EXPERT ROUNDTABLE ON THE REGULATION OF OPERATIONS OF INTERNATIONALLY AFFILIATED NON-GOVERNMENTAL ORGANIZATIONS AND NGO ACCESS TO FOREIGN FUNDING

11 July 2013
Vienna, Austria

EXECUTIVE REPORT

Contents

This report should neither be interpreted as official OSCE recommendations based on a consensus decision, nor as opinion of the OSCE Office for Democratic Institutions and Human Rights or of any particular OSCE participating State. The content of this report reflects opinions expressed by participants in the Expert Roundtable on the Regulation of Operations of Internationally Affiliated Non-Governmental Organizations and NGO Access to Foreign Funding.

A. BACKGROUND AND ANALYSIS

A.1 Executive summary

The Expert Roundtable on the Regulation of Operations of Internationally Affiliated Non-Governmental Organizations and NGO Access to Foreign Funding (hereinafter referred to as "Expert Roundtable") took place on 11 July 2013 in Vienna, Austria. It served as a forum to discuss existing legislative approaches and practices affecting the operations of internationally affiliated NGOs and access to donor funding in a number of OSCE participating States.

The Expert Roundtable featured a panel of six international experts in the area of freedom of association and NGO regulation, including government officials from two participating States and civil society representatives from four participating States. As an open event, the Expert Roundtable brought together a wide audience of NGO representatives, policymakers and international organization representatives from across the OSCE region.

The discussion at the Expert Roundtable covered issues such as the various restrictions on NGO access to foreign funding, including mandatory registration as agent of a foreign principal[1]; differential treatment of organizations involved in "political activity"; the legislative definition of "political activity;" and the difference between public and special interests.

The recommendations emanating from the Expert Roundtable are based on the outcome of the discussions and are derived from OSCE commitments and other international human rights standards.

A.2 Background and legal framework

The operations of internationally affiliated NGOs[2] and NGO access to foreign funding in the OSCE region are subject to a variety of legal regimes. These range from non-regulation to imposition of significant restrictions. In recent years, some participating States have introduced new or amended existing legislative and regulatory acts pertaining to access of non-governmental organizations and individuals to foreign sources of donor

[1] For the purposes of this report, "foreign principal" shall mean (1) a government of a foreign State or a foreign political party; (2) an individual that is a citizen of a foreign State and domiciled outside the State where the recipient of funding is domiciled or conducts operations; or (3) an organization organized under the laws of or having its principal place of business in a foreign State, where such government, political party, individual or organization exercises direction and control over the recipient of funding.

[2] This report uses civil society organizations and non-profit organizations interchangeably with non-governmental organizations (the report thus adopts a narrower definition than the general definition of the term "non-profit organizations").

funding. Proponents of such regulatory approaches have argued that similar regimes have successfully withstood the test of time in other participating States and can therefore be seen as models of best practices in this area.

The debate is further compounded by a lack of consensus on what constitutes "political activities," which forms part of the test for "foreign agent" status in at least one law in the OSCE area that restricts NGO access to foreign funding. While some legislation in practice is applied to foreign-funded, often for-profit, groups representing overseas corporate or other special interests, other, more recent examples affect a significantly wider range of organizations engaged in public interest activities, including human rights monitoring, education and advocacy.

At the same time, a trend appears to emerge where national security – a legitimate ground for restricting freedom of association under international law – receives an impermissibly broad interpretation, being increasingly conflated with the protection of state sovereignty against foreign influence.

The Expert Roundtable was convened to meet the pressing need for an open discussion involving leading NGO law experts, policymakers and civil society representatives from a range of OSCE participating States with markedly different approaches to the regulation of non-governmental organizations, and NGO access to foreign funds in particular. It brought together government officials and civil society representatives from three OSCE participating States seen as having very distinct approaches to NGO regulation and the regulation of access to foreign funding in particular the Russian Federation, Serbia and the United States. Government authorities of Serbia and the United States accepted the invitation to send a representative each to the Expert Panel for the Roundtable, as did NGO representatives of the Russian Federation, Serbia, and the United States, as well as Transparency International.

Freedom of association is a vital feature of a democratic society and has been consistently given central importance by the OSCE participating States. Notably, the 1990 Copenhagen Document reaffirms that freedom of association shall extend to the right "to form, join and participate effectively in […] human rights monitoring groups" as well as "to establish and maintain organizations or associations within their country and to participate in international non-governmental organizations."

Moreover, in Copenhagen 1990, the OSCE participating States reaffirmed the commitment that they "will […]encourage, facilitate and, where appropriate, support practical co-operative endeavours and the sharing of information, ideas and expertise among themselves and by direct contacts and co-operation between individuals, groups and organizations […] Such endeavours may cover the range of co-operation encompassed in the human dimension of the CSCE, including […] co-operative programmes and projects, […] scholarships, research grants." If implemented in good faith, in the spirit of the Istanbul 1999 commitments, it represents a shared recognition by participating States of the State's obligation to develop and maintain an **enabling environment for civil society organizations** to operate in.

Freedom of association is enshrined in key international and regional human rights treaties such as the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, and is understood as the right of everyone to voluntarily form and join groups for a common goal. While this right is a qualified one and may therefore be subject to restrictions, the main guiding principle is that "the restrictions must not impair the essence of the right (cf. art. 5, para. 1); the relation between right and restriction, between norm and exception, must not be reversed."[3]

Any **restriction** thus imposed **must meet the principles of legality, necessity and proportionality**. The requirement of legality implies that not only restrictions must be provided for by law, but the law itself must be foreseeable and sufficiently clear so as to preclude arbitrary enforcement. Consequently, a vaguely worded provision would be problematic precisely because of non-conformance with the legality principle. In turn, the requirement of necessity implies that a pressing social need must exist in order for a restriction to be deemed necessary, rather than merely useful or convenient.[4] Under international law, restrictions may only be imposed on the grounds of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.[5]

The right of civil society organizations to raise funds has been consistently interpreted as an intrinsic element of freedom of association. In its Communication No. 1274/2004, the United Nations Human Rights Committee (CCPR) clarified that "[t]he right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities." While the Communication makes no express mention of the right to access funds, the latter is obviously included under the right to freely carry out statutory activities.

Recommendation CM/Rec(2007)14 adopted in 2007 by the Committee of Ministers of the Council of Europe expressly refers to the right of NGOs to "solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties."

[3] In the General Interpretative Principles Relating to the Justification of Limitations, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (U.N. Doc. E/CN.4/1985/4) state that "[t]he scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned." Moreover, General Comment No. 27 is quoted by Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, in his Report of 24 April 2013, to "emphasize[s] that only "certain" restrictions may be applied, which clearly means that freedom is to be considered the rule and its restriction the exception."

[4] See Handyside v. UK, (1976) 1 EHRR 737, at para. 48 and Sunday Times v UK (1979) 2 EHRR 245, at para. 59, for a necessity test.

[5] International Covenant on Civil and Political Rights, Article 22(2).

The Inter-American Commission on Human Rights (IACHR) has also ruled on several cases of restrictions on access to foreign funding.[6] Importantly, the IACHR Second Report on the Situation of Human Rights Defenders in the Americas states that "[o]ne of the State's duties stemming from freedom of association is to refrain from restricting the means of financing of human rights organizations."[7]

B. PANELISTS' PRESENTATIONS AND SUMMARY OF THE DISCUSSIONS

B.1 Panelists' presentations

Ms. Ivana Ćirković, Director of the Office for Cooperation with Civil Society of the Government of the Republic of Serbia, presented an overview of the existing legal and institutional framework for the enabling environment and cooperation with civil society in Serbia. Formally established in 2011, the Office for Cooperation with Civil Society is a result of a civil society initiative put forward in 2007.[8] The Office's annual state budget is around 300,000 EUR, with an additional 1.2 million EUR allocated for a three-year technical assistance program under the 2011-2013 EU Civil Society Facility (CSF) Instrument for Pre-Accession Assistance (IPA), as well as 230,000 USD in USAID funds for an 18-month Office institutional and capacity-building program.

At present, over 22,000 civil society organizations (apart from foundations and endowments, which are subject to a different regulatory regime) exist in Serbia, most of which were established after 2000. They mainly work in culture, media and recreation; education and research; and social services. Forty-eight percent of civil society organizations (CSOs) are familiar with the regulatory regime of civil society sector, but only 30% are satisfied with it. Most of those that feel there is room for improvement of the law and regulations pertaining to CSOs would like to see the taxation policy and the law on associations reformed. Eighty percent of CSOs find the cooperation between the State and civil society productive, but still see gaps insofar as the sufficiency of funding is concerned. In relation to funding, CSOs have also indicated they would like to see the business sector more active in philanthropy. The withdrawal of international donors is widely seen as a negative development. Other concerns pointed out by CSOs include alleged lack of interest on the part of the authorities, overstaffed administration, reliance on informal networking, and insufficient cooperation with local self-government bodies.[9]

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[6] For more information, see IAHCR, Second Report on the Situation of Human Rights Defenders in the Americas, para 179-187.

[7] IACHR Second Report on the Situation of Human Rights Defenders in the Americas, para 179.

[8] The Office exists on the basis of a regulatory act (a decree) adopted by the Government of the Republic of Serbia in April 2010, and is guided by the 2011-2014 Strategic Framework and the 2013-2014 Operational Plan. Office is the Service of the Government of the Republic of Serbia and it reports to the General Secretary and the Government.

[9] Civic Initiatives NGO and Office for Cooperation with Civil Society, *Assessment of the Situation in the CSO Sector in Serbia in 2011* (2012, with USAID support).

The Office has a broad mandate of stimulating civil society development, including the initiation and reform of regulations governing CSO status, facilitating communication and cooperation between civil society and local, provincial and national authorities, capacity building, and ensuring ongoing monitoring and assessment of the civil society situation on behalf of the Government of Serbia. Importantly, the Office disburses funds to CSOs (by co-financing EU-supported projects), publishes an annual report on State budget expenditures provided to the CSOs and capacity building programs for CSOs in regards to the EU accession process, as well as acts as a contact institution for the EU Program *Europe for Citizens*. In particular, the Office participated in the development of a Government decree on seed funds for CSO programs.

The Office's priorities for the nearest future include the establishment of the National Council for Cooperation and Development of Civil Society of the Government of the Republic of Serbia (based on the EU and WB regional practices, this should be an advisory body to the Government composed of representatives of the public administration and CSOs); a National Strategy for the enabling environment for civil society development (launched in March 2014, based on the Government Annual Plan for 2014); initiating revision of laws and regulations of relevance to civil society with a view to improving the legal framework; establishing a mechanism for the regular assessment of the civil society situation; and developing a mechanism for regular communication between the Office and other stakeholders, such as public administration, the National Assembly, CSOs, media, the donor community, and the private sector.

Serbia's law treats foreign funding on par with funding from domestic sources. At the same time, the Serbian authorities have adopted a policy seeking to maximize funding from domestic sources and EU pre-accession funds, seeing all funding sources as mutually complementary.

Mr. Thomas Burrows, Senior Counsel for Multilateral Matters, Office of International Affairs of the United States Department of Justice gave an overview of the United States Government's policy on civil society and explained the legislative intent behind the Foreign Agent Registration Act (FARA), its applicability and the reasons why, in the view of the U.S. government, FARA cannot be considered a tool for civil society regulation. He noted that the U.S. government strongly supports a robust civil society as a cornerstone of democracy. The role of NGOs as monitoring actors is especially valued. The speaker stressed that in the U.S., NGOs are not required to register with the states or federal government, unless they wish to be eligible for certain benefits, such as tax breaks, in which case some kind of formal organization is a prerequisite.

The panelist mentioned that U.S. civil society organizations can receive foreign donor funding without impediment, and indeed a number of non-profit organizations, such as those working on death penalty issues, have been funded by the EU. He added as noteworthy that not a single one of these organizations has been required to register under FARA, despite millions of dollars in foreign funding, which sheds light on why FARA

cannot be interpreted as an analog of legislation that requires CSO recipients of foreign funds to register as "foreign agents."

The panelist noted that FARA originated in a very specific political context, having being passed in 1938 against the backdrop of the rise of the Nazi influence. It currently requires organizations acting on behalf of a foreign principal (be it a government or a group) to register with the Department of Justice. However, the speaker stressed as key that registration is not triggered by the mere fact of having received funding, but by the fact of the organization being directed and controlled by a foreign entity. Funding does not necessarily imply direction and control; at the same time, organizations may be directed by foreign principals without being funded by them. The overwhelming majority of FARA registrants are public relations and media consultants, lobbyists, tourism promotion associations, and the like. The panelist also emphasized as essential that FARA is enforced in a very transparent way: the registration criteria, registration procedure and the list of registrants are publicly available on the Department of Justice website. The enforcement regime is also primarily civil rather than criminal, and focused on compliance with the law rather than punishment.

Ms. Maja Stojanović, Program Director of the Serbian CSO Civic Initiatives, emphasized the importance of foreign donor funding to Serbia's civil society sector. To date, funds provided by foreign governments, international organizations and foreign-based foundations remain the key source of financing for Serbian CSOs. According to the official ISDACON database[10] of the State Office for European Integration, the civil society sector received substantial assistance from the international donor community over the period 2007-2012, with the estimated total disbursement amounting to 64.45 million EUR. The largest and the most important donor in the sector has been the EU, with total disbursement within the Instrument for Pre-Accession Assistance (IPA) component amounting to 11 million EUR in 2007-2013.

Foreign funding is not only disbursed to CSOs directly, but also channeled through the government. The Government of Serbia is currently the largest recipient of foreign aid, and a portion (albeit small) of the development assistance funds is used to foster civil society development. According to the state policy on National Priorities for International Assistance in the area of CSO development, the support of the international donor community should aim to ensure continued improvement in donor coordination with ministries, the Office for Cooperation with Civil Society and other stakeholders, and to develop a common set of priorities in the area of civil society development.

The Civic Initiatives CSO uses foreign funding for advocacy on reform of the educational and social policy, for improving volunteerism in Serbia, for projects on Roma integration and for institutional reform in a number of areas, including the development of an enabling environment for civil society. In the view of the presenter, the fact that Serbian CSOs are not subject to additional registration requirements in the event that they receive foreign funding does in no way weaken the viable transparency and accountability

[10] For further information on the ISDACON database, see http://www.evropa.gov.rs/Evropa/PublicSite/AboutUs.aspx .

mechanism. Spending, regardless of whether the funds in question originate from domestic or foreign sources, is subject to rigorous control by the donor. In addition, CSOs pay all local taxes and submit annual financial report to the State. They are also occasionally checked by financial and labor inspection. All these mechanisms are intended not only to protect the State, but also to promote transparency and sustainability in the non-governmental sector. Finally, transparency in CSO spending is also a civil society priority and as such ensured through self-regulation.

Ms. Sarah E. Turberville, Director of the Death Penalty Due Process Review Project of the American Bar Association (ABA) (United States of America), presented her organization's experience as a recipient of foreign funding. The ABA Death Penalty Due Process Review Project is funded by the ABA's Fund for Justice and Education (FJE). Neither the ABA Death Penalty Due Process Review Project nor the ABA's Fund for Justice and Education are registered under FARA, nor have they ever been required to do so.

The panelist clarified that the ABA Death Penalty Due Process Review Project was selected to receive a grant from the European Commission's European Initiative for Democracy and Human Rights (EIDHR) to examine the extent to which U.S. capital jurisdictions' death penalty systems conform to minimum standards of fairness and due process**.** In 2003, the grant was one of only ten death penalty-related grants that the EC awarded worldwide, and one of only two in the United States. Due in large part to the success of the first round of assessments, EIDHR again selected the Project as a grantee to fund assessments of the death penalty in states not examined during the previous grant period. Pursuant to this second grant awarded in 2009, the Project will evaluate four additional capital jurisdictions over a period of four years. EIDHR has committed up to 708,162 EUR to the Project over the four-year period of the grant (2009-2013).

The panelist stressed that, as with any grantor, EIDHR has not sought and does not have any input on the issues an assessment team addresses in each report, who will be hired to conduct the research, how the research is collected, or who will participate on the assessment teams. While the European Union supports abolition of the death penalty, it does not have any input into any assessment team's findings and conclusions. The ABA and the assessment teams control the substance and the methodology employed to complete the objectives of the grant proposal.

Mr. Dmitri Makarov, lawyer of the Youth Human Rights Movement CSO (Russian Federation) provided some insights into the implementation of the 2012 Federal Law on Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-commercial Organizations, Performing the Functions of Foreign Agents. He clarified that registration is triggered by the combination of a) receipt of foreign funding and b) "political" nature of the CSO's activities. Registrants are subject of a set of additional oversight and reporting requirements.

The panelist emphasized that the vagueness of the definition of "political" activity and the resulting overbroad interpretation thereof presents a concern. The extant Russian law does not provide a definition of "political activity." As a result, advocacy-oriented activities are largely misconstrued to be "political" in nature, thus making the label of "political" potentially applicable to a vast array of civil society actors, including human rights and anti-corruption organizations. The panelist noted that the lack of clarity and predictability has led to a number of instances when the same project is not viewed as "political" by the Ministry of Justice, but is found to be "political" – and thus subject to a check – by the prosecutor's office.

The presenter stated that the understanding of human rights issues as "political" also results in the treatment of foreign-funded human rights projects as "interference" in domestic affairs, in a way that is inconsistent with the commitment of all OSCE participating States (in Moscow 1991) to regard human dimension issues as matters of direct and legitimate concern to all participating States that do not belong exclusively to the internal affairs of the State concerned.

Moreover, the very definition of "foreign funding" is largely left to the enforcing agency's discretion. For instance, donations to CSOs by Russian nationals resident abroad can be seen as "foreign funding." Donations made by aliens domiciled in the Russian Federation can also, in theory and in practice, fall into this category. The amount of funding or the grant objective does not matter for registration purposes. While the requirement that recipients of foreign funding register has been waived on a considerable number of occasions, the waiver is not based on any clear criteria and as such tends to be arbitrary (e.g. donations to the United Russia party by offshore companies are not considered as subject to registration). The panelist added that while direct lobbying may indeed be legitimately subject to higher levels of scrutiny, the law as it stands now hardly targets lobbyists and does not improve transparency.

Ms. Svetlana Savitskaya, Senior Regional Coordinator, Commonwealth of Independent States, of Transparency International (based in Germany), gave a detailed overview of Transparency International's internal policy and guidelines on fundraising and reporting, stressing the importance of internal organizational oversight in ensuring transparency and accountability in spending. Founded in 1993, Transparency International (TI) is the global civil society organization leading the fight against corruption, with national Chapters in over 90 countries on all continents and an International Secretariat in Berlin.

The National Chapters and the Secretariat of Transparency International are funded from diverse sources, including foundations, governments, the private sector, individuals, membership fees, income from publications, events and other activities, as well as an endowment fund. Relying on many sources of income helps Transparency International maintain its independence. Funding may be unrestricted or tied to specific projects.

Generally, the National Chapters and the Secretariat each raise their own funding. It is Transparency International's policy to accept funding from any donor and whether

monetary or in kind, provided that acceptance does not a) impair Transparency International's independence to pursue its mission and b) endanger its integrity and reputation.

Each Chapter, as well as the Secretariat, are obligated by the internal organizational regulations to list all donations over 1,000 EUR and publicly disclose them, including in the Chapter's Annual Report and on its website. If there is a significant risk that receiving funds from a particular source would impair Transparency International's independence or if there is a significant risk to Transparency International's reputation from public association with the donor, then funding from that source must not be accepted by the intended recipient. In addition, all chapters are required to submit to the Secretariat annual financial reports together with audited accounts, which information is published online, along with the internal governance facts for each chapter (such as Board composition, conflict of interest policy, code of conduct, etc.). All Transparency International chapters go through a rigorous re-accreditation procedure once every three years to ensure full compliance with TI policies and standards of transparency, accountability, and integrity.

The panelist drew from her organization's experience operating in States where there exist restrictions on foreign funding to illustrate the negative impact such restrictions have on the implementation of the right to freedom of association and on overall democratic development.

In particular, she pointed out that labeling recipients of foreign funds as "foreign agents" is pejorative and undermines their standing in civil society. She also criticized criminal enforcement of legislation requiring recipients of foreign funds to register. Finally, she echoed the previous speaker's concern about the vagueness of the definition of "political" activity, adding that politics and policy should not be conflated, and that policy advocacy should not be interpreted as political. The panelist stressed the fundamental importance of drawing a distinct line between public interest and special interests, noting that organizations conducting legitimate public interest work (for example, human rights or anti-corruption CSOs) should be able to work freely and without impediment.[11]

B.2 Summary of the discussions

Following the Panel presentations, discussions ensued as summarized below. Overall, the participants in the discussion seemed to favor a non-restrictive approach to civil society funding, stressing the desirability of minimum regulation in compliance with international law, in particular the principles of proportionality and necessity.

[11] In this context, public interest could be defined as benefiting the the general public rather than a narrow constituency. This should not be construed as to preclude benefiting interests of marginalized or otherwise vulnerable groups, when the end objective pursued would be a fairer, more just and equitable society, which is in the general public interest. Special interest could be defined as benefiting a narrow constituency, except in those cases where benefiting interests of marginalized or otherwise vulnerable groups would, directly or indirectly, pursue the objective of a fairer, more just and equitable society.

B.2.1 State's obligation to provide an enabling environment for CSOs

Participants overwhelmingly agreed that the State bears an obligation to facilitate the exercise of freedom of association, and that this should also imply the right of civil society organizations to benefit from state funding. It was stressed that this obligation should be interpreted in a wider sense, extending it to the obligation of the State not to unduly restrict NGO access to other funding sources, including funding by foreign states and private donors. In addition, many interlocutors stressed the fact that resources available to NGOs are becoming increasingly scarce and that in certain countries foreign donor aid is vital to preserving a vibrant and pluralistic civil society.

The discussion stressed the negative impact of restrictions on funding from foreign sources and the chilling effect it has on the exercise of freedom of association. Most participants saw a clear difference between the approach chosen by the Russian and the United States authorities in ensuring transparency of funding, agreeing that the vagueness in the wording of the Russian law on "foreign agents" and the disproportionate sanctions it carries open the door to undue stigmatization of legitimate non-governmental organizations.

The chilling effect of the general requirement to register is further compounded by what many see as undue interference with a number of rights and freedoms beyond freedom of association. For example, it was mentioned that a group of leading human rights NGOs lodged an application with the European Court of Human Rights in February 2013 challenging the "foreign agent" law (the application is currently under review).[12]

As noted above, disproportionate sanctions were mentioned as contributing to the chilling effect the law has on civil society. It was stressed that criminal liability may ensue for the violation of the "foreign agents" law and that relevant offenses carry sentences of up to two years of imprisonment. It was also argued that the law contains no safeguards against arbitrary enforcement. At the same time, as some participants noted that the authorities in the participating States that adopted laws restricting foreign funding indeed referred to FARA as a source of inspiration, the need to make sure that the policymakers in these participating States realize the importance of establishing the fact of control and direction of an entity's work by a foreign principal was emphasized as key.

[12] Note that several NGOs also petitioned the Constitutional Court of the Russian Federation challenging the constitutionality of the "foreign agent" law. On April 8, 2014, Russia Federation's Constitutional Court issued its ruling, striking down the legal challenge. The court ruled, however, that the minimum fine of 300,000 rubles imposed on those who fail to register should be reduced. "The contested norm of the Administrative Offenses Code does not contradict the Russian Constitution, as it has no retroactive force and envisages responsibility only in case if a non-profit organization fails to submit a request to be registered as a 'foreign agent' in line with the procedure," the court said in its ruling. In particular, the court ruled that claims of negative connotations of the term "foreign agent" have no legal grounds.

B.2.2 Legality

The participants repeatedly stressed that the lack of a definition of "political activity" in the law of the Russian Federation results in vagueness and as such is at odds with the legality principle. However, it was argued that even if political activity were defined in the law, the latter would still have a chilling effect on freedom of association, as drawing a distinction between "political" and "non-political" civil society organizations poses a risk of fueling confrontation within the civil society sector.

It was stressed that the law presents a concern not only by failing to define what constitutes "political activity," but also by its enforcement policy that does not require the determination of a link between foreign funding and political activities. In this connection, it was noted that the Council of Europe's European Commission for Democracy through Law (Venice Commission) may assist in developing a clear definition of "political activity," which would not result in a conflation of political aims with advocacy or other activities that should be freely conducted by civic organizations. The OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulation have a well-developed definition of political party activities ("participation in the management of public affairs and the presentation of candidates in free and democratic elections") that can serve as a starting point.

B2.3 Lawful restrictions

The overwhelming majority of the participants argued that restricting access to foreign funding for legitimate activities cannot be justified on any internationally accepted grounds. While increased reporting burden may at times be justified when there exists a demonstrated need for higher scrutiny in connection with a legitimate ground for restriction, it was stressed that not only the "foreign agents" law does not possess any added value in terms of transparency and reaches beyond its stated goal of preventing foreign interference in domestic politics, but the very legitimacy of restricting advocacy as inherently damaging to state sovereignty essentially amounts to misinterpreting the concept of advocacy. This echoed the earlier made point that viewing advocacy work as an encroachment on state sovereignty is inconsistent with the OSCE commitment to view human dimension issues as matters of direct and legitimate concern to all participating States.

While an opinion was voiced that direct lobbying may indeed be legitimately subject to higher levels of scrutiny in a similar fashion as donations to political parties, it was emphasized that the Russian law on "foreign agents" does little to target lobbyists working under the control of foreign principals. Some participants claimed that donations to political parties remain highly non-transparent, while NGOs are penalized unfairly. In this connection, it was suggested that ODIHR consider deploying a mission to monitor proceedings concerning the enforcement of the foreign agents' law.

The importance of distinguishing mere funding from control and direction by a foreign principal was stressed. A note was made that the registration requirement under FARA would only be triggered in the latter case. It was stressed that no civic organization has

ever been required to register under FARA. It was also clarified that the registrants typically either provide a specific service for the foreign principal (such as in the case of tourism boards promoting tourism in specific foreign countries), or otherwise have a very dependent, almost employee-employer-like relationship with the foreign principal.

C. KEY RECOMMENDATIONS

These Recommendations emanate from the discussions held at the Expert Roundtable. They derive from OSCE commitments and other international human rights standards. They aim to assist participating States in improving their compliance with OSCE commitments and can serve as indicators to reflect on how participating States are meeting such commitments.

1. Participating States should strive to develop enabling legal and regulatory frameworks for civil society, including through the introduction of tax incentives.
2. Participating States should not interfere with freedom of association, including access to foreign funding, other than on grounds that are permissible under international human rights standards and should ensure that any limitations imposed are necessary in a democratic society and proportionate to the legitimate aim pursued;
3. While the State may legitimately restrict foreign funding of political parties, the law must be sufficiently clear so as to prevent a conflation between genuine political activity as conducted by political parties, on the one hand, and policy advocacy, on the other. The latter should not be subject to restriction as far as foreign funding is concerned, except strictly on grounds and to the extent outlined in Recommendation 2.
4. Any legislation concerning the regulation of non-governmental organizations, including their access to foreign funding, should be sufficiently clear and precise so as to preclude any excessive breadth or arbitrariness in its implementation.
5. The law must draw a clear distinction between public and special interest. While the activity of special interest lobbyists may be subject to additional restrictions, organizations working on issues of public interest should enjoy a conducive and enabling environment for their activities.
6. Participating States are encouraged to solicit ODIHR's expert review of legislation, including draft legislation, and other expert assistance on issues of relevance to the regulation of non-governmental organizations, in particular NGO access to foreign funding.
7. Participating States and ODIHR should cooperate facilitating the monitoring of the implementation of laws regulating non-governmental organizations.

ANNEXES

Annex 1. AGENDA

EXPERT ROUNDTABLE ON REGULATION OF OPERATIONS OF INTERNATIONALLY AFFILIATED NON-GOVERNMENTAL ORGANIZATIONS AND NGO ACCESS TO FOREIGN SOURCES OF FUNDING
VIENNA, HOFBURG
11 July 2013
10:30-13:00

Introductory Remarks
Ms. Snježana Bokulić, Head, Human Rights Department, OSCE/ODIHR

Legal and Regulatory Frameworks, Policies and Practices
Ms. Ivana Ćirković, Director of the Office for the Cooperation with Civil Society, Serbia
Mr. Thomas Burrows, Senior Counsel for Multilateral Matters, Office of International Affairs, Department of Justice, United States of America

Legal and Regulatory Frameworks, Policies and Practices: The Experience of NGOs
Ms. Maja Stojanović, Program Director, Civic Initiatives, Serbia
Ms. Sarah E. Turberville, Director, Death Penalty Due Process Review Project, American Bar Association, United States of America
Mr. Dmitri Makarov, Youth Human Rights Movement, Russian Federation
Ms. Svetlana Savitskaya, Senior Regional Coordinator CIS(Commonwealth of Independent States), Transparency International

Discussion

Closing Remarks

Annex 2. BIOGRAPHICAL INFORMATION: PANELISTS

Ms. Ivana Ćirković is Director of Serbia's Office for the Cooperation with Civil Society. The Office was established in 2011 by the Government of the Republic of Serbia to support the development of a dialogue between the Serbian Government and CSOs.

Mr. Thomas Burrows is Senior Counsel for Multilateral Matters, Office of International Affairs, Department of Justice, United States of America. The Office of International Affairs provides advice and assistance on international criminal matters to the Attorney General and other senior Department of Justice officials, the Criminal Division and the Department's other legal divisions, the U.S. Attorneys offices, and state and local prosecutors.

Ms. Maja Stojanović is Program Director of Civic Initiatives, a Serbian NGO. Civic Initiatives, Citizens' Association for Democracy and Civic Education was founded in 1996 by a group of NGO activists with the aim of strengthening civil society through education, promotion of democracy and support of active citizenship. Civic Initiatives are part of the Balkans Civil Society Development Network, which developed a Matrix for Enabling Environment for Civil Society Development.

Ms. Sarah E. Turberville is Director of the Death Penalty Due Process Review Project, American Bar Association (ABA), United States of America. The ABA Death Penalty Due Process Review Project was created to carry out the ABA's goal of a nationwide death penalty moratorium. In 2003 and again in 2009, the ABA Death Penalty Due Process Review Project was selected to receive a grant from the European Commission's European Initiative for Democracy and Human Rights (EIDHR) to examine the extent to which U.S. capital jurisdictions' death penalty systems comply with minimum standards of fairness and due process**.**

Mr. Dmitri Makarov works with the Youth Human Rights Movement (YHRM) in the Russian Federation. The YHRM is an international network of human rights defenders spanning over 30 countries, which has monitored the implementation and advocated for the repeal of the law requiring Russian NGO recipients of foreign funds to register as "foreign agents."

Ms. Svetlana Savitskaya is Senior Regional Coordinator CIS (Commonwealth of Independent States), Transparency International. Transparency International is a non-partisan non-governmental organization whose mission is to stop corruption and to promote transparency, accountability and integrity at all levels and across all sectors of society. In May 2013, the Russian chapter of Transparency International received a prosecutorial warning demanding that it register as "foreign agent" and refused to comply.

Annex 3. SUMMARY OF APPLICABLE INTERNATIONAL AND REGIONAL STANDARDS, INCLUDING OSCE COMMITMENTS

The right to associate freely is firmly rooted in a number of OSCE human dimension commitments, in particular the **1990 Copenhagen Document** and the **1990 Charter of Paris for a New Europe**. In addition to a general commitment to ensure that every individual has the right to freedom of association, the participating States have reaffirmed that freedom of association shall extend to the right "to form, join and participate effectively in […] human rights monitoring groups" as well as "to establish and maintain organizations or associations within their country and to participate in international non-governmental organizations" (Copenhagen 1990). Moreover, the Copenhagen 1990 commitment to "encourage, facilitate and, where appropriate, support practical co-operative endeavours […] including […] co-operative programmes and projects, […] scholarships, research grants" represents shared recognition by participating States of the State's obligation to develop and maintain an enabling environment for civil society organizations to operate in.

The right to freedom of association is enshrined in Article 22 of **the International Covenant on Civil and Political Rights** (ICCPR). In its Communication No. 1274/2004, the United Nations Human Rights Committee (CCPR) clarified that "[t]he right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities." The reference to "statutory activities" obviously includes the right to raise and otherwise access funds.

In addition, Article 6 of the **UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief** expressly reaffirms "the right to freedom of thought, conscience, religion or belief" to include the right to "solicit and receive voluntary financial and other contributions from individuals and institutions." Similarly, Article 13 of the **UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Defend Universally Recognised Human Rights and Fundamental Freedoms** expressly states everyone's right "individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means."

At the regional level, the right to freedom of association is expressly guaranteed by Article 11 of the **European Convention on Human Rights and Article 16 of the American Convention on Human Rights**.

In 2007, the Committee of Ministers of the Council of Europe adopted **Recommendation CM/Rec(2007)14**, which establishes a framework for legal status of NGOs in Europe. This Recommendation specifically addresses the funding issue by stipulating the right of NGOs to "solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies."

Paragraph 14 of the **European Union's Guidelines on Human Rights Defenders** encourages missions to "ensure that human rights defenders in third countries have access to resources, including funding, from abroad and that they are informed of the availability of resources and the means to secure them."

In a similar vein, the Inter-American Commission on Human Rights (IACHR) has ruled on several cases of restrictions on access to foreign funding. The **IACHR Second Report on the Situation of Human Rights Defenders in the Americas** (paragraph 179) states that "[o]ne of the State's duties stemming from freedom of association is to refrain from restricting the means of financing of human rights organizations."

Finally, the OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulation specify that even in the case of political party funding "regulation might permit some support from a foreign chapter of a political party, in line with the intent of paragraphs 10.4 and 26 of the Copenhagen Document, which envision external co-operation and support for individuals, groups and organizations promoting human rights and fundamental freedoms. Dependent on the regulation of national branches of international associations, financial support from such bodies may not necessitate the same level of restriction" (paragraph 172), which approach is consistent with the Venice Commission Opinion no. 366 / 2006.