



**AMERICAN BAR ASSOCIATION
CENTER FOR HUMAN RIGHTS
WASHINGTON, DC**

TO: Heidy Rombouts, Litigation Project, UN Special Rapporteur on Freedom of Association and Assembly
FROM: American Bar Association, Center for Human Rights
DATE: March 6, 2015
RE: Freedom of Association And Assembly Rights In Access to Foreign Funding

I. Introduction

The American Bar Association, Center for Human Rights¹ received a request from the U.N. Special Rapporteur on the right to freedom of association and assembly to provide international human rights standards on two questions in the context of India's Foreign Contribution (Regulation) Act (FCRA): (1) Is access to resources, in particular foreign funding, part of the right to freedom of association under international law, standards and principles? (2) If so, on what basis may States restrict access to foreign funding under international law, standards and principles?

For the reasons outlined below, the Center's research has found that access to resources, particularly foreign funding, is a fundamental part of the right to freedom of association under international law, standards, and principles. Therefore, any restriction on access to foreign funding must meet the stringent test for allowable restrictions for the right to association developed by the international human rights bodies. Given this narrow test, restricting access to foreign funding for associations of a political nature, where political nature includes any activity that may touch on advocacy for a particular group or cause, seems to violate the right because the definition is overly broad, does not conform to a proscribed aim, and is not a proportionate response to the purported goal of the restriction.

II. Is access to resources, in particular foreign funding, part of the right to freedom of association under international law, standards and principles?

A. Relevant international Standards

The right to freedom of association is enshrined in article 22² of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR broadly protects the right to freedom of association and permits

¹ This statement was prepared by the Justice Defenders program of the American Bar Association, Center for Human Rights. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association. In addition, this memorandum is intended as background information. It is not intended as legal advice on a particular cases.

² 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

only narrowly drawn limitations on the right. States' obligations under the ICCPR are twofold. On the one hand, States have a positive obligation to create an enabling environment in which the rights guaranteed by the ICCPR can be exercised. On the other hand, States have the negative obligation to refrain from interference with the rights guaranteed. The right to freedom of association is not an absolute right, but is subject only to the limitations permitted by international law.³

The right to freedom of association is protected in regional human rights treaties around the world, with language similar to that of Article 22 the ICCPR.⁴ In particular, the commissions and courts charged with the authoritative interpretation and enforcement of the European Convention of Human Rights (ECHR) and the American Convention of Human Rights (ACHR) have developed similar jurisprudence to the U.N. Human Rights Committee (UNHRC) in recognizing the right to freedom of association and determining the requirements of an allowable restriction. Therefore, even though India is not party to these conventions, the guidance from these bodies further informs the international norms that govern States' obligations to protect the right to freedom of association.

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

Although the FCRA is applicable to a variety of individuals and associations,⁵ the focus of this memorandum is on non-governmental organizations (NGOs) because the petitioner is a NGO classified as an organization of a "political nature." The right to access funding is a direct and essential component of the right to freedom of association for all NGOs. 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, "undue restrictions on resources available to associations impact the enjoyment of the right to freedom of association and also undermine civil, cultural, economic, political and social rights as a whole."⁶

For these reasons, the UNHRC – the body charged with authoritative interpretation and enforcement of the ICCPR – has consistently expressed concern over foreign funding restrictions as an impediment to fully realizing 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 should review its legislation and practice in order to enable non-governmental organizations to discharge their functions without impediments which are

(1948) [hereinafter UDHR]; American Convention of Human Rights, art. 16, 1144 U.N.T.S. 143 (1969) [hereinafter ACHR]; 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"].

³ India acceded to the ICCPR on April 10, 1979. The Indian Supreme Court has held that the rights guaranteed by the Covenant "elucidate" and "effectuate fundamental rights guaranteed" by the Indian Constitution. *See People's Union for Civil Liberties v. Union of India* (1997) 3 SCC 433 (where the Court found that "...it would suffice to state that the provisions of the covenant [ICCPR], which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such.)

⁴ *See supra* note 2

⁵ The Foreign Contribution (Regulation) Act, No. 42 of 2010; Indian Code (2010), v. 51, Section 3 [hereinafter FCRA]

⁶ *See also* United Nations Human Rights Committee, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, at ¶9, U.N. Doc. A/HRC/23/39 (April 24, 2013) [Hereinafter UN SR Access to Resources Report] http://freeassembly.net/wp-content/uploads/2013/04/A.HRC_23.39_EN-funding-report-April-2013.pdf

inconsistent with the provisions of article 22 of the Covenant, such as prior authorization, funding controls, and administrative dissolution.⁷

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:

The State party 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.⁸

The United Nations General Assembly echoed this holding 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”⁹ 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.”¹⁰

In addition, the U.N. Special Rapporteur on the Right of Freedom of Assembly and Association has stated that “the ability to access funding and resources is an integral and vital part of the right to freedom of association.”¹¹ In his 2012 report to the U.N. Human Rights Committee, on the issue of an association’s right to access resources, the Special Rapporteur explained:

The ability to seek, secure and use resources is essential to the existence and effective operations of any association, no matter how small. The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources.¹²

⁷ U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Egypt*, at ¶21, U.N. Doc. CCPR/CO/76/EGY (November 28 2002),

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.76.EGY.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.76.EGY.En?Opendocument)

⁸ 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>

⁹ *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].

¹⁰ Special Representative of the Secretary-General on the Situation of Human Rights Defenders, United Nations General Assembly, A/59/401 (2004) at ¶82(I).

¹¹ See also 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

¹² UN SR Access to Resources Report, *supra* note **Error! Bookmark not defined.** at ¶8.

C. Regional Human Rights Mechanisms protecting the right to access foreign funding as part of right to association

The European and Inter-American human rights systems have also found that restricting access to funding may infringe on an NGO's right to freedom of association.¹³ The European Court of Human Rights (ECtHR) – the entity charged with enforcement of the ECHR – has confirmed that a Member State measure that restricts an NGO's access to funding may infringe its right to the freedom of association.¹⁴ The Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission of Human Rights (IACHR) are the main institutions responsible for enforcing and interpreting ACHR rights. The IACtHR has held that the right to association includes “the right to ‘set up and participate freely in non-governmental organizations, associations or groups involved in human rights monitoring, reporting and promotion.’”¹⁵ The IACHR has further 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.”¹⁶ The IACHR has found that restrictions on receiving “international funding to defend political rights” are not permitted by international law.¹⁷

Based upon these and other decisions at regional human rights mechanisms, UNHRC, UN General Assembly, and the published opinion of the U.N. Special Rapporteur on freedom of association and assembly, access to resources, particularly foreign funding, is a part of the right to association under international human rights law.

III. If so, on what basis may States restrict access to foreign funding under international law, standards and principles?

Restrictions on foreign funding create significant barriers for non-governmental organizations to function. Because access to foreign funding is a part of the right to association, any restriction must meet the requirements set forth in the ICCPR, which only permits restrictions on freedom of association under narrowly tailored circumstances.¹⁸ Again, it is instructive to note that the same test is applicable to restrictions on the right to freedom of association as guaranteed in Article 11 of the ECHR and Article 16 of the ACHR.

¹³ See ECHR, *supra* note 2; ACHR, *supra* note 2.

¹⁴ In *Ramzanova 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.” *Ramzanova 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>.

¹⁵ Case of *Kawas-Fernandez v. Honduras*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C.) No. 196, para 146 (April 3, 2009).

¹⁶ Inter-American Commission on Human Rights, *Democracy and Human Rights in Venezuela*, para. 585, OEA/Ser.L/V/II. Doc. 54 (December 30 2009).

¹⁷ IACHR Report, *supra* note **Error! Bookmark not defined.** at ¶185 (noting that “a situation different from the one just described would be one in which an organization was proselytizing on behalf of a certain political party or candidate to a particular post. Under this circumstance, the activity would not be protected by the aforementioned standard.”).

¹⁸ *Infra*, Section IV.

The UNHRC explained in *Belyatsky v. Belarus*, that restrictions on freedom of association must meet the following three requirements: (1) proscription by law; (2) the law may be imposed solely to protect national security or public safety, public order, public health or morals, or the rights and freedoms of others; and (3) the restrictions must be “necessary in a democratic society.”¹⁹ The UNHRC elaborated that the protection afforded by Article 22 extends to all activities of an association.²⁰ The jurisprudence of the ECtHR and the IACtHR has also held that allowable restrictions on the right to freedom of association must meet the same, enumerated three-prong test.²¹

A. Proscribed by Law²²

The UNHRC has explained that, to meet the requirement that a restriction 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.”²³ Furthermore, to fulfill this prong, “the law itself has to establish the conditions under which the rights may be limited.”²⁴ 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.²⁵ A law cannot allow for unfettered discretion upon those charged with its execution.²⁶

It is acknowledged that it is virtually impossible to attain absolute precision in the framing of laws, however, any restriction on a NGO’s access to foreign funding would have to be precisely drafted so as to eliminate the possibility of arbitrary or overly-broad interpretations of its terms.²⁷ 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 could be considered a political activity.²⁸

¹⁹ 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*].

²⁰ 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*].

²¹ ECHR, *supra* note 2; ACHR, *supra* note 2; 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; *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).

²² Please note, the European Convention of Human Rights in Article 11 uses “prescribed by law,” however given that India’s obligation falls under the ICCPR, this analysis will use the terminology of the U.N. Human Rights Council. Despite the difference in wording, the interpretation of this prong is the same under both systems.

²³ 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*]. See also *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>. See *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).

²⁴ 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 article 22.).

²⁵ IACHR Report, *supra* note **Error! Bookmark not defined.** at Recommendation 17.

²⁶ *General Comment No. 34, supra* note 23 at ¶25.

²⁷ 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>.

²⁸ 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> (“For instance, in the present case these courts

Where access to foreign funding is restricted or prohibited on the basis of the particular activity of an organization, the law would need to provide a definition that was precise enough to allow such organizations to be on notice. The FCRA Rules define “political nature” to include:

- (i) organisation having avowed political objectives in its Memorandum of Association or bylaws;
- (ii) any Trade Union whose objectives include activities for promoting political goals;
- (iii) any voluntary action group with objectives of a political nature or which participates in political activities;
- (iv) front or mass organisations like Students Unions, Workers’ Unions, Youth Forums and Women’s wing of a political party;
- (v) organisation of farmers, workers, students, youth based on caste, community, religion, language or otherwise, which is not directly aligned to any political party, but whose objectives, as stated in the Memorandum of Association, or activities gathered through other material evidence, include steps towards advancement of political interests of such groups;
- (vi) any organisation, by whatever name called, which habitually engages itself in or employs common methods of political action like ‘bandh’ or ‘hartal’, ‘rasta roko’, ‘rail roko’ or ‘jail bharo’ in support of public causes.²⁹

On its face, the FCRA does not appear to provide the necessary precision required for clarity and notice. It lists examples of groups that could be defined as having a “political nature” but does not provide further definitions or examples for the terms ‘political objectives,’ ‘political activities,’ or ‘political interests.’ This appears to give the government broad discretionary powers that could be applied in an arbitrary and capricious manner. In the same manner as the imprecise language at issue in the *Zhechv* case, the definition of “political nature” in the FCRA appears to be overly broad and could encompass almost all potential activities of an organization, including those that are allowed and even encouraged by the ICCPR, such as promoting knowledge of basic rights and participation in government.

B. Legitimate Aim

Allowable restrictions on freedom of association are further limited to those which protect: national security or public security, public order (*ordre public*), public health or morals, or the protection of the rights and freedoms of others. These legitimate aims must be interpreted strictly.³⁰

States that restrict access to foreign funding for civil society organizations have tended to argue that such restrictions are necessary for national security or to protect public order.³¹ The UNHRC has found that

[Bulgarian national courts] deemed that a campaign for changes in the constitution and the form of government fell within that category. In another recent case these same courts had, more questionably, stated that the “holding of meetings, demonstrations, assemblies and other forms of public campaigning” by an association campaigning for regional autonomy and alleged minority rights also amounted to political goals and activities within the meaning of Article 12 § 2 of the Constitution of 1991.)

²⁹ Foreign Contribution (Regulation) Rules, (India) 2011.

³⁰ U.N. General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, at ¶19, U.N. Doc. A/61/267 (August 16, 2006).

³¹ See, e.g., Kay Guinane, *U.S. Counterterrorism Developments Impacting Charities*, 10 Int’l J. Not-for-Profit L. 1, Dec. 2007, at 3, available at http://www.icnl.org/research/journal/vol10iss1/special_1.htm; Mark Sidel, *Counterterrorism and the Enabling Legal and Political Environment for Civil Society: A Comparative Analysis of “War on Terror” States*, 10 Int’l J. Not-for-Profit L. 3, June 2008, at 7 available at http://www.icnl.org/research/journal/vol10iss3/special_2.htm.

when a State 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.³² 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 generally refer to the security situation in the specific area.³³ The national security justification is most likely to be seen as a legitimate aim when a NGO endorses, either directly or indirectly, terrorist activities.³⁴ 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.³⁵

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.³⁶ Similar to the ECtHR, the IACHR has also 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.³⁷

In this case, the FCRA’s stated purpose is “to prohibit acceptance and utilization of foreign contribution or foreign hospitality for any activities detrimental to the national interest.”³⁸ This stated purpose is not among those specifically enumerated in the ICCPR. On its face, it appears to be unduly broad, potentially sweeping into its scope legitimate, protected activities that are essential to the proper functioning of a democracy. National interest is not synonymous with national security or public order. The allowable aims under the ICCPR must be narrowly interpreted in scope by States parties. In this instance, the legislation does not clearly define “national interest” and appears to allow the government power to restrict the right to freedom of association for any number of government purposes beyond “national security or public security, public order (*ordre public*), public health or morals, or the protection of the rights and freedoms of others.”

C. Necessary in a Democratic Society

³² 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); *See also* IACHR Report, *supra* note **Error! Bookmark not defined.** at ¶166.

³³ *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>. *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>.

³⁴ *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>. *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> (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).

³⁵ *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>.

³⁶ *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>.

³⁷ IACHR Report, *supra* note **Error! Bookmark not defined.**, at para 185.

³⁸ The Foreign Contribution (Regulation) Act, No. 42 of 2010; Indian Code (2010), v. 51 [hereinafter FCRA]

For restrictions to be “necessary in a democratic society” they must be proportional. The UNHRC has explained that “they [the restrictions] must be 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.”³⁹ Thus, “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.”⁴⁰ 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.⁴¹

Applying the same standard, the ECtHR has consistently held that restrictions on NGOs that are vague and potentially applicable to an exceedingly large number of parties, and that impose onerous and burdensome requirements on NGOs, are disproportionate to the State’s purported objectives. In addition, measures that inflict overly severe punitive sanctions on NGOs that fail to comply with otherwise reasonable legal formalities are likely to be disproportionate.⁴² Similarly, drastic measures, such as the dissolution of a NGO or barring it from carrying out its primary activity, can only be proportionate in extreme cases, such as when an association incites violence or advocates for the destruction of democracy.⁴³

It is unlikely that a complete ban on access to foreign funding for groups engaged in activities of a “political nature” in order to maintain and protect a vague “national interest” would meet the UNHRC’s proportionality requirement. First, because a total ban is necessarily not the least restrictive measure available to the State. Second, because bans on access to foreign funding can lead to the *de facto* dissolution of an NGO, particularly those engaged in activities which may challenge vested domestic interests. Indeed, such activities are not only protected but prioritized under the ICCPR. 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.”⁴⁴ The proper functioning of democratic society depends upon the ability of citizens to form associations to petition their government for the redress of grievances. The UNHRC has said that “the reference to a ‘democratic society’ in the context of article 22 indicates, in the Committee’s opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably viewed by the government or the majority of the population, is a cornerstone of a democratic society.”⁴⁵ Any restriction that renders this right illusory is not permitted. In this case, the broad objective pursued by the FCRA, the broad discretion allowed the government in applying the law, and application of the total ban on access to foreign funding for those NGOs found to be of a “political nature” by the State could disproportionately

³⁹ U.N. Human Rights Committee, General Comment No. 27, *supra* note 24 at ¶14; *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>.

⁴⁰ Jeong-Eun Lee v. Republic of Korea, Communication No. 1119/2002, Views adopted on 20 July 2005, para.7.2.

⁴¹ *See id.*

⁴² *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>.

⁴³ *See Refah Partisi (the Welfare Party) v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, Eur. Ct. H.R. (2003), ¶¶ 98-100, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60936>

⁴⁴ 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).

⁴⁵ Kungurov, *supra* note 14, at ¶8.4; *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*, U.N. Human Rights Committee, Communication No. 1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005) at ¶7.2.

impact those NGOs engaged in critical human rights work, including those which address issues of government accountability or which represent vulnerable and minority populations.

IV. Conclusion

The right to freedom of association includes access to resources, including foreign funding. Any restriction on accessing foreign funds is a restriction on the freedom of association, and must be evaluated against the legal framework discussed above to meet the narrowly tailored regime developed by the UNHRC. On its face, the FCRA appears to contravene India's obligations under the ICCPR to ensure the rights of its citizens to free association because it imposes a total ban on associations' access to foreign funding on vaguely defined grounds for a broad purpose not included in the ICCPR's enumerated list of legitimate aims.