

GAINING GROUND

**A FRAMEWORK
FOR DEVELOPING
STRATEGIES AND
TACTICS IN RESPONSE
TO GOVERNMENTAL
ATTACKS ON NGOS**

INCLO
International Network of Civil Liberties Organizations
2017



CANADIAN
CIVIL LIBERTIES
ASSOCIATION



ASSOCIATION
CANADIENNE DES
LIBERTES CIVILES



ABOUT INCLO

The International Network of Civil Liberties Organizations ([INCLO](#)) is a group of independent, national human rights organisations working to promote fundamental rights and freedoms by supporting and mutually reinforcing the work of the member organisations working in their respective countries, and by collaborating on a bilateral and multilateral basis. Each organisation is multi-issue, multi-constituency, domestic in focus, independent of government, and advocates on behalf of all persons in their respective countries through a mix of litigation, legislative campaigning, public education and grassroots advocacy. The members of INCLO are: the American Civil Liberties Union ([ACLU](#)), the Association for Civil Rights in Israel ([ACRI](#)), the International Human Rights Group Agora ([Agora](#)) in Russia, the Canadian Civil Liberties Association ([CCLA](#)), the Centro de Estudios Legales y Sociales ([CELS](#)) in Argentina, Dejusticia in Colombia, the Egyptian Initiative for Personal Rights ([EIPR](#)), the Human Rights Law Network ([HRLN](#)) in India, the Hungarian Civil Liberties Union ([HCLU](#)), the Irish Council for Civil Liberties ([ICCL](#)), the Kenya Human Rights Commission ([KHRC](#)), the Legal Resources Centre ([LRC](#)) in South Africa, and Liberty in the United Kingdom.



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THREAT

Governments promulgate new regulations that require burdensome and intrusive reporting that can be used as a basis to block incoming grants, levy fines, seize assets, arrest board and staff members or shut down an organisation entirely. Governments also utilise ordinary regulatory frameworks for not-for-profit organisations in arbitrarily selective enforcement actions against undesired NGOs.

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RESPONSE 2 **26**
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RESPONSE 3 **27**
 Full compliance

RESPONSE 4 **28**
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THREAT

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RESPONSE 2 **36**
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THREAT

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 Operate transnationally ('offshore')

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THREAT

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RESPONSE 3 57

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RESPONSE 4 59

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THREAT

Governments stigmatise NGOs by connecting the entire NGO sector, as well as underlying human rights concepts and activities, to the public's fear of threats to personal security and welfare, leveraging populist/nationalist sentiment against what is perceived to be the influence of foreign elites.

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ACKNOWLEDGEMENTS

This report was written by Edwin Rekosh, visiting professor of law and director of human rights initiatives at Cardozo Law School. The primary editor of the report was Stefania Kapronczay, co-chair of INCLO and executive director of the Hungarian Civil Liberties Union ([HCLU](#)). Additional edits were provided by Lucila Santos, INCLO's programme coordinator, and editorial assistance was also provided by Reka Varkonyi, the HCLU's head of administration. Significant contributions were provided by the following individuals associated with INCLO members: Gasser Abdel-Razek (executive director, [EIPR](#)), Sharon Abraham-Weiss (executive director, [ACRI](#)), Debbie Gild-Hayo (director of public advocacy, [ACRI](#)), Pavel Chikov (director, [Agora](#)), Gastón Chillier (executive director, [CELS](#)), George Kegoro (executive director, [KHRC](#)), Janet Love (executive director, [LRC](#)), David Malombe (deputy executive director, [KHRC](#)), Anthony Romero (executive director, [ACLU](#)) and Martha Spurrier (director, [Liberty](#)).

Research assistance was provided by Eleonora Davidyan, with help from Cardozo students Selman Akinci and Jorida Shima. Lamin Brima and Bryony Robottom of DLA Piper provided legal research and analysis.

Many thanks also go to the following people for contributing information, ideas and resources: Sanjay Agarwal (AccountAid), Julie Broome (Ariadne), Kizito Byenkya (Open Society Foundations), Suba Churchill (Civil Society Reference Group), Bryan Nunez (Open Society Foundations), Victoria Ohaeri (Spaces for Change) and James Savage (Fund for Global Human Rights). Others prefer to remain anonymous.

INCLO is grateful to the Open Society Foundations, the Ford Foundation and the Oak Foundation for their generous support of its work in this area.

EXECUTIVE SUMMARY

In many countries the world over, governments have stepped up attacks on Non-Governmental Organisations (NGOs), making it harder for them to function effectively. A global pattern has emerged in which governments first seek to stigmatise and delegitimise these organisations, particularly by demonising their acceptance of foreign funding or other foreign connections they might have. Later they impose debilitating regulations, or take even more repressive action, to limit their activities or shut them down. These measures are often cloaked as efforts to curb money laundering, corruption or terrorism.

Such state tactics are not new and include public vilification, hostile legislation, arbitrary enforcement, surveillance, arrest and intimidation. But the speed and scale of this latest spreading wave of repression has been astonishing, fuelled by geopolitical trends and national political shifts that are weakening international human rights protection and support. NGOs are essential for mobilising private initiative, facilitating citizen engagement and protecting people's rights. They must watch closely for signs of

a coming sector-wide assault on civic freedoms in order to anticipate and prepare for potential threats.

This manual seeks to provide NGOs with relevant examples and resources to confront intensifying governmental restrictions. It is published by the International Network of Civil Liberties Organizations (INCLO), which groups 13 independent, national human rights organisations from the global North and South that work to promote fundamental rights and freedoms. Many INCLO members have had to respond to a sudden increase in threats to civic freedoms, and this publication shares their experiences and those of other selected NGOs to stimulate further exchange with organisations facing similar difficulties.

The document includes brief case studies from different countries, while recognising that the new strategies and tactics that NGOs adopt at the national level must be determined by the national context. It identifies five strategic questions, related to specific threats being seen around the world, and enumerates possible responses, evaluating their pros and cons

and addressing contextual considerations that may be taken into account.

The first strategic question posed is 'To comply or not to comply?' when governments impose new burdensome and intrusive reporting requirements on NGOs, or selectively enforce existing regulations to punish certain organisations. Officials may use the failure to comply with these regulations to try to justify seizing assets, making arrests or even shutting an organisation down. NGOs can respond to this threat in a number of ways, through: a) resistance; b) minimal compliance, aimed at enhancing a resistance strategy or used as a calculated tactical decision in itself; c) full compliance; d) over-compliance, aimed at winning public support and discouraging arbitrary enforcement; or e) voluntarily disclosing information about the organisation, irrespective of legal requirements.

The second issue this publication analyses is 'Hardening the target', when governments attempt to intimidate and interfere with NGO activities by

tolerating or encouraging violent attacks on staff members and/or by deploying extensive surveillance, using increasingly intrusive technological techniques that may include hacking. Organisations can respond by developing policies, plans and training to provide physical security to NGO staff, on the one hand. In addition, as governments dedicate more resources to cybersurveillance and cyberwarfare, NGOs can harness technological solutions to provide digital security to the organisation and its team members.

‘Creating alternative organisational structures’ is the third scenario studied in the manual. The threat is that governments make it impossible for some NGOs to exist in their current form by taking arbitrary legal action against them, prohibiting funding from foreign donors or threatening NGO leaders or staff with arrest or physical harm. The potential responses in this context include: setting up a new entity of a similar nature; establishing a commercial firm to avoid the extra regulatory burdens placed on charitable entities; doing without a legal entity altogether and organising activities as an informal group of individuals; and moving offshore or allowing targeted staff members to work from abroad. Each of these options has significant potential drawbacks.

The document’s fourth section focuses on ‘Forging alliances.’ When there is a sector-wide assault on NGOs, it is important for them to band together so governments cannot exploit the typical fissures in civil society that arise, for example, from the different issues that organisations work on or from their advocacy-

versus service-focused approaches. One way to brace for official divide-and-conquer strategies is by planting the seeds early for alliances that bridge these divisions. Once a crackdown begins, another response would be to differentiate the roles that NGOs play, based on their organisational profiles, and to balance the interests of differently affected subsectors. NGOs could also broaden coalitions to include other sectors sympathetic to their cause or suffering similar governmental pressure, including businesses, media outlets and trades unions. In addition, they should consider tracking new initiatives that do not explicitly target NGOs but could be used against them, to try to block, soften or at least prepare for such measures.

Finally, the publication explores a fifth strategic question: the importance of ‘Reshaping public perceptions and building constituency.’ Perhaps the most significant long-range threat to NGOs is the growing use of delegitimising strategies to foster the perception that they do not have any authentic local constituency – a notion exacerbated by the fact that many NGOs depend on foreign financing. When governments stigmatise NGOs by associating the sector, as well as human rights concepts and activities, to foreign interests that pose a threat to people’s security and welfare, organisations can respond in a number of ways. They can reframe human rights activities as responding to local concerns and interests and/or reframe attacks on NGOs as attacks on democracy and stability. They could also link these attacks to past episodes of repression, or reframe them

as an assault on foreign direct investment (channelled through or requiring the participation of NGOs) and on achievement of the UN Sustainable Development Goals. Furthermore, they can seek to build local constituency by reorienting priorities and strategies to emphasise their importance to one or more specific constituencies, or reorienting their focus to prioritise issues with broad appeal. In addition, organisations facing smear campaigns can build trust and dispel unfounded insinuations by being more transparent about their work.

The document’s conclusion reviews the global pattern of governmental attacks on NGOs that has become more prevalent in recent years, and often entails playing on public fears to stigmatise, divide and conquer. The framework for evaluating potential strategies and tactics provided in this manual is a good starting point for addressing NGO vulnerabilities. But many issues remain to be resolved if civil society is to effectively fight back against this tide of governmental harassment and restricted civic freedoms.

INTRODUCTION

The purpose of this publication is to serve as a resource to NGOs that are operating in national environments in which increased governmental restrictions are eroding civic freedoms. Excessive restriction of such freedoms at the national level compromises the ability of NGOs as a whole to engage in legitimate activities, such as providing services to a particular group of beneficiaries, raising awareness about the nature of specific social problems and solutions, providing access to justice through representation in the legal system, or expressing views on policy issues.

As well documented elsewhere, a rapidly increasing number of governments – of widely varying political types – have engaged in sector-wide assaults on NGOs: imposing debilitating regulatory measures, manipulating public opinion through stigmatisation strategies and, in some cases, deploying even more repressive tactics.

The International Network of Civil Liberties Organizations (INCLO) is a network of 13 independent, national human rights organisations from 13 different countries in the global North and South. INCLO members work together to promote fundamental rights and freedoms by supporting and mutually reinforcing each other's work in their respective countries and collaborating with each

other across borders. It began as an informal network in 2008 and incorporated formally in 2015 as a Swiss association headquartered in Geneva.

The creation of INCLO comes at a time when the international order buttressing the global human rights system is under pressure, governments in the global North have a diminishing role as an enforcer of rights due to changing geopolitical trends and their own internal politics, and the human rights movement across the globe is under attack. INCLO was established in recognition of the importance of strong, national civil society organisations in protecting human rights and the need to facilitate international solidarity and collaboration among them. INCLO provides a collective global perspective that can bring new strategic insights to an international human rights movement seeking novel approaches at a critical juncture.

Since the current wave of repression targeting NGOs at the national level is partly fuelled by the same shift in global politics that is undermining the human rights system, the effort to push it back cannot be led from the global level. The premise of this publication is that NGOs need to adopt new strategies and tactics to deploy at the national level, supported by – but not dependent on – international solidarity.

To be effective, national strategies must be determined by the national context in which they are deployed, so there can be no general prescriptions. Accordingly, this publication is framed as a set of threats that leaders of NGOs or NGO coalitions would be well advised to consider, along with possible responses and some of the factors that may help determine the best response for a given circumstance.

We have mapped five categories of threat that have emerged as part of a global pattern and a total of 21 possible responses, organised by threat. With respect to some threats, the possible responses are mutually exclusive by nature; with others, NGOs may choose to pursue multiple responses in parallel.

Many INCLO members have had direct experience responding to a sudden increase in threats to civic freedoms, either recently or historically or both, and these experiences – along with those of other NGOs – are captured in the publication. Our intention is to impart the learning within the INCLO network and create a framework that enables further sharing of strategies and tactics among NGOs faced with similar threats in different national contexts, as a global pattern of increased threat continues to accelerate.

RECOGNISING THE PATTERN

The first imperative for NGOs in the context of a global pattern of restricting civic freedoms is to recognise the signs of a coming sector-wide assault and to anticipate potential threats in order to prepare for them. A fairly consistent pattern has emerged in a large number of countries, sharing common elements that often unfold in a predictable sequence.

The governmental tactics themselves are not new: public vilification, hostile legislation, arbitrary enforcement, surveillance, arrest and intimidation. But the speed and scale of the almost viral assault spreading across the regions of the world in a relatively short period has been astonishing. In large part, the increasing attacks on civil society have been facilitated by geopolitical trends and a changing international order that weaken countervailing forces as well as by global trends influencing politics at the national level in many countries.

It is important for NGOs to consider governmental attacks in the context of broader trends in order to anticipate and mitigate potential risks before they materialise. It is equally important for NGOs to develop strategies that target deeply rooted enabling factors for the attacks so they can avoid becoming stuck in a reactive mode that weakens their long-term effectiveness and sustainability.

ORIGINS

In Russia and China, rhetorical concern about the intentions of foreign donors supporting civil society organisations surfaced in the mid-2000s in the form of governmental statements and media reports about ‘colour revolutions.’ Inspired in large part by the 2000 revolution that toppled Milosevic in Serbia, the 2003 Rose Revolution in Georgia was followed in quick succession by the 2004 Orange Revolution in Ukraine and the 2005 Tulip Revolution in Kyrgyzstan. In reaction, the Russian government began a public campaign linking those popular uprisings, dubbed ‘colour revolutions’, to civil society development programmes sponsored by the US government and the philanthropy of George Soros through various foundations.

Allegations of foreign-generated intrigue hearken back to the Cold War, when each geopolitical bloc engaged in overt propaganda efforts and covert activities designed to weaken the opposing bloc. Indeed, concerns have lingered just below the surface for a long time; for example, following the fall of the Berlin Wall, the Romanian government made unsubstantiated allegations about foreign involvement in the 1989 revolution that brought down the Ceausescu regime¹.

It was a small rhetorical leap to go from alleging covert foreign intervention to asserting sinister links between foreign sources of funding and above-board domestic civil society groups a decade or so later. Concerns grew in China in particular following the Jasmine Revolution in Tunisia in 2011, which quickly triggered a revolution in nearby Egypt bringing down the Mubarak regime and was widely regarded as a sign that popular uprisings might spread beyond the former Soviet space. A documentary purporting to trace the origins of colour revolutions back to George Soros appearing on Russian television around that time appeared with Chinese subtitles on Chinese television soon after.

Chinese governmental statements and mainstream and social media frequently link foreign donor support of civil society to the threat of colour revolution in Chinese territory². And most recently inflated concerns about artificially generated colour revolutions have come around full circle – back to the United States – following the election of Donald Trump and the protests that ensued. For several days immediately after the US election, a spate of articles and YouTube videos appeared asserting that a ‘purple revolution’ was afoot in the United States to unseat Trump in favour of a Hillary Clinton ‘regime’³.

‘The ostensible justification given for the [FCRA] was to curb foreign interference in domestic politics. This was the Cold War era, when both the Soviets and the Americans meddled in the internal affairs of post-colonial nations to secure their strategic interests. Amid suspicions of the ubiquitous “foreign hand” stoking domestic turbulence, the FCRA was aimed at preventing political parties from accepting contributions from foreign sources.’

/ G. SAMPATH, ‘TIME TO REPEAL THE FCRA’, THE HINDU, 27 DECEMBER 2016

¹ Andrei Codrescu, *The Hole in the Flag: A Romanian Exiles Story of Return and Revolution* (New York: William Morrow and Company, 1991), pp. 33-34

² For example, a turgid video posted on social media in August 2016, drawing links between US machinations, colour revolutions and Chinese human rights lawyers, amassed more than 10 million views in its first 24 hours online. Philip Wen, ‘The Australian connection behind China’s ultra-nationalist viral video’, *The Sydney Morning Herald*, 4 August 2016: <http://www.smh.com.au/world/the-australian-connection-behind-chinas-ultranationalist-viral-video-20160803-gqkiki.html>

³ See, for example, Wayne Madsen, ‘The Clintons and Soros Launch America’s Purple Revolution’, *Strategic Culture Foundation*, 11 November 2016: <http://www.strategic-culture.org/news/2016/11/11/clintons-and-soros-launch-america-purple-revolution.html>; ‘Anti-Trump US Color Revolution Includes Soros and Clinton “Purple” Takeover?’ *The Daily Bell*, 12 November 2016: <http://www.thedailybell.com/news-analysis/anti-trump-us-color-revolution-includes-soros-and-clinton-purple-takeover>; ‘BEWARE of Soros’ “Purple Revolution” against Trump: Soros, Clintons & Obama TRIAD’, 14 November 2016: https://www.youtube.com/watch?v=-9V3_1SjnUY

Restrictions on foreign funding of civil society groups in India have roots in the Cold War as well. The Foreign Contributions (Regulation) Act of 1976, which is a piece of Indian legislation now used to restrict NGOs, was originally promulgated to prohibit foreign contributions to political parties, political candidates, trades unions and the like. It originated during a state of emergency and suspension of civil liberties imposed by Indira Gandhi from 1975 to 1977, at a time when the Indian government felt it was under attack both internally and externally, with the possible support of the CIA. From the 1980s on the Indian government was concerned about foreign political influence exercised through NGOs⁴ and demanded new powers to curb that influence. This ultimately resulted in a legislative revision in 2010, which broadened the law's application to cover foreign financial support of any 'organisation of a political nature' for which 'acceptance of foreign contribution...is likely to affect prejudicially... public interest'⁵.

Following the amendment of the FCRA, governmental concerns over the role of NGOs increased, reaching a peak in 2012 in response to NGO protests over a nuclear power plant in Tamil Nadu⁶. Following the subsequent election of Prime Minister Narendra Modi, the law has been applied frequently to NGOs, affecting Greenpeace, the Ford Foundation⁷ and some 14,000 NGOs altogether, mostly Indian organisations⁸, including the historically important advocacy organisation Lawyers Collective.

A GLOBAL AND VIRAL DIFFUSION PATTERN EMERGES

Feeding off historical memory of the Cold War and fresher concerns about terrorism, often stoked by exaggerated claims of neocolonialism or local corruption and ultimately driven by the desire for political control, governments across the globe have developed public campaigns to delegitimise and cut off support for NGOs along with new regulatory frameworks. New laws restricting foreign funding of NGOs have increased exponentially in recent years⁹. And by now the pattern has become familiar.

The adoption of new restrictions on foreign-funded NGOs seems to have picked up speed less than a decade ago. In 2008 Jordan adopted a law requiring NGOs to obtain cabinet-level approval of foreign funds. As a result, for example, Jordanian NGO Tamkeen was prohibited from receiving funding from four foreign foundations for work on migrant workers' rights¹⁰. In Africa, in 2009, Ethiopia adopted legislation preventing NGOs receiving over 10% of their funding from foreign sources from

⁴ 'AccountAble 31: The Politics of FCRA', *AccountAble*, February 2015: <http://accountaid.net/Periodicals/AccountAble/31%20-%20The%20Politics%20of%20FCRA.pdf>

⁵ Section 3(1) and 9(e)(ii) of the Foreign Contribution (Regulation) Act, No. 42 of 2010. See Maina Kiai, UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 'Info Note: Analysis on International Law, Standards and Principles Applicable to the Foreign Contributions Regulation Act 2010 and Foreign Contributions Regulation Rules 2011', 20 April 2016.

⁶ N. Gopal Raj, 'Manmohan criticizes NGOs for Protests in Kudankulam', *The Hindu*, 24 February 2012, quoting Prime Minister Singh: 'here are NGOs, often funded from the United States and the Scandinavian countries, which are not fully appreciative of the development challenges that our country faces.'

⁷ 'The Modi government had placed the \$12.5-billion foundation on a watch list over a \$250,000 Ford grant in 2009 to Teesta Setalvada, a prominent Modi critic whose home was raided earlier this week in connection with a criminal case alleging she misused the same money. Back in 2009 she was pursuing legal cases against Modi, accusing him of failing to stop anti-Muslim rioting that killed at least 1,000 people when he was chief minister of Gujarat. Modi denies the charges and was exonerated in an Indian Supreme Court inquiry in 2012. It has also been alleged that Ford Foundation has funded one political party and profit-making organisations "illegally", which put in under the Home Ministry scanner. Greenpeace India too was accused of being involved in anti-government activities leading to the suspension of its FCRA licence and blocking of its bank accounts.' Sunaina Chadha, 'Foreign NGO Double Standard? Modi sarkar, Ford Foundation Call a Truce', *Firstpost*, 16 July 2015: <http://www.firstpost.com/business/foreign-ngo-double-standard-modi-sarkar-ford-foundation-call-a-truce-2345258.html>

⁸ Jyoti Malhotra, 'Fear of the Foreign Handout', *India Today*, 9 September 2016: <http://indiatoday.intoday.in/story/fear-of-the-foreign-handout/1/469392.html>. 'In April 2013, for example, Indian authorities froze the bank account of the Indian Social Action Forum (INSAF), a network of more than 700 NGOs working on issues ranging from indigenous people's rights to campaigns against nuclear energy that received more than 90 percent of its funding from foreign sources. The Home Ministry justified its decision by accusing INSAAF of

'THERE IS A LONG HISTORY OF GIVE AND TAKE BETWEEN NGO-BASED HUMAN RIGHTS ADVOCACY IN EGYPT AND REPRESSIVE STATE REACTIONS, WITH REPRESSIVE PERIODS FOLLOWED BY PERIODS OF RELATIVE OPENING. BUT WHEN THE EGYPTIAN GOVERNMENT INITIATED THE FIRST CRIMINAL PROCEEDING AGAINST NGOS IN 2011, IT WAS THE BEGINNING OF AN ALL-OUT ASSAULT, THE LIKES OF WHICH WE HAD NOT SEEN BEFORE.'

/ GASSER ABDEL-RAZEK, EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS (EIPR)

engaging in activities related to politics, human rights or the rule of law. As a consequence of the law, nearly half of all Ethiopian NGOs shut down within two years, and most remaining groups no longer engage in human rights activities¹¹. In Latin America, in 2010, Venezuela passed legislation prohibiting NGOs that 'defend political rights' or 'monitor the performance of public bodies' to receive income from foreign sources¹².

carrying out activities that were likely to "prejudicially affect the public interest".⁹ Thomas Carothers and Saskia Brechenmacher, *Closing Space: Democracy and Human Rights Support Under Fire* (Washington DC: Carnegie Endowment for International Peace, 2014), p. 66, n. 17. Note, there are hundreds of thousands of NGOs registered in India.

⁹ The number of countries with laws restricting foreign NGOs and/or foreign flow of funds increased fivefold in the eighteen-year period from 1995 to 2012 (69 additional countries), compared with the prior 40 years between 1955 and 1994 (17 countries). Kendra E Dupuy, James Ron & Aseem Prakash, 'Who survived? Ethiopia's regulatory crackdown on foreign-funded NGOs', *Review of International Political Economy*, vol. 22, no. 2 (2015), p. 423. Furthermore, from 2012 to 2015, 60 countries passed 120 laws restricting the activities of NGOs, with over one third of those laws related to foreign funding of NGOs. Douglas Rutzen, 'Authoritarianism Goes Global (II): Civil Society Under Assault', *Journal of Democracy*, vol. 26, no. 4 (October 2015), p. 30.

¹⁰ Carothers and Brechenmacher, p. 8.

¹¹ Dupuy, Ron & Prakash, p. 433.

¹² Carothers and Brechenmacher, p. 8.

¹³ Saskia Brechenmacher, 'Civil Society Under Assault: Repression and Responses in Russia, Egypt and Ethiopia' (Washington DC: Carnegie Endowment for International Peace, 2017): <http://carnegieendowment.org/2017/05/18/delegitimization-and-division-in-russia-pub-69958>

¹⁴ Ibid.

In 2011, relying on the rhetoric of national security, Egypt took even more dramatic steps: it arrested a large group of foreign nationals working in Cairo for foreign NGOs and eventually waged a sustained legal battle against Egyptian foreign-linked advocacy groups and their staff members¹³.

But the truly viral spread of restrictive measures on foreign-funded NGOs began in 2012, when Russia adopted a law that has served as a template for many other governments. It requires NGOs receiving foreign funding to proclaim themselves a 'foreign agent' on their websites and all other publications, with the 'foreign agent' label carrying especially fraught connotations harkening back to the Cold War era.

Although the law was not initially perceived as a significant threat by the well-developed Russian human rights community, the authorities began to enforce it vigorously, forcing a significant number of NGOs to shut down or reduce their activities. The Russian government then followed suit with an 'Undesirable Foreign Organisations Law', which led to banning several foreign donors and scaring off many others¹⁴.

In the meantime, the Chinese government began to increase public efforts to demonise foreign-funded NGOs, launching a formal study and years-long consultative legislation process culminating in the adoption of the 'Foreign NGO Management Law', which came into force in January 2017. By the time the law went into effect, international co-operation with Chinese NGOs had already diminished dramatically in anticipation, through a combination of official intimidation and self-restraint¹⁵.

In Hungary, the pattern started in 2014 with Prime Minister Viktor Orbán making a public speech calling for an 'illiberal state' and labelling NGOs as 'paid political activists...attempting to promote foreign interests'¹⁶. Two months later Hungarian authorities raided a local administrator of a Norwegian fund supporting human rights NGOs, eventually resulting in official audits, threatened nullification of NGO tax IDs and court cases¹⁷.

Meanwhile, Israel's 2016 'Law on NGO Transparency' requires NGOs receiving over 50% of their funding from foreign governmental sources to carry the stigmatising 'foreign agent' label¹⁸. (The original Israeli draft legislation went so far as to require staff members of such NGOs to wear 'foreign agent' name tags when visiting the parliament, but that measure was dropped in a compromise before the legislation was promulgated.)

'In the Russian language, we use the same words for "foreign agent" and "spy." Everybody remembers when smuggling out information about social and political problems was considered an act of treason, but it is more than absurd to use that kind of language to describe what NGOs do in Russia today. The problem is that most Russians are ready to believe the worst.'

/ PAVEL CHIKOV, INTERNATIONAL HUMAN RIGHTS GROUP AGORA, RUSSIA

¹⁵ Shawn Shieh, 'The Origins of China's New Law on Foreign NGOs', *Chinafile*, 31 January 2017: <http://www.chinafile.com/reporting-opinion/viewpoint/origins-of-chinas-new-law-foreign-ngos>

¹⁶ Csaba Toth, 'Full Text of Viktor Orbán's speech at Baile Tusnad (Tusnádfürdő) of 26 July 2014', 29 July 2014: <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592>; also available at: <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>

¹⁷ Eotvos Karoly Policy Institute, Transparency International, the HCLU & Hungarian Helsinki Committee, 'Timeline of Government Attacks', September 2016: https://tasz.hu/files/tasz/imce/timeline_of_gov_attacks_against_hungarian_ngos_20140921.pdf. Ultimately, the NGOs subjected to audit were vindicated in court.

¹⁸ The NGO law only refers to funding from governmental agencies and not from private individuals. For example, the most widely distributed newspaper in Israel is financed by US citizen Sheldon Adelson, who is also a significant private contributor to the prime minister; this is not 'foreign' funding according to the law.

JUSTIFICATIONS, SMEAR CAMPAIGNS AND DELEGITIMISATION STRATEGIES

As the assault on foreign-funded NGOs has spread, a consistent part of the pattern has been the adoption of smear campaigns by national governments designed to delegitimise NGOs and secure public support for the restrictive measures that follow. These campaigns build upon prevalent local prejudices, exaggerating and distorting them, resulting in a pernicious weakening of public support for NGOs, which is often fragile to begin with in countries with relatively young civil society traditions.

The smear campaigns are highly contextualised. In Russia and China, the principal connotations are espionage, treason and an assault on 'national values.' In Hungary, NGOs are connected to xenophobic anxiety about migrants and refugees, with references to the influence of George Soros tinged with anti-Semitism¹⁹. In Kenya, the first salvo against NGOs appeared in a 2013 article by a Kenyan official accusing NGOs of engaging in 'lawfare' against the Kenyan state. The term refers to the use of law as a tool of war, most prominently in the context of Israeli governmental efforts to delegitimise NGO human rights strategies that touch on the Israel–Palestine conflict²⁰.

'THE "TRANSPARENCY LAW" IN ISRAEL IS INSPIRED BY THE RUSSIAN LAW ON FOREIGN AGENTS – IT COULDN'T BE MORE OBVIOUS. THE ORIGINAL BILL WAS INTRODUCED BY MEMBERS OF THE KNESSET FROM ISRAEL OUR HOME, THE POLITICAL PARTY HEADED BY RUSSIAN IMMIGRANTS WHO ARE FAMILIAR WITH RUSSIAN LAW.'

– SHARON ABRAHAM-WEISS, ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL (ACRI)

'It is ironic that a former student leader of the movement that played an important role in bringing down Hungary's Soviet-friendly Socialist government in 1989 is now so intent – as Prime Minister – on copying Vladimir Putin's model of illiberal democracy. It is almost shocking how far he is willing to go to demonise civil society, undermining over 25 years of democratic development in the process.'

/ STEFANIA KAPRONCZAY, HUNGARIAN CIVIL LIBERTIES UNION (HCLU)

¹⁹ See, for example, 'George Soros: Hungarian government posters "anti-Semitic"', BBC, 11 July 2017: <http://www.bbc.com/news/world-europe-40576224>

²⁰ William Schabas, 'Gaza, Goldstone and Lawfare', *Case Western Reserve Journal of International Law*, vol. 43, no. 1 (2010). As Schabas defines it, 'lawfare' is 'a word coined within the United States military and subsequently adopted by right-wing ideologues as a way of stigmatizing legitimate recourse to legal remedies, particularly within an international law context.' *Idem*, p. 309.

²¹ Dupuy, Ron & Prakash, p. 425.

²² Meg, Davis, 'The Perfect Storm' (New York: Global Philanthropy Project 2016), p. 20.

‘THE TRUMP ADMINISTRATION HAS UNDERMINED THE RULE OF LAW BOTH AT HOME AND ABROAD EVERY DAY. THAT’S A US PROBLEM, AND IT’S A GLOBAL ONE, TOO. THIS IS A MOMENT WHEN WE NEED NEW FORMS OF GLOBAL SOLIDARITY TO SAFEGUARD INTERNATIONAL HUMAN RIGHTS.’

/ ANTHONY ROMERO, AMERICAN CIVIL LIBERTIES UNION (ACLU), UNITED STATES

Particularly in the developing world, the fear of outside influence combines with rhetorical concerns about neocolonialism and corrupt behaviour to justify attacks on foreign funded-NGOs, as in Ethiopia:

The [ruling Ethiopian People’s Revolutionary Democratic Front (EPRDF)] criticizes NGOs as opportunists using foreign money for inflated salaries and unnecessary expenses. Echoing the work of the scholarly NGO sceptics, the EPRDF says NGOs lack popular support, promote foreign agendas (particularly neo-liberal ones), and are otherwise inauthentic, undemocratic, unaccountable, or locally illegitimate. Only the state can bring about sustainable development and improve the people’s lives by sharing the benefits of economic growth, and all other opportunistic actors must be brought under the control of the state. Thus, only civil society groups established, controlled, and funded by Ethiopians, the EPRDF argues, should be allowed to advocate locally for Ethiopian political and human rights²¹.

‘The outcome of the Brexit vote was not just a critical wound for the idea of Europe, it was a wake-up call that long-standing British values cannot be taken for granted. While disaster was narrowly averted during national elections in the Netherlands and France, we must become ever more vigilant about safeguarding the values that bind us together in the European space.’

/ MARTHA SPURRIER, LIBERTY, UNITED KINGDOM

²³ Interestingly, this precise point was detailed in the British intelligence dossier compiled on Donald Trump and associates that was leaked by BuzzFeed on 10 January 2017. ‘Source C, a senior Russian financial official said the TRUMP operation should be seen in terms of PUTIN’s desire to return to Nineteenth Century “Great Power” politics anchored upon countries’ interests rather than the ideals-based international order established after World War Two. S/he had overheard PUTIN talking in this way to close associates on several occasions.’ Leaked report, p. 2: https://www.buzzfeed.com/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia?utm_term=.gf7p43R9#.xhWWQMGN

Government-orchestrated smear campaigns against NGOs also stir up and capitalise on public anxieties, including fear of terrorism or homophobia:

[They will say that] the reason we are concerned about cleaning up of civil society is to rid Kenya of terrorism, rid Kenya of neo-colonialism, rid Kenya of homosexuality, which leads to paedophilia. If you, the public, allow us to surveil, we will weed out the bad people and leave Kenya with only the good ones²².

PRESSURE ON DEMOCRATIC PRINCIPLES

In part, smear campaigns are playing on irrational public fears, but they also reflect deeper global political trends that have become increasingly evident. NGOs, as actors outside the state providing public benefits and serving as a conduit for citizen engagement in governance, are inherently liberal institutions. But the decades-long push towards a rights-based understanding of governance, spreading in seemingly inexorable fashion among nations, has met a strong headwind.

Further, the international order that provides a legal framework for human rights, binding nation states to each other to support it and serving as the foundation for the very existence of NGOs, is also inherently liberal in nature. A return to 19th century interest-based geopolitics, as Vladimir Putin among others apparently favours²³, is not possible without destroying the liberal international order – and that process appears to be underway.

The Brexit vote in the United Kingdom and Donald Trump's election in the United States, if nothing else, have alerted proponents of the global legal order everywhere that big changes are afoot.

AVOIDING COMPLACENCY

Is the pattern of governmental attacks on NGOs an orchestrated assault by the enemies of democratic values around the world, or is it just another reflection of cross-pollinating memes in the internet age? Whether it is one or the other or both is not the most important issue. What matters is that in these circumstances, it is incumbent on NGOs, wherever they are, to be attentive to the warning signs.

'The inherent strength of the human rights system is being undermined by new political polarisations that have resulted in the fragmentation of support for the core values that sustain human rights. Those of us devoted to protecting human rights need to create new spaces where all who care about the universally shared value of human dignity can come together to resist further erosion of the institutions that protect it.'

**/ GASTÓN CHILLIER, CENTRO DE ESTUDIOS
LEGALES Y SOCIALES (CELS), ARGENTINA**

The pattern shows no sign of abating; indeed, it appears to accelerate with each election cycle²⁴. In January 2017, several months before a presidential election and about a year prior to parliamentary elections, the vice president of Hungary's ruling party trotted out some already familiar tropes about George Soros 'pushing global big capital and a related political correctness.' And in a particularly disturbing new twist he also announced that Trump's election created 'conditions internationally' to support an attack on several grantees of Soros's Open Society Foundations. 'These organisations must be pushed back with all available tools, and I think they must be swept out,' he said²⁵. Within several months, the Hungarian government had followed suit with one piece of legislation that effectively sought to outlaw the Soros-founded Central European University and a second law requiring registration of foreign-supported organisations. The Hungarian government, taking a page from Israel, dubbed the second piece of legislation 'Law on the Transparency of Organisations Supported from Abroad.'

In February 2017 UN experts called on the Kenyan government to respect freedom of association in the context of upcoming national elections, noting that their statement 'comes just a month after the Interior Ministry called for the closure of non-governmental organizations (NGOs) deemed to be "not properly licensed". A Government circular alleged the groups had been involved in "nefarious activities" and claimed they posed a serious threat to national security including money laundering, diversion of donor aid and terrorism financing'²⁶.

And in South Africa, the minister in charge of the intelligence services denounced 'NGOs with funny names', specifically referring to outside support to undermine the democratically elected government²⁷. This is just one example of the attempts to delegitimise civil society organisations in South Africa. In the context of a legal dispute about access to clean water for a client community, the Legal Resources Centre (LRC) was denounced by the then minister as 'an enemy of the state'²⁸. And while being vetted in public hearings as a candidate for the position of public protector, Kaajal Ramjathan-Keogh, the leader of the South African Litigation Centre, was questioned about her NGO's funding sources in connection with activities relating to the Al-Bashir case at the International Criminal Court²⁹.

'Crackdowns on civil society in other places are dramatic but seem somewhat removed as we often think that this could never happen in a rights-respecting democracy like ours. Yet, a clear pattern is repeated across the globe (public delegitimation; attacking funding sources; and effecting legislative changes that enable state gate-keeping), and we can see that no country is immune; we must not be complacent.'

/ JANET LOVE, LEGAL RESOURCES CENTRE (LRC), SOUTH AFRICA

²⁴ Kendra E Dupuy, James Ron & Aseem Prakash, 'Hands Off My Regime! Governments' Restrictions on Foreign Aid to Non-Governmental Organizations in Poor and Middle Income Countries', *World Development*, 2016.

²⁵ Daniel McLaughlin, 'Hungary's Ruling Party Eyes Crackdown on NGOs', *The Irish Times*, 11 January 2017; Zoltan Simon, 'Soros Group to Stay in Hungary Amid Trump-Inspired Crackdown', *Bloomberg*, 11 January 2017.

²⁶ UN Office of the High Commissioner for Human Rights, 'UN experts urge Kenya to end crackdown on rights groups to ensure fair elections', 14 February 2017: <http://www.ohchr.org/AR/NewsEvents/Pages/DisplayNews.aspx?NewsID=21172&LangID=E>

²⁷ Statement made by Minister Mahlobo to News24, 22 April 2016.

²⁸ On 26 July 2012, Minister Edna Molewa made this statement after a ruling by the North Gauteng High Court in favour of LRC clients.

²⁹ This occurred during a session in Parliament on 12 August 2016 when Advocate Ramjathan-Keogh was being interviewed as one of the candidates for possible appointment to the South African Human Rights Commission.

STRATEGIC QUESTIONS

Once the signs of an impending sector-wide assault are evident, NGOs should begin to prepare strategic and tactical responses. The following represents a framework for considering how NGOs can respond, gleaned from the experiences of INCLIO members and selected others. For each threat, a number of potential responses are described, with illustrative examples provided. For the most part, the responses are not mutually exclusive; in many cases organisations might consider adopting several responses to a particular threat in parallel.

1 TO COMPLY OR NOT TO COMPLY?

Determining the appropriate approach to compliance with legal requirements is not a simple matter. There are many context-dependent considerations and a range of possible approaches, from resistance to 'radical transparency.' NGOs should make considered, intentional and strategically robust decisions on whether to comply with particular legal requirements and the degree to which they should comply. In doing so, it is important to seek professional advice on technical aspects to obtain a thorough assessment of the risks of non-compliance and to have confidence in the decision's strategic coherence in the particular circumstances, avoiding over-reliance on conventional wisdom or prior practices.

/ THREAT

Governments promulgate new regulations that require burdensome and intrusive reporting that can be used as a basis to block incoming grants, levy fines, seize assets, arrest board and staff members or shut down an organisation entirely. Governments also utilise ordinary regulatory frameworks for not-for-profit organisations in arbitrarily selective enforcement actions against undesired NGOs.

RESPONSE 1

RESISTANCE

Refuse to comply with new regulations or administrative actions.

The instinctive response of many NGOs, particularly human rights advocacy groups, is to oppose such new measures on principle as infringements of the rights to freedom of association and expression. Such a tactic has been successful in places like the United States, where NGOs resisted measures by southern states during the civil rights movement requiring civil rights groups to disclose the names and addresses of their members.

HCLU: NO TO COMPLIANCE

A series of events in the spring of 2014 led to an expansive audit by the Hungarian government and an associated legal battle involving dozens of NGOs, including the HCLU. The story began on 8 April 2014, when Hungarian media outlets reported that the head of the Hungarian prime minister's office sent a letter to the Norwegian government claiming that an NGO Fund set up by Norway, Lichtenstein and Iceland – as part of their commitments as members of the European Economic Area (EEA) – was supporting the political opposition in Hungary. Around the same time, another official in the prime minister's office publicly asserted that if the Norwegian government did not cooperate in resolving the matter, it would be interfering in the national affairs of Hungary. The same official later characterised the staff of the Ökotárs foundation, which led a consortium administering the funds, as 'party-dependent, cheating nobodies.'

On 6 May the prime minister's office formally asked the Norwegian minister of EEA and EU affairs to 'suspend' the NGO Fund activities in Hungary until the issue at stake was settled 'to the satisfaction of both parties.' With no action forthcoming from the Norwegian government, the prime minister's office asked the Government Control Office (GCO) on 21 May to audit the EEA/Norway NGO Fund, seeking evidence of improper support for political parties. On 2 June the GCO conducted an on-site audit of three of the consortium members administering the NGO Fund, seizing documents relating to the fund's grant-making.

In the month that followed the GCO sent query letters to 58 NGOs requesting project documents connected to their grants from the NGO Fund. Four of them – the Asimov Foundation (operating the investigative news portal atlatsz.hu), the HCLU, the Szivárvány Misszó Foundation (organiser of Budapest Pride) and the Krétakör Foundation – decided to make the project documents available on their respective websites instead of submitting them to the GCO, while simultaneously asserting that the audit had no legal basis. The GCO made a second request for the documents later that month, and shortly after that, on 26 July, the prime minister made his famous speech extolling the virtues of 'illiberal

democracy' and calling NGO staff 'paid political activists who are trying to help foreign interests.'

In responding to the audit requests, the HCLU uploaded most of the information requested on its website, but it excluded certain private data such as names on pay slips and donor lists. The audit of the consortium members that were administering the fund resulted in the opening of a criminal case and the suspension of consortium members' tax IDs. Ultimately, the NGO Fund consortium won a court battle that found the audit illegal, and there were no legal consequences for the fund's grantees. But during the year-long process the non-complying grantees had borne the risk of losing their tax IDs, which would have effectively blocked the receipt of funds, putting severe financial pressure on them.

In the end, despite official vilification, the HCLU along with several coalition partners resisted specific governmental actions according to clearly articulated principles, which the public appreciated, while demonstrating transparency with respect to information that legitimately could be made public.

PROTECTING ANONYMITY OF MEMBERS

A long, drawn-out court battle that began in the state of Alabama in 1956 eventually resulted in a US Supreme Court decision finding that non-compliance with certain regulatory requirements – in this case a demand by the state attorney general for the names and addresses of members – was constitutionally protected. The court found that forcing an organisation to breach its policy of protecting members' anonymity would interfere with the right to associate freely.

The National Association for the Advancement of Colored People (NAACP), one of the most prominent NGOs in the United States, was established in the early 20th century in the wake

of outrage over lynching and other incidents of racial violence. By the time the broader civil rights movement reached its height in the 1950s and 60s, it had a large national membership and a legal advocacy arm called the Legal Defense and Education Fund. The NAACP had first set up an office in Alabama in 1914, and by the 1950s it was providing legal assistance to blacks seeking to attend the University of Alabama.

In 1956 Alabama's attorney general brought a lawsuit against the NAACP, successfully enjoining it from operating in the state because it had failed to comply with state law requiring that legal entities incorporated in other states register in Alabama before doing business there. In the course of that lawsuit, the attorney general subpoenaed the names and addresses of NAACP members, and the NAACP refused to comply; as a consequence, the organisation was held in contempt of court and fined \$100,000, a very substantial sum for the organisation at the time. The NAACP appealed and a prolonged legal battle ensued, ultimately resulting in a favourable decision at the US Supreme Court, first on procedural grounds, *NAACP v. Patterson* (1956), and then six years later on the substance, *NAACP v. Alabama* (1962). The court reasoned that freedom of association is not possible without the right to anonymous association: *'Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.'*

The Supreme Court distinguished the case from a previous decision going the other way regarding the New York chapter of the Ku Klux Klan, which was engaged in unlawful acts of intimidation and violence and, importantly, had made no effort to comply with state law or provide requested information. In the Alabama case, the NAACP provided the names and addresses of members who were officers with functional responsibilities in the organisation as well as business records, the total number of members and the total amount of their dues paid, withholding only the lists of general members.

'We know that governments will sometimes use their expansive powers as an instrument to deny our inalienable rights in pursuit of a short-term political agenda. But we have learned we can prevail in the long run if we stand our ground on well-founded principle, contesting government actions we find unacceptable while complying with those that are legitimate.'

- ANTHONY ROMERO, ACLU, UNITED STATES

PROS:

- Can be an attractive and potent rallying cry for attracting solidarity and mobilising political change
- If public and covered by the media, creates more visibility, guarding against negative actions taking place without being noticed by potential supporters inside and outside the country
- Can enhance the organisation's image in the public eye by supporting a perception that NGOs are an essential force for moral or principle-based opposition to injustice

CONS:

- Can lead to escalating enforcement actions by government through administrative fines, seizure of assets and arrests, potentially resulting in closure of the organisation
- Can result in donors being unwilling to fund because of their own legal obligations or reputational concerns, either in the country or where they are based
- Can tarnish the organisation's image in the public eye by creating a basis for the government to characterise NGOs as a disturbance to a legal order that protects the public

CONTEXTUAL CONSIDERATIONS:

- What are the likely consequences of non-compliance?
- To what extent are the regulatory demands punitive in nature or in pursuit of a legitimate public aim?
- How likely is it that resisting NGOs will successfully mobilise sufficient public support, judicial action or external pressure to fend off enforcement actions in the face of resistance? How likely is it that those forces, once mobilised, will succeed in reducing the threat?
- How likely is it that other NGOs will join in a collective action of resistance, increasing the probability of achieving 'strength in numbers'?
- Who are the most important supporters, and how will they perceive resistance – as a positive or negative action?
- To what extent can NGOs influence the public to perceive resistance in a positive light?
- How would non-compliance with regulatory or legal obligations affect donor support for the NGO or the NGO sector as a whole? What is the likelihood that NGOs can coordinate effectively with foreign donors and other foreign supporters to back a strategy of resistance?

GOOD DONOR PRACTICES

The following are some good practices that donors can adopt to support NGOs under pressure:

Avoid site visits.

Although it is generally considered good practice to visit grantees in their own context in order to accurately understand their achievements and challenges, the physical presence of a foreign donor representative can trigger unwanted attention from local authorities. Grantees that depend on the goodwill of their donors or do not have secure relationships with them will not always fully communicate the risks. It is a good practice for donors to be sensitive to the possibility that they may be unwittingly putting their grantees at risk when they visit, and they should consider refraining from undertaking site visits.

Use frequent and flexible instalment schedules.

Donors typically draft their grant agreements with regular instalments, for example, by dividing a grant into two instalments at six-month intervals, or making a grant for a three-year period in three annual instalments. Donors generally have a standard policy for devising instalment schedules, often using a consistent approach for all grants to reduce risk of error and minimise the number of instalments in order to lower transaction costs related to monitoring and accounting for financial transactions. But adopting a policy allowing for more frequent instalments, on

a quarterly basis for instance, and being willing to make amendments on short notice, can be extremely beneficial. If an NGO's bank account is frozen, this will minimise the loss. If a future regulatory obstacle is foreseen, the donor can agree to accelerate payment of the balance of the grant. And if an NGO can no longer function in one legal form, the donor can amend the agreement to allow for transferring remaining funds to the NGO's leadership through another legal form. Smaller payments may also help the NGO stay below the radar.

Allow for modification of the parties to a grant agreement and relax other contractual requirements.

If a grantee organisation becomes unable to receive grant funds through the legal entity that entered into the grant agreement, because of a ruling by a governmental agency, the same staff may continue their activities through an existing sister organisation or an entirely new legal entity. In such a case, a flexible donor may choose to prioritise the strategy underway and the individuals who are executing it, rather than the formal question of which legal entity it supports. A policy that permits the modification of the parties to a grant agreement would allow donors to support NGOs that flexibly deploy different legal entities to manage regulatory risk, or make a grant to a fiscal sponsor as an intermediary. In particular, international NGOs with nationally based members or partners can serve as fiscal

When NGOs are under pressure, and are resisting regulatory controls or are vulnerable to arbitrary enforcement actions, donors can help them manage risks by modifying their own policies and practices to allow for greater flexibility. Governmental donors will often be constrained by binding regulations of a very general nature that are designed to safeguard fairness, integrity and transparency in how state resources are expended in a wide variety of contexts. But private donors are typically free to adopt policies they judge best suited to achieving effective and ethical business practices according to specific contextual factors and goals.

sponsors while also creating programmatic or strategic synergies.

Some donors will go so far as to permit transfer of grant proceeds to an individual's bank account in cases where a legal entity would not be able to receive the necessary approvals for receipt of foreign charitable funds. But other donors have strict policies against transfers into individual bank accounts to reduce the risk of self-dealing, fraud or misappropriation by the individual receiving the funds and potential complicity in the violation of local labour laws. One donor has a policy of allowing grant transfers to individual bank accounts, provided that the account is a joint account held in the name of two individuals who have no family ties, as a safeguard against financial abuses.

In addition, donors often waive requirements to credit their financial sponsorship in order to avoid exposing grantees to further political risk, and they sometimes relax expectations about documentation for purposes of monitoring and evaluating their grant to provide greater security to their grantee and their grantee's partners.

Allow grants to commercial entities.

Allowing commercial entities to be recipients of grants enables an NGO to establish a commercial legal entity to receive funds where local restrictions may prevent the receipt of foreign charitable funds, or may require a lengthy and unpredictable approval

process by a particular ministry – increasing the options available to NGOs under pressure. In the United Kingdom, donors may maintain their charitable status despite making grants to commercial entities, provided they certify the charitable purpose of the grant, even when the recipient does not maintain a charitable legal form. In the United States, by contrast, donors with charitable status must certify that grant recipients maintain the equivalent of US charitable status. In recent years, however, some philanthropists have decided to forego charitable status for their philanthropic vehicles, preferring to sacrifice certain tax advantages in favour of retaining the flexibility to fund in the form of commercial investment or service contracts as well as charitable contributions. In those cases, donors can fund commercial entities without limitation, and they often support social entrepreneurs who establish businesses with a social purpose in lieu of charitable organisations.

Pool funds with other donors to create a rapid response fund.

Particularly in countries that are experiencing a period of significant pressure on NGOs, donors active in that country can mitigate their individual risks by pooling a portion of their available funds and setting them aside to cover unforeseen needs. Although such a mechanism requires ceding some degree of control over how funds will be allocated, according to a collective decision-making process, it allows for a rapid and highly leveraged response to any change in

circumstances. The funding pool can be deployed, for example, to fund new NGO strategies in response to an attack or to cover costs associated with protecting staff who are suddenly subject to the risk of physical harm.

The European Joint Fund for Hungary is one example.

It was established under the auspices of the Network for European Foundations in 2014 with contributions from Open Society Initiative for Europe, Sigrud Rausing Trust, the King Baudouin Foundation, Rockefeller Brothers Fund and the Stefan Batory Foundation, with funds totalling several hundred thousand euros. Although the funds were not ultimately necessary for emergency response, they were used to assist selected Hungarian NGOs to improve their governance and compliance systems and to fund a campaign to improve public support for NGOs.

Consider making grant payments in cash.

Many donors would prefer not to make payments in cash because of the practical and legal risks entailed in transporting large quantities of physical money, but some donors are willing to undertake those risks where banking practices or other obstacles prevent alternatives. Such practices are not well documented, but a study by Charity & Security Network, published in February 2017, found that 42% of the 8,665 US NGOs that operate abroad transport cash across

borders as a workaround when their local field offices or local partners are unable to maintain bank accounts*.

Large humanitarian or development NGOs represent a special case.

While they are not donors themselves, large humanitarian and development NGOs often administer large contracts from governmental or intergovernmental agencies, subcontracting or granting smaller amounts to local partners. Their policies are often restricted according to the prime contract with the agency, which reduces their flexibility. But to some extent the key obstacle to flexibility is not the underlying contract, but rather additional costs in the form of increased administrative time and increased risk. The field staff of large NGOs often report significant tensions developing on the ground because of difficulties in adapting centralised policies to local constraints. Large NGOs may be well served by building the costs of flexibility into their cost structure to ensure they are supporting the resilience of local civil society rather than undermining it.

*[Sue E. Eckert, Kay Guinane & Andrea Hall, *Financial Access for U.S. Non-Profits* (Washington DC: Charity & Security Network, 2017), pp. 47-8]

RESPONSE 2

MINIMAL COMPLIANCE

When there is a specific confrontation between a resisting NGO and the government, compliance with some regulations and/or public disclosure of requested information can enhance a resistance strategy, as the earlier examples demonstrate. But even when there is no specific conflict, NGOs often make calculated tactical decisions about their degree of compliance with particular regulatory requirements. In the United States, for example, the national tax authority, the Internal Revenue Service (IRS), changed tax regulations governing charitable, tax-exempt organisations in 2014, adding among other things a new obligation to report on the portion of their annual expenses that is spent in foreign countries (IRS Form 990, Schedule F) and the obligation to report on 'related organizations and unrelated partnerships' (IRS Form 990, Schedule R).

While required to report the total sum spent abroad (broken down by officially designated regions) on Schedule F, organisations have a wide degree of latitude on how much detail they choose to provide about specific countries and specific programmatic activities. It is up to the individual organisation to interpret a great number of ambiguities, including how to characterise activities of affiliated groups abroad on the two schedules. In filing their tax

returns, US organisations that are active internationally generally make calculated decisions about how to interpret their reporting obligations in order to protect foreign organisations and individuals with whom they work from unwanted scrutiny, while at the same time ensuring they comply with the law and project a positive public image.

PROS:

- Avoids calling negative attention to the NGO because of the appearance of full compliance
- Creates a foundation for a successful legal defence, through legal argumentation about the compliance's sufficiency

CONS:

- Requires time, resources and expertise that the NGO might not have
- May lessen the effectiveness of resistance on principle at a later date
- Compared to full compliance, may increase the risk of administrative or legal action by the government
- Compared to full compliance, may diminish the likelihood of success in an administrative or legal proceeding
- May require expense for professional services (which may be mitigated by seeking pro bono services)

CONTEXTUAL CONSIDERATIONS:

- How likely is the organisation to be targeted, irrespective of the filing?
- Is the legal system sufficiently independent and technically proficient for consideration of future legal arguments to be a significant factor?
- Does the organisation have access to sufficient legal acumen (including through pro bono services) to minimise disclosure while reducing the risk of successful legal action against it?
- How burdensome are the requirements?
- What other considerations may be present, such as the privacy rights of members?

RESPONSE 3

FULL COMPLIANCE

Allocate resources to ensuring that regulatory compliance systems are up to date and consistently implemented.

PROS:

- Guards against legal action by the government
- Provides more likelihood of success for a legal strategy opposing an enforcement action
- Bolsters messaging to supporters, including donors, and to the public that there is no legitimate regulatory aim being pursued by the government if it is targeting the NGO

CONS:

- Requires significant effort
- Might not prevent the government from taking action against the NGO
- May require expense for professional services (which may be mitigated by seeking pro bono services)
- May undermine support for the organisation if it is seen to be acting inconsistent with a principled position opposing restrictions

CONTEXTUAL CONSIDERATIONS:

- To what degree do regulatory requirements violate human rights principles? How important is the organisation to a strategy to contest them and how likely is such a strategy to succeed?
- How burdensome are the regulatory requirements?
- What compliance resources (including pro bono services) does the organisation have available?

SEEKING PRO BONO LEGAL SUPPORT

In 2014, when the Hungarian government began seizing the records and files of Hungarian NGOs, the HCLU prepared itself by ensuring that it was following best practices in all aspects of its organisational governance and regulatory compliance. Businesses generally address similar needs by contracting legal services, but that can be expensive, diverting precious budgetary resources from achieving the important social mission of under-resourced NGOs.

The HCLU resolved that dilemma together with similarly situated NGOs in Budapest as part of an effort led by the Budapest office of PILnet: The Global Network for Public Interest Law, which facilitates the provision of pro bono legal services by commercial law firms. PILnet collected a set of questions regarding regulatory compliance from the NGOs and commissioned a legal memorandum by a major law firm, which the organisations were able to use to ensure that their practices were aligned with technical, regulatory requirements. Most large international law firms and an increasing number of smaller, more local law

firms have developed pro bono programmes, in which they provide legal services on a voluntary, unpaid basis to NGOs and sometimes needy individuals in fulfilment of their social responsibility.

Pro bono legal services by commercial law firms are on the rise around the world. Furthermore, commercial law firms are particularly skilled at matters of corporate governance, managing the risks of regulatory compliance and other administrative concerns of NGOs that frequently go under-attended because of a lack of adequate resources. Those skills have become easier for NGOs to access through the development in many countries of pro bono 'clearinghouses' that match law firms willing to provide pro bono legal services to NGOs with legal needs. PILnet supports the development of an international network of such clearinghouses, which are listed on its website³⁰.

³⁰ <http://www.pilnet.org/public-interest-law-programs/pro-bono-law/advocate.html>

RESPONSE 4

OVER-COMPLIANCE

Disclose more information than required as a means of reassuring well-intentioned regulatory officials, gaining public support and discouraging arbitrary enforcement actions.

PROS:

- Allows for positive messaging about the organisation's transparency and accountability

CONS:

- May reveal information that is sensitive or can be distorted by the government or media
- Transparency alone is not likely to change the course of an overall governmental policy of restricting NGOs

CONTEXTUAL CONSIDERATIONS:

- How likely is it that the government and its supporters or other antagonists to the organisation will be able to tarnish its image using the disclosed information?
- How likely is it that the government and its supporters or other antagonists to the organisation would not already have the information disclosed?
- How likely is it that the additional information will reduce misunderstanding by regulators?
- What resources are available to support the organisational effort required?

RESPONSE 5

IRRESPECTIVE OF LEGAL COMPLIANCE POLICY,
VOLUNTARILY DISCLOSE INFORMATION
PUBLICLY ABOUT THE ORGANISATION

As the example of the HCLU illustrates, to secure public support it can be beneficial to voluntarily publish information, even when resisting or only partially complying with a regulatory demand or enforcement action. Further examples are provided under Response 7 in Section V.

PROS:

- Allows for positive messaging about the organisation's transparency and accountability
- Reduces the ability of the government, allied media and other supporters to manipulate messages the public receives based on the selective or distorted use of information from legal disclosures and/or investigations and surveillance
- Can support an effort to strengthen local constituency (see Section V)

CONS:

- May reveal information that is sensitive or can be distorted by the government or media

CONTEXTUAL CONSIDERATIONS:

- How likely is it that the government and its supporters or other antagonists to the organisation will be able to tarnish its image using the disclosed information?
- How likely is it that the government and its supporters or other antagonists to the organisation would not already have the information disclosed?
- To what degree would the disclosure of information corroborate or rebut the public's existing prejudices or mistaken beliefs about the organisation?

2 HARDENING THE TARGET

Along with making choices about their degree of compliance with new and existing legal requirements, NGOs need to consider the degree to which they intend to guard against increasingly intrusive technological tools used by governments to discover, intimidate and interfere with organisations' activities. They must also contemplate the physical security of their staff.

There is nothing particularly new about NGOs being subjected to governmental surveillance operations. During the 1960s the FBI in the United States ran extensive infiltration and surveillance operations on NGOs connected to protest movements, as did South African security agencies on the anti-Apartheid movement in the 1980s. Similar operations, large and small, have been conducted frequently around the world throughout modern times.

Traditional methods governments use to collect information about NGOs include informal interviews, infiltration and use of analogue bugging devices as well as more overt measures, such as seizing documents and computer equipment according to legal procedures as part of a formal investigation.

In some ways, traditional methods continue to be the most effective in controlling and restricting NGO activities. In China, for example, informal interviews have always been a key component of a pervasive surveillance system that monitors developing civil society organisations closely. Chinese security agencies deploy a small army of security officers assigned to interact with individual NGOs, including just about all Chinese NGOs with international connections, as well as Chinese staff members – and sometimes even the Chinese-speaking foreign staff members – of international NGOs. As a result, NGO staff members have grown accustomed to being regularly 'asked to tea' (a euphemism used to mask the coercive nature of the interview requests) by security officers. Information gathered in the interviews is used for the purpose of maintaining up-to-date files on the NGO's activities and to glean and corroborate information about other NGOs. The interviews are also sometimes used to send warning messages or discourage activities or relationships considered undesirable. They operate as an institutionalised encouragement of self-censorship and self-restraint, and they can also function as an early warning device, putting the NGO on notice that harsher measures may follow.

/ THREAT

Some governments tolerate or encourage violent attacks on NGO staff members. Many governments deploy extensive surveillance operations targeting NGOs. And increasingly sophisticated technological techniques are being used, both to discover vulnerabilities that restrictive measures can exploit and to interfere with the work of NGOs through hacking and use of internet trolls.

RESPONSE 1

DEVELOP POLICIES, PLANS AND TRAINING TO PROVIDE PHYSICAL SECURITY TO NGO STAFF

Particularly in environments where there have been physical attacks in the past on NGOs and their staff, NGOs should give due consideration to whether they have adequately considered and managed risks to the physical safety of their staff. Even in locations where attacks have not occurred before but where rhetoric has become increasingly hostile, NGOs should give some consideration to the topic. Since attacks are on the rise globally, there are an increasing number of resources available to aid NGOs in conducting appropriate risk assessment, developing plans and policies and providing training to their staff.

TRADITIONAL SURVEILLANCE & INTIMIDATION IN SOUTH AFRICA

The following are excerpts from Right2Know's Big Brother Exposed: Stories of South Africa's Intelligence Structures Monitoring and Harassing Activist Movements³¹:

It's not every day that an ordinary civil servant gets a call from government spies. But that's what happened to Themba, a local government employee who doesn't want his identity revealed in this publication, when his phone rang suddenly one day in late 2014. The caller identified himself as a representative of the State Security Agency (SSA). He wanted to meet.

'I asked what is it in connection with,' remembers Themba, 'and he told me it was regarding a conversation between myself and Brian Ashley.' Brian Ashley is director of the Alternative Information Development Centre (AIDC), a left-wing think tank; he is also a prominent figure in the interim leadership of the United Front. Themba had been seeking advice from Ashley on labour issues....

One of the SSA officers replied that they see Ashley as 'an activist who wants regime change', adding that Ashley was involved with the Association of Mineworkers and Construction Union (Amcu) in Marikana. Led by Ashley, the AIDC had provided technical support to Amcu during the months-long platinum strike in 2014. The underlying accusation that AIDC's support for Amcu was somehow a programme of agitation has previously come from the ANC when they accused Amcu of being guided by 'white foreign nationals' intent on 'destabilisation of our economy' – an apparent reference to AIDC staff.

PROS:

- Can prevent physical attacks
- Can improve recovery from a physical attack
- Improves staff's sense of well-being and effectiveness

CONS:

- One-off trainings, if not properly supported by ongoing systems, can be ineffective
- Services and trainings provided by out-of-country experts can be perceived as irrelevant and therefore ignored
- Requires time and attention to develop relevant know-how

CONTEXTUAL CONSIDERATIONS:

- Is there a history of physical attacks on NGO staff?
- What is the likelihood of a physical attack in the future?
- What sources of protection and resilience already exist in the local context?
- What resources are available to help acquire new know-how?



Themba first got the impression that the SSA officials wanted him to simply cut ties with Ashley. However, by the end of their conversation, he got the impression that the men actually wanted him to become an informer on Brian's activities. 'They told me, "We'll come back to you, to see how best we can work together"'³². ...

* * *

'General' Alfred Moyo is the organiser of Macodefo, a civic organisation in the Makause informal settlement in Primrose, Germiston. Macodefo (short for 'Makause Community Development Forum') formed in 2007 to assist residents who were facing forced evictions; government had a plan to relocate residents of Makause to a site 40 kilometres away. ...

For General Moyo, there is no question that SAPS [South African Police Service] is gathering information on his organisation, although he isn't sure if Crime Intelligence is specifically involved. 'Some would phone me if we distributed some pamphlets, because my phone number would be there on the pamphlet. The detective would phone me to pretend as if they are interested in my pamphlets and they would want to participate in our march or they will want to be in our meeting. Asking for a venue, what time, all those sorts of things. Some are even wanting to be my friend on Facebook,' he says.

But Macodefo activists also believe that police officers were gathering information using more covert methods. 'Some are actually residents of Makause. They are deployed to be in Makause to trace us. They used to even attend our meetings.' He goes on to

explain that Macodefo had a source in SAPS that was sympathetic to the organisation; after the organisation had a mass meeting '[the source] will come back to us and say there were two police officers who were amongst us in this meeting. But they were in private uniforms [plain clothes].'

Moyo was also privately informed by a SAPS member that police had recruited certain residents to be informers on Macodefo's activities in the community. He explains that when Macodefo engaged with the municipality, they would often invite several community members to the meeting to provide an independent report-back to other residents. But he later learned that at least some of these residents might have also been reporting to police.

'Those members used to pretend they were our members but each and every time they will phone the police after our meeting...so the police will know everything. Those police officers who are on our side, told us that at the police station they were discussing us, discussing a report that they got from this group. Sometimes they are pre-informed of our meetings, we don't even know who phoned them'³³. ...

* * *

Vanessa Burger was chairperson of the Umbilo Action Group, a small community organisation in Umbilo, South Durban, whose main activities focused on substance abuse and police accountability. ...

In 2012, Burger received a call from someone calling himself 'Malusi', who claimed to be an Umbilo resident.

'He said he wanted to attend UAG [Umbilo Action Group] meetings,' says Burger. 'Every time he called he wanted to know when is the meeting happening, what is going to be discussed?'

But Burger started to get suspicious: 'He kept calling me, and he was very stupid actually because he kept using the same cell phone number, but giving a different name each time,' she says. In September 2012, during one of these phone calls she finally confronted the caller directly and he admitted that he was actually a sergeant with Crime Intelligence. (In fact, they had met: he had been present at a meeting between police and UAG organisers in the lead-up to a protest against the Umbilo SAPS station commander.)

After that, he would continue to call her to request information on her activities – this time openly identifying himself as the sergeant from Crime Intelligence. 'Eventually I started SMS-ing him details of upcoming meetings pre-emptively,' says Burger: "'Hello my friend, this is what I'm up to this weekend, will you be there?'"³⁴

³¹ <http://bigbrother.r2k.org.za/>

³² Right2Know, *Big Brother Exposed: Stories of South Africa's Intelligence Structures Monitoring and Harassing Activist Movements*, pp. 8-9.

³³ *Ibid.*, pp. 46-47.

³⁴ *Ibid.*, pp. 44-45.

RESPONDING TO THREATS TO PHYSICAL SECURITY

There are many NGOs that provide resources to address the risks and consequences of threats to the physical security of NGO staff. Types of resources include:

- Emergency financial support for medical expenses, legal representation, trial observation and prison visits, temporary relocation, protective accompaniment and safe spaces
- Less urgent support for rehabilitation, psychosocial services or permanent relocation
- Consulting services on acute security issues
- Training in risk assessment, threat analysis, development of security plans, personal resilience and stress management, and related skills and capacities
- Capacity building support to improve long-term security practices
- Advocacy support to respond to time-sensitive opportunities to protect vulnerable NGOs and individuals
- Fellowships to provide NGO staff working in harsh or dangerous conditions with rest and respite. In addition to the organisations providing relocation assistance below, academic fellowships can sometimes be arranged through programmes like the Scholars at Risk Network³⁵.

One key resource organisation is Protection International, a Brussels-based NGO. **Protection International**³⁶ publishes the most comprehensive written resource available on all aspects of protecting rights defenders: *Protection of human rights defenders: Best practices and lessons learnt*³⁷ (available in English, Spanish and French). Protection International also offers e-learning courses³⁸ to train groups in security and protection management. But the most important assistance provided by the organisation to NGOs under threat involves contextualised risk assessment and advice, implemented locally, including through the Protection Desks it maintains in a half-dozen countries (Colombia, DR Congo, Guatemala, Indonesia, Kenya, Thailand).

Some of the Protection Desks have spun off into independent organisations, such as **Defenders Protection Initiative (DPI)** in Uganda³⁹. DPI offers contextualised security audit services or advisory services addressing the specific security concerns of Ugandan NGOs. Similar organisations exist in other countries.

Another key resource organisation is **Front Line Defenders**⁴⁰, a Dublin-based NGO that provides consulting services to NGOs at risk. Front Line Defenders also provides small grants to improve security on an emergency or non-emergency basis, risk analysis and protection training, and it publishes *Workbook on Security*, a practical manual for human rights defenders that includes detailed checklists. The manual is available in English, Spanish, French,

Russian, Arabic, Portuguese, Chinese, Urdu and Dari. Front Line Defenders also provides fellowships and other rest and respite programmes to individuals on an invitation-only basis.

A variety of other resource-providing organisations assist individuals and organisations at risk, particularly by providing emergency material support and visibility through campaigning support.

GLOBAL RESOURCES

ProtectDefenders.eu⁴¹

Funded by the European Commission, and operating as a consortium grouping some of the most important organisations already providing resources, ProtectDefenders.eu operates telephone and Skype hotlines and a secure email channel, and it provides emergency grants for urgent security measures, both directly as well as through its members: Front Line Defenders, Reporters Without Borders, International Federation for Human Rights (FIDH), World Organisation Against Torture (OMCT), East and Horn of Africa Human Rights Defenders Project (EHAHRDP), Euro-Mediterranean Foundation of Support to Human Rights Defenders (EMHRF), Asian Forum for Human Rights and Development (FORUM-ASIA) and Urgent Action Fund. It also provides temporary relocation grants and facilitates temporary and permanent relocation through the EU Human Rights Defenders Relocation Platform⁴², as well as training on physical and digital security.

Observatory for the Protection of Human Rights Defenders

Operated by FIDH and the OMCT, the observatory provides emergency material support for physical security, digital security, related training, legal support and medical support (including psychosocial support and rehabilitation), family support, urgent relocation and advocacy support⁴³. FIDH also provides financial support for organisational capacity to preserve and advance the work of human rights defenders⁴⁴.

Freedom House⁴⁵

In collaboration with Front Line Defenders, it provides emergency financial assistance through the Lifeline Embattled CSO Assistance Fund⁴⁶. Through a consortium of eight NGOs, it provides emergency funds, advocacy support and security assistance to human rights defenders working on LGBTI issues via the Dignity for All: LGBTI Assistance Program⁴⁷.

Agir Ensemble pour les droits de l'Homme (AEDH)⁴⁸

Based in Lyon, France, AEDH has operated an Emergency Fund for Human Rights Defenders in Danger since 1999. The Fund supports relocation and settling down in a new, safe country for human rights defenders threatened with arbitrary arrest, kidnapping or assassination; provides legal assistance; and covers medical expenses. In 2015 AEDH supported 77 individuals from 16 countries with contributions averaging around EUR 1,000.

Urgent Action Fund for Women⁴⁹

This group supports women and trans activists through security-related and other training. It provides over 100 Rapid Response Grants per year (averaging between USD 5,000 and 10,000), including (1) rapid security grants to respond to threats and risks, supporting emergency security for organisations and temporary relocation awarded within 24-72 hours; and (2) rapid advocacy grants to respond to urgent opportunities for action by women's rights movements, awarded within 1 to 7 days. Urgent Action Fund Africa⁵⁰, based in Nairobi, has made Rapid Response Grants in 48 African countries.

Open Briefing⁵¹

Open Briefing, based in Cornwall, United Kingdom, provides security services, including risk assessment, anti-surveillance consulting, training and evacuation services. Although it is a not-for-profit, mission-driven organisation, it operates on a fee-for-services model. It coordinates its offerings with protection assistance grants offered by Front Line Defenders and others. There are also commercial companies that provide similar services, such as **Verrimus**⁵².

Other organisations that provide support to human rights defenders under threat on a global basis:

- **The Fund for Global Human Rights**⁵³
- **Amnesty International Relief Program**⁵⁴
- **American Jewish World Service**⁵⁵
- **Civil Rights Defenders**⁵⁶

REGIONAL RESOURCES:

A number of regional initiatives campaign on behalf of individual human rights defenders and provide emergency support for human rights defenders at risk.

AFRICA

East and Horn of Africa Human Rights Defenders Project (EHAHRDP)⁵⁷

The most well-developed of the African subregional initiatives, DefendDefenders, as it is also known, serves as a secretariat for the East and Horn of Africa Human Rights Defenders Network (EHAHRD-Net), comprising about 60 organisations in Burundi, Djibouti, Eritrea, Ethiopia, Kenya, Somalia/Somaliland, South Sudan, Sudan, Tanzania and Uganda, and ten international groups. DefendDefenders maintains a 24-hour support hotline and a secure email channel and has published a resource manual for human rights defenders. It has also established a Pan-African Human Rights Defenders Project to coordinate with other regional networks in Africa.

West Africa Human Rights Defenders Network (WAHRDN)⁵⁸

Established in 2005, the network covers Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria and Senegal.

MENA REGION

Euro-Mediterranean Foundation of Support to Human Rights Defenders (EMHRF)⁵⁹

This foundation provides emergency grants of up to EUR 5,000 to counter threats against the lives of human rights defenders and their families and to reinforce their visibility at strategic moments. In 2015 the fund provided support to about 40 individuals, particularly in Syria, Libya, Egypt and Palestine.

ASIA

Asian Forum for Human Rights and Development (FORUM-ASIA)⁶⁰

FORUM-ASIA is a network of about 60 members in 19 countries across Asia. Founded in 1991 in Manila, it maintains its secretariat in Bangkok and has offices in Geneva, Jakarta and Kathmandu. FORUM-ASIA's Protection Plan for Human Rights Defenders provides small grants to support temporary relocation, medical and other urgent needs and trial observation⁶¹. FORUM-ASIA also supports the Asian Human Rights Defenders (AHRD)⁶², an initiative campaigning on behalf of human rights defenders under threat.

CENTRAL AMERICA

Unidad de Protección a Defensoras y Defensores de Derechos Humanos de Guatemala (UDEFEQUA)⁶³

Established in 2000, Udefegua provides services to human rights defenders in Guatemala and other countries

in Central America. It provides training and other support for legal, psychosocial and security needs.

Iniciativa Mesoamericana de Mujeres Defensoras de Derechos Humanos (IM-Defensoras)⁶⁴

IM-Defensoras was launched in 2010 by five groups in the region to develop a response to increased violence against women human rights defenders. Working in El Salvador, Guatemala, Honduras, Mexico and Nicaragua, it combines training, self-care, research, social media activism, urgent action and human rights advocacy. It has assisted 112 women human rights defenders, including with family relocation services.

³⁵ <https://www.scholarsatrisk.org/>

³⁶ <http://protectioninternational.org/>

³⁷ <https://protectioninternational.org/publication/protection-of-human-rights-defenders-best-practices-and-lessons-learn/>

³⁸ <https://e-learning.protectioninternational.org/>

³⁹ <https://defendersprotection.org/>

⁴⁰ <https://www.frontlinedefenders.org/>

⁴¹ <https://www.protectdefenders.eu/en/index.html>

⁴² <https://hrdrelocation.eu/>

⁴³ <https://www.fidh.org/en/issues/human-rights-defenders/financial-support/grant-application-for-human-rights-defenders-at-risk> or <http://www.omct.org/human-rights-defenders/links/2015/10/d23598/>

⁴⁴ <https://www.fidh.org/en/issues/human-rights-defenders/financial-support/support-fund-to-enhance-the-capacity-of-local-human-rights-defenders>

⁴⁵ <https://freedomhouse.org/>

⁴⁶ <https://www.csolifeline.org/emergency-assistance>

⁴⁷ <https://freedomhouse.org/program/dignity-all-lgbti-assistance-program>

⁴⁸ <https://www.aedh.org/en/home/what-we-do/emergency-fund-for-human-rights-defenders>

⁴⁹ <https://urgentactionfund.org/>

⁵⁰ <https://urgentactionfund-africa.or.ke/en/>

⁵¹ <http://www.openbriefing.org/about/>

⁵² <http://www.verrimus.com/>

⁵³ <http://globalhumanrights.org/>

⁵⁴ Email: amnestyis@amnesty.org

⁵⁵ <https://ajws.org/>

⁵⁶ <https://www.civilrightsdefenders.org/>

⁵⁷ <https://www.defenddefenders.org/>

⁵⁸ <http://protectionline.org/source/west-african-human-rights-defenders-network/>

⁵⁹ <http://www.emhrf.org/>

⁶⁰ <https://www.forum-asia.org/>

⁶¹ <https://www.forum-asia.org/?p=7302>

⁶² <https://asianhrds.forum-asia.org/>

⁶³ 'Human Rights Defenders Protection Unit' in English: <http://udedefegua.org/>

⁶⁴ <http://im-defensoras.org/es/>

RESPONSE 2

ENSURE DIGITAL SECURITY

Attacks on the digital security of NGOs are growing at a particularly rapid pace, spurred on by increases in governmental resources devoted to cybersurveillance and cyberwarfare. NGOs should pay careful attention to the level of digital security appropriate for their organisation and the context in which they work. As with physical security, there are an increasing number of resources available to aid NGOs in conducting appropriate risk assessment, developing plans and policies and providing training to their staff.

PROS:

- Protects donors, volunteers and staff by securing information and communications
- May reduce risk of negative governmental action because of a lack of information that could trigger concerns or form a basis for a legal enforcement action
- May reduce effectiveness of legal measures taken by the government by limiting the evidential basis for them
- May increase opportunities to contest credibility of evidence falsely manufactured by the government by showing inconsistency with evidence under NGO's exclusive control
- Can support a public position of resisting illegal surveillance

CONS:

- May increase governmental agency suspicions, leading to an escalation of surveillance or the use of more disruptive enforcement measures

CONTEXTUAL CONSIDERATIONS:

- How pervasive are the governmental surveillance measures, and how feasible is it to evade them?
- What is the likelihood that non-public information about the NGO's activities would trigger significant concerns for the government?
- What is the likelihood that efforts to conceal non-public information about the NGO's activities would trigger increased investigative efforts by the government?
- How would the public perceive organisational practices to secure its information?

'WE HAVE OPTED TO AVOID ADDITIONAL SECURITY MEASURES TO PROTECT OUR DIGITAL SECURITY, IN VIEW OF OUR PRINCIPLED ASSERTION THAT OUR ACTIVITIES ARE FUNDAMENTALLY IMPORTANT IN A DEMOCRATIC SOCIETY. EVEN THOUGH WE BELIEVE THAT ENCRYPTION IS NOT ABOUT HIDING, WE NEED TO AVOID CREATING ANY BASIS FOR EVEN THE MOST UNFOUNDED SPECULATION THAT WE HAVE ANY NEFARIOUS ACTIVITIES TO HIDE. IN ADDITION, TRANSPARENCY IS A CORE VALUE OF OURS – ONE THAT WE BOTH EMBODY AND PROMOTE.'

**/ SHARON ABRAHAM-WEISS,
ACRI, ISRAEL**

EIPR ADOPTS ROBUST DIGITAL SECURITY POLICY

EIPR adopted a policy in 2014 of ensuring full digital security throughout its operations as the Egyptian government stepped up its efforts to target the organisation by fabricating accusations about violations of criminal law. The entire office now uses an operating system known for its superior capability to withstand hacking. The organisation also uses VPN (virtual private network) software to ensure that its data is stored outside of the Egyptian-controlled server networks, and the staff use data-free laptops when they travel. For communications, they use software that provides full encryption.

The main negative consequence of EIPR's robust digital security practices is that its ordinary use of technology is sometimes unreliable because VPN software drops packets of data or due to other technical reasons.

But the primary hurdle for the policy was overcoming the resistance of staff who were reluctant to make the effort to re-train themselves and had pre-existing technological consumer preferences, such as using Apple's operating system. The organisation's solution was to invest in training a few champions who were already passionate about digital security, and those staff members each worked with their peers to socialise an understanding about digital security. EIPR hired a specialised consultant to work on training the entire staff. Altogether, it took about five months to convince the entire staff to learn and adopt new technological practices, and almost all of them are very satisfied with the change.

DIGITAL SECURITY RESOURCES

Many of the organisations providing resources to help protect the physical security of NGOs also provide information and resources on digital security. But some resource-providing organisations specialise in digital security. For an overview of digital security issues, the best starting point is the **Electronic Frontier Foundation (EFF)**'s '**Surveillance Self-Defense**'⁶⁵. The website provides an easy-to-navigate set of overviews containing basic information explaining concepts such as encryption, hacking and metadata. It also contains detailed guides on using various methods for data encryption and other digital security measures that NGOs can take. EFF maintains a webpage specifically designed to navigate resources most relevant to human rights defenders⁶⁶.

For NGOs with an acute digital security need, the most efficient way to secure assistance is to contact the **Access Now Digital Security Helpline**⁶⁷. The

helpline provides a secure communications channel, with human as well as digital verification protocols, and it provides free advice, referring NGOs, activists and journalists to appropriate services, tools and other resources. The helpline responds to requests for assistance within two hours, and it may be contacted in English, Spanish, French, German, Portuguese, Russian, Tagalog and Arabic. It maintains offices in San Jose, New York, Berlin, Tunisia, Moscow and Manila.

Tactical Technology Collective provides digital security training to NGOs. Together with **Front Line Defenders** it created **Security in-a-box**⁶⁸, a detailed guide on how to secure operating systems of various devices, including technical setups and software settings. Unlike other general guidance available on the internet, it includes the necessary programmes and important settings for them. Tactical Tech has also produced studies on how human rights organisations can most effectively train about digital security⁶⁹.

Other resources relating to digital security include:

- **Front Line Defenders**⁷⁰ – Provides digital security advice within its general 'Workbook on Security: Practical Steps for Human Rights Defenders at Risk.' Appendix 14 includes a handbook for computer and phone security.
- **Community Red**⁷¹ – Provides contextualised security strategies for voiceless and vulnerable communities in closed and closing societies

through trauma-sensitive and human-centred training, tools and research.

- **Freedom of the Press Foundation**⁷² – Distributes three specific tools: SecureDrop (a free and open-source whistleblower submission system for anonymously accepting documents and information), Secure the News (automatically tracks and grades the adoption of HTTPS encryption by news organisations), and Signal (an encrypted text message and phone call application).
- **Committee to Protect Journalists (CPJ)**⁷³ – Provides guidance on risk assessment and mitigation and maintains an Emergencies Response Team providing comprehensive, life-saving support to journalists and media support staff working around the world.
- **Internews**⁷⁴ – Safer journo toolkit provides digital and online safety resources for journalists and media trainers.
- **Article 19**⁷⁵ – Provides tools and guidance on basic digital security needs.
- **Association for Progressive Communications (APC)**⁷⁶ – Documents trends, lobbies for internet rights in international forums and trains activists in how to use the internet securely.
- **Adapt Game**⁷⁷ – An open-source, mobile game application that teaches journalists critical thinking skills to mitigate risks, including how to assess digital threats, risks and vulnerabilities for themselves and their sources.

- **Liberty Guide to Counter-Surveillance**⁷⁸ – Offers a wide variety of security devices to provide more traditional security, including dashboard cameras, video streaming smart phone apps, hidden digital audio recorders, bug detectors and scramblers.
- **HCLU's infosite www.surveillancematters.com** – Offers an easy-to-use website to raise awareness on the risks associated with digital activities and to provide tools and tips for users to take control of their digital information.

In tandem with widespread⁷⁸ digital surveillance practices, governments are also developing new laws, regulations and policies that erode digital privacy. NGOs need to protect their digital privacy through their own practices, but they also need to call attention to and advocate against new restrictive laws. UK-based Liberty is leading one such effort, illustrated on the next pages.

LIBERTY'S GUIDE TO PROTECTING YOUR RIGHTS ONLINE

THE INVESTIGATORY POWERS ACT IS NOW LAW, ALLOWING THE GOVERNMENT TO RECORD AND MONITOR EVERYTHING YOU DO ONLINE – ALL WITHOUT ANY SUSPICION OF WRONGDOING.

HERE ARE SOME SIMPLE STEPS YOU CAN TAKE TO PROTECT YOUR COMMUNICATIONS FROM STATE SURVEILLANCE:

1. BROWSING THE WEB – DOWNLOAD TOR TO BROWSE ANONYMOUSLY

[Download the free Tor browser](#) to use the internet privately. Your internet provider will collect and hand over detailed records of everything you do online, but they will not be able to record or see which websites you visited using the Tor browser.

2. CALLS AND MESSAGING – USE THE SIGNAL APP TO ENCRYPT CALLS AND INSTANT MESSAGES

Download the Signal Private Messenger app (iOS and Android) – it works much like WhatsApp, but is free software and will not share your data with Facebook.

3. EMAILS – ATTEND A CRYPTOPARTY AND LEARN ABOUT EMAIL ENCRYPTION

Keep an eye on <https://www.liberty-human-rights.org.uk/support-us/whats> for upcoming privacy events.

4. JOIN LIBERTY – WATCHING THEM WATCHING US

Our message to the Government about mass surveillance? See you in court. [Join us as a member](#), or [donate](#) to support our legal challenge.

5. SHARE OUR PRIVACY GUIDE

Please spread the message far and wide, on [Twitter](#), [Facebook](#) and [Instagram](#): we need to protect our rights.

[A pdf of the guide can be found here.](#)

THE INVESTIGATORY POWERS ACT PROTECTS NEITHER OUR SECURITY NOR OUR PRIVACY. BUT THIS IS BY NO MEANS THE END OF THE ROAD. WE'LL BE CHALLENGING THE SNOOPERS' CHARTER IN THE COURTS AND CONTINUING TO HELP YOU PROTECT YOUR RIGHTS.

⁶⁵ <https://ssd.eff.org/en>

⁶⁶ <https://ssd.eff.org/en/playlist/human-rights-defender>

⁶⁷ <https://www.accessnow.org/help/>

⁶⁸ <https://tacticaltech.org/projects/security-box>

⁶⁹ <https://tacticaltech.org/projects/security-context>

⁷⁰ <https://www.frontlinedefenders.org/en/resource-publication/work-book-security-practical-steps-human-rights-defenders-risk>

⁷¹ <http://www.communityred.org>

⁷² <https://freedom.press/tools/>

⁷³ <https://www.cpj.org/reports/2012/04/technology-security.php>

⁷⁴ <https://www.internews.org/resource/saferjourno-digital-security-re-sources-media-trainers>

⁷⁵ <https://www.article19.org/pages/en/irapoly.html>

⁷⁶ <https://www.apc.org/en/projects/internet-rights-are-human-rights>

⁷⁷ <http://goo.gl/forms/CI1WB6LaLR>

⁷⁸ <https://frontierliberty.com/counter-surveillance>

3 CREATING ALTERNATIVE ORGANISATIONAL STRUCTURES

When an NGO is being targeted by a governmental enforcement action, one alternative available to the organisation's leaders, staff and supporters is to set up a new legal entity or function without a legal entity altogether. Alternatives include: setting up a new entity of a similar nature; avoiding the extra regulatory burdens to which charitable entities are subject by setting up a commercial entity; doing without a legal entity altogether and organising activities as an informal group of individuals; and moving the operational base outside the country into a legal entity organised under the laws of another country. There are many considerations to take into account before deciding on any of these changes, as each option comes with significant potential drawbacks.

/ THREAT

In some cases, governments will make it impossible for certain NGOs to exist in their current form by bringing arbitrary legal action against the organisations or individuals involved in them, by changing laws and regulations to prevent funding from foreign donors, or through threatening arrest or even physical harm to the NGO's leadership or staff.

RESPONSE 1

ESTABLISH A NEW LEGAL ENTITY AND/OR A NEW TYPE OF LEGAL FORM, SUCH AS A COMMERCIAL FIRM

Governmental attacks on NGOs increasingly come in the form of regulatory measures that target the entire NGO sector (see section on 'Recognising the pattern'). These measures, by their nature, adhere to the particular legal entity through which the NGO operates. When NGO leaders are working within a legal entity that no longer proves to be viable because of regulatory changes, one option available to them is to establish a new legal entity. Of course, governmental agencies that have decided to target a particular NGO can apply equal pressure on the

new entity, but sometimes it is possible to reduce the NGO's vulnerability by selecting a legal form that provides more options for managing regulatory obstacles.

For example, NGOs can sometimes receive funds and implement their activities more readily through a commercial entity than a charitable one. Generally, commercial entities are less regulated than charitable entities; commercial entities benefit from policies designed to promote business, and they are not subject to policies designed to safeguard the public funds that charities benefit from by virtue of tax exemptions and other special treatment.

As discussed under 'Good Practices for Donors', in Section I, some donors are able to make grants to commercial entities as well as to charitable entities. Commercial entities can also earn revenue in the form of fee-for-services contracts and receive direct investment. NGOs that engage in legal advocacy can consider establishing a new law firm or collaborating with an existing one. Grants, or portions of grants, can sometimes be re-negotiated as retainer fees to support legal representation on behalf of third parties.

While establishing a new legal entity can be time-consuming and burdensome, part of the burden can be relieved in some countries by engaging the volunteer services of a law firm through a pro bono programme, as described in Section I.

PROS:

- May allow the organisation to avoid some restrictive rules specifically targeting charities or not-for-profit organisations
- May open up the possibility to earn revenue through new sources

CONS:

- Entity may incur new tax liabilities because of losing the charitable or not-for-profit status
- Organisation may lose reputational value because of a perception that it is now earning profit through commercial activities (even if it does not in fact make or distribute profits) at the expense of its beneficiaries
- If the same individuals are involved or linked to the new entity, the government may find alternative means to legally attack it, including characterising the entity as a fraudulent sham and targeting individuals

CONTEXTUAL CONSIDERATIONS:

- What is the nature of the new regulatory burdens?
- What is the nature of the NGO's activities?
- What is the nature of the NGO's donor relationships?
- How likely is it that the government will respond by prosecuting or persecuting the new entity, through similar or new measures?

OPERATING AS A LAW FIRM

For an advocacy organisation in particular, one of the options available is to establish a new entity in the form of a law firm and to structure funding in the form of retainer agreements, either directly with clients, or through third-party retainer agreements.

In many countries setting up a law firm is a relatively simple matter, requiring little more than proof of a currently valid bar membership of one or more members, a basic organising document and payment of a small fee. While setting up a simple commercial entity, such as a Limited Liability Company (LLC), is a good alternative, the chief advantage of a law firm form for an advocacy group is that law firms are relatively free to engage in litigation.

There are also disadvantages. Like commercial entities, law firms are subject to taxation as well as regular informational filing requirements.

Depending on the country, taxes can be levied on profit or on revenue. Profit tax can be minimised in cases where the entity is set up to spend all of its revenue on activities. Revenue tax, however, applies to the total income of the entity, and will create an additional cost compared to operating a tax-exempt organisation.

In cases where organisations attempt to split activities between two different legal forms, complications can arise from misalignment between the cash flow needs of each entity and grant reporting requirements.

Finally, in some countries, law firms conducting advocacy strategies would be subject to rules intended to regulate the payment of fees by third parties. In the **United States**, for instance, the payment of legal fees by a third party is considered to raise ethical issues connected to conflict of interest and the potential for interference with the lawyer-client relationship. Ethical rules may require that the client give his/her informed consent; that the third party may not direct, regulate or interfere with the lawyer's representation of the client; and that there be no attorney-client relationship between the lawyer and third-party payer⁷⁹.

In general, operating as a law firm may help avoid some of the stringent controls placed on NGOs that are registered as foundations, associations or other charitable entities; however, governments often use

other regulatory instruments to restrict or prevent advocacy work regardless of legal form.

In **China**, a number of informal groups of lawyers have set up law firms or created departments of existing law firms since the early 2000s to implement strategic litigation activities funded primarily by foreign grants. That practice is now strictly controlled by China's new 'Foreign NGO Management Law', which went into force on 1 January 2017. The new law does not distinguish as to form of Chinese organisation, focusing its regulatory efforts on the identity of the source of foreign funds, targeting any individual or organisation – regardless of form – that cooperates with a foreign charitable organisation.

In **Egypt**, a simple registry process allows lawyers working with NGOs to establish law firms subject to minimal regulation. Starting in September 2016, however, the Egyptian government began to use national security legislation to target human rights advocates whether working within NGOs, law firms or commercial entities.

⁷⁹ See, for example, *In re State Grand Jury Investigation*, Supreme Court of New Jersey, 23 November 2009.

RESPONSE 2

OPERATE INFORMALLY

Some organisations under threat continue to operate as a collection of individuals without any legal entity, operating more like a network than a unitary organisation. The funds for projects are distributed among the bank accounts of individuals and/or commercial entities they have established. While some donors prefer to avoid transferring grant funds into individual bank accounts, or transmitting cash, others are willing to do so (see the 'Good Practices for Donors' in Section I). In some cases, funds are received by a small, rump organisation that then further distributes project funds to individual bank accounts.

PROS:

- Allows organisation to continue activities when a legal entity has been shut down or cannot operate
- Allows maximum flexibility for responding to regulatory obstacles

CONS:

- Individuals receiving the funds incur legal risk, including in many cases income tax liability for funds spent on direct expenses or personal liability for organisational financial transactions, possibly resulting in a freeze on personal assets,

travel ban and/or prosecution

- Limits ability of organisation to brand its activities consistently
- Limits ability of organisation to manage its operations efficiently and effectively and to sustain itself in the long run

CONTEXTUAL CONSIDERATIONS:

- What are the relative risks of operating as a legal entity and of operating as an informal collection of individuals?
- To what extent would the existence of an informal network of individuals advance the strategic objectives of the organisation?
- To what degree would donors support informal operations?
- How likely is it that use of individual bank accounts to receive project funding or other payments will lead to legal proceedings against the individuals?
- What are the potential tax liability consequences?

OPERATING INFORMALLY: DRONT AND UNION OF THE DON WOMEN IN RUSSIA

The 'Foreign Agents Law', adopted in Russia in July 2012⁸⁰, provides that any organisation receiving financial support from abroad and engaging in 'political activities' must register on a public list of 'foreign agents', or else face administrative and criminal sanctions. The law came into force on 21 November 2012. Initially, no organisation registered on the list, but following a speech by Vladimir Putin to the Russian national security agency, the Federal Security Service (FSB), on 14 February 2013, Russian authorities began to take enforcement measures. Prosecutorial investigations began against selected organisations in 2013, followed by court actions requiring specific NGOs to register. Furthermore, an amendment to the law authorising the Ministry of Justice to register organisations without their consent came into force on 4 June 2014.

The first voluntary registration was recorded in June 2013, and by 2017 over 100 organisations had registered, either voluntarily or because the Ministry of Justice had added them after an investigation or prosecution. By 2015 many organisations liquidated themselves as an alternative to being registered or prosecuted.

Some of those organisations have continued to operate informally. For example, Dront, an environmental group in Nizhnii Novgorod, is on the foreign agents list even though the law explicitly mentions that 'activities to protect the plant and animal world' should not be considered 'political.' Dront applied to be taken off the list, but its request was refused on the grounds that it had received foreign funding, with three sources cited, according to Amnesty International:

500 roubles (USD 8) from Bellona-Murmansk to subscribe to Dront's newspaper, Bereginja; a loan from another environmental NGO listed as a 'foreign agent', Zelenyi Mir (Green World), which was repaid by Dront before the inspection; and, even more surprisingly, a grant from Sorabotnichestvo, a foundation run by the Russian Orthodox Church. 'It turned out, [the Church] gets some cash inflow from Cyprus and that's why our regional Ministry of Justice (in strict conformity with the law, mind you) counted this money as "foreign". It is a strange, surreal situation,' said Dront's Chair Ashkat Kaiumov⁸¹.

Dront was also ordered to pay a fine of 300,000 roubles (around USD 4,800), and on 1 February 2016 the Dront leadership decided to temporarily suspend its activities until it was removed from the 'foreign agents' list, continuing to work instead as an unregistered public movement without using a legal entity⁸².

Dront's decision is not without risk. The Union of the Don Women was one of the organisations registered by the Ministry of Justice soon after the ministry was given that power in 2014. The same activists set up a new organisation called the Foundation of the Don Women, but this organisation too was declared a 'foreign agent' in October 2015. On 24 June 2016, the leader of the organisation, Valentina Cherevatenko, was informed that a criminal investigation had been opened against her for the offense of 'wilfully evading responsibilities' under the 'foreign agents' law, with a potential penalty of two years in prison⁸³. She was formally indicted on those charges on 2 June 2017⁸⁴.

RESPONSE 3

OPERATE TRANSNATIONALLY ('OFFSHORE')

The global economy allows the commercial sector to harness the comparative advantages of different countries for different purposes. Headquarters, supply chains, marketing functions and distribution centres are distributed around the world as principles of efficiency and opportunity dictate, taking into account legal and policy environments. NGOs can take advantage of the same opportunities to mitigate the impact of threatening regulatory environments. Options can include moving the entire operation. Staff members facing a particular threat of arrest or violence can be moved out of the country, and can often continue to work for the organisation remotely (see Section II on threats to physical security).

PROS:

- Allows organisation to fundraise freely
- Provides greater physical security to staff
- Protects staff from travel bans and asset freezes
- Reduces surveillance risk

CONS:

- Limits ability of organisation to engage in local advocacy strategies
- Reduces potential for local constituency building
- Reduces sustainability
- May make visas difficult to obtain

CONTEXTUAL CONSIDERATIONS:

- What will be the impact on the effectiveness of the NGO's activities if it is operating from a base outside the country?
- To what extent do staff need to reside abroad in order to be physically secure?
- Can part of the NGO's operations be based abroad in combination with organising staff or volunteers as an informal in-country network?

⁸⁰ The law officially named 'On Amendments to Legislative Acts of the Russian Federation regarding the Regulation of the Activities of Non-profit Organisations Performing the Functions of a Foreign Agent' was introduced into the Russian parliament by legislators from the governing United Russia party in July 2012 and signed into law by Vladimir Putin on 20 July 2012.

⁸¹ Amnesty International, 'Russia: Four years of Putin's "Foreign Agents" law to shackle and silence NGOs', 18 November 2016: <https://www.amnesty.org/en/latest/news/2016/11/russia-four-years-of-putins-foreign-agents-law-to-shackle-and-silence-ngos/>

⁸² Ibid

⁸³ Ibid

⁸⁴ 'Valentina Cherevatenko faces criminal charges under the Foreign Agent Law', *Front Line Defenders*, 6 June 2017: <https://www.frontlinedefenders.org/en/case/case-history-valentina-cherevatenko>

WORKING FROM ABROAD: PROS AND CONS

Russian organisations registered as 'foreign agents' faced a dilemma in deciding how to respond to enforcement efforts connected to this status. Fighting the registration in the courts took precious time and money resources away from their main work. Complying with the law required a similar investment of time and money in filing burdensome reports on a quarterly basis. And for organisations engaged in public advocacy, journalists wanted to focus on the battle with the government over their 'foreign agent' status rather than talk about the substantive work of their organisation.

As a result, some organisations opted to work from outside the country in order to continue the substance of their work, registering a legal entity under the laws of another country, in part

to secure legal residence. The following are some of the advantages and disadvantages of that approach, based on the experiences of one such organisation:

ADVANTAGES:

- Reduces drain of resources from fighting or complying with regulations and enforcement actions
- Maintains independence from direct control of Russian authorities
- Increases access to intergovernmental bodies and more effectiveness in interacting with them and in disseminating information internationally
- Allows the organisation to maintain its brand globally as well as in Russia, including maintaining a Russian-language website without a 'foreign agent' label
- Enhances the ability to work in a wider range of Russian regions, provided the purpose of the visit is kept secret
- Some expenses, such as travel to some regions, are less expensive from abroad

DISADVANTAGES:

- Activities that require direct contact with Russian authorities are no longer possible, except sometimes by engaging a local lawyer
- Less direct contact with individual clients and beneficiary groups
- Maintaining secrecy about the location and use of a legal entity, to protect against reprisals from Russian authorities and government-allied media, leads to less efficiency and drains energy

STEPS TO MITIGATE DISADVANTAGES:

- Position some of the former staff with less visible and less vocal local organisations
- Position some of the former staff with low-level local jobs, permitting them to devote time in pursuit of ongoing organisational objectives in a voluntary capacity
- Transfer some projects from the original organisation to other local organisations, including those that re-employ staff

LEGAL CHECKLIST

PREPARED BY DLA PIPER

As already discussed, there can be many reasons for an NGO to establish a new legal structure or move some part of their operations outside of their jurisdiction of origin. In the private sector, commercial, tax and regulatory issues are key considerations to establishing new structures in alternative jurisdictions or 'offshore.' The most popular jurisdictions have well-run legal, accounting, tax, administration, fiduciary and governmental services and departments to make establishment of new legal structures in the jurisdiction time efficient, cost effective and straightforward.

The checklist below sets out key factors that a human rights or other NGO should take into consideration when contemplating a legal entity outside of their home country. This information is of a general nature (not jurisdiction specific), and NGOs considering these options should discuss them in more specific detail with legal counsel.

CHOOSING BETWEEN 'ONSHORE' AND 'OFFSHORE' JURISDICTIONS

Traditionally, human rights groups set up legal entities in the countries where their founders live and work. Changes in political and regulatory environments around the world have led many organisations to consider the alternative of setting up a legal entity in another country. The options might be divided into two basic categories: 'onshore' and 'offshore.'

Traditional jurisdictions, referred to here as 'onshore' jurisdictions, offer a wide range of options, including not-for-profit structures (e.g. associations and foundations) and for-profit structures (e.g. companies and limited liability partnerships). 'Offshore' jurisdictions such as Bermuda, the British Virgin Islands, the Cayman Islands, Cyprus, Guernsey, Jersey, Isle of Man and Malta (among others) also have significant infrastructure for establishing new entities. While these latter jurisdictions can provide legal and financial benefits, they do not cater to not-for-profit organisations specifically, and there may be some stigma attached to adopting corporate structuring practices that are associated with tax avoidance or other commercial business interests. Nevertheless, 'offshore' jurisdictions represent one of the options for an NGO to consider.

Regardless of the type of jurisdiction, there is a range of issues that NGOs should consider before selecting a specific jurisdiction, including non-legal

factors, such as proximity to the country of origin, the existence of a favourable political climate, etc. Legal considerations range from the regulatory burden of the relevant jurisdiction (i.e. reporting requirements, tax burden, etc.) to requirements for start-up capital and the laws on giving and receiving donations.

WHICH STRUCTURE TO ADOPT (NOT-FOR-PROFIT VERSUS FOR-PROFIT)

Traditionally, civil society groups have opted for not-for-profit structures. This is largely due to common, historical understandings about the role of associations and foundations and other not-for-profit legal forms, and it also stems from advantages built into the legal framework for not-for-profit structures, such as exemptions from income and sales tax and other tax benefits relating to receiving and making donations and grants. However, with increasing governmental restrictions placed on not-for-profit structures and a thriving global social enterprise movement, it is worthwhile to consider other (quasi) for-profit structures that may be feasible (depending on the jurisdiction).

ISSUES TO CONSIDER:

While the best choice for jurisdiction and structure will vary by organisation, there are a number of key factors that should be considered in all cases.

PERMITTED ACTIVITIES

The type of structure may have significant implications for the activities the organisation is permitted to undertake. With respect to not-for-profit structures in onshore jurisdictions in particular, there may be limitations on lobbying activity and political campaigning, requirements that the aims and objectives be broadly charitable or for the public benefit, or restrictions on commercial activities.

Nevertheless, the regulatory regimes in onshore countries generally allow (with exceptions) for a broad range of permitted activities with respect to both for-profit and not-for-profit structures. In addition, in many jurisdictions there are special regimes in relation to for-profit structures with a social purpose (social enterprises).

Offshore, the typical structures for 'special purpose vehicles' and 'holding vehicles' may exclude domestic operations in the jurisdiction itself. As a result, possibilities for relocating operations and employees in the same jurisdiction as the new legal entity might be limited. Nevertheless, there are unlikely to be restrictions on the particular type of business conducted, outside of the usual considerations of legality, public nuisance and court supervision around, e.g., protection of shareholder interests. Typically, however, offshore structures contemplate a 'non-resident' arrangement, with legal and financial elements tied to the offshore

jurisdiction but personnel and operations in another place.

Where offshore jurisdictions do offer 'resident vehicle' arrangements, operational licences and permits (requirements for resident owners, employee permits, business licences) can be expensive and complex. Furthermore, offshore jurisdictions are unlikely to offer tax benefits or other support for not-for-profit operations or fundraising.

LIABILITY OF MEMBERS

In so far as not-for-profit structures are concerned, jurisdictions vary in terms of their liability arrangements. While some structures (particularly membership-based structures) will leave all members personally responsible for the debts and obligations of the organisation, others may limit the liability, requiring that any claims have to be brought against the legal entity rather than the members themselves. On the other hand, the disclosure/reporting requirements for unlimited liability structures may be less burdensome than for those with limited liability.

For-profit structures with limited liability generally include limited liability companies and limited liability partnerships. There are also unlimited liability options such as traditional partnerships and unlimited companies, which may have certain non-disclosure advantages (such as the absence of a requirement to file accounts). Unlimited liability options can be

attractive in situations in which protecting the liability of the shareholders is not a concern, but limiting the degree of disclosure is one.

START-UP COSTS AND ONGOING ADMINISTRATION

Not-for-profit structures often involve minimal start-up costs, with low registration fees; however, in some jurisdictions there may be minimum capital requirements of tens of thousands of dollars for some structures (such as foundations).

In addition, the more complicated the disclosure and tax reporting requirements (such as VAT registration and tax filings, annual return and accounts filings, etc.), the more accounting and legal services will be needed to establish, register and operate entities. There are many accounting firms and law firms willing to undertake this work on a pro bono basis for civil society groups, but if services are being contracted commercially, they can be expensive particularly at the initial stage and are likely to add to the cost of continuing operations.

Initial start-up share capital requirements for for-profit structures can be slightly more expensive in onshore locations (ranging from USD 100 to tens of thousands of US dollars). Generally, unlimited liability structures benefit from fewer capital requirements than those with liability attached.

As a result of cross-jurisdiction competition for offshore business, offshore jurisdictions have particularly attractive start-up and ongoing administration arrangements designed to attract commercial structures to establish 'special purpose vehicles' and 'holding vehicles' in their locations. Corporate administrators are readily available to establish entities with little initial paperwork and a small financial outlay; there are some ongoing service fees but initial share capital contributions are likely to be low, for example GBP 1 or USD 1. In addition, ongoing capital commitments are low, and there are low annual fees for maintenance, few annual reporting requirements and limited annual tax return documentation. (Sometimes there is no obligation at all to file annual accounts, thereby avoiding costs associated with audits and potential issues with disclosure.)

MANAGEMENT AND OWNERSHIP

Legal requirements governing management and ownership will have important implications for staffing decisions and especially on issues of control between the new entity and any entities in the home country.

Some structures will place ultimate control of the structure in the hands of the members, partners or shareholders, while others may place that control with the operational directors of the structure. Control can be simplified by adopting a 'single-membership' structure, which places control in one 'parent' entity, such as an entity in the home jurisdiction or another onshore location.

In some jurisdictions and for some structures, there may be requirements for a formal board of directors made up of a specified number of directors with responsibility for the general management of the structure, whereas other structures may allow for management to be organised entirely at the discretion of members.

In terms of for-profit structures, companies will usually include members/shareholders as owners, directors as the persons responsible for conducting the business of the company and possibly other mandatory company officers such as a company secretary. A limited partnership will have limited partners who are investors, with liability limited to their capital contributions, and a general partner who is responsible for the business operation of the partnership, itself often a company with the management and ownership features set out above. In some jurisdictions there may also be statutory requirements to offer employees the chance to become shareholders after a given period of time. Such complexities are usually unnecessary for an NGO setting up a new structure.

One consideration that is almost always pertinent, however, is that offshore jurisdictions usually require maintaining a registered office and/or registered agent locally. Administrative services are available for a fee to provide an address for contacting the company's representatives and a local agent to coordinate submission of annual fees, declaration, etc. Additional local presence may be required for holding meetings, which may be required to

establish 'management and control' of the structure in its jurisdiction of incorporation in order to avoid tax liability in the home country. In such cases, non-executive director services are available, providing for local resident directors who can arrange meetings, take board decisions, etc. in the relevant jurisdiction. Boards are often comprised of a mixture of these independent directors and persons who are directly concerned with the business of the structure.

TAXATION

Tax liabilities vary widely depending on both jurisdiction and legal structure. Most jurisdictions offer special tax rates for not-for-profit structures and provide opportunities for tax relief on revenue or expenditures relating to the public benefit mission of the structure. Donors may also be eligible for tax deductions. In order to take advantage of these regulatory regimes it will often be necessary to establish the public benefit or charitable purpose of the relevant legal entity. International transfers of charitable funding are sometimes treated differently than local sources of charitable funds, and tax relief for such transfers needs to be specifically explored before selecting a particular jurisdiction.

For-profit structures will typically have a much heavier tax burden, although in some jurisdictions there may be exemptions in relation to for-profit structures having a social purpose.

Certain countries with 'no or low' tax regimes make them attractive locations to establish entities for financial reasons. However, setting up in such a jurisdiction, while perfectly legal and relatively common for commercial enterprises, can create reputational harm. Prominent individuals and large corporations (such as Amazon, Google and Starbucks) have come under fire for using offshore structures to avoid taxation. NGOs relying on similar structures may play into perceptions that offshore jurisdictions harbour tax evasion, money laundering and other criminal activities (as with the recent 'Panama Papers' scandal).

To mitigate the reputational risk that comes along with some 'no or low' tax regimes, NGOs can opt instead for setting up in 'low to middle' tax countries, such as the Netherlands or Ireland. The set-up and ongoing operational costs and disclosure requirements may be less favourable, but those countries are associated with significantly less 'perception risk.'

REPORTING REQUIREMENTS

Given the specific context of the closing space for civil society, reporting or disclosure requirements may be a central consideration for any NGO wishing to establish itself outside of its jurisdiction of origin.

The extensiveness of any reporting requirements will be closely connected to the form of legal structure selected. Generally speaking, the greater the liability of the members or partners and the more limited the

funds and proceeds the entity receives, the lower are the reporting requirements. Furthermore, the more onerous the reporting and disclosure requirements, the greater the administrative cost in accountancy and legal fees (although as noted above, there are many accounting firms and law firms willing to undertake this work on a pro bono basis for charitable organisations).

Reporting requirements may range from the production of annual accounts to the delivery of auditor's reports, registers of members and directors' reports. For NGOs subject to particularly intrusive governmental scrutiny in their home country, finding a jurisdiction and legal structure that provides strong privacy protections may be particularly important.

In the for-profit sector, there are two high-concern areas for reporting – filing accounts and disclosure of shareholder registers (identifying who 'owns' the legal entity). The requirement to file accounts can be problematic in terms of both disclosure about operations and the cost of producing accounts, if not already required elsewhere. Regarding shareholder registers, onshore jurisdictions generally require filing of updated shareholder registers at least annually and offshore jurisdictions generally do not. There is a trend among offshore locations, however, to increase disclosure obligations in response to global policy initiatives aimed at reducing money laundering.

WINDING UP AND LIQUIDATION

When selecting a location for setting up a new structure, it is also important to consider the costs and requirements for terminating the structure in case priorities shift and the desirability of maintaining the structure changes in the future. In the case of not-for-profit structures, there are sometimes requirements regarding how the financial assets of the structure are used upon the liquidation of the legal entity (e.g. that they must be used for another not-for-profit organisation with a similar purpose). Some jurisdictions require that the regulation of the use of funds upon liquidation be set out in the by-laws of the legal entity.

Whether winding up an entity that is not-for-profit or for-profit, offshore locations that offer good environments for setting up new structures generally provide for efficient means for winding up and liquidation as well. Assuming the entity is solvent, the voluntary procedures are usually relatively straightforward and less procedurally burdensome in terms of filings, publication of notices, cost, etc. than onshore locations. If the entity is insolvent, liquidation can be significantly more costly and time-consuming.

4 FORGING ALLIANCES

Coalition building is not a new strategy for NGOs, but when there is a sector-wide assault on NGOs, it is particularly important for them to band together so that government cannot exploit typical fissures in the civil society sector. Civil society often fragments along the different roles and approaches of service-providing NGOs compared with advocacy NGOs; the different international networks that connect NGOs, whether humanitarian, development, human rights or environmental; and the work of some NGOs that is particularly sensitive culturally or politically, like LGBTI rights or the rights of a particular ethnic minority. The coalition practices discussed in this section can help make a coalition-based response to governmental restrictions more effective and therefore more likely to succeed.

/ THREAT

Governments deploy a divide-and-conquer strategy, singling out NGOs that represent a particular political threat or that are working on particularly controversial themes.

RESPONSE 1

PLANT SEEDS FOR RELATIONSHIPS ACROSS NGO SUBSECTORS EARLY

There are many kinds of NGOs pursuing varying goals with diverse approaches. Although NGOs rely heavily on networking for sharing resources and achieving common goals, they tend to network within subsectors that focus on particular fields, just as individual professionals do.

One of the most important divisions among NGOs is the dividing line between organisations that engage in public and legal advocacy and those that pursue development, humanitarian and service-oriented missions. NGO relationships also divide along the lines of issues they work on (e.g. climate change, civil and political rights, poverty) or populations they serve (e.g. children, LGBTI community, refugees and migrants). As a result, when the government engages in a sector-wide attack, NGOs are often slow to organise a sector-wide response. Indeed, governments often inhibit later coordination of NGOs by exploiting fault lines among them, demonising one or more particular subsectors or issue areas.

The NGO sector can improve its ability to respond to an attack by building seeds for relationships among diverse NGOs far in advance of any specific threat from the government, through informal communication or by establishing a more formal structure, such as an umbrella group. Those relationships and structures become particularly valuable if they transcend fault lines in the sector.

PROS:

- NGOs prepared to act in concert at the first signs of an impending threat
- Solidarity among NGOs stronger due to personal relationships and enhanced understanding of each other's perspectives

CONS:

- Requires foresight and leadership in order to be effective and sustained
- Can require significant time and effort, taking away from other priorities

CONTEXTUAL CONSIDERATIONS:

- Are there pre-existing structures and practices that can be built on to avoid excessive investment of time and effort?
- How likely is it that a significant threat will emerge?
- What are the key fault lines that divide the NGO sector and most need to be transcended?

A UNITED FRONT

The KHRC and other NGOs in Kenya began organising themselves into sector-wide coalitions to promote common interests well before the Kenyan government began its concerted effort to attack the NGO sector.

During the extended, violent crisis following the contested results of Kenya's national elections in 2007, two distinct public demands emerged in relation to the unfolding crisis. One demand was for accountability regarding the results of the presidential election. The opposition alleged that the election had been rigged in favour of incumbent Mwai Kibaki, and their supporters vowed there would be no peace until Raila Odinga, the opposition candidate, was declared president. The group of supporters allied to Kibaki downplayed the electoral grievances and demanded peace in relation to the unfolding violence of which they were victims. Later, they would organise their own retaliatory violence. In this context, Kenyans for Peace with Truth and Justice (KPTJ) emerged as a coalition that unified the two overriding public demands, one for peace and the other for justice.

The coalition represented a broad-based cross section of NGOs that were not connected to any political faction. The KHRC was and remains a member of KPTJ and through this platform has positioned itself as non-partisan, favouring peace with accountability.

Another space for coalition building was created by the formation of the Civil Society Reference Group, which came together in 2010 as a coordinating body dedicated to proactively championing new legislation that would enable further development of the civil society sector. In collaboration with international experts, the coalition produced a draft law, and it continued to meet regularly and develop common plans around the objective of promoting the proposed law and seeking its adoption. Because of the coalition's focus on sector-wide legislation affecting all NGOs, development groups were prominently featured in the Civil Society Reference Group.

These two pre-existing coalitions, the first structured more loosely and the second more formally, became valuable when the NGO sector needed to respond to a sector-wide governmental assault that began in 2013. The strong relationships that had developed among public advocacy groups with varying political affinities and between NGOs engaged in public advocacy and those pursuing development objectives allowed NGOs to mount a cohesive, combined response to governmental

efforts to undermine the sector. Among other advantages, NGOs were able to quickly gather data demonstrating their collective contribution to national development priorities, including quantifying the financial contribution that NGOs were making to Kenya's Gross Domestic Product (GDP).

Working within coalitions also permitted NGOs to combine their resources and reputations to attract international solidarity, including through organising missions abroad to Western capitals where they could solicit political support. The broad coalitions also protected the relatively small number of NGOs that had become political targets for the government, allowing them to keep a lower profile as less politically sensitive groups rallied to protect the entire sector.

RESPONSE 2

DIFFERENTIATE ROLES AND BALANCE INTERESTS OF DIFFERENT NGO SUBSECTORS

Once a threat to the NGO sector has become active, different subsectors will be affected differently. Some NGOs, because of their missions and organisational values, are more inclined to oppose new measures on principle and more prone to taking a bold public stand. Others may take a more pragmatic approach, avoiding unwanted attention and seeking compromise.

To maintain the force of a united sector, it is important to differentiate roles so that NGOs can play the roles most consistent with their organisational profiles. It is also important to balance the various interests of different subsectors, so that the sector as a whole can take a stronger and more united position.

PROS:

- Helps organisations retain their strong individual 'brand' identities
- Allows for coordination of diverse approaches and roles
- Aligning roles with NGOs' specific profiles makes each role in the coalition more effective
- Allows coalition to expand in size and impact
- Enhances the coalition's sustainability

CONS:

- May dilute message of coalition or coalition may work at cross purposes
- May compromise the coalition's goals
- Requires substantial time invested in coordination

CONTEXTUAL CONSIDERATIONS:

- Is communication among coalition members sufficient?
- Has trust developed sufficiently among coalition members?
- Is the decision-making process clear?

ISRAEL: FROM COOPERATION TO COALITION

There is a wide diversity of NGOs in Israel tackling issues ranging from Jewish pluralism to poverty, human rights in the occupied Palestinian territories to housing rights, and many others. Over the past 20 years, there has been a growing trend of organisations that deal with similar issues joining forces, which has manifested in coalitions.

These kinds of collaborations are formed either ad hoc in reaction to a particular issue that arises, or more proactively to challenge a pervasive problem in society. The former is a temporary arrangement and seeks to quash the emergence of a particular issue that is relevant to the shared mandate of the NGOs. This allows for a united front, strengthened by numbers and a wide range of approaches. Strategies may include publishing position papers or creating targeted campaigns from different actors in the coalition. The latter is formed to tackle issues that require a long process of consolidated effort and pressure. Typically, they might work to create a shift in policy and may include the utilisation of a multifaceted approach – including legal tactics, advocacy, public outreach, etc.

However, creating coalitions is not the only strategy utilised by NGOs to support each other's efforts.

NGOs often provide ongoing consultation to one another and share information based on their respective expertise.

Building on these practices, as the delegitimisation of NGOs has intensified and anti-democratic legislation has flooded the Knesset (Israel's legislature), ACRI has taken a leading role in attempting to create a unified front to tackle such challenges. Even if the delegitimisation campaigns do not directly align with the central missions of particular NGOs, ACRI aims for them to become involved and support the struggle to uplift and encourage the work of the NGOs targeted. Such challenges allow for the creation of new partnerships and spaces for collaboration. Over time, however, it has proven to be increasingly challenging to invite NGOs to join the struggle since they may fear being targeted in the future.

SOLIDARITY DESPITE THE DIFFERENCES

ACRI is part of a larger NGO sector actively promoting human rights, both in Israel and in the occupied Palestinian territories. Collaboration among NGOs has deep roots based on long-standing co-operation and strong interpersonal relationships (see Response 1).

Various groups of human rights organisations have begun to work together to fight the rise of anti-democratic legislation in Israel. Thirty-two organisations, coordinated by ACRI and Shatil, decided to organise around the issue by placing the defence of democracy at the centre of the discourse. This kind of discourse helps spread the message to wider audiences who support a range of human rights issues, but not necessarily the issues that are being delegitimised. The purpose is to gain public support against the persecution of civil society itself and not necessarily for the specific issues on which the NGOs work.

In parallel, other human rights groups began to organise to deal with the anti-democratic trends and legislation, such as organisations dealing strictly with human rights in the occupied Palestinian territories, or organisations that find themselves under political attack because of foreign funding or their support for certain issues (such as refugees or religious pluralism). In contrast to the coalition organised by ACRI and Shatil, this second coalition (which ACRI is part of as well) places central emphasis on the specific and often controversial issues that are fundamental to the mission of these organisations. Alongside a more general discourse that addresses the broader issue of shrinking democratic space, it is essential to hear these voices in the public sphere as they relate directly to the issues under attack and help show the link between the attack on the issues and the persecution of the organisations.

The diversity of these coalitions, and the variety of organisations participating in them, provide advantages and disadvantages.

First, this dual approach allows for different methods, for more organisations to take part, and for reaching a wider range of audiences. There are

strong ties among the different organisations in both arrangements, and the groups continually update and support one another. Naturally, some of the organisations, such as ACRI, participate in more than one of the coalitions.

At the same time, however, as the coalitions get bigger, it becomes more difficult to reach agreements and broad compromises among the organisations on the messaging and the formulation of public statements and positions. This sometimes causes the messages to be watered down and can thus become ineffective or even deter various organisations from participating because the final agreed text no longer speaks to them. Yet the power of joint support is often worth the trade-off.

There are other mechanisms that Israeli groups can use to support each other, without necessarily adopting identical policy positions. For example, when the state sued the NGO Breaking the Silence to force it to disclose the identities of sources for a report quoting Israeli soldiers on their service in the occupied Palestinian territories, ACRI filed an amicus brief supporting the organisation's right to protect the anonymity of its sources.

HUNGARY: BREAKING DOWN DIVISIONS

The HCLU is part of an NGO coalition countering the closing space for civil society in Hungary. Initially, in 2014-2015, the coalition was divided over a fundamental strategic question: whether to take bold, possibly unpopular actions in pursuing an advocacy strategy founded on human rights principles, or to adopt an approach to improve the image of relevant NGOs in pursuing a public relations strategy designed to secure broad popular support.

Lessons learned in the course of the coalition include:

- The ability of a particular NGO to support one or the other strategic approach is determined in part by the degree of independence it enjoys from the government.

Relevant factors include financial dependence, need for access to official institutions or information, and the political leanings of the NGO's core constituency;

- Diverging viewpoints can be reconciled by educating each other about the particular advocacy strategies and tactics;
- To maximise the impact of a coalition it is important to differentiate the roles of different kinds of NGOs and develop tolerance for different approaches.

As the governmental attack on NGOs intensified in 2017 with the introduction of new legislation targeting organisations that receive funds from abroad, the coalition broadened considerably. In the process, it adopted a much looser organising structure involving many more actors and more visible actions, and many of the divisions among organisations broke down, allowing for stronger co-operation.

In April 2017 the coalition organised a mass protest attracting 15,000 individuals showing their support for civil society on the streets of Budapest, and 120 organisations signed a statement decrying the new legislation. As a result, NGOs have developed new and stronger partnerships, articulated their positions on common issues more clearly and gained unprecedented positive publicity about the value of their work.

RESPONSE 3

BROADEN NGO COALITIONS TO INCLUDE OTHER SECTORS, INCLUDING SYMPATHETIC OR SIMILARLY SITUATED BUSINESSES, MEDIA OUTLETS, TRADES UNIONS AND OTHERS

Pressure on the NGO sector is often part of a larger political strategy that also targets or harms the interests of certain sectors of business as well as the media and trades unions. Finding common cause with actors outside of the NGO sector can strengthen its capability to respond and resist. Business and media, in particular, are broad and diverse sectors, and it is likely that segments of both have interests that are being harmed by the same root causes as the governmental pressure put on NGOs.

PROS:

- Creates political capital for the NGO sector
- Creates tactical opportunities to influence the government
- Can mobilise new segments of the public

CONS:

- May require compromising on goals and approaches
- Requires significant time and effort
- May result in negative public perceptions about allying with interests antagonistic to a particular NGO's programmatic goals

CONTEXTUAL CONSIDERATIONS:

- Which other sectors, besides the NGO sector, are being targeted by government?
- Are there particular segments of the business and media sectors that have interests aligning with the NGO sector?
- What relationships already exist with other sectors?

KENYA: BROADENING THE BASE

The Civil Society Reference Group in Kenya – the secretariat of which is partly housed at the KHRC – is a broad-based coalition of NGOs of all different types, including advocacy NGOs and development groups (see Response 1). As a pre-existing coalition of NGOs, it was able to rapidly mobilise its members to unite against the common threat of new legal restrictions affecting them all.

Even more importantly, the coalition was quickly able to frame the threat as one that affected civil society in its widest sense, including many institutions other than NGOs. The coalition has

developed relationships of mutual support with many other institutions that have been negatively affected by governmental policies designed to maintain control. Those affected include parts of the media, some segments of the private sector, faith-based groups, trades unions and even formal, government-related institutions such as the Kenya National Commission on Human Rights, the National Gender and Equality Commission, some parliamentary factions and portions of the judiciary.

The Kenyan government has publicly associated itself with an almost single-minded focus on economic growth. But in the process, it has privileged certain business sectors over others, creating winners and losers. Those who do not benefit are responsive to a narrative that decries ‘state capture’ as a scourge that is harmful not only to the immediate business interests of those who are excluded but to the long-term aim of building a vibrant business sector. The ‘state capture’ narrative is widely embraced not only by specific businesses but also by a wide range of actors in the media and political institutions.

Favoured business interests include a growing number of Chinese companies and a group of businesses

close to the government that have associated as the Kenya Private Sector Alliance (KEPSA). But other business associations are sometimes willing to take an independent stand. And multinationals are seen as more independent, since they can negotiate from a privileged position.

The coalition also benefits from the collective memory of the repressive Moi regime, which ended just 15 years ago. As a result, many remember the value of solidarity in repressive times, when joining forces made it harder to attack any single actor. The involvement of trades unions – with their mass membership – was particularly important to the successful resistance against repression, and the nature of today’s governmental attacks on NGOs and other components of civil society resonates with many union leaders who remember those times and are willing to engage. Unions are particularly potent because of the voting power of their members, who are easily mobilised and whose interests are served poorly by governmental policies that promote economic growth at all costs, including by resisting demands for improved working conditions.

RESPONSE 4

TRACK NEW LEGISLATIVE INITIATIVES AND OTHER DEVELOPMENTS CAREFULLY, MAKING CLEAR THE LINK OF SEEMINGLY UNRELATED MEASURES TO LARGER PATTERNS AFFECTING THE ENTIRE SECTOR

Governmental efforts to restrict the NGO sector's activities can come from a variety of legislative sources, not just from laws governing not-for-profit organisations. Laws on national security, those regulating the media and even laws that appear entirely technical in nature – such as the regulation of the telecommunications industry – may contain provisions that inhibit NGOs' activities or can be used to crack down on the NGO sector.

Defending the space for civil society requires that NGOs track legislation broadly to avoid being surprised by a legislative threat that only becomes clear once it starts being enforced against NGOs. Broad tracking efforts can alert NGO coalitions to regulatory threats when they are still at an early stage, providing more time to devise and implement a strategy to oppose the legislative change, influence its enforcement or adopt defensive tactics in anticipation of it.

PROS:

- Maximises the NGO sector's ability to foresee and respond to threats

CONS:

- Requires technical expertise, time and effort

CONTEXTUAL CONSIDERATIONS:

- What resources already exist to track and analyse legislation that may be harmful to NGOs?
- What alliances can the NGO sector form with sources of technical expertise in unfamiliar areas of the law?

NIGERIA: CALLING ATTENTION TO THE STEALTH ATTACK

Reflecting the growing power of the social media space for activism, the Nigerian government introduced a bill in 2015 blandly entitled 'To Prohibit Frivolous Petitions and Other Matters Connected Therewith', which sought to impose heavy fines (up to USD 10,000) or jail terms (up to two years) on 'anyone who intentionally propagates false information that could threaten the security of the country or that is capable of inciting the general public against the government through electronic message.'

The bill also criminalised individuals who send social media messages with the intention to 'set the public against any person and group of persons, and institution of government or such other bodies established by law.' The proposed law, which specifically mentioned WhatsApp and Twitter, could have affected 15 million Facebook users and 97 million social media users.

Nigerian civil society organisations, including groups that have pioneered advocacy strategies relying on social media in Nigeria, such as Spaces for Change, collaborated to oppose the legislation, leveraging the strengths of different players. Vigilance and early detection of harmful policies and draft laws such as this one was key: once a bill is discussed on the floor, CSOs pass it to relevant expert civil society groups and lawyers who are

able to detect early on whether there are provisions that could be harmful to civil society.

The proposed law on social media did not explicitly mention social media, but the experts spotted the problematic provisions. They then capitalised on the time and energy of youth and student groups that use social media all the time to ensure they are constantly putting messages out, and they briefed popular bloggers to provide broader context.

Their analysis went viral, framing the argument in a way that demonstrated that everyone would be impacted. Nigerian activists and social media users reacted with fury at what they described as an attempt to shut down free speech. The outcry was so significant that the bill was dropped.

5 RESHAPING PUBLIC PERCEPTIONS AND BUILDING CONSTITUENCY

/ THREAT

Governments stigmatise NGOs by connecting the entire NGO sector, as well as underlying human rights concepts and activities, to the public's fear of threats to personal security and welfare, leveraging populist/nationalist sentiment against what is perceived to be the influence of foreign elites.

RESPONSE 1

REFRAME HUMAN RIGHTS ACTIVITIES AS RESPONDING TO LOCAL CONCERNS AND INTERESTS

In some contexts, the concept of human rights carries negative political connotations that can be exploited by governments seeking to undermine civil society. Human rights can be connected to geopolitical rivalries: in China, it can be construed as a diplomatic weapon of the United States; in Russia, it can be connected to the Cold War; in Africa and Latin America, it can be interpreted as a vestige of colonial imperialism. While international support for human rights can provide a powerful base for political leverage locally, it can also work at cross purposes due to the trend of governmental strategies aimed at stigmatising local NGOs as representing foreign interests.

To undermine official strategies to stigmatise NGOs that embrace human rights, it may be important to emphasise the local nature of the concerns the NGO is working on, even while referencing international human rights.

Perhaps the most important long-range threat to NGOs is the increasingly pervasive use of delegitimising strategies to foster the perception that NGOs do not have any authentic local constituency. The fact that a large proportion of NGOs are financially dependent on foreign sources of funding feeds into that perception, creating a vulnerability that can be exploited easily. For civil society organisations to fight back effectively, they need to find ways to explain their work using terminology that continues to carry legitimacy with the public, and they need to develop stronger connections to broader constituencies.

PROS:

- Creates a stronger sense of local ownership
- Reduces the impact of negative associations the local population may have with human rights, undermining governmental stigmatisation strategies

CONS:

- May require better understanding of local perceptions about particular issues and organisations in order to create a more appealing frame, which requires significant time and effort
- May further erode the utility of international principles and the authority of the United Nations and international law

CONTEXTUAL CONSIDERATIONS:

- How is the concept of human rights perceived locally?
- What opportunities exist to connect local issues of NGO concern to human rights?
- What alternative reference points for the work of NGOs exist locally?
- What resources are available to better understand how local concerns connect to the work of NGOs?

RESPONSE 2**REFRAME ATTACKS ON NGOS AS ATTACKS ON DEMOCRACY AND STABILITY**

Since democracy is premised on the existence of a public sphere and public discourse, including roles for media and intermediary organisations such as NGOs, it can be powerful to frame attacks on NGOs as an attack on democracy itself.

Governments sometimes argue that NGOs do not represent citizens. But in a democratic system, citizens are supposed to be represented by political parties, not by NGOs. NGOs represent the interests of particular groups – organised around values, beliefs, principles or identity – as an important corrective to the potential destabilising influence of purely majoritarian representation, i.e. ‘the tyranny of the majority.’

The value of NGOs is to ensure that the interests of particular groups of citizens are represented, which is especially important when those groups’ points of view are not reflected in the mainstream of public opinion and governmental decision-making. In that way, NGOs contribute to stability and, therefore, to national security. If the viewpoints that NGOs represent were not expressed through public discourse and use of the legal system, they could instead manifest themselves in ways that undermine the stability of the prevailing system of governance.

PROS:

- Positions the government as undermining its own legitimacy by attacking NGOs
- Frames the attack on NGOs as a critical issue in which all citizens have a stake

CONS:

- In societies where democracy is not closely associated with dominant local values, emphasising democracy can play into governmental narratives connecting NGOs to foreign concerns

CONTEXTUAL CONSIDERATIONS:

- To what extent are democratic values integrated into the local culture?
- How does the work of NGOs relate to threats to stability in the particular context?

The framers of the US Constitution believed that *‘fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.’*

**/ JUSTICE LOUIS BRANDEIS, CONCURRING
OPINION OF US SUPREME COURT IN
WHITNEY VS. CALIFORNIA (1927)**

ACRI: AN ATTACK ON NGOS IS AN ATTACK ON DEMOCRACY

Excerpts from ACRI advocacy materials:

A democratic society is not based solely on the technical mechanisms of majority rule and decision-making. Democracy also involves defending the human rights of minority groups of all kinds, whether social, socioeconomic, religious, national, ethnic, political, ideological, etc. Where a democratic regime does not protect these groups, but rather makes decisions in accordance with the majority opinion, the society becomes a 'tyranny of the majority.' Foundational values such as protecting minorities and their rights, freedom of expression, freedom of association and equality before the law are basic and essential parts of any democratic society.

Third sector organisations, including human rights organisations and social change organisations, serve as the voice for many groups in a democratic

society, including Israeli society. Specifically, these organisations serve as the voice, representation and defender of human rights for minority groups of all kinds, whose abilities and access to power and decision-making are limited.

Only those who ignore history, and especially that of the Jewish people, can make light of the importance of organisations that defend human rights.

Restricting the freedom of speech, association and action of these organisations will severely harm Israeli citizens, and in particular, disadvantaged and minority groups of all kinds; as well as the democratic character of the State of Israel as a pluralistic and diverse society, and the status of the state in the family of nations. ...

Defending human rights and criticising aspects of policy and/or actions of the regime are critical to preserving democracy and human rights in Israel. The freedom to examine and criticise the government and assist those harmed by governmental policies are critical and legitimate measures, which ensure the existence and prosperity of a democracy over time. In practice, the importance and strength of a democracy is based on its defence of the rights of minority groups, and defending the freedom of speech and promoting opinions even if they fall outside of the current consensus. Encouraging a public atmosphere that is hostile to those working to defend human rights undermines the

foundations of democracy. Harassment of human rights organisations harms the most disadvantaged populations in Israel and in the Occupied Territories, which the organisations represent. ...

It is unfortunate and concerning that we must again explain basic principles of the democratic system. Every intelligent person is aware that in order for a democracy to exist at all, and certainly for a democracy to prosper, we must protect the freedom of speech, the freedom of association, the freedom to protest and criticise the government publicly, the freedom of civil society organisations to work freely, and to allow for a variety of opinions and positions, especially including unpopular opinions.

In a democratic country, political, social and other activities must not be restricted according to the social, religious or political worldviews of a sector of the population, while exploiting the political power of the same group in order to banish those who are unpopular. This is not a democracy defending itself; this is simply not a democracy.

Political persecution and attempting to severely undermine the freedom of expression and the diversity of voices in Israeli society must concern the entire political spectrum, and all partners must be recruited to end this dangerous development. Actions of this type harm one group today, but will also legitimise harming any other group in the future, according to the positions and opinions of the political majority and those in power.

RESPONSE 3

REFRAME ATTACKS ON NGOS AS CONNECTED TO PAST REPRESSION

In countries where there is a strong, collective memory of past repression, NGOs can find ways to connect attacks on them to patterns from the past, mobilising local political support. Past repression, particularly when committed by a regime that has been overthrown within the last generation or two, creates strong and durable emotional connections that can be leveraged on a large scale to persuade the public. On the other hand, association with political battles of the past may be perceived as reflecting outdated values of a prior generation, or there may be nostalgia for perceived benefits of the repressive era, such as economic prosperity or relative tranquillity.

PROS:

- Often has broad appeal, at a strong, emotional level

CONS:

- Can descend into less effective cliché if it is overused
- May be associated with a prior generation's values that are now seen as outdated
- Past repression may be associated with positive circumstances when seen through the myopic lens of nostalgia

CONTEXTUAL CONSIDERATIONS:

- To what extent does the public have a collective memory of past repression?
- To what extent does the public continue to have strong and positive emotional memories about transition from a repressive regime?

'GOVERNMENTAL LEADERS
FEAR THE LONG ARM
OF HUMAN RIGHTS
ACCOUNTABILITY, AND
WE KNOW WHY THEY
USE ALL THE POWER AND
INSTRUMENTS AT THEIR
DISPOSAL TO ATTACK US.
BUT THE KENYAN PEOPLE
HAVE EXPERIENCED
REPRESSION BEFORE, WE
HAVE OVERCOME IT, AND
WE WILL CONTINUE TO
WITHSTAND IT EVEN WHEN
IT TAKES NEW FORMS.'

/ GEORGE KEGORO, KHRC, KENYA

RESPONSE 4

REFRAME ATTACKS ON NGOS AS AN ATTACK ON FOREIGN DIRECT INVESTMENT AND THE ACHIEVEMENT OF THE UN SUSTAINABLE DEVELOPMENT GOALS

Particularly in developing countries, NGOs serve as indispensable conduits for significant financial contributions to the national economy in the form of development assistance. Although a significant portion of development assistance is provided directly to beneficiary governments, development agencies generally require some degree of participation by civil society and often transmit funding directly through NGOs. As a result, the value of NGOs can be collectively quantified by calculating annual capital inflows from development assistance, which would decrease very substantially without the participation of NGOs. Furthermore, the significance of international development assistance to the national economy can be emphasised by making comparisons, both quantitatively and logically, to foreign direct investment.

When governments attack NGOs, and especially when they attack NGOs because of their links to foreign funding, NGOs can frame such attacks as contradicting the national interest in growing the economy. In addition, NGOs can enhance their legitimacy by connecting their work to the achievement of the UN Sustainable Development Goals (SDGs), which were formulated with extensive consultation and were approved unanimously by the full membership of the United Nations. The nature of the SDGs, and the manner in which they were developed and adopted, link the substantive work of NGOs – beyond the contribution they make to the economy through distributing development funds – to clear national interests. It is harder to question the legitimacy of activities articulated as pursuing goals relating to sustainable development than activities articulated as addressing contradictions between international human rights standards and the national legal system.

PROS:

- Connects the defence of NGOs to incontrovertible national interests
- The value of NGOs can be quantified by connecting NGOs to annual capital inflows from development assistance, yielding comparisons to commercial foreign direct investment

CONS:

- May trigger cleavages in the NGO sector, justifying government tolerance for humanitarian and development NGOs while it singles out NGOs from other subsectors for attack

CONTEXTUAL CONSIDERATIONS:

- Does foreign development assistance provide a significant contribution to the national economy?
- Is the achievement of the UN Sustainable Development Goals a significant national priority?
- Are NGOs from the development subsector and other subsectors sufficiently organised into a mutually supportive alliance?

'There is no shame in helping the country to develop in order to meet the needs of its people. We celebrate when the government succeeds in obtaining foreign development assistance to aid South Africa in making its contribution to achieving the global Sustainable Development Goals and ensuring all South Africans are included in the benefits of global progress. When our NGOs secure additional foreign resources to contribute to that progress, that should be equally celebrated.'

KENYAN STUDY DOCUMENTS CONTRIBUTION OF CIVIL SOCIETY SECTOR TO GDP

Selected sectors' contribution to Kenya's
GDP (KES millions)

	2008	2009	2010	2011	2012	2013
GDP EXPENDITURE, (KES MILLIONS)	2,442,927	2,863,688	3,145,624	3,626,304	4,194,132	4,688,803
CSOS' CONTRIBUTION (KES MILLIONS)	18,322	20,046	19,817	22,120	25,165 D	30,008
CONTRIBUTION TO GDP (PER CENT)	0.75	0.70	0.63	0.61	0.60	0.64
AGRICULTURE	22.2	23.4	24.8	26.3	26.2	26.3
MANUFACTURING MINING AND QUARRYING	12.1 0.7	12 0.6	11.3 0.8	11.7 0.9	10.9 1.1	10.4 0.8
PROFESSIONAL, SCIENTIFIC AND TECHNICAL SERVICES	1.2	1.2	1.1	1.0	1.0	1.0
HOUSEHOLDS AS EMPLOYERS	0.7	0.6	0.6	0.6	0.6	0.5

Source: Kenya National Bureau of Statistics, as reproduced in Civil Society Reference Group, *Assessing Direct and Indirect Contribution of Governance CSOs to the Kenyan Economy* (2015)

KENYAN ADVOCACY MATERIAL ON CSO CONTRIBUTIONS TO THE ECONOMY

How the proposed capping of 15% of foreign funding will impact on Public Benefit Organisations (PBOs) and communities in marginalised areas – including Garissa, Wajir, Manderu and Marsabit.

In 2013, the NGOs Coordination Board documented a sector that comprises 8,260 organisations and a value to the national economy of KES 80 billion in 2012. The sector employs over 200,000, of which most are primarily Kenyan. The sector grows by 500 organisations each year. Funding to the sector is actually growing. 2011-12 saw a 12.2% increase in funding.

Most of this funding helped marginalised areas as shown in the table to the right.

It therefore follows that if the 15% capping on foreign funding were to be adopted as part of the PBO Act, marginalised areas – Garissa, Manderu and Marsabit would suffer most as the table illustrates. A national legislation cannot be applied selectively, and will apply to these regions like in others. We therefore ask the Task force to reject this idea of 15% capping in its totality.

Source: NGOs Coordination Board, *Annual NGO Sector Report for the Financial Year 2013-*

SECTOR	AREAS IN KENYA	FINANCIAL INVESTMENT (US\$)	POPULATION REACHED
CHILD PROTECTION	Incl. Manderu, Wajir, Garissa, Meru, Nairobi	51,580,000	56,000
EDUCATION	Incl. Marsabit, Nairobi, Mombasa, Kisumu, Migori, Homa Bay	2,074,527	TBD
GENDER	Incl. Nairobi, Nakuru, Kisumu, Kitui, Homa Bay, Meru	820,000	
HEALTH, AIDS/HIV & NUTRITION	Incl. Nairobi, Mombasa, Kilifi, Taita Taveta, Lamu, Kwale, Homa Bay, Migori	86,308,047	8,943,450
FOOD SECURITY	Incl. Marsabit, Nairobi, Mombasa, Kisumu, Migori, Wajir, Turkana, Tharaka Nithi	20,977,943	631,000
GOVERNANCE & CLIMATE CHANGE	Incl. Kitui, Kajiado, Wajir, Isiolo, Turkana, Tana River, and West Pokot	1,447,664	497,960
WATER & SANITATION	Incl. Isiolo, Samburu, Tana River, Mukuru, Lagdera, Garissa	7,013,916	430,000
CONFLICT MANAGEMENT	Incl. Isiolo, Samburu, Tana River, Mukuru, Lagdera, Garissa, Turkana	800,000	TBD
TOTAL		USD 171,022,097 (KES 14.3 billion)	10,558,410

RESPONSE 5

BUILD LOCAL CONSTITUENCY BY REORIENTING PRIORITIES AND STRATEGIES TO EMPHASISE IMPORTANCE OF NGO TO ONE OR MORE SPECIFIC CONSTITUENCIES

In keeping with the rationale in Response 2 (reframing attacks on NGOs as attacks on a democratic and stable system of governance), it is also important to develop a strong constituency for the particular viewpoint or viewpoints that the NGO is representing. Particularly when an organisation is working to promote a point of view about a system of values, principles or beliefs, it can be especially effective to demonstrate that it is representing groups that are otherwise politically at odds with each other – sometimes even viewpoints that are at odds with views held by a core constituency of the organisation.

One famous example of the latter was the effort by the American Civil Liberties Union (ACLU) in 1977 to defend the right of neo-Nazis to hold a march proclaiming their views in Skokie, Illinois, a predominantly Jewish suburb of Chicago.

PROS:

- Improves connection to and support from particular constituencies
- Can demonstrate the value of underlying principles by showing consistent application of those principles in strongly differing contexts
- Can undermine opponents' allegations of political partiality

CONS:

- Requires careful framing and balancing of activities in order to avoid capture by one particular constituency that is narrower than the organisation intends
- Can alienate current supporters

CONTEXTUAL CONSIDERATIONS:

- To what extent does a principled stand in favour of a particular group risk creating a new order that would undermine liberal principles altogether?
- Are there particular groups that can be supported in such a way as to demonstrate a common principle?

'It is dangerous to let the Nazis have their say. But it is more dangerous by far to destroy the laws that deny anyone the power to silence Jews if Jews should need to cry out to each other and to the world for succor.'

/ ARYEH NEIER, FORMER NATIONAL EXECUTIVE DIRECTOR OF THE ACLU (1970-1978) IN *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* (1978), P. 5

EIPR: DEFENDING SHIITES AND LGBTI RIGHTS

EIPR has been defending the human rights of the Shiite minority and LGBTI persons for many years, but recently it has given greater publicity to its advocacy on behalf of both groups. The organisation's intention is to reinforce the common principles underlying its efforts to support seemingly divergent interests in order to create a broader and stronger constituency for the principles underlying its work.

RESPONSE 6

BUILD LOCAL CONSTITUENCY BY REORIENTING PRIORITIES AND STRATEGIES TO FOCUS ON ISSUES THAT HAVE BROAD APPEAL

An alternative means for developing broader support is to devote some activities to working on one or more themes that a large segment of the public prioritises. A human rights organisation focusing on migrants, for example, could choose to emphasise its work to support the rights of migrant children, a target group that often evokes widespread support. An organisation concerned with freedom of expression and privacy rights could choose to emphasise work holding companies accountable for collecting the personal data of consumers, affecting all citizens regardless of their political viewpoint.

PROS:

- Can help develop a broader local base of support
- May increase influence of organisation more generally, including its influence on other priorities

CONS:

- May lead to mission creep, diluting organisational effectiveness
- May decrease legitimacy if priorities are not authentic to the organisation

CONTEXTUAL CONSIDERATIONS:

- Is the purpose of the organisation consistent with emphasising selected themes or framing its issues more broadly?

HCLU: CAMPAIGNING FOR THE GENERAL PUBLIC

Campaigning for decriminalisation of drug use

The aim of the campaign was to educate and convince the general public, especially residents of one of Budapest's poorest districts, to support innovative harm reduction solutions as alternatives to criminalisation of drug users. Prior to this, an NGO-based service providing clean needles in the area was forced to shut down due to the efforts of the local mayor.

The HCLU's campaign stressed the beneficial effects of harm reduction services over the harms perceived by local residents. The campaign proposed a solution: to open supervised injection rooms in this district for drug users to inject their drugs in a safe, hygienic environment. The campaign pointed out the benefits of this solution,

not only for drug users but for the general public as well, by reducing the prevalence of street injection and ridding the neighbourhood of unofficial shooting galleries⁸⁵.

Campaigning for accountability for hospital infections

Taking its approach of appealing to the general public a step further, the HCLU launched a campaign in February 2017 aimed at establishing an accountability mechanism for hospital malfeasance. The organisation publicised a request to members of the public to share personal stories about relatives who fell victim to new infections while in hospital. Based on those stories, the HCLU is calling the attention of the National Public Health and Medical Officer Service to the phenomenon, insisting on spot checks of medical institutions and, where appropriate, sanctions.

The intention of the campaign is to demonstrate the absence of an accountability mechanism for medical institutions. Civil compensation claims are expensive, face evidential challenges relating to causation and can last for years. By demonstrating that there is no independent oversight or legal enforcement mechanism, the HCLU hopes to put pressure on the state to create an accountability system, demonstrating the value of NGOs in assisting the public to claim rights proactively.

KHRC: DEMONSTRATING SUPPORT FOR NATIONAL INTERESTS

The KHRC focuses primarily on empowering vulnerable Kenyans vis-à-vis the Kenyan state and other powerful non-state actors present in Kenya. However, partly as an effort to broaden its constituency base, the KHRC invested significant resources in a case brought in London in collaboration with the Mau Mau War Veterans Association (MMWVA) against the UK government. The case, which was filed with the support of the law firm Leigh Day, claimed compensation for the brutal torture of Kenyan victims detained during the 'Kenyan Emergency' in the 1950s and 1960s, when Kenya was under British colonial rule.

After preliminary procedural victories by plaintiffs in the case, the British government settled in 2013, with a formal statement of regret to colonial-era victims of torture, an agreement to provide compensation individually to each of 5,288 claimants and a financial contribution to a monument in memory of Kenyan victims of torture under colonialism.

Because the aim of the advocacy was to hold the British government accountable for historical wrongs committed against the Kenyan people during the colonial era, the case was supported by a wide cross section of Kenyans, including many who might have perceived other actions of the KHRC as being against their interests. As a result, the KHRC reinforced the public perception that its actions were guided by universal principles rather than sectarian affinities, and it strengthened its overall base of support in Kenyan society.

RESPONSE 7

STRENGTHEN CONNECTION TO LOCAL CONSTITUENCY THROUGH GREATER TRANSPARENCY

Transparency is an important way to build trust and dispel unfounded insinuations about an NGO's purposes, activities and motivations. The more facts disclosed to the public about the NGO's work, the harder it is to mischaracterise that work. Disclosure of facts about the organisation and its work also provides a stronger foundation for framing this work in a positive light.

PROS:

- Builds trust, counteracting doubts promoted through smear campaigns
- Reveals information to the public directly that the government most likely has obtained anyway through required disclosures or surveillance
- Allows organisation to anticipate and pre-empt distortions by framing the facts

CONS:

- May provide a basis for further governmental investigation or fuel a disinformation campaign by providing facts that are later distorted by others
- May undermine strategies by signalling in advance tactical steps the organisation may take in the future
- May reveal sensitive information that affects beneficiaries negatively

CONTEXTUAL CONSIDERATIONS:

- To what extent can NGOs rely on independent media or other intermediaries to analyse disclosures fairly?
- What means of communication work most broadly and effectively in the local culture?

RUSSIA: NGO ALLIANCE COMMUNICATES THEIR WORK

A group of human rights organisations in Russia, including the Committee against Torture, Soldiers' Mothers of Saint Petersburg and Union of the Don Women, decided to respond to the public stigmatisation of their groups by communicating more clearly to the public about themselves, including the problems they are addressing and how they connect to human rights, how human rights organisations work, what kind of people work for them, and why they choose to work there.

The group of organisations – some but not all of which have been declared 'foreign agents' – started a web-documentary project, comprising video clips and narrative texts and including interviews, descriptions of the organisations' history and scenes illustrating how they work. The videos are shot in cinéma-vérité documentary

style, with the camera following human rights activists in their daily work and showing internal discussions about designing and funding new projects, meetings, conferences, field activities, client interviews and mundane details of daily life, including staff members taking a train home from work or changing a tire that has been vandalised by thugs.

They posted the videos on a project website, hragents.org, which is available in Russian and English, and promoted them through social media. The project is called Human Rights Defenders. The website name was selected as part of a strategy to reclaim the word 'agent'; the project team's intended message is that human rights organisations are indeed representing interests, but interests derived from universal principles, not interests of foreign powers.

The concept was first developed in 2012, but it began as a concrete project in 2016, with the videos posted on the website in November 2016. Current plans include expanding the video content to cover the work of LGBTI and environmental organisations.

HCLU: FINANCIAL TRANSPARENCY

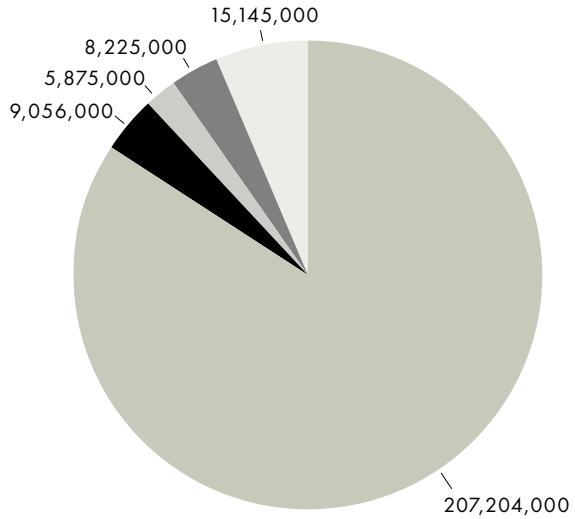
The HCLU's operations and finances have always been transparent, but in 2017 – in the face of a renewed governmental attack focusing on the origins of its financial support – the HCLU created a pop-up page on its website making it virtually impossible to miss the organisation's transparent disclosure of financial information⁸⁶. The pop-up page leads to detailed charts that describe and illustrate the organisation's finances in a clear and easy-to-grasp manner⁸⁷. English translations of the infographics are reproduced below.

⁸⁵ Additional information on the campaign can be found here: <http://drogri-porter.hu/node/2586>

⁸⁶ <http://kellatasz.tasz.hu/>

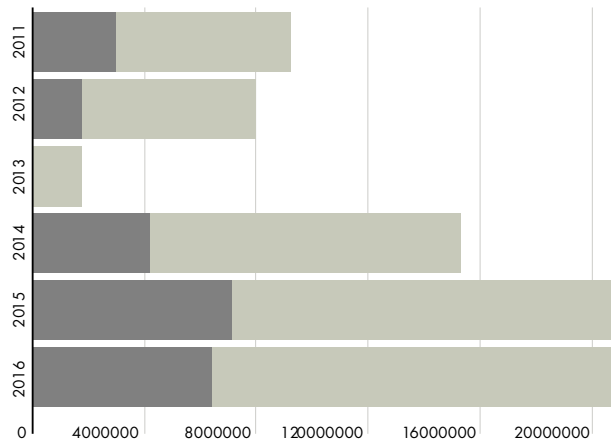
⁸⁷ <https://tasz.hu/magunkrol/tasz-gazdalkodasanak-nyilvanossaga>

HCLU'S REVENUES



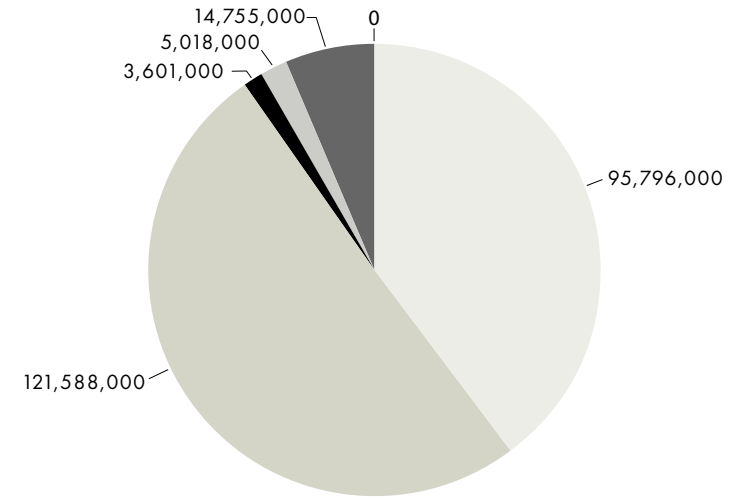
- grants, donations received from abroad
- grants, donations received from home activities
- other revenues (revenues re. public benefit activities)
- 1% personal income tax contributions
- revenues from financial operations, transactions

DISTRIBUTION OF DOMESTIC GRANTS



- domestic companies, banks, organizations, churches
- private donations, membership fees

HCLU'S EXPENDITURES



- material costs
- personnel costs
- depreciation costs
- other costs
- costs of financial operations
- material costs

CONCLUSION

In this manual, we have identified a pattern of governmental attack on NGOs that is not new, but has become increasingly prevalent in recent years. The pattern consists of a two-step process: (1) stigmatising NGOs in the public eye, particularly through highlighting their foreign funding sources and other foreign connections; and (2) adopting increasingly restrictive regulatory measures, building on campaigns to weaken public support for NGOs and falsely justifying them as part of a global effort to curb money laundering, corruption and terrorism.

As a result, NGOs in many countries are finding it harder to function effectively. Some are having difficulty raising and expending funds from donors they have traditionally relied on. Others are struggling with dramatically increased administrative burdens and the need to defend themselves against inappropriate regulatory actions. In addition, some NGOs are finding themselves distracted from their core missions as they devote resources to defending their image in the public eye. Still others have been forced to shut down entirely for non-compliance with new laws and regulations intended to eliminate them from public spaces.

The manual provides a framework that NGOs can use to evaluate potential strategies and tactics for improving their situation. With respect to some of the threats (Sections I and II on regulatory compliance and physical and digital security), the responses can do little more than help manage ongoing risks, such as arbitrary enforcement of restrictive regulations, increased surveillance or physical threats. Some of the other responses (Section III on alternative organisational structures) may permit NGO personnel to function in the most difficult environments, albeit in more limited ways.

But the most important responses for NGOs to consider are the responses in Sections IV and V that address the core, globally replicating strategy underlying governmental attacks: playing on public fears to stigmatise, divide and conquer NGOs. In response, NGOs must forge new alliances, reshape public perceptions and build stronger constituencies.

Those responses require complex and dynamic strategies involving multiple actors over a long time frame. Despite some of the lessons captured here from recent efforts to respond to governmental attacks, there are still many questions yet to be resolved if those efforts are to turn back the tide. Among the questions that require further attention are:

- How do NGO strategies need to evolve at the national level at a time when the international order is shifting in ways that weaken international protection and support?
- How can NGO alliances be broadened, particularly for their policy work? How can NGOs most effectively collaborate with youth, technologists, creative professionals, faith-based groups, trades unions and/or beneficiary communities?
- How can NGOs of different types and with different organisational purposes best support each other in shoring up the sector as a whole?
- How can the business sector be guided to provide public support to NGOs more consistently? Where is the alignment of interests with differentiated segments of the business community: large corporations in various industries, small and medium-sized enterprises, start-ups and social enterprises?
- What is the best way to explain to the public what is at stake for them? What are the simplifying models and metaphors that will help the public to accurately perceive what is happening and why it matters?

The responses outlined in the manual are a good place to start in thinking through how to address some of the vulnerabilities that open NGOs up to attack. NGOs are essential for mobilising private initiative, facilitating citizen engagement and protecting human rights. But they will need new energy and creative ideas that harness the opportunities of the 21st century to ensure that the civic freedoms gained in the past several decades are preserved and strengthened in the decades ahead.