal proceedings against NGOs and their members to create a hostile environment towards activities in defence of human rights. The application of these restrictive laws is often not necessary to restrict the activities of human rights defenders because the mere threat they pose is sufficiently dissuasive.

The study of the problem demonstrates that State barriers to the financing of NGOs represent one of the most serious institutional problems currently facing defenders. In recent years, this problem has become the focus of increasing attention by the affected NGOs, as well as by donors and certain regional and international human rights organisations. Despite awareness on this issue, the legal and institutional responses to violations of this component of the right to freedom of association remain inadequate, perhaps because of the myriad forms of the restrictions on funding. There is a pressing need to define a dual strategy that both calls on authorities to lift all restrictions and strengthens the capacities of NGOs and donors to overcome the impediments blocking free access to funding for NGOs.

B. Recommendations

1. To States

On freedom of association and the work of defenders

- To respect all components of the right to access funding – the right to solicit, receive and utilise funding – and to take a public stand on the right of human rights defenders and NGOs to benefit from support and international networks;
- To recognise the importance of the role played by human rights defenders in society and to ensure their protection;
- To respect the fundamental right to freedom of association, as guaranteed in particular under Article 22 of the ICCPR, without limitation

or discrimination based on the identity of members or the nature of the rights defended;

- To review legislation regulating the establishment, registration and operation of NGOs in order to create a straightforward and coherent legal and administrative framework favourable to the development of NGOs and their work;
- To repeal any legislation which prohibits or criminalises unregistered NGO activities, or which applies similar sanctions against NGOs merely on the grounds that they receive funding from abroad;
- To ensure that any limitation on the right to freedom of association is consistent in its entirety with Article 22 of the ICCPR;
- To respect the right of NGOs to manage their resources – including funding – and to formulate their programmes and activities independently without interference from the authorities;
- To guarantee the right of NGOs to an effective remedy in the event of denial of registration, suspension or dissolution, and to benefit from suspensive measures in all cases of suppression or limitations placed on their right to freedom of association and funding.

On access to funding and the taxation system

- To respect the Declaration on Human Rights Defenders, in particular its Article 13 on the right to solicit and receive resources from institutional or individual donors, as well as from other States and multilateral agencies;
- To replace a discriminatory or unjustified regulatory and control approach toward funding with a policy of effective encouragement through the adoption of concrete legal and administrative measures;
- To ensure access to funding for NGOs – including from abroad – without the requirement to obtain prior governmental authorisation, and under equitable conditions;
- To abolish all restrictions on foreign sources of funding imposed under the pretext of combating “foreign interference” and defending “national interests”, and respect at all times the right of NGOs to promote and protect all human rights – including political rights;

- To refrain from invoking efforts to eradicate money laundering and terrorism as pretexts for imposing restrictions on NGO access to funding;
- To exempt NGOs from income tax and other taxes applicable to fees, funds and property received from donors or international organisations, and only perform controls that are absolutely necessary for legitimate purposes defined by law;
- To refrain from interfering with the use of funds by NGOs, and ensure the application of clear, objective and non-discriminatory criteria for all forms of public aid they receive.

On defamation

- To fully assume their responsibility to respect, support and promote the work of NGOs, in particular by refraining from engagement in all forms of defamation, unfounded criticism and smear campaigns directed against them because of the source of their funding, or for any other reason, in accordance with Article 12 of the Universal Declaration of Human Rights.

2. To donors (States/Organisations/Foundations)

- To organise coordination meetings between donors to define a common strategy, and formulate concrete responses in cases where their beneficiaries are faced with problems of access to funding;
- For States and institutions that finance cooperation programmes in countries imposing restrictions on the right to external funding: to use these relationships to highlight the inconsistencies in the policies on foreign funding of the States concerned, and to call on States that are beneficiaries of cooperation programmes to lift all legal, administrative and practical restrictions on foreign funding imposed on local NGOs;
- To maintain funding – planned or ongoing – for NGOs that may be victims of smear campaigns orchestrated by their government and domestic media as well as in cases where it is impossible to obtain legal recognition of the right of NGOs to access funding due to arbitrary government policy;
- To ensure that the laws or other provisions against terrorism, including concepts such as “material support”, are not invoked unduly in relation to financial support for NGOs working perfectly legally and pursuing goals consistent with the Universal Declaration of Human Rights;

- To include the issue of funding of NGOs in their bilateral and multilateral discussions, guidelines and policies on support to NGOs;
- To support organisations and regional and international networks that assist local NGOs, particularly in cases where the latter are under threat;
- To ensure that diplomatic representations in third countries effectively support local NGOs facing difficulties in accessing funding, including from abroad; and, if necessary, intercede with the authorities concerned. This applies especially to the European Union, in accordance with its Guidelines on Human Rights Defenders;
- To respect the autonomy of NGOs in relation to programme priorities identified by them, and give preference to general financial support rather than funding that favours specific activities/programmes.

3. To NGOs affected by funding restrictions

- To alert the relevant United Nations mechanisms, such as the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the rights to freedom of peaceful assembly and of association as well as treaty bodies and, as appropriate, regional mechanisms in order to raise awareness to this issue and the applicable body of case law;
- To analyse restrictions on access to funding in light of the criteria defined by international law regarding limitations on the right to freedom of association (Article 22.2 of the ICCPR) and, in case of violation of these legal restrictions, alert the domestic courts and, where appropriate, regional and international jurisdictions;
- To develop arguments based on international law, including relevant caselaw, decisions, opinions, recommendations and statements made by United Nations and regional human rights bodies;
- To develop common strategies to counter attempts by States to defame, belittle, marginalise and criminalise NGOs that receive foreign funding, including by developing support networks;
- Develop strategies to maximise opportunities to access funding sources at local level.

On the responsibilities of defenders

In order to avoid unfounded indictment by the authorities and to continue to benefit from the protection afforded by the Declaration on Human Rights Defenders, NGOs are required to:

- Ensure that their modes of operation and purpose are consistent with Article 22 of the ICCPR, and at all times ensure that their activities comply with universal human rights norms;
- Fully assume their responsibility to contribute to the promotion of the right of all persons to a social and international order that encourages full realisation of the rights and freedoms enshrined in the Universal Declaration of Human Rights and other human rights instruments, in accordance with the Declaration on Human Rights Defenders;
- Respect, to the extent possible, the provisions relating to the transparency of financing and auditing.

4. To human rights institutions, bodies and agencies:

To national human rights institutions / Ombudsman

- To strengthen recognition of the legitimacy of human rights defenders and their work, and facilitate dialogue between authorities and defenders, including on the question of funding;
- To heighten attention to the issue of funding, especially from foreign sources and in relation to defamation; to denounce unjustified restrictions and adopt clear recommendations based on international law.

To international and regional organisations

- To heighten attention to the issue of funding, especially from foreign sources and in relation to defamation; to denounce unjustified restrictions and adopt clear recommendations;
- To explicitly denounce – in particular through public denunciations – barriers blocking access to funding as a violation of the fundamental right to freedom of association, and raise specific problems during bilateral and multilateral meetings with the authorities of the countries concerned.

To the United Nations Human Rights Council and the Office of the High Commissioner for Human Rights

- To adopt a resolution reaffirming, inter alia, the right of NGOs to access funding, especially from foreign sources, and calling on States to respect the rights of NGOs to manage their resources – including funding – and to formulate their activity programmes independently without interference from the authorities;
- To denounce any violations of this right in resolutions on countries and in cases where defamation in relation to funding sources is perpetrated or tolerated by the authorities;
- To discuss and address this question during the review of reports during the Universal Periodic Review (UPR) sessions;
- To request Special Procedures mandate-holders to pay particular attention to this issue by addressing it in their thematic or country reports, and by inviting the countries concerned to meetings / roundtables to identify concrete solutions.

To the relevant Special Procedures of the United Nations and regional organisations

- To pay systematic attention to the problem of access to funding during in situ missions and in their reports, and to adopt strong and public positions;
- To promote exchanges between affected NGOs / donors, as well as with countries restricting access to funding, in order to raise awareness to this issue; to recall the legal framework; and to formulate responses and recommendations;
- To adopt resolutions reaffirming the right of defenders to access funding, including foreign funding.

To United Nations Treaty Bodies

- To pay sustained attention to this issue during consideration of reports of States parties, and to adopt strong recommendations;
- When reviewing individual complaints, to adopt clear and strong case-law in relation to violations of the right to access funding.

ANNEX I

LIST OF INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS THAT ENSHRINE THE RIGHT TO FREEDOM OF ASSOCIATION, INCLUDING THE RIGHT OF NGOS TO ACCESS FUNDING

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As seen in Chapter 1 of this report, all international and regional human rights instruments enshrine the right to freedom of association. The unrestricted access of non-governmental human rights organisations to funds and resources – including from abroad – is an integral component of that right. Following is a recapitulative list of these international and regional instruments:

A. International instruments

→ Article 22 of the International Covenant on Civil and Political Rights (1966):

- “1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
- 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. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*
- 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention”.*

→ **Article 3 of the Freedom of Association and Protection of the Right to Organise Convention (No. 87), International Labour Organisation (1948):**

- “1. Workers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*
- 2. The public authorities shall refrain from any interference”.*

→ **Article 6.f of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981):**

“[...] the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms [...] to solicit and receive voluntary financial and other contributions from individuals and institutions”.

→ **Article 5 of 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 (1998) – hereafter the Declaration on Human Rights Defenders:**

“For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:

[...]

(b) To form, join and participate in non-governmental organizations, associations or groups;

(c) To communicate with non-governmental or intergovernmental organizations”.

→ **Article 13 of the Declaration on Human Rights Defenders:**

“Everyone 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, in accordance with article 3 of the present Declaration”.

B. Regional instruments

→ Article 11 of the European Convention on Human Rights (1950):

- “1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
- 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”.*

→ Article 16 of the American Convention on Human Rights (1969):

- “1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.*
- 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.*
- 3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police”.*

→ Article 10 of the African Charter on Human and Peoples’ Rights (1981):

“Every individual shall have the right to free association provided that he abides by the law”.

→ Article 24 (5) of the Arab Charter on Human Rights (2004):

“Every citizen has the right to form associations with others and to join associations”.

→ **Paragraph 14 of the European Union Guidelines on Human Rights Defenders (2004):**

These Guidelines recommend EU diplomatic missions to seek “*to ensure that human rights defenders in third countries can access resources, including financial resources, from abroad and that they can be informed of the availability of those resources and of the means of requesting them*”.

ANNEX II

THE OBSERVATORY FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS: AN OMCT AND FIDH JOINT PROGRAMME

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Activities of the Observatory

The Observatory is an action programme based on the belief that strengthened co-operation and solidarity among human rights defenders and their organisations will contribute to break their isolation. It is also based on the absolute necessity to establish a systematic response from NGOs and the international community to the repression of which defenders are victims. The Observatory's activities are based on consultation and co-operation with national, regional, and international non-governmental organisations.

With this aim, the Observatory seeks to establish:

- a) a mechanism of systematic alert of the international community on cases of harassment and repression of defenders of human rights and fundamental freedoms, particularly when they require urgent intervention;
- b) an observation of judicial proceedings, and whenever necessary, direct legal assistance;
- c) international missions of investigation and solidarity;
- d) a personalised assistance as concrete as possible, including material support, with the aim of ensuring the security of the defenders victims of serious violations;
- e) the preparation, publication and world-wide dissemination of reports on violations of the rights and freedoms of individuals or organisations working for human rights around the world;
- f) sustained action with the United Nations (UN) and more particularly the Special Rapporteur on Human Rights Defenders, and when necessary with geographic and thematic Special Rapporteurs and Working Groups;
- g) sustained lobbying with various regional and international intergovernmental institutions, especially the Organisation of American States (OAS), the African Union (AU), the European Union (EU), the Organisation for Security and Co-operation in Europe (OSCE), the Council of Europe, the International Organisation of the Francophonie

(OIF), the Commonwealth, the League of Arab States, the Association of Southeast Asian Nations (ASEAN) and the International Labour Organisation (ILO).

With efficiency as its primary objective, the Observatory has adopted flexible criteria to examine the admissibility of cases that are referred to it, based on the “operational definition” of human rights defenders adopted by FIDH and OMCT:

“Each person victim or at risk of being the victim of reprisals, harassment or violations, due to his or her commitment, exercised individually or in association with others, in conformity with international instruments of protection of human rights, to the promotion and realisation of the rights recognised by the Universal Declaration of Human Rights and guaranteed by the different international instruments”.

To ensure its activities of alert and mobilisation, the Observatory has established a system of communication devoted to defenders in danger.

This system, known as the Emergency Line, is available by:

Email: Appeals@fidh-omct.org

Tel: + 33 1 43 55 25 18 / **Fax:** + 33 1 43 55 18 80 (FIDH)

Tel: + 41 22 809 49 39 / **Fax:** + 41 22 809 49 29 (OMCT)

Animators of the Observatory

From the headquarters of FIDH (Paris) and OMCT (Geneva), the Observatory is supervised by Antoine Bernard, FIDH Chief Executive Officer, and Juliane Falloux, Executive Director, as well as by Gerald Staberock, OMCT Secretary General, and Anne-Laurence Lacroix, OMCT Deputy Secretary General.

At OMCT, the Observatory is run by Delphine Reculeau, Coordinator, with the assistance of Isabelle Scherer, Coordinator a.i., Marc Aebersold, Halima Dekhissi, Guro Engstrøm Nilsen, Pierre-Henri Golly, Silvia Gómez Moradillo, Marinella Gras, Alexandra Kossin, Andrea Meraz Sepulveda, Helena Solà Martín and Anne Varloteau.

At FIDH, the Observatory is run by Alexandra Poméon, Head of the Programme, and Hugo Gabbero, Programme Officer, and the support of Catherine Absalom, Victor Allenou, Hassatou Ba, Céline Balléreau, Clémence Bectarte, Corinne Bezin, Karine Bonneau, Katherine Booth, Isabelle Brachet, Marie-France Burq, Marie Camberlin, Montserrat Carboni, Delphine Carlens, Isabelle Chebat, Claire Colardelle, Kate Coles, Audrey Couprie, Stéphanie David, Nicolas Diaz, Gaelle Dusepulchre,

Salma El Hoseini, Charline Fralin, Serguei Funt, Christophe Gardais, Florent Geel, Caroline Giraud, Julie Gromellon, Tchérina Jerolon, Michelle Kissenkoetter, David Knaute, Alexandra Koulaeva, Nathalie Lasslop, James Lin, Antoine Madelin, Arthur Manet, Samia Merah, Tony Minet, Pia Navazo, Lidya Ogbazghi, Glenn Payot, Antonin Rabecq, Jimena Reyes, Jean Marie Rogue, Lea Samain-Raimbault, Marceau Sivieude, Elin Wrzoncki.

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The Observatory's activities are assisted by all OMCT and FIDH local partners.

Operators of the Observatory

FIDH

Created in 1922, the International Federation for Human Rights (FIDH) brings together 164 leagues in more than 100 countries. It coordinates and supports their work and provides a relay for them at international level. FIDH works to protect the victims of human rights violations, to prevent these violations and to prosecute those responsible. FIDH takes concrete action for respect of the rights enshrined in the Universal Declaration of Human Rights - civil and political rights as well as economic, social and cultural rights. Seven priority themes guide the work of FIDH on a daily basis: protection of human rights defenders, promotion of women's rights, promotion of the rights of displaced migrants and refugees, promotion of the administration of justice and the fight against impunity, strengthening of respect for human rights in the context of economic globalisation, strengthening of international and regional instruments and mechanisms to protect and support human rights and the rule of law in conflict periods, emergency situations and during political transition periods.

FIDH has either consultative or observer status with the United Nations, UNESCO, the Council of Europe, the OIF, the African Commission on Human and Peoples' Rights (ACHPR), the OAS and the ILO.

FIDH is in regular, daily contact with the UN, the EU and the International Criminal Court through its liaison offices in Geneva, New York, Brussels and The Hague. FIDH has also opened offices in Cairo, Nairobi and Bangkok to further its work with the League of Arab States, the AU and the ASEAN. Every year, FIDH provides guidance to over

200 representatives of its member organisations, and also relays their activities on a daily basis.

The International Board is comprised of: Souhayr Belhassen (Tunisia), President; Artak Kirakosyan (Armenia), Roger Bouka Owoko (Republic of the Congo), Khadija Cherif (Tunisia), Paul Nsapu Mukulu (DRC), Luis Guillermo Perez (Colombia), General Secretaries; Jean-François Plantin (France), Treasurer; and Yusuf Atlas (Turkey), Aliaksandr Bialiatski (Belarus), Amina Bouayach (Morocco), Juan Carlos Capurro (Argentina), Karim Lahidji (Iran), Fatimata Mbaye (Mauritania) Asma Jilani Jahangir (Pakistan), Paulina Vega Gonzalez (Mexico), Sorraya Gutierrez Arguello (Colombia), Raji Sourani (Palestine), Mario Lana (Italy), Katherine Gallagher (United States of America), Arnold Tsunga (Zimbabwe), Dan Van Raemdonck (Belgium), Dismas Kitenge Senga (DRC), Vice-Presidents.

OMCT

Created in 1985, the World Organisation Against Torture (OMCT) is today the main international coalition of NGOs fighting against torture, summary executions, enforced disappearances and all other cruel, inhuman or degrading treatment. With 311 affiliated organisations in its SOS-Torture Network, OMCT is the most important network of non-governmental organisations working for the protection and the promotion of human rights in the world.

Based in Geneva, OMCT International Secretariat provides personalised medical, legal and/or social assistance to victims of torture and ensures the daily dissemination of urgent interventions across the world, in order to prevent serious human rights violations, to protect individuals and to fight against impunity. Moreover, some of its activities aim at protecting specific categories of vulnerable people, such as women, children and human rights defenders. OMCT also carries out campaigns relating to violations of economic, social and cultural rights. In the framework of its activities, OMCT also submits individual communications and alternative reports to the United Nations mechanisms, and actively collaborates in the respect, development and strengthening of international norms for the protection of human rights.

A delegation of the International Secretariat has been appointed to promote activities in Europe and to represent OMCT to the EU. It constitutes the link with European institutions; its role is to support and to implement the International Secretariat's mandate at the European level.

OMCT has either a consultative or observer status with the United Nations Economic and Social Council (ECOSOC), the ILO, the OIF, the ACHPR and the Council of Europe.

Its Executive Council is composed of Mr. Yves Berthelot, President (France), Mr. José Domingo Dougan Beaca, Vice-President (Equatorial Guinea), Mr. Dick Marty, Vice-President (Switzerland), Mr. Anthony Travis, Treasurer (United Kingdom), Mr. Santiago Alejandro Canton (Argentina), Ms. Aminata Dieye (Senegal), Mr. Kamel Jendoubi (Tunisia), Ms. Tinatin Khidasheli (Georgia), Ms. Jahel Quiroga Carrillo (Colombia) and Mr. Henri Tiphagne (India).

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The Observatory
for the Protection
of Human Rights Defenders

"The topic of this year's report is most pertinent as lately we have witnessed increased stigmatization and undue restrictions in relation to access to funding and resources for civil society organizations, in an attempt to stifle any forms of criticism, especially calls for democratic change or accountability for human rights violations. [...] I am particularly dismayed about laws or policies stigmatizing recipients due to their sources of funding, which have been adopted in the past months or are under consideration, in several countries across the world".

"I am confident that the Observatory report and my work in this field will be complementary and mutually beneficial. I hope our joint efforts will succeed and will pave the way for better respect of the right to freedom of association, especially its core component, the access to funding and resources, in all parts of the world. It is ultimately the obligation of Member States to fully protect this right, which shall be enjoyed by everyone".

Maina Kiai, United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association.

The Annual Report 2013 of the Observatory provides a global review of the violations of the right of NGOs to funding. It provides a detailed picture of this as yet little studied problem, the growing dimension of which is a worrying concern. This picture is illustrated with around thirty country situations affecting human rights organisations. While recalling the legal basis of this right, as well as its organic relationship with the right to freedom of association and the embryonic jurisprudence on this subject, the report stimulates deep reflection on the negative impacts of these restrictive measures and makes concrete recommendations to all relevant stakeholders (beneficiaries, donors, governments and intergovernmental organisations).

In 2012, the Observatory covered **more than 50 country situations**, notably through **336** urgent and follow-up **interventions** concerning over **500** human rights **defenders**.

Created in 1997 jointly by the International Federation for Human Rights (FIDH) and the World Organisation Against Torture (OMCT), the Observatory for the Protection of Human Rights Defenders is the leading global programme on the protection of human rights defenders. It bases its action on the conviction that solidarity with and among human rights defenders and their organisations ensures that their voice is being heard and their isolation and marginalisation broken. It responds to threats and acts of reprisal suffered by human rights defenders through urgent interventions, vital emergency assistance for those in need, international missions and advocacy for their effective domestic and international protection.



International Federation for Human Rights



World Organisation Against Torture