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**INTERNATIONAL AND COMPARATIVE LAW ANALYSIS
OF THE RIGHT TO AND RESTRICTIONS ON FOREIGN
FUNDING OF NON-GOVERNMENTAL ORGANIZATIONS**

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I. INTRODUCTION¹

Many countries around the world require the registration of non-governmental organizations (“NGOs”). Some have special registration requirements when organizations receive funding from foreign sources. These laws may designate such organizations as “foreign agents” or other terms that can undermine the organization’s perceived legitimacy or independence. Such registration laws often include onerous record keeping or inspection requirements that permit broad government surveillance of the operations of civil society, including watchdog groups that monitor government compliance with domestic and international norms. As such, these laws may infringe upon international and domestic constitutional protections for the right to freedom of association and expression. Other registration regimes only apply to groups engaging in sensitive activities, such as those involved in promoting candidates for public office.

In light of the growing number and complexity of registration laws around the world, the ABA Center for Human Rights prepared this comparative analysis of international and comparative norms to examine the legality of local laws that require the registration of organizations that receive foreign funding. The jurisdictions analyzed are: U.N. treaty-bodies, the European human rights system, the Inter-American human rights system, the African Commission on Human and People’s Rights, France, Germany, the United Kingdom, the United States, and Canada.

The U.N. Special Rapporteur on freedom of assembly and association² and the European Court of Human Rights has addressed this issue directly, concluding that NGOs have a right to access foreign sources of funding.³ In each other jurisdiction, there is a body of established jurisprudence relating to fundamental or constitutional rights of freedom of expression or freedom of association that would likely curtail the ability of the government to restrict foreign sources of funding for NGOs. **While each jurisdiction has its own test, as a general matter, a government must show that a proposed restriction on fundamental expression or association rights is sufficiently limited and necessary to justify the infringement.**

While no jurisdiction analyzed includes a broad prohibition of foreign funding of domestic NGOs, many have imposed restrictions on foreign funding of domestic elections.⁴ For example, the European Court of Human Rights, while supporting the right of NGOs to receive

¹ The statements and analysis contained in this memorandum are the work of the American Bar Association Center for Human Rights, which is solely responsible for its content. The Board of Governors and House of Delegates of the American Bar Association has neither reviewed nor sanctioned its contents. Accordingly, the views expressed herein should not be construed as representing the policy of the ABA. In addition, this memorandum is intended as background information. It is not intended as legal advice on particular cases.

² *See infra* Section II.b.

³ *See infra* Section III.b.

⁴ Restrictions on the transfer of funds in order to prevent terrorism and money laundering are also common and have raised some concerns in so far as they may be used to restrict NGO funding. These restrictions are not addressed in detail in this memorandum, however, as they are clearly different from the broad foreign funding restrictions with which this analysis is concerned.

funding from foreign sources, has also declined to strike down a law barring the foreign funding of domestic political parties.⁵

In sum, if faced with the issue, the jurisdictions analyzed would likely find that to restrict a domestic NGO's access to foreign sources of funding would infringe on fundamental rights. Therefore, such a restriction would only withstand judicial review if the government shows that the infringement was sufficiently narrow and necessary to meet the applicable standard.

II. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

This section analyzes the protection afforded the freedoms of the right to association and expression in the ICCPR. The ICCPR is the multilateral human rights treaty adopted by the United Nations General Assembly in 1966. The ICCPR broadly protects the right to freedom of association and expression and permits only narrowly drawn limitations on the right. The rights to freedom of association and expression are enshrined in articles 22⁶ and 19⁷ of the ICCPR.

a. U.N. Human Rights Committee

The U.N. Human Rights Committee (“UNHRC or Committee”) – the body charged with authoritative interpretation and enforcement of the ICCPR – has explained that restrictions on freedom of association and expression must be: (1) proscribed by law; (2) imposed solely to protect national security or public safety, public order, public health or morals, or the rights and freedoms of others; and (3) “necessary in a democratic society.”⁸ The UNHRC elaborated that the protection afforded by Article 22 extends to all activities of an association and that, therefore, official or *de facto* dissolution of an association must satisfy all of the requirements above.⁹ Since, both rights to freedom of association and expression share similar allowable enumerated restrictions, it can be inferred that UNHRC's guidance regarding restrictions for expression would be the test against a restriction on freedom of association would be evaluated.

⁵ See *infra* Section III.b.

⁶ International Covenant on Civil and Political Rights, art. 22, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]; See also Universal Declaration of Human Rights, art. 10, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR]; American Convention of Human Rights, art. 16, 1144 U.N.T.S. 143 (1969) [hereinafter American HR Convention]; African Charter on Human and People's Rights, Art. 10, June 27, 1981, 21 I.L.M. 58 [hereinafter “African HR Charter”]; European Conv. on Human Rights, art. 11, Nov. 4, 1950, Europ. T.S. No. 155 [hereinafter “ECHR”].

⁷ ICCPR, *supra* note 2 at art. 19; See also UDHR, *supra* note 2 at art. 19; American HR Convention, *supra* note 2 at art. 13 African HR Charter, *supra* note 2 at art. 9; ECHR, *supra* note 2 at art. 10.

⁸ Aleksander Belyatsky et al. v. Belarus, U.N. Human Rights Committee, Communication No. 1296/2004, U.N. Doc. CCPR/C/90/D/1296/2004, at ¶7.3 (July 24, 2007). [hereinafter Belyatsky]; Kim v. Republic of Korea, U.N. Human Rights Comm'n, CCPR/C/64/D/574/1994, 64th Sess., at ¶12.2 (4 Jan. 1999) [hereinafter Kim] ([a]ny restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of article 19 (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and it must be necessary to achieve a legitimate purpose.)

⁹ Korneenko, et. al v. Belarus, U.N. Human Rights Committee, Communication No. 1274/2004, CCPR/C/88/D/1274/2004 (10 November 2006) [hereinafter Korneenko].

1. Proscribed by Law

The UNHRC has explained that, to meet the requirement that it be “proscribed by law”, a restriction must be “formulated with sufficient precision to enable an individual to regulate his or her own conduct accordingly and it must be made accessible to the public.”¹⁰ Furthermore, to fulfill this prong, “the law itself has to establish the conditions under which the rights may be limited.”¹¹ A law cannot allow for unfettered discretion upon those charged with its execution.¹²

2. Legitimate Aim

State parties often argue that restrictions on foreign funding are necessary for national security or protecting public order. The UNHRC has found that when a State party invokes national security and protection of public order as a reason to restrict the right to association, the State party must prove the precise nature of the threat.¹³ Thus, a State party invoking national security to “suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute...human rights defenders for having disseminated such information, would be found in violation of paragraph 3 of article 19.”¹⁴ The UNHRC has also found that a restriction on issuing statements in support of a national strike did not satisfy the national security grounds and thus was found to infringe on the speaker’s right to speech.¹⁵

3. Necessary in a Democratic Society

The ICCPR protects the right of associations and individuals to express ideas that are unpopular or critical of the government. The UNHRC has recognized that such free expression of ideas is necessary to ensure the proper functioning of government and is therefore “a cornerstone of a democratic society.”¹⁶

To meet the requirement that restrictions on these fundamental rights are only imposed if they are “necessary in a democratic society” the restrictions must be proportional, “they must be

¹⁰ U.N. Human Rights Committee, *General Comment No. 34(Article 19: Freedom of opinion and expression)* ¶25, U.N. Doc. CCPR/C/GC/34 (12 September 2011) [Hereinafter General Comment No. 34].

¹¹ U.N. Human Rights Committee, *General Comment No. 27(Freedom of movement, Art. 12)*, ¶12, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999) [hereinafter General Comment No.27] (Article 12 of the ICCPR includes exactly the same language regarding restrictions on the right to freedom of movement as articles 19 and 22.).

¹² General Comment No. 34, *supra* note 10 at ¶25.

¹³ *Mr. Jeong-Eun Lee v. Republic of Korea*, U.N. Human Rights Committee, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 at ¶7.3 (2005).

¹⁴ U.N. Human Rights Committee, *Concluding observations on the Russian Federation* U.N. Doc. CCPR/CO/79/RUS (1 December 2003).

¹⁵ *Sohn v. Republic of Korea*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/54/D/518/1992, Communication No. 518/1992, (18 March 1994).

¹⁶ *Viktor Korneenko et al. v. Belarus*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/88/D/1274/2004, Communication No. 1274/2004, ¶7.3 (2006).

appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”¹⁷ The Committee has further elaborated that “the mere existence of reasonable and objective justifications for limiting the right to freedom of association is not sufficient. The State party must further demonstrate that the prohibition of an association is necessary to avert a real and not only hypothetical danger to national security or democratic order, and that less intrusive measures would be insufficient to achieve the same purpose.”¹⁸ The right to freedom of association and expression protect the activities of NGOs focused on any issue facing the citizens of that State, and the restrictions allowed on these rights should be evaluated against the legal framework discussed above to meet the narrowly tailored regime developed by the UNHRC.

b. The right to access foreign funding is protected by Article 22

The right to access funding is a direct and essential component of the right to freedom of association, which is protected by Article 22 of the ICCPR. Most NGOs, and especially human rights organizations, function on a “not-for-profit” scheme and therefore depend heavily on external sources of funding to carry out their work. Therefore, barriers and restrictions to funding sources directly undermine the ability of NGOs to function and thus the right of their members to freedom of association and the right to freedom of expression. Given the strict interpretation of allowable restrictions under the ICCPR by the UNHRC, and the U.N. rhetoric surrounding the importance of civil society, it is unlikely an overly broad law restricting foreign funding for NGOs would be upheld without a State party proving a strong legitimate aim and that the restriction is proportional.

For these reasons UNHRC has consistently expressed concern over foreign funding restrictions as an impediment to the right to freedom of association. For example, after reviewing Egyptian legislation which required NGOs receiving foreign funding to register with the government, the Committee stated that:

The State Party [Egypt] should review its legislation and practice in order to enable non-governmental organizations to discharge their functions without impediments which are inconsistent with the provisions of article 22 of the Covenant, such as prior authorization, funding controls, and administrative dissolution.¹⁹

The UNHRC reiterated this concern when evaluating an Ethiopian law prohibiting Ethiopian NGOs from obtaining more than 10% of their budget from foreign donors. The law in question also prohibited NGOs considered by the government to be “foreign”, from engaging in human rights and democracy related activities. The Committee stated:

¹⁷ U.N. Human Rights Committee, General Comment No. 27, *supra* 11 at ¶14.

¹⁸ Jeong-Eun Lee v. Republic of Korea, Communication No. 1119/2002, Views adopted on 20 July 2005, para.7.2.

¹⁹ U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Egypt*, at ¶21, U.N. Doc.CCPR/CO/76/EGY(November282002), [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.76.EGY.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.76.EGY.En?Opendocument)

The State party [Ethiopia] should revise its legislation to ensure that any limitations on the right to freedom of association and assembly are in strict compliance with articles 21 and 22 of the Covenant, and in particular it should reconsider the funding restrictions on local NGOs in the light of the Covenant and it should authorize all NGOs to work in the field of human rights. The State party should not discriminate against NGOs that have some members who reside outside of its borders.²⁰

The United Nations General Assembly echoed this conclusion in the Declaration on Human Rights Defenders which states, “[e]veryone has the right, individually and in association with others, to solicit, receive, and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means”²¹ The Special Representative of the Secretary-General on the Situation of Human Rights Defenders has also stated that “governments must allow access by NGOs to foreign funding as a part of international cooperation, to which civil society is entitled to the same extent as Governments.”²²

In addition, the U.N. Special Rapporteur on the right of freedom of assembly and association has stated that:

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 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.²³

Restrictions on foreign funding create significant barriers for non-governmental organizations to function. Such restrictions also may undermine the right to freedom of expression as funding may legitimately be used to pay expenses related to acts of expression, including the costs of publicizing an individual’s or an association’s views. It therefore follows that restrictions on access to funding for those wishing to participate in public debates and human rights discourse must meet the requirements set forth in the ICCPR, which only permits restrictions on freedom of expression and association under narrowly tailored circumstances.

²⁰ U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Ethiopia*, at ¶25, U.N. Doc. CCPR/C/ETH/CO/1 (August 19, 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/448/95/PDF/G1144895.pdf?OpenElement>

²¹ *Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, U.N. General Assembly, U.N. Doc. G.A. Res. 53/144, 9 December 1998, art. 13 (under this framework, States are supposed to adopt legislation to facilitate and not impede the solicitation, receipt and use of resources.) [hereinafter Declaration on Human Rights Defenders].

²² Special Representative of the Secretary-General on the Situation of Human Rights Defenders, United Nations General Assembly, A/59/401 (2004) at ¶82(1).

²³ United Nations Human Rights Committee, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, at ¶¶67-68, U.N. Doc. A/HRC/20/27 (May 21, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf

III. EUROPEAN SYSTEM

This section analyzes the European human rights system and whether NGOs enjoy any specific rights that would be infringed if a country imposed a restriction on NGOs receiving contributions from foreign sources. The European human rights system consists of separate entities with distinct functions. The relevant jurisprudence is derived from three separate institutions; the Council of Europe (“COE”), the European Court of Human Rights (“ECtHR”) and the European Union (“EU”).

a. The European Convention on Human Rights and Relevant Regional Standards

The European Convention on Human Rights and Fundamental Freedoms (the “ECHR”)²⁴ is the most important, binding, supra-national legal instrument to establish “human rights” within Europe and has been signed by and is binding under international law on all Member States.²⁵ The Convention guarantees the right to the freedoms of expression and association, rights that are essential for a NGO to exist and operate. Most Member States have incorporated the ECHR into their national legal system, either through constitutional provision, statute, or judicial decision. If a Member State introduces a measure restricting an NGO’s right to access foreign funding, it would infringe on the rights of freedom of expression and association of the NGO under the ECHR.

Article 10 of the ECHR establishes the right to the freedom of expression:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure

²⁴ IAN BACHE, *POLITICS IN THE EUROPEAN UNION* 85 (2d ed. 2006).

²⁵ The current Member States are: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, United Kingdom, Greece, Turkey, Iceland, Germany, Austria, Cyprus, Switzerland, Malta, Portugal, Spain, Liechtenstein, San Marino, Finland, Hungary, Poland, Bulgaria, Estonia, Lithuania, Slovenia, Czech Republic, Slovakia, Romania, Andorra, Latvia, Albania, Moldova, Macedonia, Ukraine, Russia, Croatia, Georgia, Armenia, Azerbaijan, Bosnia and Herzegovina, Serbia, Monaco, and Montenegro.

of information received in confidence, or for maintaining the authority and impartiality of the judiciary²⁶

Article 11 of the ECHR establishes the right to the freedom of association:

(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.²⁷

The rights established in Articles 10 and 11 are qualified rights, meaning that interference with the rights by a Member State can be justified in certain circumstances.²⁸ Paragraph (2) of both Articles 10 and 11 of the ECHR provide an exhaustive set of circumstances that allow Member States to restrict the rights enjoyed under Articles 10 and 11. While permissible, restrictions on the rights established in Articles 10 and 11 as they apply to NGO funding would be narrowly construed in recognition of the role that NGOs play in expressing identity and culture and promoting participation in a democratic society.²⁹

The ECtHR is the European institution that determines whether there has been an infringement and, if so, whether it is justified. The ECtHR has found that Member States can introduce reasonable legal measures regarding the “establishment, functioning or internal organizational structure of NGOs.”³⁰ Where the infringement is justified, there will be no breach of the ECHR.

²⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, C.E.T.S. No. 5, amended by Protocols Nos. 11, C.E.T.S. No. 155, and 14 art. 10, C.E.T.S. 194.

²⁷ *Id.* at art. 11.

²⁸ *See* Parti Nationaliste Basque-Organization Regionale D’Iparralde v. France, App. No. 71251/01, Eur. Ct. H.R. (2007), ¶¶ 39–52, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80897>.

²⁹ *See* Gorzelik v. Poland, App. No. 44158/98, Eur. Ct. H.R. (2004), ¶ 40, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61637>.

³⁰ *See* Tebieti Mühafize Cemiyeti and Sabir Israfilov v. Azerbaijan, App. No. 37083/03, Eur. Ct. H.R. (2009), ¶ 72, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94854>.

1. The European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations

The Council of Europe (“COE”) is an intergovernmental organization of 47 European countries (the “Member States”) with a broad mandate to agree on minimum legal standards on a range of issues. The COE authored the European Convention on Human Rights and Fundamental Freedoms (the “ECHR”).³¹ In addition to the ECHR, the COE has introduced a number of other measures aimed at protecting the role of NGOs. The COE also performs a monitoring and reporting function to assess how well signatory countries are meeting the agreed standards.

In 1986, the COE introduced the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations (“NGO Convention”) to recognize that NGOs carry out work of value to the community, particularly in the scientific, cultural, charitable, philanthropic, health and education fields, and that they contribute to the achievement of the aims and principles of the United Nations Charter and the Statute of the COE.³² The NGO Convention requires those Member States that have ratified that convention to recognize the legal status of each other’s national NGOs.³³ The NGO Convention recognizes the trans-border nature of NGOs and aims to remove unnecessary restrictions that may prevent them from operating outside of their home Member State. As such, any Member State measure restricting NGOs from receiving foreign funding would run counter to the aims of the NGO Convention.

2. Recommendation of the Committee of Ministers to Member States on the Legal Status of Non-Governmental Organizations in Europe

In 2007, a Recommendation of the Committee of Ministers to Member States on the Legal Status of Non-Governmental Organizations in Europe (the “2007 Recommendation”) was adopted. The 2007 Recommendation specifically asserts an NGO’s right to secure foreign funding:

(50) NGOs should be free to solicit and receive funding—cash or in-kind donations—not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable

³¹ IAN BACHE, *POLITICS IN THE EUROPEAN UNION* 85 (2d ed. 2006).

³² European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, C.E.T.S. No. 124 pmbi. A recommendation is one of the legal instruments by which the Committee of Ministers of the COE may communicate its conclusions regarding measures it believes will further the aims of the COE. A recommendation differs from other methods of communication to Member States in that it explicitly indicates agreement has been reached regarding the measures contained therein, irrespective of the legal nature of the measures.

³³ The convention has been ratified by Austria, Belgium, Cyprus, France, Greece, Macedonia, The Netherlands, Portugal, Slovenia, Switzerland, and the United Kingdom, and it has been extended to Guernsey, Jersey, and the Isle of Man.

to customs, foreign exchange and money laundering and those on the funding of elections and political parties.³⁴

In addition, it provides that:

(14) 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 authorization being required, but subject to any licensing or regulatory requirements generally applicable to the activities concerned.³⁵

Although non-binding, the 2007 Recommendation has legal significance. This legal significance can be assessed in light of the ECHR and its interpretation by the ECtHR, as the preamble of ECHR specifically refers to a duty to develop human rights.³⁶ The ECtHR will find it difficult to ignore Recommendation 2007. As such, the ECtHR typically interprets the ECHR in line with the 2007 Recommendation, and the ECtHR can also use the Recommendation as support for development of ECHR case law in keeping with it.³⁷

3. Code of Good Practice for Civil Participation in the Decision-Making Process

The 2007 Recommendation led to the adoption in 2009, by the Conference of International Non-Governmental Organizations of the COE, of a Code of Good Practice for Civil Participation in the Decision-Making Process (the “Code”).³⁸ The Code is non-binding but seeks to foster a constructive relationship between NGOs and public authorities following the common principles of trust, accountability, and independence. It also looks to promote the participation of NGOs in the Member State decision-making process. Importantly, the Code declares: “NGOs must be recognized as free and independent bodies in respect to their aims, decisions and activities. They have the right to act independently and advocate positions different from the authorities with whom they may otherwise cooperate.”³⁹ Any Member State that introduces a restriction that completely prohibits the receipt of foreign funding would likely run afoul of the standards set out in the Code.

³⁴ COMMITTEE OF MINISTERS, COUNCIL OF EUROPE, RECOMMENDATION OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE LEGAL STATUS OF NON-GOVERNMENTAL ORGANIZATIONS IN EUROPE ¶ 50 (2007), available at <https://wcd.coe.int/ViewDoc.jsp?id=1194609>.

³⁵ *Id.* ¶ 14.

³⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6 at pmb1. (“Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms.”).

³⁷ See *Johnston v. Ireland*, App. No. 9697/82, Eur. Ct. H.R. (1986), ¶ 53, <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57508>.

³⁸ COUNCIL OF EUROPE, CODE OF GOOD PRACTICE FOR CIVIL PARTICIPATION IN THE DECISION-MAKING PROCESS (2009), available at http://www.coe.int/t/ngo/Source/Code_English_final.pdf.

³⁹ *Id.* at 6.

4. COE Expert Council on NGO Law

In 2008, the COE created the “Expert Council on NGO Law.” The Expert Council’s mandate is “to contribute to the creation of an enabling environment for NGOs throughout Europe by examining national NGO law and its implementation and promoting its compatibility with Council of Europe standards and European good practice.”⁴⁰ The Expert Council carries out periodic thematic studies on specific aspects of NGO legislation and its implementation. It focuses on the areas that seem to pose problems of conformity with international standards, notably the ECHR and the above-mentioned 2007 Recommendation. It provides advice to Member States on how best to comply with the NGO legislation. In its second Annual Report, the Expert Council suggested that some Member States have in place a number of accounting and reporting obligations that are not appropriate or required.⁴¹ The Council also noted that there is often “significant influence” exercised by public authorities over the granting of funding for NGOs. The Council recommended to Member States that NGOs should not be subject to any unnecessarily burdensome accounting or reporting obligations, such as registration requirements to receive foreign funding.⁴²

b. The European Court of Human Rights

The ECtHR is an international court established by the ECHR and is the main institution responsible for enforcing ECHR rights. The final judgments of the ECtHR are legally binding on Member States, and they are obliged to enforce the judgments. Enforcement of ECtHR judgements sometimes requires amending national legislation so that it is compatible with the ECHR.⁴³

1. NGO Fundamental Rights

The ECtHR has recognized on numerous occasions the vital role NGOs play in a properly functioning, healthy democracy.⁴⁴ In *Zhechev v. Bulgaria*, the ECtHR set out the principle that “associations formed for other purposes are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and

⁴⁰ CONFERENCE OF INGO’S, COUNCIL OF EUROPE, TERMS OF REFERENCE: EXPERT COUNCIL ON NGO LAW 2 (2008), available at <http://www.osce.org/odihr/33741>.

⁴¹ See Expert Council on NGO Law, Council of Europe, Second Annual Report on the Internal Governance of Non-Governmental Organizations, ¶¶ 92–99 (2010), available at https://www.coe.int/t/ngo/Source/Expert_Council_NGO_Law_report_2009_en.pdf.

⁴² See *id.* ¶¶ 388–89, 397–98.

⁴³ DAMIAN CHALMERS, EUROPEAN UNION LAW 232-6 (2d ed. 2010).

⁴⁴ See, e.g., *Gorzelik v. Poland*, App. No. 44158/98, Eur. Ct. H.R. (2004), ¶¶ 88–89, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61637>.

groups with varied identities is essential for achieving social cohesion.”⁴⁵ In keeping with that principle, the ECtHR’s decisions have ensured that NGOs are not unnecessarily restricted in their activities or functions.⁴⁶

The ECtHR consistently holds the view that a refusal by a domestic authority to grant legal entity status to NGOs due to burdensome administrative requirements amounts to an interference with the NGO’s exercise of its right to freedom of association.⁴⁷ In *Baczowski v. Poland*, a group was refused permission from the responsible state authority to hold a gay pride march because the organizers had not submitted a traffic organization plan. The ECtHR found that the decision to refuse permission violated the freedom of association, as it “could have had a chilling effect on the applicants and other participants in the assemblies.”⁴⁸ An administrative requirement does not have to be an absolute ban to be unlawful. The chilling effect of a variety of measures introduced by a Member State can violate the right to associate freely.⁴⁹ The ECtHR has also found that a measure is more likely to have a “chilling effect” when a measure is vague and far reaching.

The ECtHR has confirmed that a Member State measure that restricts an NGO’s access to funding may infringe its right to the freedom of association. For instance, in *Ramazanova v. Azerbaijan*, the ECtHR found that “even assuming that theoretically the association had a right to exist pending the state registration, the domestic law effectively restricted the association’s ability to function properly without legal entity status. It could not, inter alia, receive any ‘grants’ or financial donations that constituted one of the main sources of financing of non-governmental organizations in Azerbaijan. Without proper financing, the association was not able to engage in charitable activities which constituted the main purpose of its existence.”⁵⁰

2. Justifications for Infringing NGO Rights

The ECtHR has developed a robust framework to ensure that any restrictions on freedom of association and expression are justified. Any restriction on protected rights must: (1) be prescribed by law; (2) serve a legitimate aim (as set out in Articles 10 and 11); and (3) be

⁴⁵ *Zhechev v. Bulgaria*, App. No. 57045/00, Eur. Ct. H.R. (2007), ¶ 35, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81209>.

⁴⁶ See *Ramazanova v. Azerbaijan*, App. No. 44363/02, Eur. Ct. H.R. (2007), ¶ 54, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79301>; *Sidiropoulos v. Greece*, App. No. 26695/95, Eur. Ct. H.R. (1998), ¶ 40, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58205>.

⁴⁷ See *APEH Üldözötteinek Szövetsége v. Hungary*, App. No. 32367/96, Eur. Ct. H.R. (2000), ¶ 36, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58843>; see generally *Goodwin v. UK*, App. No. 17488/90, Eur. Ct. H.R. (1996), ¶ 39, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57974>.

⁴⁸ See *Baczowski v. Poland*, App. No. 1543/06, Eur. Ct. H.R. (2007), ¶ 67, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80464>.

⁴⁹ See *Kasparov v. Russia*, App. No. 21613/07, Eur. Ct. H.R. (2013), ¶ 84, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126541>.

⁵⁰ See *Ramazanova v. Azerbaijan*, App. No. 44363/02, Eur. Ct. H.R. (2007), ¶ 59, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79301>.

necessary and proportionate to the measure's stated aim.⁵¹ "All three conditions must be met cumulatively. Should only one of them not be met, there will have been a violation of the Convention."⁵² Previously, decisions by Member State authorities relating to measures interfering with the rights under Article 11 were given great deference by the ECtHR.⁵³ Recently, the ECtHR has interpreted this deference narrowly, stating that compelling reasons are needed to justify a restriction of Article 11.⁵⁴ There will, however, be no breach of Article 11 where the Member State measure has no practical effect on the organization or where the measure can be readily avoided by the organization concerned.⁵⁵ The ECtHR has emphasized that Member States must tolerate a wide range of opinions, including those opposed to the status quo.⁵⁶

i. Prescribed By Law

The ECtHR is likely to consider a Member State measure "prescribed by law" only if the measure is sufficiently precise so as to allow the consequences of the measure to be reasonably foreseeable to those affected by the measure.⁵⁷ On numerous occasions the ECtHR has declared that Member State measures that are vague both in scope and effect are not justifiable. For example, in *Zhechev v. Bulgaria*, the ECtHR found that the term "political activity" was too broad and open to so many potential interpretations that most activities carried out by any organization

⁵¹ See *Koretsky v. Ukraine*, App. No. 40269/02, Eur. Ct. H.R. (2008), ¶ 43, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85679>; *Gorzelik v. Poland*, App. No. 44158/98, Eur. Ct. H.R. (2004), ¶ 53, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61637>; *Sidiropoulos*, App. No. 26695/95, ¶ 32; U.N. Hum. Rts. Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); U.N. Hum. Rts. Comm., Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, annex., U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984).

⁵² ZVONIMIR MATAGA, THE RIGHT TO FREEDOM OF ASSOCIATION UNDER THE EUROPEAN CONVENTION ON PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 14 (2006), available at <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan044376.pdf>.

⁵³ See *APEH Üldözötteinek Szövetsége v. Hungary*, App. No. 32367/96, Eur. Ct. H.R. (2000), ¶ 36, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58843> (a refusal to register an association on the grounds of objection to its proposed name was acceptable where there was no indication that the association could not be registered under a different name).

⁵⁴ See *Zhechev v. Bulgaria*, App. No. 57045/00, Eur. Ct. H.R. (2007), ¶ 55, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81209>; *Parti Nationaliste Basque-Organization Regionale D'Iparalde v. France*, App. No. 71251/01, Eur. Ct. H.R. (2007), ¶ 46, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80897>.

⁵⁵ See *Movement for Democratic Kingdom v. Bulgaria*, App. No. 27608/95, Eur. Ct. H.R. (1995), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-25111>; *Sygounis, Kotsis v. Greece*, App. No. 18598/91, 78 Eur. Comm'n H.R. Dec. & Rep. 71 (1994), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86311>.

⁵⁶ See *Sidiropoulos*, App. No. 26695/95, ¶ 23.

⁵⁷ See *Koretsky v. Ukraine*, App. No. 40269/02, Eur. Ct. H.R. (2008), ¶ 47, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85679>.

could be considered a political activity.⁵⁸ The ECtHR has acknowledged that it is virtually impossible to attain absolute precision in the framing of laws. Any restriction on an NGO's access to foreign funding, however, would have to be precisely drafted so as to eliminate the possibility of arbitrary or overly-broad interpretations of its terms in order for the ECtHR to consider the restriction appropriately prescribed by law.⁵⁹

ii. Legitimate Aim

Any restriction on the rights to the freedoms of association and expression would have to meet one of the legitimate aims provided for in Articles 10 and 11 of the ECHR. Under Article 11(2), with respect to freedom of association, these aims are the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others. In respect of freedom of expression, under Article 10(2), legitimate aims are the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence and maintaining the authority and impartiality of the judiciary. The most commonly cited legitimate aims regarding NGOs are national security and the prevention of disorder.

Restrictions on freedom of association based on national security concerns must refer to the specific risks posed by the association; it is not enough for the state to refer to the security situation in the specific area.⁶⁰ An NGO having separatist objectives cannot automatically be restricted on national security grounds.⁶¹ The national security justification is most likely to be seen as a legitimate aim when the NGO endorses, either directly or indirectly, terrorist activities.⁶² Similarly, measures intended to prevent crime and disorder will be deemed to have a legitimate aim where the NGO calls for violence, crime, or a complete rejection of democratic principles.⁶³

⁵⁸ See *Zhechev*, App. No. 57045/00, ¶ 55.

⁵⁹ See *Ezelin v. France*, App. No. 11800/85, Eur. Ct. H.R. (1991), ¶¶ 21–22, 45, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57675>.

⁶⁰ See *Freedom and Democracy Party (ÖZDEP) v. Turkey*, App. No. 23885/94, Eur. Ct. H.R. (1999), ¶ 44, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58372>.

⁶¹ See *Parti Nationaliste Basque-Organization Regionale D'Iparralde v. France*, App. No. 71251/01, Eur. Ct. H.R. (2007), ¶ 47, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80897>.

⁶² See *Rekvenyi v. Hungary*, App. No. 25390/94, Eur. Ct. H.R. (1999), ¶ 30, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58262>.

⁶³ See *United Communist Party of Turkey v. Turkey*, App. No. 133/1996/752/951, Eur. Ct. H.R. (1998), ¶ 26, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58128>. The ECtHR noted that it appears from the opinion produced by the Venice Commission that the Member States of the COE are divided on the question of whether financing of political parties from foreign sources should be permissible. The Committee of Ministers of the Council of Europe recommended that the governments of Member States specifically limit, prohibit, or otherwise regulate donations from foreign donors. Committee of Ministers, Council of Europe, Recommendation on Common Rules Against Corruption in the Funding of Political Parties and Electoral Campaigns, art. 7 (Apr. 8, 2003),

National security may also justify restrictions on the funding of political parties participating in elections for public office. In *Parti Nationaliste v. France*, a Basque separatist political party in France was prohibited from receiving funding from foreign sources. The ECtHR found that the restriction on foreign funding of associations involved in promoting candidates for public office – unlike vague restrictions on the activities of organization involved in “political activities” – had the legitimate aim of preserving national security.⁶⁴

iii. Necessary and Proportionate

The ECtHR requires that any Member State measure seeking to restrict the rights afforded under the ECHR must be both necessary in a democratic society and proportionate to the legitimate aim pursued.⁶⁵ In other words, the State measure must pursue a pressing need, and it must be the least severe (in range, duration, and applicability) option available to the public authority in meeting that need.⁶⁶

In *United Macedonia v. Bulgaria*, the ECtHR stated that “in determining whether a necessity within the meaning of Article 11(2) exists, the States only have a limited margin of appreciation.”⁶⁷ The ECtHR has found that refusing to register an NGO because its articles of association are not consistent with national law⁶⁸ and forcing NGOs that have political objectives in order to register do not meet the required standard.⁶⁹

For a measure to be proportionate, it must not restrict the freedom more than is required to pursue the legitimate aim. Member States are allowed to require NGOs to comply with reasonable legal formalities, so long as they are proportionate.⁷⁰ The ECtHR has consistently deemed to be disproportionate sweeping, overly-broad measure that are both vague and potentially applicable to an exceedingly large number of parties, and that impose onerous and burdensome requirements on NGOs. In *Stankov v. Bulgaria* the ECtHR emphasised that

<http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/cy%20activity%20interface2006/rec%202003%20%284%29%20pol%20parties%20EN.pdf> This led the Court to conclude that prohibiting political parties from receiving funds from foreign parties is not in itself incompatible with Article 11 of the Convention.

⁶⁴ See *Parti Nationaliste Basque-Organization Regionale D’Iparralde v. France*, App. No. 71251/01, Eur. Ct. H.R. (2007), ¶ 47, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80897>.

⁶⁵ See *Arslan v. Turkey*, App. No. 23462/94, Eur. Ct. H.R. (1999), ¶ 46, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58271>.

⁶⁶ See *id.*

⁶⁷ See *United Macedonian Organisation Ilinden v. Bulgaria*, App. No. 59489/00, Eur. Ct. H.R. (2006), ¶ 61, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70731>.

⁶⁸ See *Koretsky v. Ukraine*, App. No. 40269/02, Eur. Ct. H.R. (2008), ¶¶ 52–54, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85679>.

⁶⁹ See *Zhechev v. Bulgaria*, App. No. 57045/00, Eur. Ct. H.R. (2007), ¶¶ 55–56, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81209>.

⁷⁰ See *Republican Party of Russia v. Russia*, App. No. 12976/07, Eur. Ct. H.R. (2011), ¶ 87, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104495>.

“[s]weeping measures of a preventive nature to suppress freedom of assembly and expression...do a disservice to democracy and often even endanger it.”⁷¹ In addition, measures that inflict disproportionate sanctions on NGOs that fail to comply are likely to be disproportionate.⁷² Similarly, drastic measures, such as the dissolution of NGO or barring it from carrying out its primary activity, can only be proportionate in extreme cases.⁷³

c. The European Union

The EU is both a political project and a form of legal organization consisting of 28 countries.⁷⁴ These countries are party to the treaties of the EU and thereby subject to the privileges and obligations of EU membership.⁷⁵ Unlike the membership of other international organizations (such as the United Nations or the COE), EU membership places each country under binding laws in exchange for representation in the EU's legislative and judicial institutions.⁷⁶ Thus, in order to be admitted, each country must harmonize its domestic laws and policies with EU standards.

1. Charter of Fundamental Rights of the European Union

In 2009, the EU introduced a specific legal obligation regarding the right to freedom of association. The Charter of Fundamental Rights of the European Union (the “Charter”)⁷⁷ makes the right to the freedom of association expressly applicable within the EU. The Charter has legal application only when the institutions and individual countries are implementing EU law (such as regulations and directives).⁷⁸ The Charter does not extend the applicability of the EU regime to Member State domestic matters beyond that which already exists under EU treaties. Article 12 of the Charter states that:

Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade

⁷¹ See *United Macedonian Organisation Ilinden v. Bulgaria*, App. No. 59489/00, Eur. Ct. H.R. (2006), ¶ 97 n.43, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70731>.

⁷² See *Tebieti Mühafize Cemiyeti & Sabir Israfilov v. Azerbaijan*, App. No. 37083/03, Eur. Ct. H.R. (2009), ¶ 63, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94854>.

⁷³ See *Refah Partisi (the Welfare Party) v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, Eur. Ct. H.R. (2003), ¶¶ 88–89, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60936>.

⁷⁴ Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Sweden, United Kingdom, Greece, Germany, Austria, Cyprus, Malta, Portugal, Spain, Finland, Hungary, Poland, Bulgaria, Estonia, Lithuania, Slovenia, Czech Republic, Slovakia, Romania, Latvia, and Croatia.

⁷⁵ CHALMERS, *supra* note 43 at 1–3.

⁷⁶ It is a condition of membership of the EU that all member states must also be members of the COE and ratify the ECHR.

⁷⁷ The Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.

⁷⁸ The United Kingdom, Poland, and the Czech Republic have secured an opt-out from the application of the Charter.

union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.⁷⁹

The meaning of Article 12 is the same as that of Article 11 of the ECHR. Pursuant to Article 52(3) of the Charter, limitations on the right may not exceed those considered legitimate by virtue of Article 11(2) of the ECHR. The aim of the Charter is not to create a double human rights protection system within Europe, but rather to compliment it by ensuring that the rights are clearly visible and have absolute legal certainty within the EU. The Charter is also broader than the ECHR, as it also covers social and economic rights. In addition, Articles II-112(3) and 113 of the Charter state that the ECHR and ECtHR case law constitute the minimum standard for the interpretation of the EU's fundamental rights. The EU courts and national courts must take account of the Charter provisions in cases that fall within the scope of EU law. NGOs can use the rights granted to them under the Charter as grounds for review of EU measures or as grounds to challenge the legality of national measures implementing EU legislation.

IV. INTER-AMERICAN HUMAN RIGHTS SYSTEM

The American Convention of Human Rights is the binding human rights treaty for the Organization of American States (OAS) which came into effect in 1978. It has been ratified by 25 of the 35 Member States of the OAS.⁸⁰ The Inter-American Human Rights System encompasses the Inter-American Commission of Human Rights ("IACHR") and the Inter-American Court of Human Rights ("IACtHR"), which protect and enforce the rights enshrined in the American Convention of Human Rights ("American Convention").⁸¹

The American Convention protects the right to freedom of association in article 16 with similar language to the ICCPR and the ECHR:

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.⁸²

⁷⁹ Charter of Fundamental Rights of the European Union, art. 12.

⁸⁰ Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago (Denunciation), Uruguay, Venezuela (Denunciation).

⁸¹ American Convention of Human Rights, art. 16, 1144 U.N.T.S. 143 (1969) [hereinafter American HR Convention].

⁸² *Id.* at art. 16.

Similar to the jurisprudence adopted by the UNHRC and ECtHR regarding allowable restrictions to freedom of association, the IACHR and IACtHR – the authoritative bodies for interpretation and enforcement for the American Convention – has similar guidance. All states that are signatories to the American Convention must fulfill their obligations under this treaty and must abide by the recommendations and decisions made by the IACHR and the IACtHR.

The IACHR, emphasizes “the role of freedom of association as a fundamental tool that makes it possible to fully carry out the work of human rights defenders, who, acting collectively, can achieve a greater impact.”⁸³ Furthermore, this right has been interpreted by the IACtHR as including “the right to ‘set up and participate freely in non-governmental organizations, associations or groups involved in human rights monitoring, reporting and promotion.’”⁸⁴ The IACHR has determined that “the right to receive international funds in the context of international cooperation for the defense 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 of freedom of association.”⁸⁵

Allowable restrictions on the right to freely associate, including restrictions to access to foreign funding require that “such restrictions [be] established by law that have a legitimate purpose and that, ultimately, may be necessary in a democratic society.”⁸⁶ In determining whether a provision is “established by law”, the IACtHR requires “restrictions to be formulated previously, in an express, accurate, and restrictive manner to afford legal certainty to individuals.”⁸⁷ The IACHR has also advised that in order to meet this principle of legality the law should not use vague, imprecise, or broad definitions of legitimate motives for restricting the establishment of an NGO.⁸⁸ Furthermore, all restrictions on this right must be for a legitimate purpose, namely “in the interest of national security, public safety, or public order or to protect public health or morals or the right and freedoms of others.”⁸⁹ Similarly to the UNHRC, the

⁸³ Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas*, para. 152, OEA/Ser.L/V/II. Doc. 66 (December 31 2011) [Hereinafter IACHR Report].

⁸⁴ Case of *Kawas-Fernandez v. Honduras*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C.) No. 196, para 146 (April 3, 2009).

⁸⁵ Inter-American Commission on Human Rights, *Democracy and Human Rights in Venezuela*, para. 585, OEA/Ser.L/V/II. Doc. 54 (December 30 2009).

⁸⁶ Case of *Escher et al. v. Brazil*, Preliminary Objects, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 200, para 173 (July 6, 2009).

⁸⁷ Case of *Kimel v. Argentina*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C.) No. 177, para 63 (May 2, 2008); Case of *Uson Ramirez v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 207, para 56 (November 20 2009).

⁸⁸ IACHR Report, *supra* note 83 at Recommendation 17.

⁸⁹ American HR Convention, *supra* note 81 at art. 16.

IACHR requires that a real, not hypothetical threat exist for States to invoke national security as a reason to restrict the right to freedom of association.⁹⁰

The IACHR has stated that “the guarantee of the right to associate freely with other persons implies, on the one hand, that the public authorities may not limit or impair the exercise of such right; as long as the association’s purpose is lawful, the State must allow it, without pressure or interference that may alter or impair the nature of such purpose.”⁹¹ States should understand civil society in democratic terms, so that organizations defending human rights should not be subject to unreasonable or discriminatory restrictions.⁹²

The IACHR has stated that States have a duty to refrain from restricting the means of financing of human rights organizations.⁹³ The “right to receive international funds ... for the defense and promotion of human rights is protected by the 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.”⁹⁴ Similar to the ECtHR, the IACHR has distinguished foreign funding restrictions for political parties or organizations speaking on behalf of a political party as not falling within the protected standard that has been discussed above.⁹⁵

The Inter-American jurisprudence protects the right for civil society to access foreign funding as an integral part of the right to freedom of association. However, IACHR recognizes the difference between foreign funding being used for political parties which does not fall within the framework of protection discussed and the access of civil society to funding to carry out their protection of human rights.

V. AFRICAN HUMAN RIGHTS SYSTEM

Similar to the European and Inter-American human rights systems discussed above, the African human rights system is developed around the African Charter on Human and People’s Rights (“African Charter” or “Charter”), that is enforced and interpreted through the African Commission of Human Rights and People’s Rights (ACHPR or African Commission) and the African Court of Human and People’s Rights (ACtHPR). The African Charter came into force in

⁹⁰ IACHR Report, *supra* note 83 at para. 166.

⁹¹ Case of Baena-Ricardo et al. v. Panama, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C.) No. 72, para 156 (February 2, 2001); Case of Kawas-Fernandez, *supra* note 84 at para. 143.

⁹² IACHR Report, *supra* note 83 at para 167.

⁹³ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights Defenders in the Americas*, Rec. 51., OEA/Ser.L/V/II.124 Doc. 5 rev.1 (March 7, 2006).

⁹⁴ Inter-American Commission on Human Rights, *Democracy and Human Rights in Venezuela*, para. 585, OEA/Ser.L/V/II. Doc. 54 (December 30 2009).

⁹⁵ IACHR Report, *supra* 83, at para 185.

1986 under the auspices of what is now known as the African Union. It has been ratified by every African Union member state except for South Sudan.⁹⁶

The African Charter on Human and People's Rights protects the right to freedom of association in article 10:

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.⁹⁷

While the African Commission has not had occasion to provide extensive elaboration on restrictions on foreign funding for civil society, it has provided some guidance regarding the right to freedom of association and how restrictions should be evaluated to protect the right. The African Commission determined that limitations on rights guaranteed by the African Charter must satisfy a stringent three-part test: (1) restriction on expression must be "founded in a legitimate state interest"; (2) the restriction "must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained"; and (3) "a limitation may never have as a consequence that the right itself becomes illusory."⁹⁸

The ACHPR's Resolution on Freedom of Association observes that:

- (1) The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standard;
- (2) In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom;
- (3) The regulation of the exercise of the right to freedom of association should be consistent with State's obligations under the African Charter on Human and Peoples' Rights.⁹⁹

The ACHPR has reiterated the State's obligations under the Charter with regards to freedom of association, and has further expressed that these principles apply to all rights

⁹⁶ African Commission on Human and People's Rights, *Ratification Table: African Charter on Human and People's Rights* (October 6, 2014) available at <http://www.achpr.org/instruments/achpr/ratification/>.

⁹⁷ African (Banjul) Charter for Human and People's Rights, art. 10, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter African Charter].

⁹⁸ *Media Rights Agenda v. Nigeria*, Comm. Nos. 105/93, 128/94, 130/94, 152/96, 12th Afr. Comm'n H.P.R. AAR Annex V (1998-1999) at paras. 60-70.; *See also Constitutional Rights Project v. Nigeria*, Comm. 140/94, 141/94, 145/95, 13th Afr. Comm'n H.P.R. AAR Annex V (1999-2000), ¶ 42.

⁹⁹ Resolution on the Right to Freedom of Association, African Commission on Human and People's Rights, Res. No. 5, 11th Session, (2 March 1992), available at <http://www.achpr.org/sessions/11th/resolutions/5/>; *See also Huri-Laws v. Nigeria*, Afr. Comm'n H.P.R., Comm. No. 225/98, at para. 48 (2000); *See also Lawyers for Human Rights v. Swaziland* Afr. Comm'n H.P.R., Comm. No. 251/2002 at para 60 (2005).

guaranteed by the African Charter.¹⁰⁰ Although the ACHPR has not officially had the chance to review foreign funding restrictions, it has made statements expressing concern over the proposed budget limits on foreign funding for NGOs.¹⁰¹ It has also passed resolutions regarding human rights situations in Egypt and Ethiopia where it condemned their foreign funding legislation as denying access to NGOs of their right to freedom of association.¹⁰²

Given the statements and condemnation already expressed by the ACHPR regarding foreign funding restrictions for NGOs, it seems likely that case brought before it regarding this issue would be found to be in violation of the protections of Article 10 of the African Charter.

VI. EUROPE

a. France

In general, France treats access to contributions (including foreign contributions) by French associations¹⁰³ as part of the fundamental right to freedom of association and has no restrictions on foreign funding of associations. This is exemplified by decision No. 84-176 DC of the French *Conseil Constitutionnel* of 25 July 1984, which held that the freedom of association allows associations to secure the funds necessary for the achievement of their goals, including through the exercise of profit-making activities.¹⁰⁴ French law treats access to funding of associations (including foreign funding) as a fundamental right, without any restrictions specific to the source of the funding.

1. Associations in France

Under Article 1 of the *Law of 1 July 1901 on the contract of association* (the “1901 Act”), an association is defined as “an agreement by which two or more persons bring together,

¹⁰⁰ Lawyers for Human Rights v. Swaziland, *supra* note 99; See also Dawda Jawara v. The Gambia, Afr. Comm’n H.P.R., Comm. Nos. 147/95 and 149/96 at para 68 (2000).

¹⁰¹ Press Release on the NGO and Media Bills in Kenya, Afr. Comm’n H.P.R., (April 3, 2014), available at <http://www.achpr.org/press/2014/04/d198/>

¹⁰² See 287: Resolution on Human Rights Abuses in Egypt, Afr. Comm’n H.P.R., 16th Extraordinary Session (July 29 2014), available at <http://www.achpr.org/sessions/16th-oo/resolutions/287/>; See also 218: Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia, Afr. Comm’n H.P.R., 51st Ordinary Session (May 2, 2012), available at <http://www.achpr.org/sessions/51st/resolutions/218/>.

¹⁰³ In France, 98% of the NGOs/civil society groups have the status of “associations.” See B. Poitevin, *ONG et Associations*, JURISEXPERT, (Sept. 29, 2011), <http://www.jurisexpert.net/ong-et-associations/>. Consequently, the scope of this section is limited to the set of rules applicable to associations.

¹⁰⁴ Conseil Constitutionnel [CC] [Constitutional Court] Decision No. 84-176 DC, July 25, 1984, Cons. 6. In the French legal system, the *Conseil Constitutionnel* has exclusive jurisdiction to rule on the conformity with the Constitution of (i) a proposed legal provision before it is enacted and (ii) an enacted provision if, during proceedings in progress before a court of law, it is asserted that such provision infringes the rights and freedoms guaranteed by the Constitution (1958 CONST. art. 61, 61-1.).

in a permanent manner, their knowledge or activities for a non-profit purpose...¹⁰⁵ Associations can be “freely constituted, without special authorization or prior declaration.”¹⁰⁶ A preliminary declaration is necessary only if the association wants to obtain legal capacity.¹⁰⁷ Legal capacity gives an association the right, without the need for any special authorization, to “bring an action to court, receive individual gifts as well as state subsidies, and to acquire against payment, possess, and manage...: (i) its members’ subscriptions, (ii) premises designed for the association’s management and its members’ meetings, and (iii) immovable property strictly necessary to accomplishment of the association’s goal.”¹⁰⁸ The right to receive funding (whether domestic or foreign) can thus be considered as a “component” of legal capacity. Non-declared associations can receive and manage membership dues, even though they do not have legal capacity.

According to the 1956 decision of the French *Conseil d’Etat*¹⁰⁹ in the *Amicale des Annamites de Paris* case, the freedom of association is a “Fundamental Principle Recognized by the Laws of the Republic” (“*Principe Fondamental Reconnu par les Lois de la République*”).¹¹⁰ Under French law, such principles are given the same controlling legal weight as provisions of the Constitution itself, as recognized by the *Conseil Constitutionnel* in its 1971 *Liberté d’association* decision.¹¹¹

2. Funding of Associations in France

Under French law, although different types of funding are subject to different rules, the source of such funding is irrelevant. According to the 1901 Act, only four types of funding resources are available to declared associations. Article 6 of the 1901 Act provides that any declared association “may, without any special authorization...receive gifts by hand as well as state subsidies, acquire against payment, possess and manage...its members’

¹⁰⁵ Loi du 1 juillet 1901 relative au contrat d’association [Law of 1 July 1901 on the Contract of Association], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 1, 1901, art. 1.

¹⁰⁶ *Id.* at art. 2.

¹⁰⁷ *Id.* at art. 5.

¹⁰⁸ *Id.* at art. 6.

¹⁰⁹ The *Conseil d’Etat* is the highest administrative court in France.

¹¹⁰ C. Denizeau, *Associations – Associations de droit commun – Associations para-administratives*, 170 JCL ADMINISTRATIF § 6 (citing *Conseil d’Etat* [CE Ass.] [Court of State] July 11, 1956, Rec. Lebon 317); L. FAVOREU ET AL., *DROIT DES LIBERTÉS FONDAMENTALES* 229 (4th ed. 2007) (same).

¹¹¹ Conseil Constitutionnel [CC] [Constitutional Court], Decision No. 71-44DC, July 16, 1971, Rec. 29; *see also* Conseil Constitutionnel [CC] [Constitutional Court], Decision No. 2000-434DC, July 20, 2000, Rec. 107.

subscriptions...”¹¹² Also, under Article 11 of the Act, associations “may receive donations and bequests.”¹¹³

Case law and commentary agree that the list of funding resources set out in the 1901 Act is not exhaustive and that, in principle, no type of funding is prohibited per se.¹¹⁴ The rationale is that the freedom of association implies the right to receive funds.¹¹⁵ For instance, the *Conseil Constitutionnel* ruled in 1984 that the freedom of association includes the right to procure funding necessary for the achievement of an association’s goals, including through the exercise of profit-making activities.¹¹⁶ In that case, it was alleged that the Draft Law modifying the Law of 29 July 1982 on audiovisual communication violated the Constitution because radio stations organized as associations, which had been granted the authorization to use radio frequencies on the national territory, were allowed to resort to fund raising and advertising. This right was alleged to violate the principle of “non-profitable activity of associations,” which was alleged to be inherent to the 1901 Act. The *Conseil Constitutionnel* declared that associations were not prohibited from exercising profit-making activities to achieve their goals, and the Draft Law was accordingly declared constitutional.¹¹⁷

Certain types of funding, however, may not be available to certain types of associations, with a distinction being made between funding that associations secure internally (“own-source funding”) and funding obtained externally. Different types of own-source funding are available to declared associations: (a) contributions or donations in cash or in kind from their founders;¹¹⁸ (b) members’ subscriptions and entrance fees if the articles of association so allow;¹¹⁹ (c) the sale of goods or services;¹²⁰ and (d) issuances of bonds if the association performs an economic activity, the association is registered in the Companies Register, and the articles of association so allow.¹²¹ The external sources of funding available to associations are as follows: (a) “[i]ndividual gifts” (not subject to any formal requirement) may be received by any “declared association,”¹²² and if the association actively solicits such individual gifts, the *Cour des*

¹¹² Loi du 1 juillet 1901 relative au contrat d’association [Law of 1 July 1901 on the Contract of Association], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 1, 1901, art. 6.

¹¹³ *Id.* art. 11.

¹¹⁴ G. SOUSI, Y. MAYAUD, & R. BOCTI, LAMY ASSOCIATIONS §§ 258-2, 260-2 (1992).

¹¹⁵ S. Rabiller, *Droit administratif et Convention européenne des droits de l’homme*, 26 JCL ADMINISTRATIF § 122.

¹¹⁶ Conseil Constitutionnel [CC] [Constitutional Court] decision No. 84-176DC, July 25, 1984, Rec. 29.

¹¹⁷ *Id.*

¹¹⁸ SOUSI, MAYAUD, & BOCTI, *supra* note 82 § 117-3; FRANCIS LEFEBVRE, MEMENTO PRATIQUE – ASSOCIATIONS - 2012-2013 §§ 8080, 8095 (2012); C. Laronde-Clérac, *Associations – Constitution – Capacité*, 174-20 JCL SOCIÉTÉS TRAITÉ § 28.

¹¹⁹ SOUSI, MAYAUD, & BOCTI, *supra* note 82 §§ 258-3, 258-8; FRANCIS LEFEBVRE, *supra* note 86 § 8200.

¹²⁰ SOUSI, MAYAUD, & BOCTI, *supra* note 82 §§ 258-36–40.

¹²¹ *Id.* § 258-15.

¹²² *Id.* § 260-3; FRANCIS LEFEBVRE, *supra* note 86 § 8400.

*Comptes*¹²³ will monitor such fundraising activities;¹²⁴ (b) donations¹²⁵ can only be received by “[r]ecognized public-interest associations”¹²⁶ and some “declared associations” providing assistance, charity services, or expertise in scientific or medical research;¹²⁷ and (c) state subsidies may be received by “declared associations.”¹²⁸ “Non-declared associations” cannot receive donations.

b. Germany

The following section provides an overview of German law (both constitutional and otherwise), including German case law, where applicable, relating to the right to freedom of association, in particular with respect to the right of NGOs to access funding without restrictions.

1. German Constitutional Law

The German Basic Law, which entered into force in 1949, is the *de facto* Constitution of Germany. Until German Reunification in 1990, the Basic Law applied only to West Germany. There are provisions in the Basic Law for the promulgation of a full Constitution, but there has been no movement toward drafting and implementing a new and full Constitution. The Basic Law was amended most recently on July 17, 2012.

2. Constitutional Right to Association includes the Right to Access Funding

The right to freedom of association is set forth in Article 9 of the Basic Law and is one of the fundamental rights (*Grundrechte*) provided therein. In general, the right to freedom of association is defined as the right of all German nationals to associate with other persons and/or entities in the pursuit of a common interest.¹²⁹

Article 9.I of the Basic Law protects the right of associations to act without interference by governmental authorities, and the right of an association to decide on its activities.¹³⁰ German

¹²³ The *Cour des Comptes* is a financial administrative body, the mission of which is to monitor the use of public funds and inform the citizens about the results of its activities. The Court monitors the propriety of the use of public funds and assesses the proportionality and efficacy of the uses. The Court assists the Parliament in its control of governmental actions; it also assists the Parliament and the Government in their control of the execution of financing actions and social security financing actions and in their evaluation of public policies. All of its reports are public.

¹²⁴ Laronde-Clérac, *supra* note 86 § 167; FRANCIS LEFEBVRE, *supra* note 86 § 8462.

¹²⁵ Under French law, donations must be recorded in a deed prepared by a notary. This legal requirement is applicable in all cases, no matter who makes or receives the donation.

¹²⁶ SOUSI, MAYAUD, & BOCTI, *supra* note 82 § 260-41.

¹²⁷ Laronde-Clérac, *supra* note 86 § 165.

¹²⁸ SOUSI, MAYAUD, & BOCTI, *supra* note 82 § 260-17.

¹²⁹ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 9, § I.1.a.

¹³⁰ *Id.* at art. 9, § I.2.a–b.

jurisprudence and legal literature understand Article 9.I of the Basic Law as a so-called “Double Basic Right” (*Doppelgrundrecht*), protecting both individuals in their freedom to associate and protecting associations themselves in their right to act free from governmental restrictions (individual and collective entitlement to protection under the basic right)¹³¹ unless such restrictions are permitted by other law.

As set forth below, the basic right to freedom of activities for associations includes the right to access appropriate funding.

3. Constitutional and Other Limitations of the Right to Association

Article 9.II of the Basic Law contains an inherent constitutional limitation on the right to association by providing that an association may be prohibited entirely.¹³² Article 9.II enumerates the only permissible reasons for such prohibition (and mandatory dissolution),¹³³ which are: (i) the association’s purposes or activities that violate criminal law,¹³⁴ (ii) the association does not comply with the constitutional regime,¹³⁵ or (iii) the association acts or aims to act against norms of international law.¹³⁶ The latter, in particular, applies if an association funds a group which instigates violence between nations.¹³⁷ Prohibitions on the right of association on any other basis are not permitted by constitutional law.¹³⁸

Nevertheless, in order to engage in economic transactions and activities legally, an association must be formed in compliance with subconstitutional law,¹³⁹ and some restrictions on

¹³¹ *Id.* at art. 9, § I.3.a; Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Jan. 3, 1979, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 699, 1979; VOLKER EPPING & CHRISTIAN HILLGRUBER, BECK’SCHER ONLINE-KOMMENTAR GRUNDGESETZ (19th ed. 2013).

¹³² Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] June 15, 1989, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 37, 1990.

¹³³ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 9, § 122.

¹³⁴ It is, however, required that the applicable criminal law provision does not specifically address associations, but penalizes certain activities in general. *See* KLAUS HÜMMERICH, WINFRIED BOECKEN & JOSEF DÜWELL, NOMOSKOMMENTAR ARBEITSRECHT art. 9, at 28 (2d 2010); HANS D. JARASS & BODO PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND art. 9, at 18 (2006).

¹³⁵ *E.g.*, Bundesverwaltungsgericht [BverwG] [Federal Administrative Court] Nov. 27, 2002, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 986, 2003.

¹³⁶ HÜMMERICH, BOECKEN & DÜWELL, *supra* note 102 at art. 9, at 30; JARASS & PIEROTH, *supra* note 102 at art. 9, at 20; THEODOR MAUNZ & GÜNTER DÜRIG (eds.), GRUNDGESETZ-KOMMENTAR art. 9, at 131 (2013).

¹³⁷ Bundesverwaltungsgericht [BverwG] [Federal Administrative Court] Dec. 2, 2004, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 1435, 2005.

¹³⁸ Bundesverfassungsgericht [BverfG][Federal Constitutional Court] June 15, 1989, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 80, 244, 1990.

¹³⁹ Bundesverfassungsgericht [BverfG][Federal Constitutional Court] March 1, 1979, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 699, 1979; EPPING & HILLGRUBER, *supra* note 99 at art. 9, at 18.

the right to association are provided for by subconstitutional law.¹⁴⁰ All such subconstitutional restrictions are required by the Basic Law (so-called “constitutional order to form the right to association” (*grundrechtliches Ausgestaltungsgesetz der Vereinigungsfreiheit*)) and must comply with Article 9 of the Basic Law.

The German Association Code (*Vereinsgesetz*) provides the details of the restrictions on associations, in accordance with Article 9 II of the Basic Law.

4. Right of Association and to Access Funding under German Subconstitutional Law

This section provides an overview of the relevant German subconstitutional law applicable to associations/NGOs.¹⁴¹ It further provides examples of subconstitutional law restrictions imposed on NGOs and other associations.

i. No mandatory registration of NGOs required for legal capacity

No registry of all NGOs operating in Germany currently exists. An NGO may operate fully without registering with the German commercial register (*Handelsregister*) or the German register of associations (*Vereinsregister*). Therefore, an NGO is free to decide whether or not to register with the competent authority to obtain officially recognized status. Both unregistered associations¹⁴² (*nicht eingetragener Verein*) and registered associations¹⁴³ (*eingetragener Verein*) are common legal forms for an NGO in Germany to take.

In the past, the more restrictive regulations, Sections 43 (3), 61 (2) and 54 (1) of the Civil Code (*BGB*) applicable to private partnerships were applied to unregistered associations, as opposed to the less restrictive provisions applicable to registered associations. Because such restrictions were not in accordance with Article 9.I of the Basic Law,¹⁴⁴ Sections 43 (3) and 61 (2) were repealed in 1953 and 1997, respectively.¹⁴⁵ Section 54 (1) of the German Civil Code is still in force but is limited to the interpretation of jurisprudence and legal literature, as discussed below.

Since the revocation of Sections 43 (3) and 61 (2) of the Civil Code, the provisions applicable to registered associations have been applicable to unregistered associations as well,

¹⁴⁰ EPPING & HILLGRUBER, *supra* note 99 at art. 9, at 18.

¹⁴¹ In Germany, the common legal form for establishing an NGO is the association (*Verein*).

¹⁴² BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGL.] 195 § 54.

¹⁴³ BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGL.] 195 § 21.

¹⁴⁴ OTTO PALANDT ET AL., BÜRGERLICHES GESETZBUCH § 54, at 1, (73d ed. 2014); STAUDINGER, *supra* note 112.

¹⁴⁵ GESETZ ZUR WIEDERHERSTELLUNG DER GESETZEINHEIT AUF DEM GEBIET DES BÜRGERLICHEN RECHTS [LAW FOR THE RESTORATION OF THE PROFESSIONAL CIVIL SERVICE], March 5, 1953, BUNDESGESETZBLATT, Teil 1 [BGBL. I] at 33; JUSTIZMITTEILUNGSGESETZ UND GESETZ ZUR ÄNDERUNG KOSTENRECHTLICHER VORSCHRIFTEN UND ANDERER GESETZ [ACT AMENDING COST LAW PROVISIONS AND OTHER LAWS], June 18, 1997, BUNDESGESETZBLATT, Teil 1 [BGBL. I] at 1430.

unless the provision expressly requires the registration of the association.¹⁴⁶ Article 9.I of the Basic Law requires the civil law to provide an appropriate legal system for unregistered associations to avoid unconstitutional restrictions or their de facto forced registration.

Furthermore, since a 2001 decision of the Federal Court of Justice (*Bundesgerichtshof*) relating to the legal capacity of the private partnership,¹⁴⁷ it has been the prevailing view in Germany that an unregistered association has legal capacity, at least to a certain extent.¹⁴⁸ The argument is: If a private partnership has legal capacity according to the Federal Court of Justice, then an unregistered association must have legal capacity as well, since the legal organization of an unregistered association is even closer to a legal person than is a private partnership.

Contrary to an old decision of the Higher Regional Court Koblenz,¹⁴⁹ it is now the prevailing view in the German legal literature that an unregistered association is capable of issuing and accepting bills or checks (*wechsel- und scheckfähig*).¹⁵⁰ The argument is: If, according to a decision of the Federal Court of Justice,¹⁵¹ a private partnership is capable of issuing and accepting checks, as then an unregistered association must have the same capacity.

ii. *Access to banking facilities and foreign grants / funds for NGOs*

Under German law, both unregistered and registered associations are entitled to open and keep bank accounts. Access to banking facilities is ensured for NGOs, whether operating as an association, corporation, or in any other legal form.¹⁵²

¹⁴⁶ Bundesgerichtshof [BGH] [Federal Court of Justice] June 11, 1968, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1830, 1968; Oberlandesgericht [OBL] [Higher Regional Court Frankfurt] Dec. 19, 1984, RECHTSPRECHUNG DER OBERLANDESGERICHTE IN ZIVILSACHEN [OLGZ] 215, 1985; PALANDT, *supra* note 113; KARSTEN SCHMIDT, GESELLSCHAFTSRECHT § 25.II.1.a (1980).

¹⁴⁷ Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 29, 2001, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1056, 2001.

¹⁴⁸ C. H. BECK (pub.), MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 54, at 19 (6th ed. 2012); SCHMIDT, *supra* note 115; Walthur Hadding, *Zur Rechtsfähigkeit und Parteifähigkeit der (Außen-) Gesellschaft bürgerlichen Rechts sowie zur Haftung ihrer Gesellschafter für Gesellschaftsverbindlichkeiten*, ZEITSCHRIFT FÜR GESCHICHTLICHE RECHTSWISSENSCHAFT [ZGR] 712, (Oct., 2001); Othmar Jauernig, *Zur Rechts- und Parteifähigkeit der Gesellschaft bürgerlichen Rechts*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2231 (June 30, 2001).

¹⁴⁹ Oberlandesgericht [OBL] [Higher Regional Court Koblenz] Mar. 18, 1955, MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 424, 1955.

¹⁵⁰ MÜNCHENER KOMMENTAR, *supra* note 117 § 54, at 24; STAUDINGER, *supra* note 112 § 54, at 27; Ulrich Stoltenberg, *Zur Frage der Teilrechtsfähigkeit nichtrechtsfähiger Vereine*, MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 494 (Apr., 1989).

¹⁵¹ Bundesgerichtshof [BGH] [Federal Court of Justice] July 15, 1997, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2754, 1997.

¹⁵² C. H. BECK (pub.), MÜNCHENER KOMMENTAR ZUM HANDELSGESETZBUCH §§ 343–72 annex. I (2d ed. 2009); KATJA LANGENBUCHER, DIRK BLIESENER, & GERALD SPINDLER (eds.), BANKRECHTS-KOMMENTAR § 1(1)(III)(2) (1st ed. 2013).

5. German Subconstitutional Restrictions on the Right to Association and to Access Funding

In Germany, restrictions on the right of an NGO to have access to foreign funding must be in accordance with Article 9.I of the Basic Law. Where such restrictions are imposed, they are imposed not only on NGOs but on trading companies, corporations, and private persons as well. Further, the legal restrictions on the right to association and to access funding must be narrowly tailored to comport with the objectives provided by Article 9.II of the Basic Law.¹⁵³

To further the very limited bases for prohibiting an association found in Article 9.II, Section 3 of the Association Code provides details on the prohibition procedure.¹⁵⁴ The bases for imposing the prohibitions is applicable to both German and foreign associations. The law permits the confiscation¹⁵⁵ of the funds of an association that satisfies one of the causes for prohibition according to Art. 9.II and Section 3 of the Association Code.¹⁵⁶ According Association Code, the bases for imposing a mandatory dissolution of an association consisting in total or predominantly of foreign nationals (“*Ausländervereine*”), and of a foreign association (“*ausländische Vereine*”) are not limited to the restrictive reasons provided for in Art. 9.II, but—in particular for the prevention of terrorism¹⁵⁷—also derive from subconstitutional law in certain cases,¹⁵⁸ unless the members and heads of such foreign association are of German or EU nationality.¹⁵⁹ The reason for treating foreign associations differently from domestic associations is that Article 9.I is a so-called “*Deutschengrundrecht*,” that is, a basic right generally only applicable to German domiciled associations and nationals, as mentioned above when discussing the definition of the “right to association.”¹⁶⁰ Foreign associations and associations consisting at least predominantly of foreign nationals are, in contrast, only protected by the general freedom of activities right (“*Allgemeine Handlungsfreiheit*”) according to Article 2.I of the Basic Law.¹⁶¹

¹⁵³ For example: The “first amendment of the Association Code of 7 December 2002 to restrict extremist associations of foreign nationals in Germany” shows the narrow tailoring of restrictions on Art. 9.I Basic Law. GESETZ ZUR REGELUNG DES ÖFFENTLICHEN VEREINSRECHTS [ASSOCIATION CODE] August 5, 1964, BUNDESGESETZBLATT, Teil 1 [BGBl. I] 593, as amended.

¹⁵⁴ *Id.* §§ 3–9.

¹⁵⁵ *Id.* §§ 10–14.

¹⁵⁶ *Id.* § 3.

¹⁵⁷ *Id.* §§ 3–9.

¹⁵⁸ *Id.* §§ 10–13.

¹⁵⁹ *Id.* § 15.

¹⁶⁰ KATHRIN GROH, VEREINSGESETZ § 9, at 1 (1st ed. 2012).

¹⁶¹ *Id.*

c. United Kingdom

The United Kingdom (“UK”) has no laws that specifically impose limits or restrictions on the receipt of foreign funding by NGOs operating in the UK. While the UK has not expressly recognized access to foreign funding by NGOs as a fundamental right, it expressly recognizes the freedoms of association and expression as universal and fundamental rights. For the reasons set forth below, any attempt to limit or restrict an NGO’s access to foreign funding is potentially a breach of these universal and fundamental rights, and UK-based NGOs would be entitled to seek relief in the UK and/or European courts.

1. Freedom of association and freedom of expression

The UK recognized both freedom of association and freedom of expression as universal and fundamental rights in the Human Rights Act 1998 (the “HRA”).¹⁶² Coming into force in 2000, the aim of the HRA was to “give further effect” to the ECHR in the UK.¹⁶³ The HRA contains the Articles and Protocols of the ECHR that are deemed to apply in the UK.¹⁶⁴ Although not all of the Articles and Protocols in the ECHR are replicated in the HRA, Articles 10 and 11 (freedom of expression and freedom of association respectively) are included. These rights are qualified, however, and can be restricted under the same circumstances as those set out by the ECtHR.¹⁶⁵

The effect of the HRA is to provide a remedy for breaches of the rights contained in the ECHR without an individual having to refer the case to the ECtHR in the first instance and incur the additional delay and costs associated with doing so. Under the HRA, the UK courts must, as far as possible, read and give effect to domestic legislation in a way that is compatible with the rights enshrined in the ECHR. If a UK court finds that a particular law does not comport with the ECHR, it can declare the law incompatible or strike the legislation all together.¹⁶⁶

¹⁶² Human Rights Act, 1998, c. 42 (U.K.)

¹⁶³ *Id.*

¹⁶⁴ *Id.* at sched. 1.

¹⁶⁵ *Supra* section III.b.

¹⁶⁶ For example, in *A and Others v. Secretary of State for the Home Department*, [2004] UKHL 56 (H.L.) (appeal taken from Eng.), the court quashed The Human Rights Act 1998 Order 2001, *Human Rights Act 1998 (Designated Derogation) Order 2001* [U.K.], Statutory Instrument 2001 No. 3644, 13 November 2001, available at <http://www.refworld.org/docid/46e5564f2.html>, because it was not a proportionate means of achieving the aim sought. The court ruled that Section 23 of the Anti-terrorism, Crime and Security Act, 2001, c. 24 (U.K.) was incompatible with Articles 5 (Right to liberty and security) and 14 (Prohibition of discrimination) of the HRA as it was disproportionate and permitted the detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status. The incompatible provisions were subsequently repealed by the Prevention of Terrorism Act, 2005, c. 2 (U.K.).

While the UK does not impose any restrictions specifically targeting the receipt of foreign funding by NGOs operating in the UK, it does have laws and regulations on a range of issues, including immigration and visas, campaign finance and lobbying, terrorism financing, and money-laundering, which may affect NGOs. We, however, are not aware of any case law in the UK regarding restrictions on the funding of NGOs.

VII. NORTH AMERICA

a. United States

In the United States, strong protection is granted to freedom of association and freedom of speech, which has limited government restrictions on financial contributions in some cases and which could be used to protect financial contributions to NGOs.¹⁶⁷ Freedom of association and freedom of speech are protected by the First Amendment to the Constitution.¹⁶⁸ The U.S. Supreme Court has held that infringement of such rights must meet the “strict scrutiny” test under U.S. law, that is, the infringement must be “narrowly tailored to advance a compelling government interest.”¹⁶⁹

In several different statutory and regulatory contexts, however, U.S. courts have concluded that the government’s compelling interests allow for regulation of financial support from foreign sources. This section will address the restrictions, and U.S. cases challenging such restrictions, found in the Foreign Agents Registration Act (“FARA”) and the Federal Election Campaign Act (“FECA”).

1. Foreign Agents Registration Act

i. Background

FARA, enacted in 1938, was initially intended to restrict the importation of Nazi propaganda,¹⁷⁰ but the amendment of the act in 1966 shifted the government’s use of FARA to its current focus—exposure of efforts by foreign entities to influence U.S. policies.¹⁷¹ FARA

¹⁶⁷ *Citizens United v. FEC*, 558 U.S. 310 (2010) (declaring limits on corporate political speech unconstitutional); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, (1986) (“Were the State to restrict by statute financial support of the Party’s candidates to Party members, or to provide that only Party members might be selected as the Party’s chosen nominees for public office, such a prohibition of potential association with non-members would clearly infringe upon the rights of the Party’s members under the First Amendment to organize with like-minded citizens in support of common political goals.”).

¹⁶⁸ U.S. CONST. amend. I.

¹⁶⁹ *E.g.*, *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (stating the modern strict scrutiny standard); *Shapiro v. Thompson*, 394 U.S. 618, 658–61 (1969) (Harlan, J., dissenting) (tracing the development of the “compelling interest” requirement).

¹⁷⁰ Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America’s National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 735 (1985).

¹⁷¹ See Yuk K. Law, Note, *The Foreign Agents Registration Act: A New Standard for Determining Agency*, 6 FORDHAM INT’L L.J. 365, 368 (1983).

requires a person or organization that is an “agent of a foreign principal”¹⁷² to register with the Justice Department,¹⁷³ file and label all materials that it produces,¹⁷⁴ and make certain, periodic disclosures, including the names of its principals and the sources of its funding.¹⁷⁵ While FARA does not bar an agent’s actions based on the agent’s principals or sources of funding, it may discourage funding when a source of funds needs to maintain confidentiality or anonymity.

ii. *Challenges to FARA’s Constitutionality*

Various plaintiffs have attempted to challenge FARA’s registration, labeling, and reporting requirements as a violation of the First Amendment, but the courts that have heard these challenges have always upheld the FARA provisions.

First, in *Attorney General of the United States v. Irish Northern Aid Committee (INAC)*, the courts adopted a very broad definition of “agent” in order to ensure that the plaintiff was covered under FARA, and, consequently, that the registration requirement would be upheld. INAC had challenged the Attorney General’s assertion that it was an agent of the Irish Republican Army (IRA), arguing that its activities merely constituted “a citizen’s constitutionally protected expression of political beliefs and sympathies.”¹⁷⁶ The district court held and the Second Circuit affirmed, however, that “control” as defined under traditional agency law was not a requirement of “agency” within the meaning FARA.¹⁷⁷ The district court stated that “it is

¹⁷² The term “agent of a foreign principal” is defined very broadly by the statute:

(1) any person who acts as an agent, representative, employee, or servant, or any person **who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal** or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person—

(i) engages within the United States in political activities for or in the interests of such foreign principal;

(ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;

(iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or

(iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and

(2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection.

22 U.S.C. § 611(c) (2006) (emphasis added). See the discussion of “request,” *infra* text accompanying notes 148–50.

¹⁷³ 22 U.S.C. § 612.

¹⁷⁴ *Id.* § 614(a)–(b). Prior to amendment of FARA by the Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601–14, materials had to be labelled as “political propaganda,” but Congress eliminated that requirement in recognition of the negative connotation of the word propaganda. WILLIAM V. LUNEBURG, THOMAS M. SUSMAN, & REBECCA H. GORDON, *THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE* 316 (4th ed. 2009).

¹⁷⁵ *Id.* § 611.

¹⁷⁶ *Attorney General of the United States v. Irish N. Aid Comm.*, 530 F. Supp. 241 at 246–48, 251 (S.D.N.Y. 1981), *aff’d*, 668 F.2d 159 (2d Cir. 1982).

¹⁷⁷ *INAC*, 668 F.2d at 161.

sufficient to establish agency under the Act that defendant...acts at [the IRA's] 'request,'"¹⁷⁸ and the Second Circuit, though somewhat troubled by the potentially expansive use of "request" to define agency, did little to limit the district court's opinion.¹⁷⁹

Second, in *Meese v. Keene*¹⁸⁰ and *Block v. Meese*¹⁸¹ the U.S. Supreme Court and the D.C. Circuit court, respectively, found that the labeling requirement did not infringe upon freedom of speech because it was a neutral comment that had no effect on the plaintiffs' ability to distribute material. The plaintiff in *Keene*, a state legislator who wanted to show an environmentally-themed Canadian film, claimed he could not because the label would hurt his reelection campaign.¹⁸² The plaintiff in *Block*, a film distributor, claimed the label would prevent the same film from being seen because interested organizations, like schools and libraries, would not purchase something labeled as propaganda.¹⁸³ In *Keene*, the Supreme Court ultimately found that though the "propaganda" label was capable of being construed as a pejorative term indicating misleading information, it also carried a neutral usage.¹⁸⁴ The Supreme Court imputed the neutral meaning to the statute, causing "the constitutional concerns voiced by the District Court [to] completely disappear,"¹⁸⁵ and it never reached the issue of whether the means chosen were narrowly tailored to further a compelling government interest.¹⁸⁶ The D.C. Circuit, in

¹⁷⁸ *INAC*, 530 F. Supp. at 257.

¹⁷⁹ *INAC*, 668 F.2d at 161 ("Nevertheless, while we acknowledge that the Act requires registration by a person who acts, in specified ways, at a foreign principal's 'request,' we caution that this word is not to be understood in its most precatory sense. Such an interpretation would sweep within the statute's scope many forms of conduct that Congress did not intend to regulate. The exact perimeters of a 'request' under the Act are difficult to locate, falling somewhere between a command and a plea. Despite this uncertainty, the surrounding circumstances will normally provide sufficient indication as to whether a 'request' by a 'foreign principal' requires the recipient to register as an 'agent.'").

¹⁸⁰ *Meese v. Keene*, 481 U.S. 465 (1987).

¹⁸¹ *Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1986). Both this case and *Keene* were decided at a time when the labeling provision still required the use of the term "propaganda." That term has now been eliminated by statute and replaced with the language "information materials." Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601–14. This change could be construed as a congressional overruling of the *Keene* and *Block* cases, but there is no congressional statement to confirm such an inference.

¹⁸² *Keene*, 481 U.S. at 473–74.

¹⁸³ *Block*, 793 F.2d at 1308.

¹⁸⁴ *Keene*, 481 U.S. at 477–78.

¹⁸⁵ *Id.* at 485.

¹⁸⁶ *See id.* at 490–94 (Blackmun, J., dissenting). Justice Blackmun, writing for the dissent, stated: I can conclude only that the Court has asked, and has answered, the wrong question. Appellee does not argue that his speech is deterred by the statutory definition of 'propaganda.' He argues, instead, that his speech is deterred by the common perception that material so classified is unreliable and not to be trusted, bolstered by the added weight and authority accorded any classification made by the all-pervasive Federal Government. Even if the statutory definition is neutral, it is the common understanding of the Government's action that determines the effect on discourse protected by the First Amendment...The Court often has struck down disclosure requirements that

Block v. Meese,¹⁸⁷ held that even if the “propaganda” label could be construed as a sign of government disparagement, “the first amendment [sic] has [not] been held to be implicated by governmental action consisting of no more than governmental criticism of the speech’s content.”¹⁸⁸

Finally, in *Block* the D.C. Circuit also considered a challenge to the FARA reporting requirements and held that the reporting requirement was constitutional.¹⁸⁹ The court balanced the burden on the plaintiff’s First Amendment rights, which the court formulated as (i) the right to receive ideas in privacy and (ii) the right to privacy (or anonymity) in the dissemination of ideas, against the Government’s interest in disclosing the nature and extent of dissemination of foreign “propaganda.”¹⁹⁰ The court found the state’s interest to be of minimal importance, but even the insubstantial state interest was sufficient when weighed against the Act’s impairment of the First Amendment rights in question.¹⁹¹ “[T]he Constitution recognizes an associational interest, as well as an individual interest, in the privacy of receipt of ideas,”¹⁹² but because it did not appear that the appellants wished to use the films only for viewing by their own select membership (which, the court implies, is when that associational interest would be at its strongest),¹⁹³ the plaintiff’s rights were outweighed by the government’s interests.¹⁹⁴

Although FARA is broadly worded, it has been applied narrowly and NGOs receiving foreign funding generally are not required to register.¹⁹⁵ According to the U.S. Department of Justice – the U.S. government agency charged with enforcement and implementation of FARA – “not a single one of these [civil society organization (“CSOs”)] has been required to register under FARA, despite millions of dollars in foreign funding, which sheds light on why FARA cannot be interpreted as an analog of legislation that requires NGO recipients of foreign funds to

threatened to have a deterrent and chilling effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association.” *Id.* at 489-490, 492 (internal citations and quotations omitted).

¹⁸⁷ *Block*, 793 F.2d 1303.

¹⁸⁸ *Id.* at 1313–14 (“The line of permissibility, we think, falls... between...the disparagement of ideas...and the suppression of ideas through the exercise or threat of state power.”).

¹⁸⁹ *Id.* at 1315.

¹⁹⁰ *Id.* at 1316–17.

¹⁹¹ *Id.* at 1315–16.

¹⁹² *Id.* at 1316.

¹⁹³ *Id.*

¹⁹⁴ *Id.* The court noted a similar associational interest, and came to the same conclusion regarding its relative importance, with respect to the right to privacy (or anonymity) in the dissemination of ideas. *See id.* at 1317.

¹⁹⁵ *Expert Roundtable on the Regulation of Operations of Internationally Affiliated Non-Governmental Organizations and NGO Access to Foreign Funding*, Executive Report (Organization for Security and Cooperation in Europe(OSCE)/Office of Democratic Institutions and Human Rights(ODIHR), Vienna Austria) July 11, 2013 at 7-8 (hereinafter OSCE Executive Report on Foreign Funding).

register as ‘foreign agents.’”¹⁹⁶ FARA’s registration requirement is not triggered by mere receipt of foreign funds, rather it is triggered by an organization being controlled and directed by a foreign entity.¹⁹⁷ Since the 1966 Amendments to FARA, discussed above, the Department of Justice has reported that there have been “no successful criminal prosecutions under FARA” and enforcement of the act has focused on those seeking economic or electoral gains.¹⁹⁸

iii. Conclusion

While U.S. courts have upheld FARA in the face of limited constitutional challenges, they have never had occasion to consider whether application of FARA to an organization engaged in human rights work and receiving foreign funds would violate the First Amendment as such organizations are not required to register. Although FARA has broadly worded language, the enforcement and implementation of the law does not inhibit the ability of NGOs to receive funding nor require them to register with the U.S. government.

2. Federal Election Campaign Act

i. Overview of U.S. Legal Restrictions on Campaign Contributions by Foreign Nationals

U.S. law currently bans all political contributions and expenditures by foreign nationals to any U.S. political candidate or committee, whether at the federal, state, or local level.¹⁹⁹ The law also bans the solicitation, acceptance, or receipt of a contribution or donation from a foreign national.²⁰⁰ Under the Federal Election Campaign Act (FECA), a foreign national is defined as a person who is not a citizen or national of the United States, and who is not lawfully admitted for permanent residence.²⁰¹ The term foreign national is also statutorily defined to include a “foreign principal,” such as a foreign government or political party, or an organization, corporation, or association organized under the laws of or having its principal place of business in a foreign country.²⁰² The United States first enacted the ban in 1966 as part of the amendments to the Foreign Agents Registration Act (FARA).

FECA originally banned only contributions to individual U.S. political candidates. After an investigation by the Senate Committee on Governmental Affairs into the influence of foreign

¹⁹⁶ *Id.* at 7.

¹⁹⁷ *Id.* at 7.

¹⁹⁸ See United State Attorneys Manual, Criminal Resource Manual 2062, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02062.htm.

¹⁹⁹ 2 U.S.C. § 441E (2006); 36 U.S.C. § 510(c) (2006).

²⁰⁰ 2 U.S.C. § 441E(a)(2).

²⁰¹ *Id.* § 441E(b)(2).

²⁰² *Id.* § 441E(b)(1); 22 U.S.C. §(b) (2006).

citizens on elections, Congress passed the Bipartisan Campaign Report Act of 2002, amending FECA to ban foreign nationals not only from making contributions to individual candidates, but also from making contributions to political parties.²⁰³

ii. Enforcement of FECA by the Federal Election Commission

Following a 1974 amendment to FECA, the interpretation and enforcement of the ban on political contributions by foreign nationals falls under the exclusive jurisdiction of the Federal Election Commission (FEC).²⁰⁴ Pursuant to this jurisdiction, the FEC issues advisory opinions on compliance with FECA and brings enforcement actions.²⁰⁵ In one instance, the FEC issued an advisory opinion to a foreign national who wished to contribute funds to a non-profit committee, Californians for Safe Streets, where the non-profit committee was formed to qualify and pass a state ballot measure in California.²⁰⁶ The FEC opined that the foreign national was prohibited from making the contribution under FECA, because the non-profit committee was a “controlled committee,” in which a political candidate exercises a significant influence over the committee’s actions.²⁰⁷

iii. Constitutional Challenge to FECA’s Ban on Campaign Contributions by Foreign Nationals

FECA’s ban on foreign campaign contributions has been unsuccessfully challenged on First Amendment grounds. Two foreign citizens living lawfully in the United States on temporary work visas wished to donate to state and federal political campaigns and distribute flyers advocating candidates. These individuals filed suit against the FEC, challenging the bar to their desired activities under the First Amendment.²⁰⁸ The D.C. Circuit acknowledged that “political contributions and expenditures are acts of political expression and association protected by the First Amendment,” such that any restriction of these rights must meet strict scrutiny (requiring a statute to be “narrowly tailored to advance a compelling government interest”).²⁰⁹ The court determined that FECA’s provisions on contributions by foreign nationals satisfied the strict scrutiny test, analogizing the restriction to other statutes which have been

²⁰³ Priv. L. No. 107-155, 116 Stat. 81 (2002).

²⁰⁴ 2 U.S.C. § 437c.

²⁰⁵ *See id.* §§ 437d(a), 437f–g; FEC Advisory Op. 1992-16 (1992) (A U.S. subsidiary of a foreign corporation may request an advisory opinion from the FEC, regarding whether the subsidiary may lawfully make campaign contributions to state and local entities.); FEC Advisory Op. 1995-15 (1995) (A political action committee (PAC) may also request an advisory opinion regarding whether it may lawfully accept a donation by the domestic subsidiary of a foreign corporation.).

²⁰⁶ FEC Advisory Op. 1989-32 (1990).

²⁰⁷ *Id.*

²⁰⁸ *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281, 285 (D.D.C. 2011) *aff'd*, 132 S. Ct. 1087, 181 L. Ed. 2d 726 (2012).

²⁰⁹ *Id.* at 285–86.

found to constitutionally exclude foreign citizens from activities “intimately related to the process of democratic self-government,” such as voting, serving as jurors, or even working as public school teachers.²¹⁰

However, the D.C. Circuit was careful to note three limiting principles to the scope of its holding: (1) it did not decide whether Congress could constitutionally extend the current statutory ban to lawful permanent residents who have a more “significant attachment” to the United States than the possession of a temporary work visa; (2) it did not decide whether Congress could prohibit foreign nationals from engaging in speech other than contributions to political candidates and parties and express-advocacy expenditures, such as lobbying or issue advocacy; and (3) it cautioned that any enforcement by the government of violations of FECA for criminal penalties will require proof of the defendant’s knowledge of the law, expressing a concern that many aliens living in the United States may not be aware of the statutory ban on foreign expenditures.²¹¹ Although the United States has limitations on foreign funding, it is almost exclusively in the context of interference with “democratic self-government” and not used or targeted towards NGOs focused on human rights activities.

b. Canada

Although no right to receive foreign funds has been explicitly tied to any of Canada’s Constitutional rights, the right to funding generally has been protected by the Supreme Court of Canada in limited circumstances in the context of the right to freedom of expression. If foreign funding of a Canadian NGO was challenged, it is likely that it would be protected under a similar rationale.²¹²

Section 2 of the Canadian Charter of Rights and Freedoms, which was enacted in 1982, protects the following rights: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.²¹³ Though Section 2 of the Charter describes these rights as “fundamental freedoms,” Section 1 qualifies that these rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”²¹⁴

²¹⁰ *Id.* at 287.

²¹¹ *Id.* at 292.

²¹² The only exception is the explicit prohibition on the ability of Canadian NGOs to receive funding from foreign sources is where the foreign source is engaged in terrorism. Dmitry Kabak, *Canada NGO Regulation*, LEGISLATIONLINE (Apr. 2007), <http://legislationline.org/topics/subtopic/18/topic/1/country/38>.

²¹³ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

²¹⁴ *Id.* It should be noted that the Canadian provinces have their own version of the Charter of Rights and Freedoms, the jurisprudence of which could potentially conflict with the federal Charter.

Since the Charter was enacted, freedom of expression has developed into the most robust right with respect to protecting the rights of NGOs. Freedom of association has been invoked almost exclusively in the context of unions, and freedom of assembly has been interpreted to be supplemental to the freedom of association.²¹⁵ As a result, protection of the rights of a non-union organization has generally been accomplished through the right of freedom of expression.²¹⁶

Because of the limitation to rights contained in Section 1 of the Charter, Canada uses a four-part test similar to that under international and U.S. law to determine when a restriction on expression is unlawful. The test was first developed in *Irwin Toy Ltd. v. Quebec*.²¹⁷ Under *Irwin Toy*, a court starts by determining whether the activity in question is protected expression within Section 2 of the Charter. This is a low bar; if any “activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee.”²¹⁸ Second, the court determines whether the purpose or effect of the challenged law was to restrict expression. It is important that a restrictive effect will be sufficient because under such a test, content-neutral restrictions may still violate the right to expression.²¹⁹ Third, the court evaluates the government’s justification for the restriction, and if the government can show that the justification is “pressing and substantial,” then the restriction may be upheld because it will have only proscribed freedom of expression within the reasonable limits allowed by Section 1 of the Charter.²²⁰ Finally it determines whether the restriction is proportional to the justification. This inquiry contains two elements: first, there must be a rational connection between the means and the ends, and second, the restriction must be as minimal as possible.²²¹

At least two courts have used the *Irwin Toy* test to strike down restrictions on funding as a violation of the right to freedom of expression, though neither case dealt with the foreign funding of NGOs. In *Epilepsy Canada v. Alberta*,²²² the Alberta Court of Appeals evaluated a challenge to the Public Contributions Act, which required a wide variety of organizations to request a license in order to solicit for funds. The organizations were required to request the

²¹⁵ See, e.g., Reference re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 (“The associational aspect of s. 2(c) clearly finds adequate protection in the very expression of a freedom of peaceful assembly.”).

²¹⁶ See, e.g., *Libman v. Quebec*, [1997] 3 S.C.R. 569 (Can.) (protecting third party interest groups via the right to freedom of expression); *Epilepsy Canada v. Alberta*, [1994] 115 D.L.R. 4th 501 (Can. Alta. C.A.) (protecting charities and any other organization that has a “benevolent, philanthropic, patriotic, artistic, athletic, recreational, or civic purpose” via the right to freedom of expression).

²¹⁷ *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927 (Can.).

²¹⁸ *Id.* at 696.

²¹⁹ *Irwin Toy* established protection from restrictive effects in its dicta, *id.* at 976–77, although the restriction in the case was not content-neutral (a ban on commercial messages to children). In practice, courts do use this test to strike down content-neutral laws. See, e.g., *Ramsden v. Peterborough*, [1993] 2 S.C.R. 1084 (Can.) (striking down a city ordinance that banned any posters on all public property).

²²⁰ *Irwin Toy*, [1989] 1 S.C.R. at 986 (citing *R. v. Oakes*, [1986] 1 S.C.R. 103, 138–39.).

²²¹ *Id.* at 991–92.

²²² *Epilepsy Canada v. Alberta*, [1994] 115 D.L.R. 4th 501 (Can. Alta. C.A.).

license before each round of solicitation, and the government was free to deny the license for any reason. The court held that the law violated the right of expression because of the onerous requirement of having to request permission from the government repeatedly, the overbreadth in organizations covered by the law, and the unchecked discretion the government had in denying licenses, thus finding it disproportionate to the justification.²²³ Later, in *Libman v. Quebec*,²²⁴ the Supreme Court of Canada was faced with a challenge to the Referendum Act, which severely limited the amount of money third party groups could spend to run issue advertisements or the types of activities they could engage in during a referendum. The Court held that the government's justification, preventing one side from drowning out the view point of the other, easily met the pressing and substantial standard, but, as in *Epilepsy Canada*, the Court found the restriction was not proportional to the justification because it almost completely limited third party speech in this context.²²⁵

In conclusion, Canada currently does not restrict foreign funding of NGOs, but if a restriction were ever to be enacted, its legality would likely be judged under the *Irwin Toy* test for violations of the right of freedom of expression. Since the Supreme Court of Canada has recognized that severe funding restrictions can be a violation of the freedom of expression in *Libman* and since at least one Canadian court has recognized the mere act of asking for funding as protected expression, it is likely that a ban or severe restrictions on requesting or accepting foreign funding would be found to be a violation on the right to freedom of expression. The government would have to show that the particular ban on foreign funding was proportional to a valid justification²²⁶ to prevent the ban from being struck down.

VIII. CONCLUSION

Access to funding by NGOs is protected under international law as an integral part to the right to freedom of association. The international law framework and national law regimes discussed in this paper clearly establishes that any restrictions on the right to freedom of association are only permissible if they are narrowly tailored for a legitimate interest. An overly broad, vaguely worded law, without a clearly stated and identified reason to restrict access to funding for NGOs would likely be found to be incompatible with the protection and enforcement of the right to freedom of association.

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²²³ *Id.*

²²⁴ *Libman v. Quebec*, [1997] 3 S.C.R. 569 (Can.).

²²⁵ *Id.*

²²⁶ Furthermore, complete bans are less likely to be upheld as proportional under the *Irwin Toy* test. Compare *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927 (Can.), in which the Supreme Court of Canada upheld a restriction that was limited to commercial speech aimed at children under 13 and broadcast on television, with *Ramsden v. Peterborough*, [1993] 2 S.C.R. 1084 (Can.), in which the Court struck down a complete ban on any posters in all public space.