

Foreign Funding and Civil Society: International Law and Best Practices

Kareem Elbayar, Legal Advisor - Middle East / North Africa
The International Center for Not-for-Profit Law (ICNL)

kelbayar@icnl.org



Foreign Funding : *UN Declaration on Human Rights Defenders* (1998)

- Each State has the responsibility to protect human rights and fundamental freedoms by “adopting such steps as may be necessary to create all conditions necessary... as well as the legal guarantees required to ensure” that all persons are able to enjoy these rights and freedoms (Article 2).
- Among these is 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” (Article 13).
- The UN High Commissioner for Human Rights has explicitly stated that the Declaration’s protections extend to the “receipt of funds from abroad.”

About the *UN Declaration on Human Rights Defenders*

- Adopted by the UN General Assembly “by consensus... and therefore represents a very strong commitment by States to its implementation.”
- Not legally binding but “contains a series of principles... based on human rights standards in other international instruments *that are legally binding*”

International Covenant on Civil and Political Rights

- Article 22

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** shall 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, the protection of public health or morals, or the protection of the rights and freedoms of others.**

Applying the *ICCPR* Standard

- Any **restriction** on the freedom of association is **impermissible** unless it meets all three of these conditions.
 1. It must be prescribed by law.
 2. It must be necessary in a democratic society.
 3. It must be in the interests of one or more of these justifications:
 - a. National security or public safety
 - b. Public order
 - c. The protection of health or morals
 - d. The protection of the rights and freedoms of others

Applying the *ICCPR* Standard

- Are rules on foreign fundraising “restrictions?”
- Are such restrictions “prescribed by law?”
 - Clear, unambiguous, predictable standard
- Are they “necessary in a democratic society?”
 - Least intrusive means of regulation

Applying the *ICCPR* Standard

- A government would not be permitted under the ICCPR to dissolve an organization, terminating the rights of its members to associate, at its discretion
- If the government may cut off significant funding to an organization at its discretion, essentially terminating the organization's activities, it will have the same effect on the members right to associate
- This is particularly true in countries where domestic funding sources are not well developed, as organizations may have few options besides foreign funding

Financial Action Task Force

- FATF – an inter-governmental body that develops and promotes national and international policies to combat money laundering and terrorist financing
- **FATF Special Recommendation VIII** deals with special issues raised by NGOs, and sets out a list of recommended policies to protect the non-profit sector from terrorist abuse

Financial Action Task Force: Special Recommendation VII

- Does **not** recommend government pre-approval of foreign funding or other NGO financing.
- Instead, FATF suggests **Four Elements to Combating Terrorist Financing in NGOs:**
 - Outreach to the sector,
 - Supervision or monitoring,
 - Effective investigation and information gathering, and
 - Effective mechanisms for international cooperation.

FATF Policy Recommendations

- According to FATF, States should require NGOs to:
 - conduct transactions via regulated financial channels;
 - maintain publicly-available information on the purpose and objectives of their activities and the identities of people who own, control, or direct their activities;
 - issue annual financial statements that provide detailed breakdowns of incomes and expenditures;
 - have appropriate controls in place to ensure that funds are accounted for and spent in accordance with the purpose and objectives of the NGO;
 - make best efforts to confirm the identities of their beneficiaries and partner organizations and document the identity of their significant donors;
 - maintain, for at least five years, publicly-accessible and detailed records of domestic and international transactions.

International Best Practices

- Remember the *ICCPR* standard: no restrictions except those that are necessary in a democratic society in the interests of national security, etc.
- Registered organizations should be permitted to engage in any legitimate fundraising activity.
- Advance permission is generally inappropriate. The government should not be permitted to screen or require approval of specific grants or sources of funds.
- Foreign funding should be permitted so long as organizations comply with applicable customs and foreign exchange rules.

Public Policy Considerations

- Foreign funding is a valuable source of disaster relief
 - after 2004 Indian Ocean tsunami, more than \$2 billion in foreign money was donated in one year, including more than \$1 billion from private donors
 - Prior restrictions delay immediate disaster relief.
 - Compare Sri Lanka tsunami aid to Iran earthquake aid: after Iran's 2003 Bam earthquake, more than \$1 billion was pledged but only \$17.5 million was received in the year after the earthquake.
- Foreign funding is a valuable source of development aid
 - Yemen receives an average of \$300 million in development aid per year
 - Prior restrictions affect ability of donors to allocate and budget future funds and programs

Consider Current Law (Article 23.1)

- Any association or foundation may, with the knowledge of the Ministry, obtain assistance from overseas from a foreign person or entity or the representatives thereof, and they may also send anything so mentioned above to persons or entities overseas for humanitarian purposes.
- **Does this meet the standard?**

Proposed Amendment (Article 1)

- a) **...It is not allowed to send cash or in-kind assistance to persons or organizations for humanitarian purposes abroad before receiving the approval of the Ministry or its offices...** The application should contain the following data:
1. The type and amount of provided or sent assistance;
 2. The name of the association or a foundation which would receive assistance...
 3. The name of the foreign person or agency or the name of its representative...
 4. A brief on the foreign person or organization or agency that is providing the grants and the nature of his work and activities.
 5. The intended goal of receiving or sending such assistance.
 6. The method by which an association or foundation will receive assistance...
- b) The Ministry or its office should decide upon the application within thirty days from the submission date and in case no decision is taken in this time period the application shall be considered approved.

● **Does this meet the standard?**

Responding to Proposed Amendments

- How will this affect your organization?
- What will be the effect on other Yemeni NGOs?
- Why is the government making this change?
- Will the government be able to achieve its own goals by making this change?
- Is there a more predictable, less discretionary alternative?