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Master 2 Mention Droit international et européen – Spécialité Droits de l'Homme, Sécurité et Développement

The access to foreign resources for civil society

Sous la direction de Madame Maja Smrkolj

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SUMMARY

LIST OF ABBREVIATIONS

§	paragraph
§§	paragraphs
AZN	Azerbaijani New Manat
CAT	United Nations Committee Against Torture
CCPR	United Nations Committee on Civil and Political Rights
CEDAW	United Nations Committee on the Elimination of Discrimination Against Women
CERD	United Nations Committee on Elimination of Racial Discrimination
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CoE	Council of Europe
CRC	United Nations Committee on the Rights of the Child
Doc.	Document
e. g.	*Exempli gratia*
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EHRAC	European Human Rights Advocacy Centre
FATF	Financial Action Task Force
HRHF	Human Rights House Foundation
HRHN	Human Rights House Network
ICCPR	International Covenant for Civil and Political Rights
ICNL	International Center for Non-for-Profit Law
id.	*Idem*
INGOs	International non-governmental organisations
IRFS	Institute for Reporter's Freedom and Safety
LES	Legal Education Society
loc. cit.	*Loco citato*
n°	Number

NCO(s)	Non-commercial organisation(s)
NED	National Endowment for Democracy
NGO(s)	Non-governmental organisation(s)
OHCHR	Office of the High Commissioner for Human Rights
OMCT	World Organisation Against Torture
op. cit.	*Opere citato*
OSCE	Organisation for Security and Cooperation in Europe
p.	Page
PACE	Parliamentary Assembly of the Council of Europe
pp.	Pages
SCAF	Supreme Council of Armed Forces
U.S.	United States
UN	United Nations
UNGA	United Nations General Assembly
v.	*Versus*
WGAD	United Nations Working Group on Arbitrary Detention

INTRODUCTION

The right to access foreign resources is at the heart of the legislative and practical developments with which civil society is confronted throughout the world. Civil society is facing a "viral-like spread of new laws"[1] under which organisations receiving funds from abroad see their operative space shrinking. In a context in which civil society receives little support from local donors in their own countries, it has been recorded that since 2012, more than hundred laws have been enacted with the aim to restrict the registration, activity, operation and funding of non-governmental organisations[2] (hereinafter 'NGOs').

This trend is particularly visible in developing and post-communist countries against human rights organisation, which are still considered as hostile and dangerous voices while exposing human rights abuses. Civil society, particularly human rights organisations, plays a major role in the development, realisation and continued protection and promotion of human rights, democracy and the rule of law. At the United Nations General Assembly (hereinafter 'UNGA') in October 2015, the Special Rapporteur on the situation of human rights in Belarus, Mr Miklós Haraszti, called the progression of restrictions to the right to access foreign funding in Europe the new Berlin Wall[3].

§1 Starting point of the pushback against civil society

The pushback against civil society has begun in the first half of the 2000s and has since grown more persistent and pernicious[4]. In this context, the UNGA adopted the Millennium Declaration. This Declaration highlighted the importance of human rights and

[1] CAROTHERS T., *The Closing Space Challenge: How Are Funders Responding?*, Carnegie Endowment for International peace, November 2015
[2] *Challenging the Closing Space for Civil Society*, Funders' Initiative for civil society, May 2016, p. 8
[3] Expression used in the interactive dialogue of the Special Rapporteur with the UNGA, 70th session, 29 October 2015. UNGA official documentation only registers the Special Rapporteur's introductory statement and not the remarks of the Special Rapporteur following the statements of States. This expression was used in the later part of those remarks. The author had the possibility to verify with two sources the veracity of the remarks.
[4] CALINGAERT D., *Resisting the Global Crackdown on Civil Society*, Freedom House, 11 July 2013 https://freedomhouse.org/article/resisting-global-crackdown-civil-society

the value of "non-governmental organisations and civil society in general"[5]. However, after the terrorist attacks of 11 September 2001 on the World Trade Centre in New York City, New York, the discourse shifted away from the positive contribution of civil society. In order to impede terrorist organisations to operate, the government of the United States of America begun to freeze assets of terrorist organisations. President George W. Bush declared "terrorists oftentimes use nice-sounding, non-governmental organisations as fronts for their activities"[6] and therefore decided to limit certain rights and freedoms that NGOs enjoyed.

In 2003, the Rose Revolution in Georgia, East Europe, broke out and marked the end of the Soviet era of leadership in the country with the eviction of President Eduard Shevardnadze. In 2004, the Orange Revolution in Ukraine was the turning point and the President of the Russian Federation, Mr Vladimir Putin, saw this country as a "battleground State in the contest for political influence"[7] between the Russian Federation and the West. Mr Vladimir Putin perceived this revolution to be the result of Western funding of Ukrainian civil society rather than an authentic response to electoral fraud. These "Colour Revolutions" challenged autocratic governments and led to a global "democratic recession"[8]. Consequently the promotion of democracy and human rights had become synonymous for "Western-imposed regime change"[9]. International support for local organisations involved in the revolutions led Eastern governments to declare that the political changes were orchestrated by "Western governments and private philanthropists, acting from behind the scenes"[10]. These countries are no longer considered to be in transition, they are now focusing on the consolidation of governmental institutions and State power. All of them also joined international instruments guaranteeing the rule of law, such as the International Covenant on Civil and Political Rights (hereinafter 'ICCPR'), or institutions with such a mission, such as the Council of Europe (hereinafter 'CoE').

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[5] UNGA, *United Nations Millennium Declaration*, UN Doc. A/55/L.2, 8 September 2000, § 30
[6] President Bush, "President Freezes Terrorists' Assets," Remarks on Executive Order, U.S. Department of State Archive, 24 September 2001, available at: http://2001-2009.state.gov/s/ct/rls/rm/2001/5041.htm .
[7] RUTZEN D., "Aid barriers and the rise of philanthropic protectionism", *International Journal of Not-for-Profit Law, volume 17, n° 1*, March 2015
[8] DIAMOND L., *The Democratic Rollback: the Resurgence of the Predatory State*, Foreign Affairs, March/April 2008
[9] CAROTHERS T. & BRECHENMACHER S., *Closing Space, Democracy and Human Rights support under fire*, Carnegie Endowment for International Peace, 2014, p. 25
[10] CAROTHERS T. & BRECHENMACHER S., Op. cit. p. 26

§2 Development of legislation against access to foreign resources

As a sort of culmination point of the crackdown against NGOs, in 2012 the Russian Federation adopted a law requiring non-commercial organisations (hereinafter 'NCOs') receiving international funds and engaged in political activities to register with the Ministry of Justice as "foreign agents"[11]. In Belarus and Azerbaijan civil society organisations have the obligation to register any grants agreements. In Ethiopia, societies and charities are not able to receive more than ten percent of their total income from foreign sources[12]. This complex and lengthy procedure subjects the recipients of international grants to political vetting[13]. This research will analyse the legal context of the access to foreign resources in Eastern Europe countries, mostly focusing on Azerbaijan, Belarus and the Russian Federation. Other countries, such as Ethiopia, Israel, or Egypt will be examined or referred to as examples of restrictions worldwide.

As a result of their human rights activities, human rights defenders are facing risks and are often subjects of serious abuses. Hence, they need definite and enhanced protection at local, national and international levels. States, as primarily responsible for the protection of human rights defenders, have both positive and negative obligations under international law. First, States have the positive obligation to protect human rights defenders from abuses by third parties and to exercise due diligence in doing so[14]. They also have to take proactive measures to support the full realisation of the rights of human rights defenders. States have the negative obligation to refrain from any violations or abuses of the rights of human rights defenders because of their activity. Moreover States have the obligation to create and maintain a safe and enabling environment for civil society. This includes effective protection of dignity, integrity, liberty and security of human rights defenders. A safe and enabling environment encompasses the realisation of other fundamental freedoms and human rights such as the rights to freedom of opinion and expression, the right to

[11] ICNL, "NGO Law Monitor: Russia", last updated 26 August 2016, available at: http://www.icnl.org/research/monitor/russia.html
[12] ICNL, "NGO Law Monitor: Ethiopia", last updated 30 January 2016, available at: http://www.icnl.org/research/monitor/ethiopia.html
[13] RUTZEN D., op. cit., p. 5
[14] Id.

participate in public affairs, freedom of movement, the right to communicate with international bodies, including international and regional human rights mechanisms[15].

Despite legal guarantees enriched in international and regional law to protect the right to freedom of association, three causes to the "global crackdown"[16] against civil society emerge. Firstly, post-communist governments see the possibility of foreign funding as a western interference in their internal affairs. Secondly, governments have realized the power of civil society to raise human rights violations, particularly after pro-democracy uprising and the revolutionary waves in Eastern European countries. Finally, States are using counter-terrorism measures and the fight against money-laundering as legitimate means to curb foreign funding.

§3 The reaction of the international community to the crackdown against civil society

In reaction to the crackdown against civil society, the United Nations (hereinafter 'UN') Human Rights Council passed a resolution on "civil society space" in 2013. The resolution enumerates a number of recommendations for States to follow in order to promote an enabling and operating environment for civil society at the national level. The resolution urges States to "create and maintain, in law and in practice, a safe and enabling environment in which civil society can operate free from hindrance and insecurity"[17]. The resolution also calls on States to "acknowledge publicly the important and legitimate role of civil society in the promotion of human rights, democracy and the rule of law, and to engage with civil society to enable it to participate in the public debate on decisions that would contribute to the promotion and protection of human rights and the rule of law and of any other relevant decisions"[18]. A few months later, at the twenty-fifth session of the UN Human Rights Council, Secretary-General Ban Ki-Moon recalled that "a free and

[15] Id.
[16] SHERWOOD H. et al., "Human rights groups face global crackdown 'not seen in a generation'", *The Guardian*, 26 August 2016, available at: https://www.theguardian.com/law/2015/aug/26/ngos-face-restrictions-laws-human-rights-generation
[17] UN Human Rights Council, Resolution "Civil society space: creating and maintaining, in law and in practice, a safe and enabling environment", 9 October 2013, UN doc. A/HRC/RES/24/21
[18] Id.

independent civil society is the foundation for healthy, responsive governance at the local, national and global levels"[19].

More specifically to the right to access foreign support, the Human Rights Council also passed a resolution on the protection of human rights defenders[20] in 2013. The Council expressly calls upon States "to ensure that they do not discriminatorily impose restrictions placed on potential sources of funding aimed at supporting the work of human rights defenders (…), and that no law should criminalise or delegitimise activities in defence of human rights on account of the origin of funding thereto"[21]. This resolution is important as it expressly recognises the negative impact of the restrictions on the access to foreign funding. Furthermore, the resolution constitutes the first international legal document instituting that the right to access foreign support is part of the right to freedom of association and can only be restricted within the conditions foreseen for such restrictions by international law.

Foreign funding is often the only way civil society can continue to exist and operate in countries where authorities restrict more and more civil society space. Restrictions to access to such funding are therefore at the heart of the current legal developments. The capacity of NGOs to seek, receive and use foreign resources presupposes that these NGOs exist and consequently that freedom of association is respected[22]. Laws related to foreign resources have a significant impact on the freedom of association. On one hand they can strengthen the organisation by empowering its capacity to work and on the other hand they can "subjugate associations to a dependent and weak position"[23]. Therefore, inappropriate restrictions on foreign resources have repercussion on the enjoyment of the right to freedom of association but also undermine civil, political, economic, social and cultural rights as a whole.

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[19] UN Secretary-General Ban Ki-Moon, video message to the 25th Session of the Human Rights Council, 3 March 2014, available at http://www.ohchr.org/EN/NewsEvents/Pages/HRC25.aspx

[20] UN Human Rights Council, Resolution "Protecting human rights defenders", 15 March 2013, UN doc. A/HRC/22/L.13

[21] UN doc. A/HRC/22/L.13, op. cit., point 9

[22] Annual Report, "Violations of the right of NGOs to funding: from harassment to criminalisation", The Observatory for the protection of human rights defenders, 2013, p. 7

[23] UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 24 April 2013, UN doc. A/HRC/23/39, §9

The way in which governments enact laws on freedom of association and their practical implementation reflects the state of democracy in a country[24]. Indeed a restrictive approach to civil society space, particularly human rights NGOs with a watchdog function, is incompatible with a pluralist democracy[25]. A pluralist democracy needs to "guarantee the work of all NGOs without undue interference in their internal functioning, unless there are objective reasons for doing so"[26]. The restrictions on foreign funding are part of a broader crackdown on independent civil society and a larger shrinking of political space for activism and opposition[27].

§4 Definitions

The right to freedom of association is prescribed and protected under article 22 of the ICCPR and article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'ECHR'). Both texts ensure individuals the right to associate with others, "including the right to form and join trade unions for the protection of his interests". The right to freedom of association can be enjoyed individually or by an association in the "performance of activities and in pursuit of the common interests of its founders and members"[28]. The right to freedom of association is a fundamental human right that is at the core of the functioning of a democratic society and is an essential prerequisite for the enjoyment of other human rights[29].

The term 'civil society' can include many different actors such as but not limited to, human rights defenders, human rights organisations, coalitions and networks, unions, social movements, or associations of victims of human rights violations[30]. These civil society actors are individuals or groups of individuals who "voluntarily engage in forms of

[24] JAGLAND T., *State of democracy, human rights and the rule of law, a security imperative for Europe*, Report by the Secretary General of the Council of Europe, 18 May 2016
[25] Id.
[26] Id.
[27] CAROTHERS T. & BRECHENMACHER S., op. cit., p. 15
[28] ECtHR, *Refah Partisi (the Welfare Party) and others v. Turkey*, Grand Chamber, Application n° 41340/98, 41342/98, 41343/98 and 41344/98, judgment of 13 February 2003, §§ 87-88
[29] CoE, *Compilation of Venice Commission Opinions on Freedom of Association*, Venice Commission, 3 July 2014, CDL-PI(2014)004, § 2.2
[30] *Working with the United Nations Human Rights Programme, a Handbook for civil society*, OHCHR, 2008, HR/PUB/06/10/Rev.1, p. vii

public participation and action around shared interests, purposes or values that are compatible with the goals of the United-Nations: the maintenance of peace and security, the realisation of development and the promotion and respect of human rights"[31]. This research will only focus on human rights NGOs and human rights defenders associations. NCOs, also called non-profit organisations, will also be examined. An NCO is defined as an organisation that uses its extra income to further achieve its mission or purpose rather than distributing it to the organisation's shareholders as profit. Trade unions or social movements will be excluded from the study as the major restrictions on the access to foreign funding concern human rights organisations. Civil society actors occupy the civil society space, the environment where civil society organisations operate and work. This space is also the place where relationships among civil society actors, the State, private actors, and the society are created.

The word 'resources' covers a large concept, which includes financial transfers (donations, grants, social investments, etc.), forms of financial assistance from natural and legal persons, in-kind donations (contribution of goods, services, real property, etc.), material resources, human resources, solidarity, etc.[32]. The present research will only focus on the issue of financial resources, which encompasses monetary transfers, in-kind donations and other forms of financial assistance. Moreover this research will not deal with domestic funding but will primarily focus on the issue of foreign or international funding provided by natural and legal persons, foundations, associations, governments and international organisations. Foreign funding is considered to be prohibited when the legislation places a strict ban on the receipt of foreign funds, and restricted when the law places at least one restriction on the receipt of foreign funds (e.g. governmental approval or the routing of foreign funds though a bank account).

Associations play a central role in "achieving goals that are in the public interest"[33] and are crucial actors in supporting the protection and promotion of all human rights. The active involvement of human rights defenders is essential to ensure the achievement of an

[31] *A Practical Guide for civil society, Civil society space and the United Nations Human Rights system*, OHCHR, 2014, p.2
[32] UN doc. A/HRC/23/39, op. cit. §10
[33] Guidelines on Freedom of association, ODIHR, 2015, p. 5

effective implementation of international human rights. Civil society is able to assist States to guarantee full respect for fundamental freedoms, human rights, democracy and the rule of law. Governmental authorities should respect the dissenting voices in their countries which may be expressed through peaceful ways. The international community also considers that it is important for State to "acknowledge the important and legitimate role of human rights defenders"[34].

§5 Research through a traineeship

In order to link this research with her traineeship, the author decided to focus her study on States where the Human Rights House Foundation (hereinafter 'HRHF') is active and to analyse cases of NGOs that are part of the Human Rights House Network (hereinafter 'HRHN'). The HRHF is the secretariat of HRHN which unites more than one-hundred independent organisations in sixteen Human Rights Houses. Those Houses exist in thirteen countries in Eastern Europe, Western Balkans and South Caucasus. The aim of HRHF is to protect, empower and support human rights defenders, their organisations and their work[35].

During her traineeship at HRHF in Geneva, the author has had the opportunity to work on a report exploring how foreign donors should adapt their granting methods. The report is constituted of general principles that should govern foreign donors in the process of foreign funding. The work for the report has been conducted in parallel of this research as the two subjects are inherently linked. Not only are NGOs facing limitations to access foreign funding by their own government, they are also confronted with restrictions imposed by foreign donors themselves. Both studies are complementary as they concern the same subject, the access to foreign resources for civil society, but from two different angles.

By participating in debates, conferences, sessions at the UN Human Rights Council and by interviewing civil society actors, the author has been able to gather relevant and

[34] Guidelines on the protection of Human Rights Defenders, OSCE & ODIHR, 2014, p. 1
[35] HRHF website, available at: http://humanrightshouse.org

precise information on the subject and to widen her knowledge on the right to freedom of association and the active work of civil society. HRHF's work is mostly focusing on the right to freedom of association and peaceful assembly, the right to freedom of expression and the right to be a human rights defender.

A large number of NGO partners of HRHF operate in countries where governments have decided to restrict the access to foreign grants. In these cases, external funding is the only resource human rights organisations have in order to exist and work. International funding is considered to be a lifeline for organisations operating on sensitive and complex issues, such as human rights advocacy, election monitoring or anticorruption work, for which domestic funding is rare and insufficient. In this context it is important to consider the link between restrictions on the access to foreign resources and the existence itself of organisations working in the protection and promotion of human rights. This leads to the following questioning: how do State regulations on the access to foreign resources impact fundamental freedoms and most particularly the right to freedom of association? The purpose of this research is to analyse the legality of such restrictions and the effect of excessive restrictions.

While there is no explicit provision on the right to access foreign funding in international and European binding instruments, it is possible to affirm that international and European bodies have recognised an obligation for States to allow civil society to seek, receive and use foreign resources as part of the right to freedom of association (PART ONE). Despite the formal recognition of the right to access foreign funding as a human right, restrictions exist and violate the fundamental freedoms of civil society (PART TWO).

PART ONE

THE RECOGNITION OF THE RIGHT TO ACCESS FOREIGN RESOURCES AS INHERENT TO THE RIGHT TO FREEDOM OF ASSOCIATION

The right to freedom of association is protected by international human rights law through the Universal Declaration of Human Rights[36] and in international and regional binding instruments such as: the International Covenant on Civil and Political Rights of 16 December 1966[37], the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950[38], the American Convention on Human Rights of 22 November 1969[39] and the African Charter on Human and People's Rights of 27 June 1981[40].

This research will only focus on the United Nations human rights system and the European human rights system as their instruments and their human rights protection mechanisms are the ones used in the countries studied. As there is no explicit provision in international or European binding instruments on the right to receive foreign resources, non-legally binding texts have been developed in order to protect this process and recognise it as a human right.

The analysis of these texts has shown that international and European bodies have recognized that the right to seek, receive and use foreign resources is an integral part of the right to freedom of association and therefore, that States have an obligation to allow civil society to access foreign resources (Chapter I). However under international law, the right to freedom of association is not absolute. If the right to seek, receive and use foreign resources is an integral part of the right to freedom of association, it also means that States have the right to limit the access to foreign resources by restricting the right to freedom of association (Chapter II).

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[36] UNGA, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)
[37] UNGA, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
[38] CoE, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, best known as European Convention on Human Rights
[39] Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969
[40] Organization of African Unity, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

CHAPTER I – THE OBLIGATION OF STATES TO ALLOW CIVIL SOCIETY TO SEEK, RECEIVE AND USE FOREIGN RESOURCES

Under international law, States have the obligation to take positive measures to establish and maintain an enabling environment for associations. They must refrain from unduly obstructing the exercise of the right to freedom of association, and respect the privacy of associations[41]. However, there is no expressly binding provision that obligates States to guarantee to civil society a right to access foreign funding. Therefore the recognition of the right to seek, receive and use foreign resources has evolved through non-legally binding documents. In order to fully understand the origin of the right to access foreign resources it is important to analyse it at the international level (Section1) but also at the European level (Section 2).

Section 1 – The international legal framework

When considering the international legal framework regarding the right to access funding, it is important to recall the functioning of the UN human rights system (§1) before analysing the outcomes of UN bodies in relation to the right to access foreign funding and the right to freedom of association (§2).

§1 The UN human rights system

At international level, the Office of the High Commissioner for Human Rights (hereinafter 'OHCHR') represents the world's commitment to universal ideals of human rights and dignity. Its representative, the High Commissioner for Human Rights, is the principal human rights official of the UN. The OHCHR works to "offer the best expertise

[41] UN Special Rapporteur on the rights to freedom of peaceful assembly and of association website, available at: http://freeassembly.net/about/freedoms/

and support to the different human rights monitoring mechanisms in the UN system"[42]: the UN Charter-based bodies and bodies created under the international human rights treaties. The Charter-based bodies are composed of the former Commission on Human Rights, the Human Rights Council and special procedures. The treaties-based bodies are composed of independent experts assigned to monitor State parties' compliance with their treaty obligations and elected by such State parties.

The Human Rights Council replaced the Commission on Human Rights and held its first meeting on 19 June 2006. This intergovernmental body includes forty-seven elected UN Member States serving for a period of three years. The Human Rights Council is empowered to "prevent abuses, inequity and discrimination, protect the most vulnerable and expose perpetrators"[43]. Special procedures have been established to address either specific country situations or thematic issues in all parts of the world. Special procedures can be of two sorts: an individual or a working group. These independent experts, appointed by the Human Rights Council as 'special rapporteur', 'independent expert' or as member of a 'working group', hold a mandate to "examine, monitor, advise and publicly report on human rights situations in specific countries, country mandates, or on human rights issues of particular concern worldwide, thematic mandates"[44]. They all have the duty to report to the Human Rights Council on their findings and recommendations. They are able to address situations and abuses in all parts of the world without the requirement for countries to have had ratified a human rights instrument. Therefore their role is crucial as they might be the only mechanism to alert the international community to certain human rights violations. There are now forty-one thematic mandates and fourteen country mandates[45]. Their reports cannot be considered as binding but constitute doctrine.

Besides the UN Charter, there are ten core international human rights treaties. It is recorded that since 1948 and the adoption of the Universal Declaration of Human Rights, all UN Member States have ratified at least one international human rights treaty and

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[42] UN OHCHR, Human Rights Bodies, available at: http://ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx
[43] Id.
[44] Id.
[45] UN OHCHR, Special Procedures of the Human Rights Council, Introduction, available at: http://ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx

eighty percent have ratified four or more[46]. One hundred and sixty-eight States have ratified the ICCPR and therefore assume a legal obligation to implement the rights recognized in the treaty[47]. By ratifying an international text, States commit to put in place domestic measures and legislation compatible with the treaty obligations. The ten human rights treaty bodies are composed of committees of independent experts, which monitor the implementation of the international human rights treaties. The Human Rights Committee monitors the implementation of the ICCPR and its protocols by its State parties. The Human Rights Committee examines reports submitted by State parties and expresses its concerns and recommendations to them in the form of concluding observations. It also considers inter-State complaints and examines individual complaints with regard to alleged violations of the ICCPR by State parties. It may also publish general comments in which it gives its interpretations of the content of the human rights provisions.

In October 2010, the Human Rights Council adopted resolution 15/21 in which it "reaffirmed that everyone has the rights to freedom of peaceful assembly and of association and that no one may be compelled to belong to an association; (…) Recognized also that the rights to freedom of peaceful assembly and of association are essential components of democracy, providing individuals with invaluable opportunities to, inter alia, express their political opinions (…)"[48]. This resolution also established the mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association. The role of the mandate holder is to gather relevant information relating to the promotion and protection of the rights to freedom of peaceful assembly and of association, to study developments, trends and challenges in relation to the exercise of these rights, and to make recommendations on means to ensure the promotion and protection of these rights.

The different organs of the UN human rights system have repeatedly claimed that the right to freedom of association includes the right to seek, receive and use foreign funding (§2).

[46] UN OHCHR, Human Rights Bodies, loc. cit.
[47] OHCHR, Status of ratification of a core international human rights treaty or its optional protocol, available at: http://indicators.ohchr.org
[48] UN Human Rights Council, Resolution on the rights to freedom of peaceful assembly and of association, 6 October 2010, UN doc. A/HRC/RES/15/21

§2 The right to access foreign resources as an integral part of the right to freedom of association

The right to freedom of association is enshrined in article 22 of the ICCPR. It states as follows:

> "1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right."

The Human Rights Council has recognized that civil society is an essential element for the promotion of human rights, democracy and the rule of law[49]. States have the positive obligation to create and maintain a safe and enabling environment in which civil society actors can work free from hindrance and insecurity[50]. This safe and enabling environment is complete when the right to freedom of association is fully respected and promoted. If the access to resources is restricted or prohibited, the exercise of the right to freedom of association is severely curtailed and rendered null.

Although the text of article 22 of the ICCPR does not explicitly refer to the right of civil society actors to access funding, the Special Rapporteur on the right to freedom of peaceful assembly and of association, Mr Maina Kiai, has underlined that the provision contains the ability of NGOs and individuals to seek, receive and use resources, be it human, material and financial from public and private, domestic and foreign, sources[51]. The Special Rapporteur affirms that the ability of civil society actors to access funding from domestic, foreign and international sources is an integral part of the right to freedom

[49] UN Human Rights Council, Resolution "Civil society space: creating and maintaining, in law and in practice, a safe and enabling environment", 27 September 2013, UN doc. A/HRC/24/L.24
[50] UN Special Rapporteur on the rights to peaceful assembly and of association, *Protecting civil space and the right to access resources, General Principles*, Community of Democracies, 2015
[51] UN doc. A/HRC/23/39, op. cit., pp. 4-6.

of association, and not a separate right[52]. Resources, whether domestic or foreign, are of a central importance in effectively exercising the right to freedom of association. Already in a report from May 2012, the Special Rapporteur highlighted the principle that "any associations, both registered or unregistered, should have the right to seek and secure funding and resources from domestic, foreign, and international entities"[53].

In addition, the Human Rights Council has called upon States to "ensure that reporting requirements for civil society do not inhibit functional autonomy of association and do not discriminatorily impose restrictions on potential sources of funding"[54]. In another resolution, the Human Rights Council recalled States to ensure that their legislations and practices do not hinder the work of civil society[55]. The Human Rights Council "underlines the importance of the ability to solicit, receive and utilize resources for their work"[56]. In March 2013, in a resolution on the protection of human rights defenders[57], the Human Rights Council took an important step forward by directly addressing the issue of funding in a resolution regarding the protection of human rights defenders.

Although the resolutions of the Human Rights Council are not legally binding, they still have a certain force. States have to vote in order for a resolution to be passed by the Human Rights Council. By voting in favour of a resolution on a specific subject or for the establishment of a Special Rapporteur, States commit themselves to the provisions of the resolution. On the contrary when a State votes against a resolution, it clearly shows its refusal to be bound by the resolution. For instance, at the thirty-first Session of the Human Rights Council in March 2016, Egypt, Cuba, China, Pakistan and the Russian Federation proposed amendments to the draft resolution on the protection of human rights defenders in order to remove any reference to the term "human rights defender", to deny the

[52] UN doc. A/HRC/23/39, op. cit., §20
[53] UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 21 May 2012, UN doc. A/HRC/20/27, §68
[54] UN doc. A/HRC/22/L.13, loc. cit.
[55] UN doc. A/HRC/L24/24, loc. cit.
[56] Id.
[57] UN doc. A/HRC/22/L.13, loc. cit.

legitimacy of their work and to weaken their protection against reprisals and attacks[58]. The amendments were rejected by other States and the resolution was finally adopted with thirty-three votes in favour, six against and eight abstentions. The Member States voting against the adoption of the resolution were Burundi, China, Cuba, Nigeria, the Russian Federation and Venezuela. In China, NGOs seeking international resources must obtain approval from a specific regulatory agency[59]. In some cases organisations need approval to establish a bank account. Notice 63 on Issues Concerning the Administration of Foreign Exchange Donated to or by Domestic Institutions has been issued in 2010 in China. This formal notice requires national NGOs to comply with new and more complex rules for receiving and using foreign fund. Many NGOs have been able to continue accessing foreign resources, but some have experienced difficulties in particular when the funding is coming from the National Endowment for Democracy (hereinafter 'NED'), the Open Society Institute and the International Republican Institute, international donors perceived as sensitive due to their "democracy promotion" work[60]. In Venezuela the main legal barrier affecting resources comes from the political context that affects all Venezuelan sectors[61]. Any donations must be converted to Venezuelan local currency; violations of exchange control laws can lead to fines and imprisonment. In addition, the Law for Protection of Political Liberty and National Self-determination was passed in 2010. It targets NGOs dedicated to the defence of political rights and other political objectives. It prevents these organisations from receiving any income from international sources. Violations of this law can lead to a fine of double the amount received from the international source[62].

These regulations and the Russian Foreign Agents Law reflect the unwillingness of certain States to support and comply with resolutions of the Human Rights Council and the trend to counter its legitimacy. The same reasoning on the legal nature of such resolutions upon States also applies to UNGA resolutions.

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[58] International Service for Human Rights, *Human Rights Council: Adopt resolution on human rights defenders and reject hostile amendments*, 22 March 2016, available at: http://www.ishr.ch/news/human-rights-council-adopt-resolution-human-rights-defenders-and-reject-hostile-amendments

[59] NGO Law monitor, China, ICNL, available at: http://www.icnl.org/research/monitor/china.html

[60] Id.

[61] NGO Law monitor, Venezuela, ICNL, available at: http://www.icnl.org/research/monitor/venezuela.html

[62] Id.

Numerous other UN Human Rights bodies have also stressed the importance of the free access to funding for civil society. UN committees have highlighted the crucial role that States should play in supporting civil society actors, directly or indirectly, in the process of access to funding. Consequently, States must create a "conductive legal framework, institutional environment and effective practices in this regard"[63]. UN committees have denounced cases of patent violations by State parties of the right to freedom of association, such as restricting the access to foreign resources or arbitrarily imposing excessive taxes on NGOs or prior authorisation. Moreover they have reminded States on the essential role of financial support for civil society active in the promotion and protection of human rights[64].

The Human Rights Committee observed that "the right to freedom of association related not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by article 22 extends to all activities of an association"[65]. Consequently fundraising activities are also protected under article 22 of the ICCPR and any restrictions that impede the ability of association to pursue their statutory activities constitute an interference with article 22[66].

The Committee on Economic, Social and Cultural Rights (hereinafter 'CESCR') recognized the importance of the issue of access to foreign funding when it expressed "deep concern" regarding Egypt's Law on Civil Association and Institutions of 1999, which "gives the Government control over the right of NGOs to manage their own activities, including seeking external funding"[67].

The Committee on the Elimination of Racial Discrimination (hereinafter 'CERD') has called on Ireland to financially assist human rights organisations[68].

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[63] Annual Report, *Violations of the right of NGOs to funding: from harassment to criminalisation*, op. cit., p. 16
[64] Id.
[65] UN Human Rights Committee, Communication No. 1274/2004, *Viktor Korneenko et al. v. Belarus*, 10 November 2006, UN doc. CCPR/C/88/D/1274/2004, § 7.2
[66] UN doc. HRC/23/39, op. cit., §16
[67] UN Committee on Economic, Social and Cultural Rights, Report on the twenty-second, twenty-third and twenty-fourth sessions, Egypt, UN doc. CESCR E/2001/22, 2000, §§ 161 and 176
[68] UN Committee on the Elimination of all forms of Racial Discrimination, Concluding Observations of the CERD, Ireland, UN doc. CERD/C/IRL/CO/2, April 2005, §12

The Committee on the Elimination of Discrimination Against Women (hereinafter 'CEDAW') recommended Algeria to "enable the associations working on gender equality and empowerment in a developmental context to receive funding from international donors without unnecessary administrative requirements, which may impair such activities"[69].

The Committee on the Rights of the Child (hereinafter 'CRC') also underlined the importance for NGOs to receive adequate funding to effectively operate. It called on the Central African Republic to do its utmost to "strengthen the role played by civil society though the provision of support to civil society in accessing resources"[70].

The Committee against Torture (hereinafter 'CAT'), in Concluding Observations on Belarus, was concerned about several reports on refusal to register independent NGOs, threats and criminal acts, arrests, acts of intimidation[71]. The CAT recommended Belarus to "acknowledge the crucial role of NGOs in assisting the State party fulfilling its obligations under the Convention, and enable them to seek and receive adequate funding to carry out their peaceful human rights activities"[72].

In 2012, the CAT was worried about the Russian approach toward the work of organisations and individuals that report and monitor human rights conditions in the country. The CAT was seriously concerned about the requirement for NGOs receiving foreign financial support to register and identify themselves publicly as 'foreign agents'. This term definitely has a negative approach and threatens human rights defenders. Therefore the CAT recommended Russia to "recognize that human rights defenders are at risk and have been target due to the performance of their human rights activities (…); amend its legislation requiring human rights organisation that receive foreign funding to

[69] UN Committee on the Elimination of Discrimination Against Women, UN doc. CEDAW/C/DZA/CO/3-4, 23 March 2012
[70] UN Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child – Central African Republic, UN doc. CRC/C/15/Add.138, 18 October 2000, §§ 22 and 23
[71] UN Committee Against Torture, Concluding Observations of the Committee against Torture – Belarus, UN doc. CAT/C/ BLR/CO/4, 7 December 2011
[72] Id. § 25

register as "foreign agents"; "repeal the amended definition of the crime of treason in the Criminal Code; and review its practice and legislation"[73].

The problem of the access to foreign funding is not isolated but exists worldwide, including in the "global north"[74]. The CEDAW recommended Denmark to "ensure that an adequate level of funding is made available for the NGOs to carry out their work, including to contribute to the work"[75].

The right to seek, receive and use foreign funding is therefore not explicitly recognized by international human rights provisions but UN human rights bodies have repeatedly recognised the right to access foreign funding as essential for the exercise of the right to freedom of association. It is important to recall the nature of the recommendations emitted by UN Committees. When a State ratifies an international treaty it commits itself to the provisions of the text but also to the mechanism which controls the good implementation and respect of the provisions of the treaty. In the case of the ICCPR, the mechanism of control is the Human Rights Committee, whose members are elected by the State Parties. Article 26 of the Vienna Convention on the Law of Treaties (hereinafter 'Vienna Convention') states that "every treaty in force is binding upon the parties to it and must be performed by them in good faith"[76]. Consequently, every State Party to the ICCPR is bound by its provisions. The Human Rights Committee being the foreseen mechanism to oversee the implementation of such bounding obligations, its finding cannot be seen simply as informative. For a State to be willing in good faith to implement its obligations deriving from the ICCPR, it should follow the interpretation of the Committee as much as possible, although no sanction mechanism is foreseen either.

Only two international instruments refer explicitly to the right to access funding: the Declaration on the Elimination of All Forms of Intolerance and of Discrimination

[73] UN, CAT Concluding observations on the fifth periodic report of the Russian Federation, adopted by the Committee at its forty- ninth session, 11 December 2012, UN doc. CAT/C/RUS/CO/5
[74] UN doc. A/HRC/20/27, loc. cit.
[75] UN CEDAW, Concluding Observations of the Committee on the Elimination of Racial Discrimination – Denmark, UN doc. CERD/C/DNK/CO/18, 27 August 2010, § 43
[76] UN, *Vienna Convention on the Law of Treaties*, 23 May 1969, UN, Treaties Series, volume 1155, p. 331

Based on Religion or Belief[77] and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms[78] (hereinafter 'Declaration on Human Rights Defenders').

The first one was proclaimed by the UNGA in 1981. Its Article 6(f) states that the right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the freedom "to solicit and receive voluntary financial and other contributions from individuals and institutions". It is important to note that no distinction is made between domestic and foreign sources. The right to solicit and receive funds is protected regardless of the source of the funding.

The second one, the Declaration on Human Rights Defenders, explicitly recognizes the right to access funding as a "self-sanding substantive right"[79]. Article 13 is read as follows:

> "Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration"[80].

The UN Special Rapporteur on the situation of human rights defenders has emphasized the importance of funding in a report where it states that: "in order for human rights organisation to be able to carry out their activities, it is indispensable that they are able to discharge their functions without any impediments, including funding

[77] UNGA, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN doc. A/RES/36/55, 25 November 1981
[78] UNGA, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms : resolution / adopted by the General Assembly*, UN doc. A/RES/53/144, 8 March 1999
[79] *Report Defending Civil Society*, World Movement for Democracy, June 2012, p.48
[80] UN Declaration on Human Rights Defenders, Article 3: "Domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed and within which all activities referred to in the present Declaration for the promotion, protection and effective realization of those rights should be conducted."

restrictions"[81]. When individuals are denied the access to the resources needed to carry out activities and operate an organisation, the right to freedom of association becomes void[82].

Article 13 covers the different phases of the funding process. The Declaration on Human Rights Defenders obliges States to adopt legislative, administrative and other measures to facilitate, or at least not to hinder, the effective exercise of the right to access funding. It is important to stress that while the Declaration on Human Rights Defenders protects the right to solicit, receive and utilize funds, it does not place any restrictions on the sources of the funding.

Moreover, the Special Rapporteur on the situation of human rights defenders underlined that this Declaration protects the rights to "receive funding from different sources, including foreign ones"[83]. Given the limited resources available for human rights organisations at the local level, legal requirements of registration or of prior authorization for international funding may seriously affect the ability of human rights defenders to carry out their activities. They even have seriously put at risk the very existence of human rights organisations and civil society as a whole[84]. States should allow and facilitate the access to foreign resources for civil society as part of international cooperation. International cooperation is a vital condition for the "full achievement of the purposes of the United Nations"[85] and is essential to the prevention of violations of human rights and fundamental freedoms.

Already in 2004, the Special Representative of the Secretary-General on human rights defenders, Mrs Hina Jilani, affirmed that "the ability of human rights defenders to carry out their activities rests on their ability to receive funds and utilize them without

[81] UN, Report of the Special Rapporteur on the situation of human rights defenders, 4 August 2009, UN doc. A/64/226, §91
[82] UN Special Rapporteur on the situation of human rights defenders, *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011, p. 95
[83] UN, Report of the Special Rapporteur on the situation of human rights defenders, 28 July 2011, §70, UN doc. A/66/203
[84] UN, Report of the Special Representative of the Secretary-General on human rights defenders, 1 October 2004, §77, UN doc. A/59/401
[85] UN Human Rights Council, Resolution "Enhancement of international cooperation on the field of human rights", 21 June 2013, UN doc. A/HRC/RES/23/3

undue restriction, in conformity with article 13 of the Declaration"[86]. Despite the fact that the Declaration on Human Rights Defenders is not a legally binding text, it is argued that its adoption by the General Assembly represents a "strong global political commitment to the principles enshrined"[87].

Therefore States have a double obligation: firstly they should refrain from restricting means of funding of human rights organisations, secondly they should allow and facilitate human rights organisations' access to funds in the context of international cooperation[88].

As there is no legally binding provision on the right to access foreign funding, international bodies have had to develop an indirect obligation through the right to freedom of association for States to allow civil society access to international funding. An important step forward in the process of funding would be to create a binding provision in order for States to have no other choice but to comply with international obligations. The second section of this chapter will now examine the right to access foreign funding as part of the right to freedom of association through the work of the different European bodies (Section 2).

Section 2 – The European legal framework

It is important to first recall the Council of Europe's human rights system (§1) before analysing the outcomes of the European bodies on the right to access foreign funding in relation to the right to freedom of association (§2).

[86] UN doc. A/59/401, loc. cit.
[87] CAROTHERS T. & BRECHENMACHER S., Op. cit., p. 42
[88] UN Special Rapporteur on the rights to peaceful assembly and of association*, Protecting civil space and the right to access resources General Principles*, Community of Democracies, 2015

§1 The Council of Europe's human rights system

The Council of Europe was founded in 1949. It unites forty-seven countries, including twenty-two countries from Central and Eastern Europe. The statutory bodies of the Council of Europe are the Committee of Ministers and the Parliamentary Assembly (hereinafter 'PACE'). The Committee of Ministers is the Council's decision-making body, it is composed of the ministers of foreign affairs of each Member State or their permanent diplomatic representatives in Strasbourg. The Committee of Ministers decides the policies and approves the Council of Europe's budget and programme of activities.

The PACE is constituted of 318 members of parliament from the forty-seven Member States. The PACE elects the Secretary General, the Human Rights Commissioner and the judges of the European Court of Human Rights (hereinafter 'ECtHR'). The ECtHR is the permanent judicial body, which guarantees for all individuals the rights protected by the ECHR.

The Conference of International NGOs (hereinafter 'INGOs') includes four hundred international NGOs and provides essential links between politicians and the public. It brings the voice of civil society to the Council of Europe. The Expert Council on NGO Law was created in 2008 by the Conference of INGOs with the goal of creating an enabling environment for NGOs and civil society in general by examining national laws in relation of NGOs and their implementation. It provides advice on means to bring national legislation and practice into line with the standards of the Council of Europe.

Finally the European Commission for Democracy through Law (hereinafter 'Venice Commission') was established in 1990 by eighteen Council of Europe Member States. Currently it is composed of sixty Member States, including twelve non-European countries and Kosovo. The Venice Commission provides legal advice to its Member States and support to States willing to bring their legislation and practice into line with European standards in the field of democracy, human rights and the rule of law.

As there is no explicit provision in the ECHR on the right to access foreign funding, the different bodies of the Council of Europe have recognised this right as a fundamental freedom protected under article 11 ECHR (§2).

§2 The right to access foreign funding recognised as a fundamental right through the work of European bodies

The right to freedom of association is enshrined in article 11 of the ECHR. It states as follows:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to joint 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."

Just like article 22 of the ICCPR, article 11 of the ECHR does not explicitly refer to the right for individuals or organisations to access funding, domestic or foreign. However the right to access financial resources is affirmed by different Council of Europe's bodies through sources that may not have the same legal force.

In 2007, the Committee of Ministers adopted the Recommendation on the legal status of NGOs[89]. This instrument focuses on the legislator, the national authorities and the NGOs themselves. The aim of the Recommendation is to "recommend standards to shape legislation and practice vis-à-vis NGOs, as well as the conduct and activities of the NGOs

[89] CoE, *Recommendation CM/Rec (2007) 14 of the Committee of Ministers to member states on the Legal Status of Non-Governmental Organisations in Europe*, 10 October 2007, CoE doc. CM/Rec(2007)14

themselves in a democratic society based on the rule of law"[90]. The Recommendation contains a specific section regarding 'fundraising'. Paragraph 57 of the Recommendation states:

> "NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemption from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies, income from investments, rent, royalties, economic activities and property transaction, as well as incentives for donation through income tax deductions and credits.".

The Recommendation identifies as an objective for States to allow NGOs to engage freely in "any lawful economic, business or commercial activities in order to support their non-for-profit activities without any special authorisation being required"[91]. Moreover it underlines that NGOs should be "subject to any licensing or regulatory requirements generally applicable to the activities concerned"[92]. The Recommendation explicitly affirms that NGOs should be free to solicit and receive funding "not only from public bodies in their own State but also from institutional or individual donors, another State or multilateral agencies"[93]. This clearly imposes on States the obligation to allow the access for civil society to foreign resources, either cash or in-kind donations. Indeed, the role of banking facilities is crucial in the funding process, especially concerning foreign funding. For instance, in Azerbaijan if an organisation receives any funding exceeding AZN 200 (approximately 110 euros), it is required to sign a formal grant agreement. The failure to submit the agreement to the Ministry of Justice may result in a fine up to AZN 2500 (approximately 1360 euros). The only way to receive funding exceeding AZN 200 is via bank transfer. However, in a country where dissident voices are shut down, an unregistered NGO is unable to open a bank account and therefore unable to receive any foreign resources. Azerbaijan became a Member State of the Council of Europe on 25 January 2001. In 2014 Azerbaijan took over from Austria the Chairmanship for the Council of

[90] Council of Europe, *Explanatory Memorandum to Recommendation CM/Rec (2007) 14 of the Committee of Ministers to member states on the Legal Status of Non-Governmental Organisations in Europe*, December 2008
[91] CoE doc. CM/Rec(2007)14, op. cit., §14
[92] CoE doc. CM/Rec (2007)14, loc. cit.
[93] CoE doc. CM/Rec (2007) 14, op. cit. §50

Europe's Committee of Ministers. Despite its commitment to the Council of Europe's values and principles, the Azerbaijani government has continued the crackdown on its civil society. While Azerbaijani Minister of Foreign Affairs, Elmar Mammadyarov, recalled his government's support for "human rights, rule of law and democracy", a court in the capital, Baku, was sentencing several prodemocracy activists to six to eight years imprisonment[94]. Although the Recommendation is not a binding instrument, it has nevertheless legal significance. This can be assessed in light of the content of the ECHR and its interpretation by the ECtHR, as the preamble of the ECHR especially refers to a duty to develop human rights.

Moreover, in its second Annual Report, the Expert Council on NGO Law notices that in several Member States of the Council of Europe "the scope of obligations with respect to the auditing of accounts and reporting on activities is not always entirely clear and may not always be appropriate"[95]. The Expert Council further warns States to not let the public authorities use their power "to grant or withdraw funding or the participation of officials in meetings of NGO decision-making bodies to exercise undue influence on the decisions being taken by NGOs"[96].

Already in 1986 the Council of Europe adopted the European Convention on the Recognition of the Legal Personality in International Non-Governmental Organisations[97] (hereinafter 'NGO Convention'). The NGO Convention recognizes that NGOs contribute to the achievement of the aims and principles of the UN Charter and the Statute of the Council of Europe. Although the NGO Convention has only been ratified by eleven States[98], it requires its Member States to recognize the legal status of each other's national NGOs. This NGO Convention calls on States to support the trans-border nature of NGOs and withdraw any undue restriction that could prevent them from operating outside of their

[94] KNAUS G., Journal of Democracy, Volume 26, n° 3, Europe and Azerbaijan : the end of shame, July 2015
[95] CoE, *Expert Council on NGO Law, Second annual report on the internal governance of non-governmental organizations,* January 2010, § 388
[96] Id. §398
[97] Council of Europe, *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations*, (ETS No. 124), entered into force 1 January 1991
[98] The Convention has been ratified by Austria, Belgium, Cyprus, France, Greece, Netherlands, Portugal, Slovenia, Switzerland, The former Yugoslav Republic of Macedonia and the United Kingdom

home Member States. Hence, any national measure restricting or prohibiting NGOs from receiving foreign funding would go against the aims of the NGO Convention.

The Venice Commission has published opinions concerning national legislations on NGOs, especially regarding Azerbaijan. In 2014 the Venice Commission was concerned with the new amendments to the Law on NGOs adopted by the Republic of Azerbaijan. The amendments imposed more and more obligations and burdensome requirements on NGOs. According to the Venice Commission, State's authorities seem to have a too "paternalistic approach"[99] on NGOs' work and functioning. The Venice Commission highlights that it is the cumulative effect of all the stringent requirements, in addition to the broad discretion given to the executive authorities regarding the registration, operation and funding of human rights organisations, that has a "chilling effect on the civil society"[100]. Hence the Venice Commission finds that these amendments "further restrict the operations of NGOs in Azerbaijan"[101] and therefore would be a violation of their right to freedom of association.

Finally, the ECtHR has affirmed that article 1 of the First Protocol of the ECHR, which protects the right to the "peaceful enjoyment of his possessions"[102], is applicable to both natural and legal persons[103]. The ECtHR has underlined that this article does not give any guarantee of a right to acquire possessions, however the ECtHR has found that the right to property includes the right to dispose of one's property[104]. This right would consequently contain the right to make contributions to civil society organisations for lawful purposes. Moreover, the ECtHR has stressed the importance of organisations and associations, other than political parties, for the effective functioning of democracy. The

[99] CoE, Opinion on the law on non-governmental organisations 'public associations and funds) as amended of the Republic of Azerbaijan, Venice Commission, 15 December 2014, §92, CoE doc. Opinion 787/2014
[100] Id. §93
[101] Id.
[102] Article 1 of the First Protocol of the European Convention "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."
[103] *Report Defending Civil Society*, op. cit.,p. 50
[104] OVEY C. & WHITE R., *The European Convention on Human Rights*, 3rd edition, Oxford University Press, 2002

ECtHR has affirmed that "the harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively"[105].

The ECtHR has not yet examined an alleged violation of the right to freedom of association in relation to the right to access foreign funding. It has however found several cases of violation of article 11 of the ECHR when Azerbaijani authorities have arbitrarily denied or delayed the registration of NGOs[106]. Two cases will be analysed here as they are linked to the right to access foreign funding.

In 2007, the ECtHR found a violation of article 11 in the case Ramazanova and others v. Azerbaijan[107]. The applicants founded an NGO with the aim to help the homeless in Azerbaijan. Repeatedly, the Ministry of Justice refused their requests for registration on the grounds that the NGO's charter failed to satisfy relevant national legislation. In its judgement, the ECtHR underlined that the repeated failures to register the NGO amounted to a *de facto* denial to register it. Despite the fact that the organisation could have operated without being registered, it was not able to receive any grants, which are the main sources of financing for NGOs in Azerbaijan. The ECtHR expressly stated that "without proper financing, the association was not able to engage in charitable activities which constituted the main purpose of its existence"[108]. Therefore the delays and repeated refusal of registration constituted an interference with the applicant's freedom of association.

Mr Rasul Jafarov, an Azerbaijani national, is a well-know civil society activist and human rights defender. He is the co-founder and the chairman of Human Rights Club[109]; an NGO which has vainly attempted to obtain legal entity status with the Azerbaijani authorities. The main goal of the Human Rights Club is to protect fundamental freedoms

[105] ECtHR, *Gorzelik and others v. Poland*, Grand chamber, application n° 44158/98, 17 February 2004, §92
[106] See for example: ECtHR, *Nasibova v. Azerbaijan,* application n° 4307/04, 18 October 2007, or ECtHR, *Ismaylov v. Azerbaijan*, application n° 4439/04, 17 January 2008
[107] ECtHR, *Ramazanova and others v. Azerbaijan*, application n° 44363/02, 1 February 2007
[108] Id. §59
[109] Human Rights Club website, available at: http://www.civicsolidarity.org/member/551/human-rights-club

and human rights; enhance respect for human rights and arrange effective rights defence in Azerbaijan. As an active human rights defender, Mr Jafarov has helped in the drafting of several reports relating to human rights issues in Azerbaijan[110]. In 2014 Mr Jafarov was arrested and charged with the offences of illegal entrepreneurship, large-scale tax evasion and abuse of power[111]. His appeal against the detention order was rejected and later he was charged with high-level embezzlement. In April 2015, he was convicted of charges and sentenced to six and a half years' imprisonment. The applicant brought his case before the ECtHR alleging violations of article 5§§1 and 3, article 5§4, article 18 in relation with article 5, article 11 and article 34. It is under the analysis of the violation of article 5§§1 and 4 that the ECtHR expressed its concern on the issue of funding in Azerbaijan. Without registration, NGOs are facing serious difficulties such as opening bank account or receiving funding as a legal entity. Moreover, the applicant received a number of grants as an individual; practice that is not prohibited by the Azerbaijani law. The money received as grants has been spent as designated in the grant agreement, donors confirmed[112]. The ECtHR uses strong language to condemn Azerbaijani government for the refusal of registration of civil society organisations and especially the one advocating for human rights and democracy. By finding a violation of article 5 of the ECHR, the ECtHR reiterates its firm intention to denounce the unlawful arrest and detention of the applicant. It is, however, regretful that the ECtHR did not examine the case of Mr Jafarov under the article 11 of the Convention. A case is nonetheless pending before the ECtHR concerning the authorities' refusal to register the applicant's NGO[113]. The ECtHR would take an important step forward by assessing the case of Mr Jafarov in relation to the restrictions on the access to foreign funding imposed by the Azerbaijani government.

The right to property is also protected by article 17 of the Universal Declaration of Human Rights[114]. A broad interpretation of this article could lead to extending the right to

[110] Mr Jafarov has also been involved in promoting the adoption of a PACE report on political prisoners in Azerbaijan and has been working on a consolidated list of political prisoners to be presented to the CoE. He has been a speaker at CoE and UN events
[111] ECtHR, *Rasul Jafarov v. Azerbaijan*, Chamber, application n° 69981/14, 17 March 2016, §16
[112] Id., §32-34
[113] ECtHR pending application n° 27309/14
[114] Article 17 Universal Declaration on Human Rights: "(1) Everyone has the right to own property alone as well as in association with others; (2) No one shall be arbitrarily deprived of his property."

own property and protection against arbitrary State deprivation of property to legal entities including civil society organisations.

The international and European bodies have both recognised a principle that directly follows on from the right to freedom of association: civil society actors have a right to access foreign funding. There is a clear homogeneity in the voices of the different international and European institutions that both want to protect civil society from the hindrance of States into the right to freedom of association. However, the right to freedom of association is not an absolute human right and States may be able to restrict this right in the limits imposed by article 22§2 of the ICCPR but also article 11 of the ECHR (Chapter II).

CHAPTER II – THE RIGHT OF STATES TO LIMIT ACCESS TO FOREIGN RESOURCES

If the right to access foreign resources is considered to be an integral part of the right to freedom of association by allowing human rights organisations to seek, receive and use foreign resources, it also means that States have a right to limit this right. As article 22 of the ICCPR or article 11 of the ECHR are not absolute rights, States have a right to restrict these rights without violating international law. A qualified right is nevertheless a human right and it cannot be limited without justification. While international and regional bodies have accepted that the right to access foreign resources can be restricted in general (Section 1), three strict conditions must always be respected when restricting this right (Section 2).

Section 1 – The right to limit access to foreign resources as part of the right to freedom of association

Article 22 of the ICCPR recognises and protects the right to freedom of association. As a qualified right, article 22 is composed of two paragraphs. The first one protects the right to freedom of association, the second one permits to restrict it. The right to access foreign resources, recognized to be an integral part of article 22, is also considered to be a qualified right. Consequently, international bodies have recognized the right of States to limit the access to foreign resources.

In 1999, the Human Rights Committee recognized that: "in adopting laws providing for restrictions (…) States should always be guided by the principle that the restrictions must not impair the essence of the right (…); the relation between right and restriction, between norm and exception, must no be reversed"[115]. When considering human rights, which are the cornerstone of democracy and the rule of law, the principle

[115] UN Human Rights Committee, CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, UN doc. CCPR/C/21/Rev.1/Add.9

must always overtake on the exception. The exception, the restriction of the principle, needs to stay occasional and proportionate.

Moreover, in a Communication regarding the Republic of Korea, the Human Rights Committee highlighted that: "the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals for membership in such organisations are in fact necessary to avert a real, and not hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose"[116].

It is essential that States are not totally free while restricting human rights. While some States claim that restrictive civil society policies are necessary to ensure financial transparency and accountability, human rights organisations and advocacy coalitions underline that international law "protects the right of NGOs to operate free from unwarranted State intrusion or interference in their affairs"[117]. Human rights organisations are oftentimes the only critical voices that exist in a non-democratic country, and for this reason States are willing to shut them down and restrict civil society in order to control it and close it down.

The Human Rights Committee has consistently expressed concern over foreign resources restrictions as an "impediment to the right to freedom of association"[118]. While evaluating the Egyptian law which required NGOs receiving foreign resources to register with the government, the Human Rights Committee argued that: "the State Party should review its legislation and practice in order to enable NGOs to discharge their functions without impediments which are inconsistent with the provisions of article 22 of the Covenant, such as prior authorisation, funding controls, and administrative dissolution"[119].

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[116] UN Human Rights Committee, *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication n° 1119/2002, UN doc. CCPR/C/84/D/1119/2002, 23 July 2005, §7.2
[117] World Movement for Democracy, Defending Civil society, February 2008
[118] American Bar Association Center for Human Rights, *International and comparative law analysis of the right to and restrictions on foreign funding of non-governmental organisations*, 2015, p. 7
[119] UN Human Rights Committee, *Concluding observations: Egypt*, §21, 28 November 2002, UN doc. CCPR/CO/76/EGY

The Human Rights Committee has echoed his concern when considering an Ethiopian law prohibiting local NGOs from obtaining more than ten percent of their budget from foreign donors. This law also prohibited NGOs considered by the government to be 'foreign', from engaging in human rights activities and democracy related actions. In its Concluding Observations, the Human Rights Committee stated: "the State Party should revise its legislation to ensure that any limitations to 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 authorise all NGOs to work in the field of human rights"[120].

The justifications claimed by governments for the backlash against civil society are as varied as the restrictions themselves. Governments maintain that these restrictions are necessary to promote NGO accountability, protect State sovereignty, or preserve national security[121]. The main issue is that these concepts are not clearly defined, neither by governments nor by the international community. They are malleable and prone to misuse. The UN OHCHR has stressed that "organisations are closed down under the slightest of pretexts; sources of funding are cut off or inappropriately limited; and efforts to register an organisation with a human rights mandate are delayed by intentional bureaucracy"[122].

If restrictions are permitted under article 22§2 of the ICCPR, not all justifications can be admissible. The UN Special Rapporteur on the right to freedom of association and of peaceful assembly has recalled that while restrictions to access to foreign funding might be legitimate in the fight against money-laundering and terrorism, this context should "never be used as a justification to undermine the credibility of the concerned association, nor to unduly impede its legitimate work"[123]. Even if the fight against money-laundering or terrorism are legitimate aims, included in the list of article 22§2 as national security or public order, in many cases governmental justifications to restrict foreign funding are "merely rhetorical and the real intention of governments is to restrict the ability of human

[120] UN HR Committee, *Concluding observations: Ethiopia*, §25, UN doc. CCPR/C/ETH/CO/1, 19 August 2011
[121] Defending civil society report, op. cit., p. 29
[122] UN OHCHR, Fact Sheet 29 : Human Rights Defenders : Protecting the Right to Defend Human Rights, April 2004, p. 13
[123] UN doc. A/HRC/20/27, op. cit., §94

rights organisations to carry out their legitimate work in defence of human rights"[124]. Every limitation on access to foreign resources must be proportionate to the State's aim of protecting such interests and have to be the least intrusive means to achieve this objective.

The Organisation for Security and Cooperation in Europe (hereinafter 'OSCE') and the Venice Commission have stressed that point when considering the Draft Law Amending the Law on Non-Commercial Organisations and other legislations Acts of the Kyrgyz Republic. The opinion states that: "any control imposed by the State on an association receiving foreign resources should not be unreasonable, overly intrusive or disruptive of lawful activities"[125]. In 2013, the Venice Commission expressed its concern about foreign funding in Egypt. Even though legitimate restrictions may exist, regulations on the access to foreign funding need to address these concerns through "means other than a blanket ban"[126]. Administrative requirements for NGOs receiving foreign funding may be considered as important for transparency reasons, but authorities should be entrusted with the competence to review the legality of the foreign funding by a simple system of notification and not one of prior authorisation. The procedure of notification needs to be clear and straightforward, with an implicit approval mechanism[127] and not a burdensome procedure. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has noted that associations should be excepted "only to carry out a notification procedure on the receipt of funds and to submit report on their accounts and activities"[128].

If States are allowed to limit the right to freedom of association and therefore the right to access foreign funding, they cannot do it without any control. Articles 22 of the ICCPR and 11 of the ECHR expressly mention three conditions to be respected for the restriction to be lawful (Section 2).

[124] UN doc. A/64/226, op. cit., §94
[125] OSCE/ODIHR and Venice Commission, "Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organisations and Other Legislative Acts of Acts of the Kyrgyz Republic", CDL-AD(2013)030, 16 October 2013, § 66
[126] Venice Commission, "Interim opinion on the draft law on civic work organisations of Egypt", CoE doc. CDL(2013)023, 16 October 2013, §35
[127] Id. §43
[128] UN doc. A/HRC/23/39, op. cit., §37

Section 2 – The conditions to be respected for the restriction to be lawful

Under article 22§2 of the ICCPR, restrictions are admissible if the State follow three strict conditions:

> "2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others"

The Human Rights Committee recalled this requirement and explained that restrictions on freedom of association and expression must be: prescribed by the law (§1), imposed to pursue a legitimate aim expressly stated in paragraph 2 of article 22 (§2), and necessary in a democratic society[129] (§3). The following paragraphs will describe in detail these conditions and apply them to the issue of restrictions on foreign funding.

§1 Prescribed by the law

This first requirement means that restrictions must have a formal basis in law and be sufficiently clear and precise for an NGO or an individual to evaluate whether or not the intended action would constitute a breach and what consequences this action could entail. The Johannesburg Principles stress that "the law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is lawful"[130]. The degree of precision and clarity is a precious criteria to assess the exercise of discretionary authority[131].

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[129] UN Human Rights Committee, *Aleksander Belyatsky et al. v. Belarus*, communication 1296/2004, UN doc. CCPR/C/90/D/1296/2004, §7.3, 24 July 2007

[130] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Principle 1.1(a). The Johannesburg Principles were developed by a meeting of international experts at a consultation in South Africa in October 1995 and are available at: www.article19.org

[131] OSCE/ODIHR, Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations, p. 4.

Restrictive measures on the right to freedom of association are only lawful and valid if they have been introduced by law. An act of Parliament or a similar unwritten norm of common law is considered to be a law. On the contrary, restrictions are not permissible if they are introduced through Government decrees or equivalent administrative orders. A difference can here be noted; while article 22§2 only allows restrictions if they are "prescribed by the law", article 21§2 on the right to freedom of peaceful assembly allows restrictions if they are "in conformity with the law". This would imply that restrictions to the right to freedom of peaceful assembly could take the form of a more general statutory authorization, such as an executive order or a decree[132]. The Nepalese government released in 2014 a new Development Cooperation Policy which would require development partners to channel their cooperation through the Ministry of Finance rather than directly to civil society. The restriction was based on executive action and not "introduced by law", therefore violating the standard required under article 22§2 of the ICCPR[133].

The Human Rights Committee has asserted that to be "prescribed 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"[134]. Moreover, the Human Rights Committee has explained that "the law itself has to establish the conditions under which the rights may be limited"[135]. It is important to note that the law cannot allow for unregulated discretion upon those in charge of its execution. For instance, the extra-legal actions of security services, which harass and scrutinize human rights defenders and civil society activists, are certainly not prescribed by law.

The ECtHR also expressed its concern on this requirement. The ECtHR considers that a Member State's measure is "prescribed by law" only if the measure is sufficiently precise. The consequences of the measure must be reasonably foreseeable to those affected by it[136]. The Court underlined the importance of the legal basis of the restriction in the case

[132] Commentary to the declaration on the right and responsibility of individuals, op. cit., p. 31
[133] RUTZEN D., op. cit., p. 33
[134] UN Human Rights Committee, General Comment n° 34, §25, UN doc. CCPR/C/GC/34, 12 September 2011
[135] UN doc. CCPR/C/21/Rev.1/Add.9, loc. cit., §12
[136] ECtHR, *Koretskyy v. Ukraine,* Chamber, application n° 40269/02, 3 April 2008, §47

of foreign funding. It stated that a restriction on an NGO's access to foreign funding needs to be precisely drafted in order to eliminate the possibility of "arbitrary or overly-broad interpretations of its terms" and to enable the Court to assess if the restriction is appropriately prescribed by the law[137].

International and European instruments require the measure restricting a right to be prescribed by the law. The second requirement is that the measure needs to pursue a legitimate aim (§2).

§2 Pursuing a legitimate aim

Article 22§2 of the ICCPR expressly states four legitimate aims that a State can use in order to justify restrictions to the right to freedom of association: national security or public safety, public order, the protection of public health or morals and the protection of the rights and freedoms of others. The justifications available are limited to the four aims listed above. Their interpretation cannot be extended to include other grounds than those explicitly defined in article 22§2 of the ICCPR. Article 11§2 of the ECHR also expressly states aims to justify restriction to the freedom of association: 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.

Most of the reasons used by governments to justify restrictions on foreign funding are under the 'national security' or 'public order' legitimate aims of article 22§2. However, the Human Rights Committee has stressed that when a State invokes national security or the protection of public order as a ground to restrict the right of association, the State has the duty to prove the precise nature of the threat[138]. Similarly the ECtHR explained that "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

[137] ECtHR, *Zhechev v. Belgaria*, Chamber, application n° 57045/00, 21 June 2007, §55
[138] UN doc. CCPR/C/84/D/1119/2002, op. cit., §7.3

security situation in the specific area"[139]. The ECtHR has highlighted the fact that the national security justification will be likely seen as legitimate when the organisation endorses, directly or indirectly, terrorist activities[140].

The fight against terrorism and money laundering are the most common justifications for restrictions on the access to foreign funding. States see foreign money as a support for terrorist activities. However, this justification is often misused to intentionally discredit human rights organisations which are critical voices in non-democratic States. It is established that more than one hundred and forty governments have enacted new counterterrorism legislation since 11 September 2001[141]. Oftentimes these measures fail to provide precise and clear definitions of the nature of the acts and the type of organisations they target. Instead they refer to ambiguous concepts such as "public order" or "public safety" which can be easily misused and abused to restrict the freedom of association[142]. According to the Siracusa Principles, assertions of national security shall be read restrictively "to justify measures limiting certain rights only when they are taken to protect the existence of the national or its territorial integrity or political independence against force or threat of force. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order"[143]. If counterterrorism measures are officially intended to limit material support to terrorist organisations, in reality they have restricted NGO's access to foreign funding. This is often due to ambiguous, unclear and often too broad definitions of the concepts of 'terrorism' and 'material support'.

The Financial Action Task Force (hereinafter 'FATF') is an inter-governmental body that sets standards for legal measures to fight threats to the international financial

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[139] ECtHR, *Freedom and Democracy Party (OZDEP) v. Turkey*, Grand Chamber, application n° 23885/94,8 December 1999, §44,
[140] ECtHR, *Rekvenyi v. Hungary*, Chamber, application n° 25390/94, 20 May 1999, §30
[141] Challenging the Closing Space for Civil Society, A practical starting point for funders, Funders' Initiative for Civil Society, May 2016, p. 29
[142] Human Rights Watch, *In the name of security : counterterrorism laws worldwide since September 11*, 29 June 2012, available at: https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11
[143] UN Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN doc. E/CN.4/1985/4, 1984

system, such as money laundering[144]. After the terrorist attacks in the United States in September 2001, the FATF added anti-terrorist financing to its programme and developed special proposals and recommendations to address it, including one on civil society organisations, Recommendation 8[145]. The FATF's Recommendation 8 on non-profit organisations has been used by governments to introduce legislations restricting the flow of international funding of civil society organisations. Protecting human rights organisations from terrorist abuse is both a critical element of the global fight against terrorism and a necessary step to protect and preserve the integrity of NGOs[146]. A report by Statewatch and the Transnational Institute found that eighty-five percent of one hundred and fifty-nine countries were non compliant or only partially compliant with Recommendation 8. Only five countries were rated fully compliant with the Recommendation, including Egypt and Tunisia, which at the time had highly restrictive NGO laws[147]. States often use the importance of the fight against financial abuse and money laundering to restrict access to international donors. Azerbaijan justified amendments relating to the registration of foreign donations claiming that this requirement was essential to "enforce international obligations of the Republic of Azerbaijan in the area of combating money-laundering"[148].

The Special Rapporteur on the rights to freedom of peaceful assembly and of association recalled in his report from 2013 that a State may not use national security as a justification for measures aimed at perpetrating repressive actions and practices against the local civil society. The Special Rapporteur noted that this principle includes defaming or stigmatising foreign funded groups by accusing them of "treason" or "promoting regime change"[149].

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[144] GUINANE K., *The international anti-terrorist financing system's negative effect on civil society resources*, Charity & Security Network, 2015

[145] FATF Recommendation 8 "Countries should review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse […]"

[146] Financial Action Task Force, "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations," Financial Action Task Force Report, 2012, p. 54

[147] HAYS B. *Counter-terrorism, "Policy Laundering, » and the FATF : Legalising Surveillance, Regulating Civil Society*, Amsterdam/London : Transnational institute and Statewatch, 2012

[148] Charity & Security Network, "How the FATF Is Used to Justify Laws That Harm Civil Society, Freedom of Association and Expression", 16 May 2013

[149] UN doc. A/HRC/23/39, op. cit., §27

Some States see foreign funding as a way for Western countries to meddle in domestic political affairs. They fear a destabilisation of the country. Therefore they justify restrictions on foreign funding arguing that they are essential to prevent efforts to destabilise or overthrow the government currently in place. The Russian Federation justified the Foreign Agents Law stating that "there is so much evidence about regime change in Yugoslavia, now in Libya, Egypt, Tunisia, in Kosovo – that's what happens in the world, some governments are working to change regimes in other countries. Russian democracy needs to be protected from outside influences"[150]. President Putin justified the Foreign Agents Law stating that "the only purpose of this law after all was to ensure that foreign organisations representing outside interests, not those of the Russian State, would not intervene in our domestic affairs. This is something that no self-respecting country can accept"[151]. In 2014, Mr Viktor Orban, the Hungarian Prime Minister, applauded the creation of a parliamentary committee to monitor civil society organisations. He explained the establishment of this committee in a significant statement: "We are not dealing with civil society members but paid political activists who are trying to help foreign interest here… it is good that a parliamentary committee has been set up to monitor, document, and publish foreign influence by civil society organisations"[152]. The protection of State sovereignty or the fight against any interference in domestic affairs cannot be used as legitimate aims to restrict access to foreign funding.

Only the 4 legitimate grounds written in article 22§2 are admissible and "States cannot refer to additional grounds to restrict the right of freedom of association"[153]. Another justification put forward by States is the transparency and accountability of civil society. The Azerbaijan government argued that the amendments to the legislation on NGOs have been made with the goal of "increasing transparency in this field… In that

[150] "Russian Parliament gives first approval to NGO Bill", BBC, July 6 2012, available at: http://www.bbc.com/news/world-europe-18732949
[151] President of Russia, "Remarks at Meeting of Council for Civil Society and Human Rights," November 12, 2012, available at: http://eng.kremlin.ru/news/4613
[152] SIMON Z., "Orban Says he seeks to end liberal democracy in Hungary", *Bloomberg News*, 28 July 214
[153] UN doc. A/HRC/23/39, op. cit., §30

regard, these amendments should only disturb the associations operating in our country on a non-transparent basis"[154].

If a measure restricting the access to foreign funding is prescribed by the law and pursues a legitimate aim expressly stated in article 22§2, it still needs to be necessary in a democratic society in order to be lawful (§3).

§3 Be necessary in a democratic society

The last requirement of article 22§2 of the ICCPR is for the measure or the act to be necessary in a democratic society. This test implies that the measure or the act has to be proportionate to the legitimate aim pursued and only imposed to the extent that is "no more than absolutely necessary"[155]. In order to assess if the interference is necessary, one needs to consider whether or not there are less intrusive means available to achieve the desired goal. The Human Rights Committee recalls this principle and emphasises the importance of the continuous and effective protection of Covenants' rights when States demonstrate the necessity of restrictions[156]. The ECtHR also requires Member States to ensure that measures seeking to restrict the rights protected by the European Convention are both necessary in a democratic society and proportionate to the legitimate aim pursued[157]. The ECtHR continued and explained that 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"[158].

The Special Rapporteur on the rights to freedom of association and of peaceful assembly underlined the fact that in order for the measure to be necessary in a democratic society, it must not target all civil society organisations but needs to be limited only to

[154] UN OHCHR, Remarks by Azerbaijan, 31 May 2013
[155] Key Guiding Principles of Freedom of Association with an emphasis on NGOs, op. cit., p. 4
[156] UN Human Rights Committee, General Comment 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, UN doc. CCPR/C/21/Rev.1/Add/13, §6
[157] ECtHR, *Arslan v. Turkey,* Grand Chamber, application n° 23462/94, 8 July 1999, §46
[158] Id. §66

those falling within the clearly identified aspects described in the measure[159]. Consequently, when Ethiopia imposed a ten percent cap on the foreign funding of all NGOs promoting a variety of objectives, including women's rights and disability rights, Ethiopia does not establish a "direct and immediate connection between the activity at issue and the threat"[160]. Moreover this cap of ten percent is not the least intrusive means available to fight against terrorism. The counterterrorism objective of the Ethiopian legislation fails to justify the restriction on foreign funding and is therefore in violation of international human rights law.

The justifications used by governments to restrict NGOs' access to foreign funding are often a "pretext to constrain dissenting views or independent civil society"[161] which violates international law. After the adoption of the Foreign Agents Law, the Russian Federation passed numerous other laws, one banning NGOs engaged in political activities and receiving fund from the United States, a law on public assembly, and a treason law, in order to restrict civil society space[162]. There is a clear correlation between States where election manipulation takes place and States where the government prohibits and restricts NGOs' access to foreign funding[163]. In countries where political opposition is unhindered and the voting process is conducted in a "free and fair manner", there are no restrictions imposed on NGOs receiving foreign funding. This can be explained by the fear that well-funded NGOs could contribute to the defeat of the current regime. Therefore restrictions on foreign funding are used as a tactic for vulnerable regimes to maintain the power by defunding the opposition.

The Special Rapporteur on the rights to freedom of association and of peaceful assembly had affirmed that a democratic society only exists where "pluralism, tolerance and broadmindedness" are in place[164] and "minority or dissenting views or beliefs are respected"[165]. The ICCPR is here to protect the right of associations and individuals to

[159] UN doc. A/HRC/23/39, op. cit., §23
[160] UN doc. CCPR/C/GC/34, op. cit., §35
[161] UN doc. A/HRC/23/39, op. cit., §23
[162] RUTZEN D. op. cit., p. 37
[163] CHRISTENSEN D. & WEINSTEIN J. "Defunding dissent : restrictions on aid to NGOs", *Journal of democracy, Volume 24, Number 2*, April 2013
[164] UN doc. A/HRC/20/27, op. cit., §17
[165] UN doc. A/HRC/20/27, op. cit., §84(a)

express opinions that are unpopular or critical to the government. The free expression of such ideas is essential to ensure the proper functioning of government and is a "cornerstone of a democratic society"[166]. When States enact undue restrictions on the access to foreign resources they participate to the shut down of the civil society rather than creating a more vibrant and locally rooted civil society[167].

In addition, the Human Rights Council, in its resolution on the protection of human rights defenders from 2013 has underlined that restrictions on the sources of funding aimed at supporting the work of human rights defenders should not be imposed discriminatorily[168]. The resolution makes a comparison between the work of human rights defenders and "other activity unrelated to human rights". They should both be protected and restrictions on the sources of funding would only be acceptable if, like for the activities unrelated to human rights, they would ensure "transparency and accountability".

The UNGA adopted a resolution two years later on human rights defenders. It expresses its concern about national legislation controlling the registration and funding of civil society organisations. The resolution stressed that legislation and procedures need to be "transparent, non-discriminatory, expeditious, inexpensive, allow for the possibility to appeal and avoid requiring re-registration"[169]. The wording of this resolution has been strengthened in order to reflect the reaction of the international community worried about the growing number of restrictions on the access to foreign funding[170].

The obligation to demonstrate that the interference respects international law and is lawful under article 22§2 of the ICCPR or article 11§2 of the ECHR is on States. If it is recognised that States have a right to limit the access to foreign funding, the measures taken need to respect the three cumulative conditions imposed by international human rights law: the measure has to be prescribed by the law, pursue a legitimate aim stated in

[166] UN doc. CCPR/C/88/D/1274/2004, op. cit., §7.3
[167] DUPUY K., RON J., & PRAKESH A., "Reclaiming political terrain : the regulatory crackdown on overseas funding for NGOs", American Political Science Association 2013 Annual Meeting, 2013
[168] UN doc. A/HRC/22/L.13, op. cit., point 9
[169] UNGA, Resolution "recognising the role of human rights defenders and the need for their protection", 2 November 2015, UN doc. A/C.3/70/L.46
[170] Human Rights House Foundation, "Updated: UN adopts resolution supporting human rights defenders", 18 December 2015, available at: http://humanrightshouse.org/Articles/21308.html

the article concerned and finally the measure needs to be necessary in a democratic society. Most of the legislations restricting the access to foreign funding fail to fulfil the three cumulative requirements. When States claim that foreign funding to civil society is a form of imperialism or neo-colonialism[171], the justification used to restrict access to foreign resources, the protection of sovereignty, is not listed as a legitimate interest in the Covenant, even though the measure has a legal basis. The prevention of terrorism financing is a legitimate aim including the protection of national security and public safety. However the measure must be the least intrusive means to achieve the pursued goal. The measure should not target all civil society organisations indiscriminately or arbitrarily. Even though the measure aimed at combatting terrorism financing has a legal basis and pursues a legitimate aim, it will fail to meet the proportionality and necessity test.

It has been demonstrated how the right to access foreign resources is an inherent part of the right to freedom of association under international human rights laws. It is an essential component of the right to freedom of association as it allows human rights organisations to operate in a free and independent manner, without being controlled by States' authorities. The access to foreign resources is crucial for some NGOs when local funding is barely accessible. International donors play a major role in order to support dissenting voices in countries where the freedoms of expression and of association are too many times violated. When governments impede human rights organisations to access foreign funding, they violate their obligations under international human rights law but they also impede the proper work of the organisation. The consequences of the restrictions on the access to foreign resources imposed by State on civil society require a particular attention. By restricting or prohibiting the access to foreign resources, States impede organisations and individuals to work, exercise and enjoy their fundamental freedoms (PART TWO).

[171] Factsheet: Civil society's ability to access resources, Special Rapporteur Maina Kiai's report to the Human Rights Council, June 2013, (UN doc. A/HRC/23/39)

PART TWO

CONSEQUENCES OF RESTRICTIONS TO THE RIGHT TO ACCESS FOREIGN RESOURCES ON THE ENJOYMENT OF FUNDAMENTAL FREEDOMS

The issue of the access to foreign resources for civil society actors is quite new and international bodies and institutions have not yet been able to fully apprehend and proscribe unlawful national legislations that restrict the access to foreign funding. Consequences of restrictions on the access to foreign funding are significant and numerous; not all of them can be listed and analysed in this research. In order to understand the link between the importance of foreign funding and the work of civil society, it is important to consider that States are using their ability to restrict the access to foreign resources as a means to undermine and weaken the action and the proper functioning of the civil society (Chapter I). Moreover, it is not only the right to freedom of association that is violated when States restrict the access to foreign resources, but also other fundamental rights and freedoms of individuals who are actively working within civil society (Chapter II).

CHAPTER I – THE DISCREDIT OF THE WORK OF CIVIL SOCIETY AS A WHOLE

In countries where democracy, human rights and the rule of law are not fully respected, States' authorities are often strong and invasive in their action to control what is happening on their territory. NGOs are the most vulnerable when they reveal their dissenting voices and when their critical views are directed towards the government. States use their authority and power to shut down contradictory opinions and therefore shrink civil society space. States see foreign funding as an interference in their internal affairs and moreover an incursion from the West. Therefore they want to stop this interference by prohibiting or at least restricting any form of foreign funding arriving in their country. Many Eastern European States, such as the Russian Federation or Azerbaijan, have developed a very strict set of legislations on the access to foreign resources in order to control the work of civil society organisations operating in their territories (Section 1). This kind of legislation is a worrisome trend as it leads to the stigmatisation and harassment of human rights organisations (Section 2).

Section 1 – Excessive barriers to the exercise of the right to freedom of association

National campaigns to hinder or limit foreign support for domestic NGOs are often part of a broader crackdown on independent civil society and a larger shrinking of political space for activism and dissent[172]. When studying the various national legislations enacted by Eastern European States on the issue of foreign funding, it appears that there exists three different types of laws regulating the access to foreign resources: governmental authorisation is necessary in order to receive foreign funding (§1), States' authorities strictly control recipients of foreign grant (§2), and finally tax law and regulation are stricter when it comes to NGOs receiving foreign funding (§3).

[172] CAROTHERS T. & BRECHENMACHER S., op. cit., p. 15

§1 The obligation of a prior authorisation before receiving foreign funding

In many countries civil society organisations have to receive prior permission from the States' authorities in order to receive foreign funding; in some extreme cases government authorisation is required even to apply for such funds[173]. On 20 July 2012 the Russian Federation enacted the federal law "On Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-commercial Organisations Performing the Function of Foreign Agents[174]; best known as the Foreign Agents Law. This law requires all NCOs to register in the registry of NCOs as "foreign agents" before receiving funding from any international sources if they intend to conduct political activities. The Ministry of Justice, which is in charge of the registration, does not provide any process in order to remove the label of "foreign agent" when an NCO stops receiving funds from foreign donors.

Similarly in Azerbaijan, amendments to the Laws on NGOs and on Grants have been introduced in 2014. These amendments state that local NGOs are allowed to receive foreign funding only if the international donor has an agreement with the Ministry of Justice and has obtained the right to give a grant in Azerbaijan. This right is granted to a donor when an opinion on the financial need of the grant issued by a State body is established[175]. Moreover, there is a serious lack of clarity in the process of obtaining the right to support and give a grant to local NGOs in Azerbaijan, which makes it almost impossible for NGOs to receive funds from foreign donors. As most of the critical and advocacy-oriented organisations do not receive the authorisation to be registered in the country, it is very difficult for them to receive international funds, as they need to register their grants within the Ministry of Justice. In practice many of these NGOs continued to operate as unregistered entities when their registration has been denied or revoked arbitrarily. Indeed public associations, with the exception of "branches and representatives of foreign NGOs", are able to operate without legal personality on an informal basis[176]. According to the Law on Grants, if an NGO has not registered its grants, it can be fined

[173] Commentary to declaration on Human Rights Defenders, op. cit., p. 98
[174] ICNL, "NGO Monitor law: Russia", loc. cit.
[175] ICNL, "NGO Monitor Law: Azerbaijan", last updated 24 August 2016, available at: http://www.icnl.org/research/monitor/azerbaijan.html
[176] CoE, Venice Commission, Opinion 787/2014, op. cit., §43

with a fee between AZN 1000 to 2500 (545 – 1363 euros)[177]. The failure to register a foreign grant makes NGOs vulnerable; the fines are so high that such penalties can lead to severe hardship or even the termination of the organisation.

In Belarus unregistered organisations are banned from all activities. The Criminal Code of the Republic of Belarus established criminal responsibility for organising or participating in activities of a "political party or other public association, which has not registered with appropriate state authorities in accordance with established procedure"[178]. If an organisation is caught in such activity, it is punishable by a fine, an arrest for up to six months or imprisonment for up to two years. International funding must be registered with the Department for Humanitarian Activities at the President's Administration of the Republic of Belarus[179]. This Department has the power to refuse the registration. Moreover NGOs are not allowed to seek such foreign grants without registration. In 2013, the organisation "Our Generation" was fined five million Belarusian roubles for illegal use of foreign grant[180].

The former Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, already underlined this issue of registration and prior permission to receive foreign funding in a report in 2009[181]. She noted with concern that an organisation can receive a dissolution order for allegedly "having received foreign funding without authorisation"[182]. However in this case, the organisation had notified the authorities of the foreign funds it was about to receive. The organisation did not receive any response within the timeframe prescribed by the law; it could thus rightfully be considered that the Government approved the foreign funding.

[177] Defending Civil Society Report, op. cit., p. 27
[178] ICNL, "NGO Monitor Law: Belarus", last updated 21 August 2016, available at: http://www.icnl.org/research/monitor/belarus.html
[179] Id.
[180] Open Society Foundation, "Regulation of the non-profit sector, Government don'ts in implementing the FATF'S Recommendation 8", 2015
[181] UN doc. A/64/226, loc. cit.
[182] UN doc. A/64/226, op. cit., §96

Even though an NGO has received the authorisation to receive a foreign funding, the State is still very present in controlling the recipients of foreign grants (§2).

§2 State's excessive control over foreign grants

Some governments require that foreign funding received by NGOs be deposited in a bank designated and fully controlled by the government. Margaret Sekaggya, in her report on the situation of human rights defenders, highlighted the case of NGOs receiving grants from abroad in foreign currency who were obliged to deposit the money in the central bank of the country[183].

In Azerbaijan, article 24(1)5 of the Law on NGOs requires NGOs to provide an application letter and supporting documents to the Ministry of Justice within fifteen days of the date of the grant agreement. NGOs have the obligation to report all donations to the relevant authorities, including the amount of the received grants and the identity of the donor[184]. Anonymous donations are prohibited and donations are received "as a transfer to the bank account of an NGO"[185]. However donations under AZN 200 (109 euros) can be received by NGOs only if their statutory purposes include charitable purposes. Since there is no definition of charitable NGO in the Law on NGOs, this provision could be of uncertain application, hence dissuading human rights organisations from accepting cash donations. The Law on NGOs limits the list of potential donors to "a citizen of the Republic of Azerbaijan or legal person, as well as branches or representative of foreign legal persons (…) registered in Azerbaijan and not being aimed at profit to a NGO"[186]. An unregistered NGO, which lacks legal personality, is unable to formally own property or open bank accounts. In order to get round these restrictions, NGOs may either receive donations in the names of their founders in privately held bank accounts since according to article 3 of the Law on Grants, an individual "may be recipient of a grant"[187] or establish

[183] UN doc. A/24/266, op. cit., §97
[184] ICNL, "NGO Law Monitor: Azerbaijan", loc. cit.
[185] Article 24(1) Law on NGO 13 June 2000, http://www.icnl.org/research/monitor/azerbaijan.html
[186] Id.
[187] GULUZADE M. & BOURJAILY N., *Overview of the changes to NGO legislation adopted on 17 December 2013 by the Parliament of the Republic of Azerbaijan*, 19 February 2014

partnership with other registered NGOs. In November 2011, controls against unauthorised foreign funding have intensified. Article 21 of the Law on Public Associations prohibits local NGOs from holding an account in a bank or a financial institution located abroad. Any use of foreign funds, that have not been authorised, is criminalised.

At the same time Mr Ales Bialiatski, President of the Human Rights Centre Viasna[188] and Vice President of the International Federation of Human Rights (hereinafter 'FIDH'), was sentenced to four and a half years imprisonment for failing to report foreign funds in his personal bank account in Poland and Lithuania used to finance Viasna's activities in Belarus[189]. Any violation of the provisions on foreign funding may lead to the confiscation of funds and the payment of a fine equal to the amount of the unauthorised funds[190]. According to the Belarusian Criminal Code, if the offence is repeated within twelve months, the NGO staff or individuals are liable to two years of imprisonment. The UN Working Group on Arbitrary Detention (hereinafter 'WGAD') qualified the detention of Mr Ales Bialiatski as arbitrary as it resulted from the exercise of the right to freedom of association. Mr Bialiatski had no other choice but to open foreign bank accounts in order to fund the activities of Viasna. Hence he could not report the funds to the Belarusian authorities. The WGAD stressed that States that are party to the ICCPR "are not only under a negative obligation not to interfere with the founding of associations or their activities" but are also under a "positive obligation" to facilitate "the tasks of associations by public funding or allowing tax exemption for funding received from outside the country"[191].

The issue of the access to foreign funding and its restrictions is not limited to Eastern European countries. In Ethiopia, the Charities and Societies Proclamation[192] has established a restrictive environment for human rights organisations because of heavy measures restricting their funding sources. This Proclamation applies the definition of "foreign association" to all local NGOs that receive more than ten percent of their funding

[188] Viasna Human Rights Center, http://spring96.org/en
[189] Violations of the right of NGOs to funding: from harassment to criminalisation, op. cit., p. 43
[190] Article 23.24 of the Belarusian Code on Administrative offences
[191] UN Human Rights Council, Opinions adopted by the WGAD at its sixty-fourth session, Concerning Alexsandr Viktorovich Bialatski, 23 November 2012, §§ 39-50, UN doc. A/HRC/WGAD/2012/39
[192] ICNL, "Civic Freedom Monitor: Ethiopia", last updated 21 August 2016, available at: http://www.icnl.org/research/monitor/ethiopia.html

from foreign donors. It also prohibits them from engaging in several human rights activities, in particular activities related to the rights of women and children, handicapped persons, ethnic issues, conflict resolution, governance and democratisation[193]. In a country where local sources of funding are non-existent and in which ninety-five percent of local NGOs receive more than ten percent of their funding from abroad, this restrictive legislation affects the ability of the local civil society to conduct their activities.

A number of UN committees have expressed their concern regarding the Ethiopian Proclamation. In January 2011, the CAT voiced serious concern about it and asked that Ethiopia "unblock any frozen assets" of NGOs[194]. In August the same year, the Human Rights Committee noted that "this legislation impedes the realisation of the freedom of association and assembly as illustrated by the fact that many NGOs and professional associations were not authorised to register under the new Proclamation or had to change their area of activity"[195]. It added that Ethiopia "should reconsider the funding restrictions on local NGOs in the light of the Covenant and it should authorise all NGOs to work in the field of human rights"[196].

States are abusing their power and authority to excessively control recipients of foreign funding. Another way to limit and restrict the access to foreign funding is through tax law and regulation (§3).

§3 Tax law and regulation

Tax law and regulation are also used to hinder the work of human rights organisations and disproportionately affect them. In many democratic countries donations to non-profit organisations, and especially human rights organisations, are exempt from

[193] Violations of the right of NGOs to funding: from harassment to criminalisation, op. cit., p. 45
[194] UN CAT, *Concluding observations of the Committee against Torture - Ethiopia*, UN doc. CAT/C/ETH/CO/1, 20 January 2011, § 34.
[195] UN CCPR, *Concluding observations of the Human Rights Committee - Ethiopia*, UN doc. CCPR/C/ETH/CO/1, 19 August 2011, § 25.
[196] Id.

taxation. As the former Special Rapporteur on the situation of human rights defenders noted: "providing a tax exempt status is not a requirement under the right to freedom of association"[197], however States should not place different taxation regimes for human rights organisations and other non-profit organisations. Extensive scrutiny and control by tax authorities and abuse of fiscal procedures are often experienced by NGOs critical about the government.

In the Russian Federation, if an international organisation is willing to make tax-exempt grants to Russian individuals or NGOs, it must be on a list of organisations approved by the Russian government[198]. It goes without saying that the access to the list is severely limited. The Human Rights Committee deplores that such measures affect the enjoyment of the rights afforded by articles 19, 21 and 22 of the ICCPR. It cautions the State party against "adopting any policy measures that directly or indirectly restrict or hamper the ability of non-governmental organisation to operate freely and effectively"[199]. A Presidential Decree radically shortened the list of international organisations allowed to give grants to NGOs and benefiting from tax exemptions[200]. The Russian Tax Code grants tax exemption to certain NGOs on services they provide in the fields of health, culture, assistance to the population or education. It is important to note that activities in defence of human rights are excluded from this exemption. The Russian government also uses tax law or other legal administrative regulations to harass NGOs who are recipients of foreign support. In March 2013 several tax investigators inspected hundreds of Russian NGOs that had received or were suspected of having received foreign funding[201].

In Azerbaijan, the Tax Code states that charitable organisations benefit from tax exemption, except on revenues derived from their economic activities. However a double problem appears here: there is no law that deals with the status of "charitable organisations" nor is there a procedure that would define what type of entity should be

[197] UN doc. A/64/226, op. cit., §99
[198] ICNL, "NGO Law Monitor: Russia" loc. cit.
[199] UN Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Russian Federation, 24 November 2009, UN doc. CCPR/C/RUS/CO/6, §27
[200] ICNL, "NGO Law Monitor: Russia" loc. cit.
[201] "Fears for NGOs in Russia as tax raids multiply", BBC News, March 27 2013, available at: www.bbc.co.uk/news/world-europe-21952416

granted this status. Hence, there is a legal gap which leaves NGOs "in the dark"[202] as to whether they are entitled to benefit from a tax exemption. This lack of clarity encourages and supports arbitrary taxation.

The CRC expressed its concern in Bosnia-Herzegovina where commercial entities and non-profit organisations are subjected to the same tax regime. The CRC urged the State "to consider according civil society and NGOs a more conducive context for their work, *inter alia*, through funding and lower tax rates"[203].

Globally, the cumulative effect of these stringent requirements, added to the large discretion left to the executive authorities regarding the registration, functioning and funding of NGOs, is likely to have "a chilling effect on civil society, especially on those associations that are devoted to key issues such as human rights, democracy and the rule of law"[204]. In addition to the burdensome requirements imposed by States on NGOs, legislations restricting the access to foreign funding also have a negative effect on the credibility and legitimatisation of human rights organisations. States use the issue of foreign funding as a means to stigmatise and harass human rights organisation (Section 2).

Section 2 – Stigmatisation and harassment of human rights organisations via "Foreign Agents" legislation

Human rights organisations are targets of repressive governments that see them as a danger for their internal affairs and the stability of the country. The Human Rights Council is aware of this worrisome trend and, through a resolution, has already warned States not to impose laws that would "criminalise or delegitimise activities in defence of human rights

[202] Violations of the right of NGOs to funding: from harassment to criminalisation, op. cit., p. 53
[203] UN CRC, Concluding observations on the consolidated second to fourth periodic reports of Bosnia and Herzegovina, adopted by the Committee at its sixty-first session, 29 November 2012, UN doc. CRC/C/BIH/CO/2-4, §26
[204] CoE, Opinion of the Venice commission on the law on non-governmental organisations (public associations and funds) as amended of the republic of Azerbaijan, December 2014, p. 20

on account of the origin of funding thereto"[205]. The Russian Federation was the first one to adopt a law on "foreign agents" aimed at discrediting the work of NGOs in the eyes of the public (§1). Other countries have followed the Russian example and enacted similar pieces of legislation (§2).

§1 The Russian example

In the former Soviet Union legal restrictions are not the only way to limit civil society and stymie the work of NGOs receiving foreign support. Governments engaged in this pushback also work to create a political climate in which "recipients of foreign funding are intimidated and publicly delegitimised"[206]. President Putin has declared that foreign funded NGOs in Russia often end-up "serving dubious vested and commercial interest"[207]. It seems that Russia wants to insulate local civil society from international cooperation and assistance.

In 2012, the Russian Federation adopted a law amending the status of NCOs, the so-called Foreign Agents Law. This law requires all NCOs that receive foreign funds and that conduct "political activities" to register with a government agency. These NCOs are now called "non-commercial organisations carrying functions of a foreign agent"[208]. The term "political activities" is defined in the law as "participation in the organisation and conduct of political actions for the purposes of influencing decision-making by governmental bodies aiming to change the governmental policies implemented by them, as well as in the formation of public opinion in said purposes". Moreover, any information published by such an NCO has to be marked with the mention "published and distributed by the organisation, performing the functions of a foreign agent"[209]. A major problem arises here: the lack of clarity of the definition of the concept of "political activities". This

[205] UN doc. A/HRC/22/L.13, op. cit., point 9
[206] CAROTHERS T. and BRECHENMACHER S., op. cit., p. 11
[207] BOGORODITSKII A., "Russia", *International journal of non-for-profit law*, volume 12, n°3, May 2010
[208] CAROTHERS T. and BRECHENMACHER S., op. cit., p. 50
[209] Report by Human Rights Watch, "Laws of attrition – crackdown on Russia's civil society after Putin's return to the presidency", April 2013, p. 21

extremely vague definition allows the authorities to target human rights organisations, which contribute towards influencing authorities and public opinion on public affairs[210].

This law was passed in haste just after the inauguration of President Putin on 7 May 2012. The Russian President accused the United States and in general, foreign governments, of instigating the anti-Kremlin demonstration during the winter of 2011-2012. Mr Putin argued that the law was necessary to protect the country from foreign intervention in domestic political affairs. Russian NGOs consider this law as a means to erode their credibility in the public eye and to facilitate their repression by State authorities. They argue that their categorisation as "foreign agents" will "at best, discredit them and, at worst, depict them as spies working for an "enemy""[211]. In Russia the term "foreign agent" has a particularly negative connotation when it is considered that spying and repression by State police were widespread at the time of the Soviet Union. Indeed the word "agent" is understood in Russia as a "spy". Local NGOs fear that this categorisation will exclude themselves from society, they will become suspect in the eye of the public and any contact with official interlocutors will be denied.

The lower house of the Russian Parliament continued the attempts to delegitimise NGOs with a series of amendments to the laws on treason and espionage. The new provisions in the Criminal Code extend the definition of treason to include "providing financial, technical, advisory or other assistance to a foreign state or international organisation (…) directed at harming Russia's security". Any contact with a foreign entity is subject to criminalisation and can lead to a 20-year prison sentence. This provision can seriously affect the ability of civil society to keep contact with international partners. Moreover the use of very imprecise terms such as "other assistance" allows for arbitrary application of this provision[212]. In September 2012, the Federal Security Service Deputy Director, Mr Yury Gorbunov affirmed that "we should include international organisations on the list of agents that can be charged with treason due to the fact that foreign intelligence agencies actively use them to camouflage their spying activity"[213]. There is a

[210] CAROTHERS T. and BRECHENMACHER S., op. cit., p. 50
[211] CAROTHERS T. and BRECHENMACHER S., op. cit., p. 53
[212] CAROTHERS T. and BRECHENMACHER S., op. cit., p. 59
[213] Christian Science Monitor, *Russian NGOs in panic mode over proposed "high treason" law*, 26 September 2012

worrisome trend of fabrication of theories of foreign infiltration via NGOs to discredit the latter.

The CAT expressed its concern on the Foreign Agents Law and claimed that "foreign agent" is a term "that seems negative and threatening to human rights defenders, including organisations that receive funds from the United Nations Voluntary Fund for Victims of Torture"[214]. Further, the CAT considered that the law "could affect persons providing information to the Committee against Torture, the Sub-Committee on Prevention of Torture or the United Nations Voluntary Fund for Victims of Torture, which the Committee is concerned could be interpreted as prohibiting the sharing of information on the human rights situation in the Russian Federation with the Committee or other United Nations human rights organs"[215]. If an NGO receiving foreign fund fails to register it with the government agency, the organisation is subject to the suspension of its activities. Its failure to "provide information required by the law" is punishable by a fine of up to 1200 euros for its members and 25000 euros for the NGO itself[216].

In January 2013, additional provisions restricting access to foreign funding came into force. Russian NGOs conducting "political activities" are no longer able to receive financial support from United States nationals and organisations. The Russian authorities argue that "such support constitutes a threat to the interest of the Russian Federation"[217].

In February 2013, the European Human Rights Advocacy Centre (hereinafter 'EHRAC') and Memorial Human Rights Centre brought a case against Russia before the ECtHR on behalf of 15 NGOs. Applicants alleged that the Russian law on Foreign Agents violates their right to freedom of association and expression. They argued that the Foreign Agents Law unnecessarily and unjustifiably puts them at risk of serious sanctions, such as criminal prosecutions of individuals and suspension of their organisations. Mr Philip Leach, Director of EHRAC has said "*This is a very repressive law which directly threatens the integrity and the activities of Russian NGOs which play an absolutely vital role in*

[214] UN doc. CAT/C/RUS/CO/5, op. cit., §12
[215] Id.
[216] CAROTHERS T. and BRECHENMACHER S., op. cit., p. 50
[217] Id.

scrutinising and monitoring the State"[218]. The application is still pending before the ECtHR but a positive judgement would give international support to the unanimous condemnation of the Law on Foreign Agents by international civil society, the European Union, the UN, the Council of Europe Commissioner for Human Rights, the PACE and the Venice Commission[219]. In a press release, the UN High Commissioner for Human Rights and three UN Special Rapporteurs (on freedom of association, freedom of expression and the situation of human rights defenders) expressed deep concern over this law[220]. They considered that the law on Foreign Agents is likely to have major negative implications for civil society in the country. They urged the Russian government not to adopt it. However their appeal was disregarded.

In March 2013, the Russian authorities started to conduct extensive check on NGOs to determine if they were complying with the provisions of the Foreign Agents Law. A year later the Ministry of Justice had the authority to unilaterally register NGOs as "foreign agents" without their consent[221]. NGOs that refuse to register within six months after being labelled as "foreign agents" by the authorities face damaging fines or even suspension (without a court order) at the discretion of the Ministry of Justice[222]. It is reported that since June 2014, ninety-five NGOs have been included in the "foreign agents" register[223]. Amnesty International considered that the law was "designed to stigmatise and discredit NGOs engaged in human rights, election monitoring and other critical work. It is providing a perfect pretext for fining and closing critical organisations and will cut often vital funding streams"[224].

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[218] EHRAC Press release, Leading Russian Human Rights NGOs launch challenge at European Court to 'Foreign Agent' Law, 6 February 2013

[219] LEVINE K. Legislating against foreign funding of human rights – A tool of repression in the former Soviet Union, loc. cit.

[220] UN OHCHR, Russia: increasingly hostile environment for NGOs and rights defenders is unacceptable, press release, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13323&LangID=E#sthash.b07rQ4K8.dpuf

[221] Human Rights Watch, "Russia : Government against rights groups", 16 April 2016, available at: https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle

[222] "Case of Sakharov Centre : A Semyonov and A Bayer, 'A cloud over Russia's civil society'", Washington Post, 6 March 2015

[223] CoE, "How to prevent inappropriate restrictions on NGO activities in Europe?", Report of the Committee on Legal Affairs and Human Rigts, PACE, January 2016, p.11, CoE doc. 13940

[224] *Russia : A year on, Putin's foreign agents law choking freedom*, Amnesty International, 20 November 2013

In addition, the Russian government enacted in May 2015 a law against "undesirable" NGOs. This new law enables the office of the Prosecutor General to ban the activities of international NGOs suspected to be undermining "state security", "national defence", or "constitutional order"[225]. The Prosecutor General is also allowed to fine or jail civil society groups and Russian activists for keeping contact with such organisations[226]. With this new law, financial institutions are under an obligation to refuse any financial operations involving the participation of an "undesirable" NGO[227]. Activities of "undesirable" organisations are prohibited; any individual participating in such activities is subject to administrative and criminal penalties. This law directly attacks foreign and international groups and is aimed at "suffocating Russian civil society, cutting them off from their international partners, and leaving them in limbo"[228].

The Russian authorities have been using international law and the frontiers of the right to limit the access to foreign funding as a way to undermine and discredit human rights organisations in the public's eyes. Civil society experts have noticed a contagion effect when restrictive measures introduced in one country are copied by neighbours States, leading to a regional shrinking of civil society space[229] (§2).

§2 Russian influence on other States

In 2013, the Kyrgyzstan government presented a draft law almost identical to the Russian Foreign Agents Law. If adopted, the law would require NGOs receiving foreign funds and engaging in political activities to register as "foreign agents"[230]. As of May

[225] CAROTHER T., *An examination of the ways Western public and private funders are responding to the increasing restrictions on support for civil society around the world*, Carnegie Endowment for International Peace, The Closing Space Challenge: How Are Funders Responding?, 2 November 2015
[226] GROVE T., "Russia's Putin Signs New Law Against 'undesirable' NGOs", *Wall Street Journal*, May 25 2015
[227] Opinion of the Commissioner for Human Rights, Legislation and practice in the Russia Federation on non-commercial organisations in the light of Council of Europe standards: an update, July 2015, p. 8
[228] LUHN A., "Russia bans 'undesirable' international organisations ahead of 2016 elections", *The Guardian*, 19 May 2015, available at: http://www.theguardian.com/world/2015/may/19/russia-bans-undesirable-international-organisations-2016-elections
[229] *Challenging the Closing Space for Civil Society,* op. cit., p.9
[230] *International Journal of Not-for-Profit Law,* volume. 17, n°. 1, March 2015 p. 13

2016, the Kyrgyz Parliament is considering a revised draft that not longer includes the provisions on foreign agents but still imposes burdensome reporting requirements on all NGOs. The World Organisation Against Torture (hereinafter 'OMCT') considered these requirements "unnecessary" restrictions to the right of NGOs to freedom of association[231].

In January 2014, the Ukrainian government passed a legislative package of so-called "dictatorship laws"[232]. This series of laws included a "foreign agents" law similar to the Russian one. However this law was then repealed by the Parliament when President Yanukovych fled the country and an interim government was formed[233].

In Azerbaijan, the media link NGOs to foreign interference theories. In 2012 the pro-government media Yeni Azerbaycan and Merkez started a smear campaign against the Institute for Reporter's Freedom and Safety (hereinafter 'IRSF') after the latter received a notice from the Ministry of Justice for alleged violations of the Law on NGOs. The media claimed that IRSF used its funding to conduct anti-State activities and to finance mass protests such as the Sing for Democracy campaign created in the context of the Eurovision Song Contest in Baku in May 2012[234].

This approach against civil society also exists outside of the former Soviet Union. The Knesset, the Israel's parliament, has passed a law that forces human rights organisations that receive more than half their funding from abroad to disclose it prominently in communication with officials, in the media and in online reports. The failure to provide such information would result in a fine of up to 6800 euros. The Prime Minister declared that the public needed to "know when foreign States were meddling in its internal affairs"[235]. It is important to note that twenty-five of the twenty-seven

[231] OMCT, *Kyrgyzstan ; Parliament must reject discriminatory bill targeting NGOs*, 13 April 2016, available at: http://www.omct.org/human-rights-defenders/urgent-interventions/kyrgyzstan/2016/04/d23709/
[232] KRAMER A., "Ukrainian Prime Minister Resigns as Parliament Repeals Restrictive Laws," *New York Times*, 28 January 2014,
[233] Freedom House, Nations in Transit 2015 : Ukraine, available at: https://freedomhouse.org/report/nations-transit/2015/ukraine
[234] Violations of the right of NGOs to funding: from harassment to criminalisation, op. cit., p. 52
[235] "EU criticises Israel law forcing NGOs to reveal foreign funding", *BBC News*, 12 July 2016, http://www.bbc.com/news/world-middle-east-36775032

organisations to which the law would apply are human rights NGOs[236]. The so-called "NGO Transparency Law" would exempt right-wing organisations that receive most of their resources from private donors from the obligation of reporting and publicity. The European Commission said that the requirements went "beyond the need for transparency"[237]. The president of the FIDH stated that: "this NGO Transparency Law clearly targets peaceful dissent groups and seeks to restrict the legitimate activities of civil society and human rights defenders in Israel"[238]. The international community and UN Special Rapporteurs have claimed that the proposed law "has the evident intent of targeting human rights and civil rights organisations, which receive a majority of their funding from foreign government entities, while leaving unaffected other organisations that nonetheless receive a substantial amount of foreign funding from individuals"[239].

In Egypt tensions between the authorities and NGOs were intense during the period of political transition managed by the Supreme Council of Armed Forces (hereinafter 'SCAF'). The political instability in the country favoured SCAF allegations to depict foreign organisations as subversive agents, particularly those of the United States. These organisations were accused of "destabilising the country and acting as agents of American political interests"[240]. An article published in January 2012 claimed that Wikileaks had published information on the secret funding of Egyptian human rights organisations by the United States embassy in Cairo[241]. A month later Egyptian authorities declared their intention to prosecute forty-three defenders, including nineteen Americans[242]. The charges included the pursuit of activities such as research for the United States and "serving foreign interests". Consequently, a number of local NGOs had to return funds received from abroad, including, for instance, grants from the American organisation Freedom House and from the UN Democracy Funds.

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[236] FIDH, "Israeli Knesset approves controversial law targeting foreign-government funding for NGOs, Press release", 18 July 2016
[237] "EU criticises Israel law forcing NGOs to reveal foreign funding", loc. cit.
[238] Id.
[239] OHCHR, Israel: UN experts urge Knesset not to adopt pending legislation that could target critical, Press release, 24 June 2016, available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20177&LangID=E
[240] Violations of the right of NGOs to funding: from harassment to criminalisation, op. cit., p. 61
[241] Id.
[242] Violations of the right of NGOs to funding: from harassment to criminalisation, op. cit., p. 41

Where the laws on "foreign agents" have been implemented, civil society, and in particular human rights defenders and organisations, have come under significant pressure. They are being forced to allocate scarce resources to manage the effect of the law's implementation while continuing to seek redress and protection for victims of human rights violations. The positive affirmation of the right of human rights defenders to benefit from international financial support has given way to a negative environment marked by suspicion of criminal activity and foreign interference[243]. The criminalisation of foreign funding and sanctions against the NGOs concerned contribute towards delegitimising the work of human rights defenders in the public's eyes.

Already in 2009 the UN Special Rapporteur on the situation on human rights defenders deplored this phenomenon and underlined that "the multitude of arrests and detentions of defenders also contributed to their stigmatisation since they are depicted and perceived as troublemakers by the population"[244]. Another issue needs to be considered; these laws have dissuaded the operations of a number of foreign donors in these countries[245].

By using restrictions to the access to foreign funding, States contribute to the discredit of the work of the civil society. Defamation and stigmatisation in relation to funding sources threatens to undermine the principle of international solidarity in the effort for the defence of human rights. States do not only undermine the work of human rights organisations, they impede human rights defenders and individuals working within human rights organisations to properly work and live freely. By restricting the access to foreign funding, States also violate human rights and fundamental freedoms of individuals working within civil society (Chapter II).

[243] Violations of the right of NGOs to funding: from harassment to criminalisation, op. cit., p.57
[244] UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders, Mrs Margaret Sekaggya, 30 December 2009, § 32, UN doc. A/HRC/13/22
[245] LEVINE K., op. cit., p. 31

CHAPTER II – VIOLATIONS OF THE RIGHTS OF INDIVIDUALS WORKING WITHIN CIVIL SOCIETY

The Declaration on Human Rights Defenders states that all individuals, groups and organs of society have the right and the responsibility to promote and protect universally recognised human rights and fundamental freedoms[246]. Yet individuals working within civil society are too regularly facing false accusation, unfair detention, threats, torture or execution. Although human rights defenders are the frontline targets of violations of human rights (Section 1), their lawyers are also subject to violations of human rights (Section 2).

Section 1 – Violations of human rights defenders' rights

Human rights defenders often work in hard conditions, to the detriment of their own safety and pay a heavy price for their commitment[247]. Because of their legitimate activities, human rights defenders may face criminal charges. The UN Special Rapporteur on the situation of human rights defenders expressed its concern on a "disturbing trend towards the criminalisation of activities carries out by unregistered groups"[248]. In States that require prior authorisation from NGOs recipients of foreign funding, human rights defenders are facing criminal penalties if they fail to comply with the registration requirement. In addition, laws aimed at preventing and prosecuting terrorism have also been used to criminalise activities of human rights defenders.

The above-mentioned restrictions on NGOs funding have been misused and abused in order to silence active civil society under the pretext of combatting terrorism financing and money laundering[249]. Moreover the former Special Rapporteur on the promotion and

[246] UN Declaration on Human Rights Defenders, 9 December 1998, UN doc. A/RES/53/144
[247] European Commission, Delivering on Human Rights Defenders, Highlights of the Semester, January-June 2012, Development and Cooperation EuropAid, 2012, p. 7
[248] UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders, 23 December 2013, UN doc. A/HRC/25/55, §68
[249] UN doc. A/HRC/64/226, op. cit. §94

protection of the right to freedom of opinion and expression, reiterated his concern about the use of "an amorphous concept of national security to justify limitation on the enjoyment of human rights", a concept that "is broadly defined and is thus vulnerable to manipulation by the State as a means of justifying actions that target vulnerable groups such as human rights defenders, journalists or activists"[250]. Human rights defenders are thus an exposed group that needs specific protection and attention.

This trend of criminalisation of human rights defenders' activities is particularly visible in Azerbaijan. In May 2014, the Prosecutor General's Office started a criminal investigation in connection with the activities of several NGOs on charges of tax evasion and abuse of power. The authorities claimed that they had found "irregularities in the activities of a number of NGOs of Azerbaijan Republic, and branches or representative offices of foreign NGOs"[251]. All the allegations of financial irregularities related to misconduct flowing from the restrictions on grant reporting requirement and NGOs registration. In the context of this investigation, offices of NGOs have been searched, the equipment and documents confiscated and the personal bank accounts of the leaders have been frozen. This led to the arrest of four prominent human rights defenders on fabricated charges connected to their legitimate work with their NGOs. Mrs Leyla and Mr Arif Yunus, founders and leaders of NGO Peace and Democracy Institute, Mr Intigam Aliyev, head of the registered Legal Education Society, and Mr Rasul Jafarov, founder of Human Rights Club NGO, have been arrested and detained. Mr Anar Mammaldi and Mr Bashir Suleymanly, two other prominent NGO leaders, who run Election Monitoring and Democracy Studies Centre, were arrested on similar charges in December 2013 and sentenced to five and a half years and three and half years of imprisonment respectively.

The ECtHR has already recognised that allegations against peaceful activists on the grounds that their activities threaten national security will violate the State's obligations under international law[252]. In addition, the UN WGAD has highlighted the importance of a

[250] UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 17 April 2013, UN doc. A/HRC/23/40, §60
[251] Amnesty International, "Guilty of defending rights, Azerbaijan's human rights defenders and activists behind bars", 2015
[252] ECtHR, *Sidiropoulous and others v. Greece,* Chamber, application n°26695/95, 10 July 1998, §43

"particularly intense review"[253] when human rights defenders are the subject of such prosecutions.

Mrs Leyla Yunus is the director of the Institute for Peace and Democracy. This organisation promotes the rule of law and is also involved in conflict resolution and peace-building between Armenia and Azerbaijan. In July 2014, Mrs Yunus was arrested and charged with treason, tax evasion and other alleged Criminal Code violations. Her husband Mr Arif Yunus was charged with the same offences and was placed under house arrest because of his bad health condition. The financial charges were linked to grants received by her NGO, which the government has prevented her from registering. The prosecution claimed that Mrs Yunus carried out "illegal business activity", "evaded payment of taxes" and "embezzled" a total of AZN 61 277[254] (approximately 60 000 euros) of funds transferred by donors to her bank account. These grants were not registered with the Ministry of Justice. Mrs Yunus's organisation received the funds from the NED, the German Marshall Fund and Open Society Foundation between 2002 and 2012. At that time the law did not require unregistered NGOs to register foreign funds. Moreover Mrs Yunus did not receive any funds from abroad after 3 February 2014 when the amendments to the Law of NGO and on Grants had entered into force. Therefore her arrest and detention on financial crime charges was disproportionate and unlawful.

In addition, the conditions of her detention were harsh and aggravated her health problem (she suffers from diabetes and hepatitis C). She claimed that after she complained about the conditions in prison, the prison authorities increased the violence in order to "teach her a lesson"[255]. According to her lawyer, Mrs Yunus kept receiving threats, "including that a group of men in civilian clothes entered her cell and made sexually threatening gestures towards her"[256]. This clearly shows the evidence of inhuman and poor detention conditions, violating basic human rights.

[253] UNWGAD, *Eskinder Nega v. Ethiopia*, Opinion n° 62/2012, 21 November 2012, §39
[254] "Guilty of defending rights, Azerbaijan's human rights defenders and activists behind bars", op. cit., p. 11
[255] Id.
[256] Id.

Azerbaijan authorities target human rights activists because of their work promoting and protecting human rights. Through her work, Mrs Yunus's attempted to "foster peace with Armenia through people-to-people dialogue"[257]. Human rights defenders' work touches sensitive political matters for the government and therefore needs to be silenced and controlled. In December 2015, an Appeal Court in Baku, Azerbaijan, converted Mrs Yunus' eight-and-a-half year prison sentence into a suspended term because of her health conditions. It must be noted that her conviction on charges of tax evasion and fraud, despite being denounced as politically motivated by the international community, remains in place. Amnesty International has described Mrs and Mr Yunus as "prisoners of conscience, imprisoned solely for their legitimate human rights work and criticism of the government"[258].

Mr Intigam Aliyev is one of the most respected human rights defenders and lawyers in Azerbaijan[259]. His registered organisation, Legal Education Society (hereinafter 'LES'), promotes awareness of the law and offers legal support to individuals and organisations. He was one of the first lawyers in Azerbaijan to bring cases of violations of human rights before the ECtHR in Strasbourg where he submitted hundreds of applications. In June 2014, Mr Aliyev was a major speaker at a side event during the PACE session. He strongly criticized the Azerbaijani government, highlighting human rights violations and the government's failure to comply with rulings of the Strasbourg Court. Present at the PACE session, when asked about political prisoners in his country, President Ilham Aliyev said that "unfortunately, Azerbaijan is subject to deliberate provocations. We know the source and we know the reason. It has nothing to do with human rights and democracy. It is political"[260]. A few weeks after the PACE session, tax authorities launched an inspection of Mr Aliyev organisation. Mr Aliyev was arrested and detained on 8 August 2014 after being called to the Prosecutor General's Office as a witness in the criminal investigation of NGOs. During the interview, the Prosecutor accused him of conducting illegal business,

[257] Human Rights House Network & Freedom Now, "Breaking point in Azerbaijan, Promotion and glamour abroad, Repression and imprisonment at home", May 2015, p. 43

[258] Amnesty International, Azerbaijan: Release of Leyla Yunus should spur freedom for all prisoners of conscience, 9 December 2015, available at: https://www.amnesty.org/en/latest/news/2015/12/azerbaijan-leyla-yunus-released/

[259] "Breaking point in Azerbaijan, Promotion and glamour abroad, Repression and imprisonment at home", loc. cit.

[260] Speech by Ilham Aliyev at the PACE Session, 24 June 2014, available at: http://en.president.az/articles/12202

tax evasion and abuse of authorities. The prosecution claimed that his NGO failed to register funds from foreign donors, including from HRHF and the NED. In addition the prosecution considered that he conducted illegal business activities "by spending the received funds in the guise of services fees and salaries"[261]. Furthermore he allegedly abused his official authority by acting as a legal representative of the LES. According to Mr Aliyev, only two grants were unregistered with the Ministry of Justice because of the refusal of the authorities to register them. One unclear fact is that the Ministry of Justice deleted from its website a previously published list of funds registered by Mr Aliyev for his NGO.

In addition to his unlawful arrest and detention, Mr Aliyev was also subject to bad detention conditions. At the time of his imprisonment he suffered from severe headaches and nerve pain. He was denied of appropriate medication and health care during the first six months of his detention[262]. Access to hot water was only possible twice a week, the size of the prison cell made it impossible to walk, and there was insufficient ventilation and heating[263]. His trial started on 23 January 2015 and on 22 April 2015 he was convicted and sentenced to seven and a half years for abuse of office, tax evasion, illegal entrepreneurship, forgery and embezzlement. In March 2016 the Azerbaijani authorities released Mr Aliyev as part of a presidential pardon.

Mr Rasul Jafarov is an internationally respected human rights defender. He advocates on the issue of unlawful imprisonment in Azerbaijan. Since the creation of the Human Rights Club in 2010, this human rights activist has repeatedly applied for registration of his organisation with the Ministry of Justice; registration that has been denied on arbitrary grounds. Having exhausted all domestic remedies, Mr Jafarov submitted a complaint to the ECtHR, which is still pending. Despite the refusal of registration, Mr Jafarov continued his work, funded by several international donors such as the NED, the German Marshall Fund, the Open Society Foundations and the OSCE. In

[261] "Guilty of defending rights, Azerbaijan's human rights defenders and activists behind bars", op. cit., p. 15
[262] "Breaking point in Azerbaijan, Promotion and glamour abroad, Repression and imprisonment at home", op. cit., p. 48
[263] Id.

August 2014 he was arrested and placed in pre-trial detention[264]. The authorities accused him of failing to register the foreign funds he received, but did not charge him under the Law on NGOs and on Grants. Instead, the authorities considered the grants as commercial income to a business; they charged him with a series of criminal offences, including illegal business activity, tax evasion, abuse of office, forgery and embezzlement[265]. Prosecution claimed that Mr Jafarov embezzled large amounts of money and evaded taxes by working with an unregistered NGO, therefore failing to register funds received from international donors between 2010 and 2014. Just like Mrs Yunus, Mr Jafarov did not receive any grants from abroad after February 2014. This apparent retroactive application of the revised Law on NGOs and on Grants is clearly used to support criminal charges against unregistered NGOs' leaders who relied on foreign funding to carry out their activities[266]. It is important to highlight that the Law on NGOs and on Grants does not include imprisonment as a punitive measure. The authorities are using the Criminal Code which prohibits tax evasion and illegal business activity to justify detention of NGOs' leaders. Mr Jafarov's trial began in January 2015.

Mr Jafarov's lawyer produced a letter from twenty international donor organisations claiming that all grants sent to the Human Rights Club were spent according to the terms of the grant agreements[267]. The Court convicted him of tax evasion, illegal business activity, abuse of office, embezzlement and forgery and sentenced him to a six and a half years prison sentence in April 2015. In addition, Mr Jafarov was banned from holding public office for three years[268] and had to pay back AZN 350 (310 euros) for the use of expert witnesses.

In addition to blocking access to international funds for civil society, governments interfere with human rights activists accessing international mechanisms for redress. In

[264] OMCT, "Azerbaijan : Rasul Jafarov sentenced to 6.5 years of jail for human rights work, World Organisation Against Torture", Press release, 16 April 2015, available at: http://www.omct.org/human-rights-defenders/statements/azerbaijan/2015/04/d23093/

[265] "Breaking point in Azerbaijan, Promotion and glamour abroad, Repression and imprisonment at home", op. cit., p.52

[266] "Breaking point in Azerbaijan, Promotion and glamour abroad, Repression and imprisonment at home", op. cit., p. 51

[267] OMCT, "Azerbaijan : still on-going judicial harassment against Mr Rasul Jafarov", 2 April 2015, available at: http://www.omct.org/human-rights-defenders/urgent-interventions/azerbaijan/2015/04/d23081/

[268] "Breaking point in Azerbaijan, Promotion and glamour abroad, Repression and imprisonment at home", loc. cit.

Azerbaijan, authorities have taken punitive measures against individuals who cooperate with international or regional human rights bodies[269]. A number of human rights defenders face travel bans when they seek to travel outside of the country to places where they may speak to international media, give testimony and provide evidence of human rights abuses. Threat and harassment are so high, that many local human rights defenders that cooperated with the Office of the Commissioner for Human Rights of the Council of Europe have been forced into hiding. Since Mr Pedro Agramunt and Mr Joseph Debono Grech have been appointed as rapporteurs on Azerbaijan for the Council of Europe Monitoring Committee, journalists and human rights defenders they met are now imprisoned or in exile. In June 2014, several human rights defenders organised a side-event in Strasbourg when President Aliyev addressed the PACE, two months later Mr Aliyev and Mr Jafarov were arrested and Mr Huseynov fled to the Swiss embassy in Baku seeking protection against his own imminent arrest. Khadija Ismayilova, an investigative journalist in Azerbaijan, was also arrested after meetings with the OSCE and the PACE.

The arbitrary use of criminal charges to imprison civil society actors has been recognised as a violation of international human rights law[270]. Human rights defenders are facing various and gross violations oh their human rights, such as the right to a fair trial, the right to liberty and security, the right not to be subjected to inhuman or degrading treatment. While human rights defenders are arrested and imprisoned, their lawyers are also facing violations of human rights (Section 2).

Section 2 – Impact and violations of third parties' rights, lawyers at risk

Lawyers, especially those who defend human rights activists, are too often victims of human rights violations because of their devoted and legitimate work. Unlike other human rights defenders, human rights lawyers have a legal responsibility to protect those

[269] "Breaking point in Azerbaijan, Promotion and glamour abroad, Repression and imprisonment at home", op. cit., p. 28
[270] UN doc. A/HRC/WGAD/2012/39, op. cit., §§ 39-50

suffering from human rights violations[271]. Human rights lawyers play a vital role upholding human rights and raising awareness of the international community on human rights violations.

The Human Rights Committee has recalled that the right to a fair trial "is a key element of human rights protection and serves as a procedural means to safeguard the rule of law"[272]. The Committee further stressed that this protection applies regardless of the specific legal tradition of the country involved[273]. Both the ICCPR and the ECHR protect the right of defendants to be assisted by a legal counsel[274].

The UN Basic Principles on the Role of Lawyers (hereinafter 'UN Basic Principles') have been formulated to assist Member States in their task of promoting and protecting the role of lawyers, ensuring that their role is respected and taken into account by States within the framework of their national legislation and practice[275]. The UN Basic Principles were unanimously adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in September 1990. The UNGA adopted the UN General Principles without a vote and invited "governments to respect them and to take them into account within the framework of their national legislation and practice"[276]. Principles 16 and 17 states the following:

> "16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

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[271] Human Rights House Network, "Human Rights Lawyers at risk, Making the Case for Protection of Legal Professionals in Azerbaijan, Belarus, Moldova, Russia, and Ukraine", 10 September 2015, p. 14
[272] UN Human Rights Committee, General Comment n° 32 on article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, UN doc. CCPR/C/GC/32, §2
[273] Id. §4
[274] Article 14 ICCPR and Article 6 ECHR
[275] OHCHR, Basic Principles on the Role of Lawyers, September 1990, available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx
[276] UNGA, Resolution on "Human rights in the administration of justice", 18 December 1990, UN doc. A/RES/45/166

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities."

These principles are not legally binding but are broadly accepted and the rights included in them are largely integrated in binding international or regional human rights treaties.

In November 2015, the UNGA passed a resolution on the protection of human rights defenders, in which it firmly condemns the violence, intimidation, criminalisation, torture, killing and silencing of human rights defenders and stresses the importance to also protect their legal representatives[277]. The context of the adoption of this resolution is important to analyse. China and Russia asked for a vote on the resolution, therefore "breaking past unanimous support for human rights defenders at the UN"[278]. The resolution was finally adopted with one hundred and seventeen votes in favour, fourteen against and forty abstentions. This vote reflects not only the increasingly repressive atmosphere for human rights defenders and lawyers in the countries that voted against the resolution but also the international community opposition to these worrying conditions[279].

The Brussels Declaration on Criminal Justice Systems stresses that: "lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards"[280]. The Council of Europe Committee of Ministers has called on States to refrain from putting pressure on applicants, their lawyers and members of their family with the aim of discouraging applications to the Court[281]. In addition the PACE made similar recommendations in its 2007 Resolution[282]. In this Resolution, the PACE expressed its serious concerns about a number of cases involving the alleged murder, disappearance, beating or threatening of applicants initiating cases

[277] UNGA, Resolution on the role of human rights defenders and the need for their protection, 2 November 2015, UN doc. A/C.3/70/L.46, point 5-6
[278] HRHF, "Updated: UN adopts resolution supporting human rights defenders", loc. cit.
[279] Id.
[280] OSCE, Fourteenth Meeting of the Ministerial Council, 5 December 2006, available at: http://www.osce.org/mc/25065?download=true
[281] CoE Committee of Ministers, "Resolution CM/Res(2010)25 on member states' duty to respect and protect the right of individual application to the European Court of Human Rights", 10 November 2010, §§ 1-2 and 4
[282] CoE, PACE Resolution 1571 (2007), "Council of Europe member states' duty to co-operate with the European Court of Human Rights", §§ 17.1-17.3

before the ECtHR that have still not been fully and effectively investigated by the competent authorities. It further noticed illegal methods of pressure on lawyers who defended applicants before the ECtHR "included trumped-up criminal charges, discriminatory tax inspections and threats of prosecution for 'abuse of office'. Similar pressure has been brought to bear on NGOs who assist applicants in preparing their cases."[283]. The disbarment clearly ends the ability of lawyers to proceed their case, the President of the PACE has expressed its concern on the subject and stated "against the background of increasing intimidation of human rights defenders in Azerbaijan, such clear pressure on independent lawyers defending civil society leaders is unacceptable"[284].

Just like the human rights defenders they represent in courts, human rights lawyers face threats, intimidation and pressure to discourage them to take sensitive cases which impedes them to freely denounce violations and abuses. In relation to the issue of foreign funding, lawyers of NGO leaders presented above have been harassed, threatened and in most cases disbarred. The threat of disbarment has been very successful at reducing the number of lawyers in Azerbaijan who are willing to risk their careers and their own security[285]. Pressure on lawyers from the Azerbaijan Bar Association itself takes the form of a verbal warning in order to dissuade the lawyers from taking a particular client or case. Authorities then threaten lawyers with disciplinary action, which may result in temporary or permanent suspension from the Bar[286]. In Azerbaijan, once a lawyer is disbarred he is not able to act as defence counsel in a criminal case at any level of review.

Lawyers of Mrs Leyla Yunus have experienced this worrisome trend of pressure against lawyers. Mr Javad Javadov, who has represented Mrs Yunus since her arrest on 30 July 2014, has been removed from the case after he highlighted the procedural weaknesses and violations of the right to a fair trial in the on-going judicial process[287]. In November 2014, Mr Khalid Bagirov, the second main lawyer representing Mrs Yunus, was also excluded from the case and banned from defending her. The prosecution has called both

[283] Id.
[284] PACE, "Pressure on Ilgar Mammadov's lawyer is unacceptable", 10 December 2014, available at: http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=5347&lang=2
[285] "Breaking point in Azerbaijan, Promotion and glamour abroad, Repression and imprisonment at home", op. cit. p.30
[286] Id.
[287] Amnesty International, "Urgent Action, Leyla Yunus denied lawyers of her choice", 11 November 2014

lawyers as witnesses, hence preventing them from acting as defence counsel. The authorities removed them from the case claiming a conflict of interest; therefore the two lawyers did not have access to their client anymore. Mr Alaif Gasanov, another lawyer acting for Mrs Yunus, was sentenced to 240 hours of community service because of public statements about the conditions of detention of his client. After his visit to Mrs Yunus in a pre-trial detention centre, Mrs Nuriya Guseinova, Yunus's cellmate, filed a complaint against Mr Gasanov stating that he had insulted and defamed her; both these acts are considered criminal offences[288]. The lawyer was convicted for his Facebook publication where he stressed the poor conditions of detention of Mrs Yunus – her two cellmates smoked in the cell, thus creating a deterioration of her health. In November 2014, the court found Mr Gasanov guilty of defamation, which according to the criminal code is defined as the "dissemination of knowingly false information discrediting honour and dignity of another person or damaging his reputation in public statement or mass media"[289]. The removal of the two main lawyers representing Mrs Yunus since her arrest, and the criminal charges brought against the third one, constitute a violation of her right to be represented by a lawyer of her choice, which is an essential component of the right to fair trial.

States' regulations on the access to foreign funding have severe repercussions on both civil society organisations and on the individuals working within them. Not only do governments violate human rights defenders' fundamental freedoms and impede them from doing their legitimate work, they also violate their right to a fair trial by restricting access to their lawyer. Human rights lawyers are also victims of harassment, intimidation, threat of disbarment or imprisonment. Restrictions to the right to access foreign resources have bigger consequences than just impeding the right to freedom of association of NGOs and individuals, they also violate the rights and fundamental freedoms of invidual's working closely with civil society.

[288] HRHF, "Human Rights Lawyers at risk, Making the Case for Protection of Legal Professionals in Azerbaijan, Belarus, Moldova, Russia, and Ukraine", op. cit., p. 19
[289] Id.

CONCLUSION

In conclusion of this research, it can be affirmed that access to foreign funding for NGOs defending human rights is a universal right. Although this postulate is not binding, it reflects a standard which has been developed by the international community and international institutions in a context of more and more restrictive legislations. National laws that restrict or prohibit civil society to access foreign funding have damaging impact on the exercise of the right to freedom of association but also on the enjoyment of other fundamental freedoms.

The right of NGOs to access foreign funding is violated either directly through legislation that explicitly prohibits or restricts access to such funding, or indirectly by restricting the ability of human right defenders to operate freely and independently. Regardless of the option chosen by the State, the measures and their implementation have a devastating impact on the ability of NGOs to operate, and to promote and protect human rights.

All NGOs should be free to solicit, receive and use resources except confirmation of any criminal activity. The right of NGOs to access and use foreign funds is accompanied by responsibilities especially in terms of transparency and good governance. States have a legitimate right to counter activities that endanger national security or public safety, but the measure taken should not be transformed into a "pervasive system of preventive control that affects all human rights NGOs" [290]. Moreover prohibiting international funds is another way used by States to disempower and undermine local civil society. Campaigns of defamation related to the issue of foreign funding alter and pervert the concept of solidarity and international cooperation. Restrictions on foreign funding while targeting national NGOs engaged in the protection and promotion of human rights, also considerably affect "international flows of democracy assistance"[291]. Therefore the

[290] "Violations of the right of NGOs to funding: from harassment to criminalisation", op. cit., p. 8
[291] "Defunding Dissent: Restrictions on Aid to NGOs", op. cit., p.79

effect of funding restrictions affects NGOs' activities at the national level but also affects the regional and international solidarity network of human rights NGOs[292].

Furthermore, the crackdown on international financial assistance and foreign involvement in national interests represents in many countries only one element of a broader attack on civil society and political pluralism.

States that use restrictions on foreign funding must change their perception and treatment of this issue. This includes moving from a system where the State undertakes the right to control access to funding to one where the State satisfies its obligation to support and allow, directly or indirectly, the funding of human rights organisations' activities. It is clear that the efforts of the international community have been insufficient to fully guarantee and protect the right of NGOs to access foreign funding. International pressure is not always effective: Ethiopia, Egypt and the Russian Federation are strategically significant enough to risk international disapproval and sanctions[293].

The Special Rapporteur on the rights to freedom of association and of peaceful assembly has highlighted another concern regarding the issue of foreign funding: "sectoral equity". This concept implies that an equally favourable environment should be created and maintained by States for businesses and associations. Indeed many governments make greater efforts to help the business sector grow and succeed than they do for the voluntary sector, despite having obligation to do so under international human rights law[294]. The Special Rapporteur considers that State would better protect and promote assembly and association rights if they raised the treatment of associations to similar levels as businesses[295]. While there are more and more restrictions on NGOs access to foreign funding, restrictions on foreign business investment are dissipating. For instance, India encourages foreign commercial investment but still requires NGOs receiving external funds to obtain government permission. In Russia eighty-eight NGOs have been obliged to register as "foreign agents" because they received foreign funding. In 2013, Russia was the

[292] "Violations of the right of NGOs to funding: from harassment to criminalisation", op. cit., p. 9
[293] "Defunding Dissent: Restrictions on Aid to NGOs", op. cit., p. 82
[294] UNGA, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 4 August 2015, UN doc. A/70/266, §19
[295] Id.

third country among the worlds' most successful countries in attracting foreign business investment[296]. The Special Rapporteur believes that "the presence of a robust, vocal, critical civil society sector, almost without exception, guarantees that a State also possesses a good business environment… Rule of law is stronger, transparency is greater, and markets are less tainted by corruption. Indeed, the presence of critical civil society can be viewed as a barometer of a State's confidence and stability"[297]. This different treatment is often more motivated by politics than practicality. Economic interests are considered to be more important than non-economic activities; the influence and opinions of industry take precedence over fundamental rights and social justice. The concept of sectoral equity should be adopted by every States. Enabling and balanced environments are better for multinational corporations but also major international NGOs.

One aspect of the subject of the access to foreign funding which is also important to consider is the reaction of foreign donors. International donors are able to play a major role in the evolution of the process of funding and its simplification. Foreign donors would be able to counter restrictive legislations by adapting their granting methods for local NGOs. An essential step would be to explore new ways of funding. For instance the NED, a private, non-profit foundation, is committed to support and strengthen democratic institutions around the world[298]. Certain that a vibrant civil society is essential to ensure human rights, democracy and the rule of law, the NED has developed its granting method to be flexible and quicker. NED is able to work in difficult circumstances and to respond quickly when there is a possibility of political change. This international donor is aware of the practical difficulties faced by local NGOs to access foreign funding. The ability of the NED to maintain its activities in increasingly closed environments shows the importance and value of quasi-governmental and non-governmental means for supporting civil society[299]. Foreign donors in general also need to develop more sustainable sources of funding for domestic civil society organisations.

[296] Id. §71
[297] Id. §18
[298] National Endowment for Democracy website, available at: http://www.ned.org/about/
[299] "Defunding Dissent: Restrictions on Aid to NGOs", op. cit., p. 89

A solution to change the States' behaviour on the issue of foreign funding, is for the ECtHR to expressly claim that the access to foreign resources is an integral part of the right to freedom of association and to condemn States that disproportionally restrict access to such resources. A clear and strong jurisprudence needs to be adopted by the ECtHR.

In countries where the right to freedom of association is not fully respected and therefore where the access to foreign funding is difficult, if not impossible, human rights organisations need a better protection from the international community. NGOs advocating for the protection and promotion of human rights are essential when democracy and the rule of law are not the governing principles of a country. Whilst domestic funding is barely possible to receive, it is through international funding that local NGOs are able to operate, voice the human rights abuses and make the international community conscious of the damaging effect of violations of human rights and fundamental freedoms. Through financial restrictions, the true and wider objective of many of those holding State power is certainly to silence dissent, silence negative reporting and silence those upholding the State to its international obligations: the very aim of human rights defenders.

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