

To The Honorable Clement N. Voule

**Special Rapporteur on the rights to freedom of peaceful assembly and of association
Comments on his Report to the 50th session of the Human Rights Council**

18 February 2022

The Charity & Security Network (C&SN) thanks the Special Rapporteur for the opportunity to submit information and recommendations on the important topic of civil society organizations' access to resources, including raising and disbursing funds. Our mission is to promote and protect the ability of nonprofits to carry out effective programs that support peace and human rights, aid civilians in areas of disaster and armed conflict, and build democratic governance. Our members, located around the world, have cited access to financial services and the ability to send and receive funds between organizations as a major barrier to their ability to operate. Consequently, we are encouraged by the Special Rapporteur's interest in this topic.

Introduction

In the case of civil society, access to resources is essential to both the rights of association and assembly, as set out in Article 20 of the Universal Declaration of Human Rights and Articles 21 and 22 of the International Covenant on Civil and Political Rights. The importance of access to resources for the free exercise of these rights for civil society organizations has been stressed in reports from the previous Special Rapporteur, Maina Kiai. In his 2012 report to the General Assembly, he noted that "The right to freedom of association ranges from the creation to the termination of an association, and includes the rights to form and to join an association, to operate freely and to be protected from undue interference, *to access funding and resources* and to take part in the conduct of public affairs."¹ (emphasis added) He notes that "Numerous United Nations human rights bodies have also emphasized the principle that associations should access funding freely."² He explains that "in many countries, domestic funding is very

¹ Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, UN Document A/HRC/20/27

https://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session20/a-hrc-20-27_en.pdf

² Ibid, page 17

limited or non-existent, leading associations to rely on foreign assistance to conduct their activities.”³

In his 2015 report on sectoral equity, Kiai emphasizes that the ability to “seek, secure and use resources—from domestic, foreign and international source(s)—is essential to the existence and effective operations of any association, no matter how small.”⁴ Intrusive and disproportionate restrictions on resource acquisition thus impedes or violates the right to freedom of association.

In his Forward to a 2013 report from the Observatory for the Protection of Human Rights Defenders, Kiai noted that “lately we have witnessed increased stigmatization and undue restrictions in relation to access to funding and resources for civil society organizations, in an attempt to stifle any forms of criticism, especially calls for democratic change or accountability for human rights violations.”⁵ The report itself argues that repression of human rights defenders can take many forms. Rather than outright banning NGOs, many governments draw on a sophisticated arsenal of restrictive legal, administrative or practical measures to block their access to funding, especially from international sources.⁶

The problem is not limited to autocratic regimes. As the *Economist* noted in 2014, “Heavy-handed enforcement of laws aimed at stopping money-laundering and the funding of terrorism has made it harder to send money to NGOs doing good work in some of the countries where civil society is under attack. A bank that knows a single slip could make it liable to draconian penalties may decide simply to close accounts rather than carry out costly checks or risk an expensive misjudgment.”⁷

Since that time the problem has only grown worse, as a result of both deliberate and unintended consequences. Restrictions by authoritarian governments are intended to limit civil society and disproportionate counterterrorism measures and sanctions often do not adequately incorporate IHRL and IHL frameworks as required by Security Council Resolution 2462 and 2482, that would protect associational and assembly rights. A recent report from the Counterterrorism

³ Ibid, page 17

⁴ Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, UN Document A/HRC/70/266 <https://undocs.org/A/70/266>

⁵ Observatory for the Protection of Human Rights Defenders, *Violations of the right of NGOs to funding: from harassment to criminalisation* Annual Report 2013 https://www.fidh.org/IMG/pdf/obs_2013_human_rights_defenders_english.pdf

⁶ Ibid

⁷ The Economist, *Illiberal governments are blocking activists from receiving foreign cash. Liberal ones should not join in*, Sept. 13, 2014 <https://www.economist.com/leaders/2014/09/15/uncivil-societies> See also Center for Global Development, “Unintended Consequences of Anti–Money Laundering Policies for Poor Countries: A CGD Working Group Report” Clay Lowery, Chair Vijaya Ramachandran, Director 2015 <https://www.cgdev.org/sites/default/files/CGD-WG-Report-Unintended-Consequences-AML-Policies-2015.pdf>

Executive Directorate highlights the need to make counterterrorism frameworks more consistent with international human rights and humanitarian law.⁸

These comments address problematic outcomes of counterterrorism measures and sanctions that unduly disrupt the activities of civil society organizations, including the ability to solicit, receive and utilize resources. We address the following areas:

- State Practices: Sanctions, bank derisking and lack of adequate access to the international financial system for civil society organizations
- Donor Practices: Donor restrictions that impede flow of aid funds and harm program implementation;
 - Excessive vetting requirements that infringe on rights of association, assembly and privacy rights
 - Donor freezing and cutting funds pending investigations in response to politically motivated attacks on civil society and political pressure

PART ONE

State Practices: Sanctions, AML/CFT Regulations, Bank Derisking, and Lack of Adequate Access to the International Financial System for Civil Society Organizations

In the modern world financial services are a necessity for civil society organizations (CSOs) to carry out activities that fundamentally exercise the rights of peaceful assembly and association. This is particularly true for CSOs that work across national borders. CSOs bring people together to act on a common mission for the public benefit, and operation of their programs requires outreach to and engagement with others.

In order to carry out these programs, it is essential that CSOs are able to gather resources and use them to achieve their missions. This requires financial services that allow them to, at a minimum, raise funds and spend and disburse them, just as private sector companies raise, spend and disburse funds.

The last decade has witnessed dramatic challenges for CSOs seeking to operate programs and raise and disburse funds across borders. This problem fits into a larger trend known as “derisking,” defined by the Financial Action Task Force (FATF) as “the phenomenon of financial institutions terminating or restricting business relationships with clients or categories of clients to avoid, rather than manage, risk

⁸ United Nations Security Council, Counter-Terrorism Committee Executive Directorate (CTD), “The interrelationship between counter-terrorism frameworks and international humanitarian law” January 2022 https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2022/Jan/cted_jhl_ct_jan_2022.pdf

in line with the FATF's risk-based approach."⁹ (FATF says, "A risk-based approach means that countries, competent authorities, and banks identify, assess, and understand the money laundering and terrorist financing risk to which they are exposed, and take the appropriate mitigation measures in accordance with the level of risk.")¹⁰ There is now more than ample documentation demonstrating the particularly negative impact derisking has on CSOs that operate a wide range of programs, from humanitarian assistance to conflict resolution and mitigation efforts.¹¹

C&SN's *Financial Access for U.S. Nonprofits* report noted that, "Recognition of the phenomenon of derisking has grown significantly in the past few years and has been featured prominently in speeches at the 2016 UN General Assembly, reports by development agencies such as the World Bank, guidance and work plans of international financial and security bodies such as the Group of Twenty (G-20), Financial Stability Board (FSB), and FATF, statements by members of the U.S. Congress concerned about local populations, and policy pronouncements by the U.S. government (USG)."¹² However, recognition of the problem has not led to effective steps to alleviate it.

The legal/counterterrorism measures that affect financial access for civil society organizations

A combination of legal measures govern financial institutions and their customers, including CSOs. These include sanctions imposed by the UN Security Council and unilaterally by Member States. Many of these sanctions target terrorist organizations, including state sponsors of terrorism and non-state armed groups. In addition, banking regulations intended to stop money laundering and counter the financing of terrorism (AML/CFT) and criminal prohibitions on providing material support to listed terrorists also have the effect of limiting CSOs' ability to secure needed financial services, creating significant disruptions to their work.¹³ This often happens in areas labeled "high risk," which are the same areas who would most benefit from these financial services.

After 9/11, the international community turned to the financial system as a means to fight terrorism. Banking institutions were drawn into the mix and became enforcers of many of these new standards. The U.S. led the way in the aftermath of 9/11 with passage of the Patriot Act, which included significant amendments to the Bank Secrecy Act.¹⁴ Because of the out-sized

⁹ Financial Action Task Force, "FATF clarifies risk-based approach: case-by-case, not wholesale de-risking," October 2014, www.fatf-gafi.org/documents/documents/rba-and-de-risking.html

¹⁰ Financial Action Task Force, "Risk-Based Approach for the Banking Sector" October 2014, <https://www.fatf-gafi.org/documents/documents/risk-based-approach-banking-sector.html>

¹¹ Charity & Security Network, "Financial Access for Nonprofit Organizations," Feb. 17, 2017, See Appendix A, <https://charityandsecurity.org/csn-reports/finaccessreport/>

¹² Ibid

¹³ See the section on impacts below.

¹⁴ Office of the Comptroller of the Currency, "Bank Secrecy Act," <https://www.occ.treas.gov/topics/supervision-and-examination/bsa/index-bsa.html>

influence that U.S. banking laws and regulations have on financial services worldwide, U.S. legal standards have a significant impact on the availability of financial services for CSOs all over the world.

For example, the U.S. maintains an extensive system of sanctions on various countries and non-state armed groups in an effort to counter terrorism, narcotics trafficking and human rights abuses. When a group or country is sanctioned, their assets, subject to U.S. jurisdiction, are frozen. All transactions with them are prohibited, including transactions by financial institutions or CSOs.¹⁵

U.S. law imposes strict liability for sanctions violations.¹⁶ However, international standards have been moving toward a more proportionate and flexible risk-based approach (RBA) for over a decade. The FATF revised its Recommendation 8 on Nonprofit Organizations in 2016 to reflect the RBA, calling for measures that are proportionate to risk and that do not unduly disrupt the activities of legitimate CSOs. This approach, if implemented properly, is in line with international human rights law. Strict liability standards are at odds with the RBA and contribute to barriers CSOs experience accessing resources to carry out their work.

As the FATF's 2016 mutual evaluation of the United States noted, "As violations of TF-related TFS are strict liability offenses, the authorities should continue to work with the NPO community to understand and mitigate the real TF risks that exist, while engaging stakeholders on banking challenges that some NPOs may face when working in conflict zones. The U.S. authorities are aware of the continuing challenges in this difficult area and are encouraged to continue their efforts, including work with the private sector."¹⁷ To date, insufficient action has been taken to alleviate the legal pressures that contribute to financial access barriers for CSOs, and derisking is utilized over implementing a RBA in practice.

Main drivers of adopting these measures and the derisking trend

The FATF has recognized the ways in which the derisking problem has impacted CSOs and urged countries and financial institutions to address the problem.¹⁸ These factors are interwoven

¹⁵ U.S. persons may apply to the Office of Foreign Assets Control (OFAC) at the Department of Treasury for a specific license that would allow otherwise prohibited transactions. CSOs have found this process to be unduly complex and lengthy, resulting in delays and program disruption. In some cases OFAC issues General Licenses which allow some transactions necessary for CSOs to operate programs.

¹⁶ see 50 U.S.C. § 1705 at <https://www.law.cornell.edu/uscode/text/50/1705>

¹⁷ Financial Action Task Force & Asia/Pacific Group on Money Laundering, "United States Mutual Evaluation: Anti-Money Laundering and Counter-Terrorist Financing Measures," at p. 105, December 2016, <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>

¹⁸ Financial Action Task Force, "FATF takes action to tackle de-risking," 23 October 2015, <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-action-to-tackle-de-risking.html>; David Lewis, Executive Director, Financial Action Task Force, Keynote speech ESAAMLG Public/Private Sector Dialogue, 2 September 2016, <https://www.fatf-gafi.org/publications/fatfgeneral/documents/keynote-esaamlg-public-private-sector.html>;

and include profitability concerns, high compliance costs, fear of supervisory actions and reputational concerns. Our 2017 report *Financial Access for U.S. Nonprofits*, found that, “There is no simple or singular reason for derisking generally or of NPOs specifically...”¹⁹

The U.S. Government Accountability Office (GAO) published a report in December 2021 which concluded that both nonprofits and money transmitters experience challenges with banking access due to banks’ apprehensions surrounding sanctions and Bank Secrecy Act (BSA)/anti-money laundering (AML) regulations compliance.²⁰ Banks cited the following as reasons they restrict and sometimes even deny funds transfers to nonprofits and money transmitters:

- Sanctions compliance;
- BSA/AML compliance costs and profitability;
- Reputational risk;
- Decrease in relationships with correspondent banks;
- Enhanced regulatory uncertainty and scrutiny.

This is consistent with findings in our 2017 report, as well as regular surveys of the financial industry, which “consistently demonstrate that FIs’ compliance-related concerns and regulatory expectations are among the most significant reasons for derisking. A multiplicity of factors has indeed created a ‘perfect storm’ resulting in serious unintended consequences which limit financial access for NPOs.”²¹ The report goes on to find that, “Routine second-guessing of FIs’ decisions and treatment of certain clients as categorically high risk by bank examiners require FIs to undertake extensive and expensive steps to mitigate those risks, tipping the risk-reward scale toward exiting such relationships. Despite reassuring statements from government officials, FIs perceive a clear disconnect between what policy officials say and what happens at the individual bank examination level.” NPOs are routinely subject to second-guessing and high risk categorization, despite a lack of evidence to warrant either.

Impact of financial access barriers on CSO’s rights of association and assembly

As noted above, financial access barriers for civil society organizations that need to raise, send and receive funds across borders is a widespread and well-documented problem. It impacts both CSOs that need to send funds and those that need to receive them.

Financial Action Task Force, *High-Level Synopsis of the Stocktake of the Unintended Consequences of the FATF Standards*, 27 October 2021 <https://www.fatf-gafi.org/media/fatf/documents/Unintended-Consequences.pdf>

¹⁹ Charity & Security Network, “Financial Access for Nonprofit Organizations,” Feb. 17, 2017, <https://charityandsecurity.org/csn-reports/finaccessreport/>

²⁰ United States Government Accountability Office, “BANK SECRECY ACT Views on Proposals to Improve Banking Access for Entities Transferring Funds to High-Risk Countries,” Report to Congressional Committees, December 2021, GAO-22-104792 <https://www.gao.gov/assets/gao-22-104792.pdf>

²¹ Charity & Security Network, “Financial Access for Nonprofit Organizations,” Feb. 17, 2017, p. vii <https://charityandsecurity.org/csn-reports/finaccessreport/>

Problems for CSOs that wish to provide funding to CSOs across borders

Philanthropic organizations and non-governmental organizations (NGOs) operating internationally need to send cross-border transfers to grantees, local operating partners, field offices, vendors and other parties involved in carrying out their missions. Numerous reports cite problems with financial institutions closing accounts, denying or delaying fund transfer requests and requiring duplicative and extensive requests for information.²² As a result, too often CSOs are forced to carry cash across borders—sometimes on their person—risking theft and diversion of funds and the physical safety of staff. In the C&SN study cited above, 42 percent of respondents indicated they had been forced to carry cash. In addition, some programs have been shut down, and beneficiaries have suffered from delayed arrival of aid.

C&SN's 2017 report findings are based on empirical evidence gathered from a representative sample of U.S. CSOs operating internationally. Key findings are:

- 2/3 of U.S.-based NPOs working internationally experience banking problems.
- Transfers to all parts of the globe are impacted; the problem is not limited to conflict zones or fragile and failing states.
- The most common problems include: delays of wire transfers (37%), unusual documentation requests (26%), and increased fees (33%). Account closures represent 6% and refusal to open accounts (10%).
- 15 percent encounter these problems constantly or regularly.
- The prevalence and types of problems vary by program area, with NPOs working in peace operations/peacebuilding, public health, development/poverty reduction, human rights/democracy building, and humanitarian relief reporting the greatest difficulties.
- NPOs with 500 or fewer staff are more likely to encounter delayed wire transfers, fee increases, and account closures. Most significantly, smaller organizations are almost twice as likely to receive unusual additional documentation requests. The smallest NPOs (those with 10 or fewer employees) are having the most trouble opening accounts.
- NPOs, categorically treated as high-risk, are sometimes forced to move money through less transparent, traceable, and safe channels as a result of delays in wire transfers and requests for additional documentation.

These challenges greatly impede CSOs ability to carry out their mandates, many of which deliver lifesaving support to populations most in need, and which no other actors are providing.

Problems for CSOs that receive donations/funding from foreign CSOs and government donors

²² Financial Action Task Force, "Risk-Based Approach for the Banking Sector," October 2014, <https://www.fatf-gafi.org/documents/documents/risk-based-approach-banking-sector.html>

When a CSO has problems sending funds this also affects the partner CSOs and beneficiaries those funds are intended to help. Program implementation is delayed, staff and suppliers may go unpaid, supplies are not delivered and beneficiaries suffer the most consequences in their time of most need.

A 2017 study by the Duke Law School's International Human Rights Clinic (IHRC) and the Women Peacemakers Program (WPP) showed the effects of CFT measures on women's rights organizing, women's rights organizations, and gender equality globally, especially in areas of conflict or at risk of terrorism. *Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security*²³ surveyed grassroots women's organizations and found that 86.67 percent of respondents classified their organization's work as contributing to combatting terrorism and violent extremism, but an overwhelming 90 percent said that CFT measures had an adverse impact on their work.

It found that while civil society as a whole has suffered under this regulatory scheme, women's rights organizing and organizations have been impacted in a particularly acute way because, the report notes:

“Highly reliant on foreign funding and often in receipt of short-term or project-based funding, women's rights organizations have little financial resilience, are nascent or newly-established, are relatively small and often operate at the grassroots level, and already often face some degree of financial exclusion.”

The report argues that this is at odds with human rights “obligations, such as prohibitions on both direct and indirect discrimination on the basis of sex and gender and guaranteeing freedom of association, assembly, and expression, including in ensuring access to resources.” Financial exclusion is highlighted in the March 2020 Organisation for Economic Co-operation and Development (OECD) report stating that “4% of [Development Assistance Committee] DAC members' total aid” went to “programmes dedicated to gender equality and women's empowerment as the principal objective.”²⁴

²³ Duke Law International Human Rights Clinic & Women Peacemakers Program, *Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security*, March 2017

<https://law.duke.edu/sites/default/files/humanrights/tighteningpursestrings.pdf>

²⁴OECD DAC NETWORK ON GENDER EQUALITY (GENDERNET), *Development finance for gender equality and women's empowerment: A snapshot*, March 2020

<https://www.oecd.org/development/gender-development/Aid-Focussed-on-Gender-Equality-and-Women-s-Empowerment-2020.pdf>

PART TWO

Donor restrictions that impede flow of aid funds and harm program implementation

The right of association protects CSOs' ability to work with each other to carry out programs and joint projects. Such partnerships are especially important to get resources to areas with high need but few domestic resources. A major source of funding for these programs and projects is governmental donor agencies and the United Nations (UN). Examples include the UN's Office for the Coordination of Humanitarian Affairs (OCHA), the United States Agency for International Development (USAID) and the Foreign, Commonwealth & Development Office (FCDO).

To qualify to receive funding from these donors CSOs must meet rigorous good governance and due diligence requirements, and demonstrate their ability to carry out programs. Once an award is approved CSOs are subject to continued oversight and detailed reporting obligations.

Since 9/11 donors have enhanced due diligence to address the risk of diversion of assets to listed terrorist organizations. Because the need for aid of all kinds is great in areas of armed conflict where listed non-state armed groups are present, these additional measures have a significant impact on CSO program operations.

Excessive vetting requirements that infringe on rights of association, assembly and privacy rights

In some cases these measures are so stringent that they impinge on CSOs' rights of peaceful assembly and of association beyond what is necessary to ensure donors' funds are used properly. These measures typically focus on preventing involvement of listed groups and people associated with them. Unfortunately, this goes beyond screening for designated persons and entities to impose exclusions based on non-official and non-transparent sources. Such sources include commercial screening databases that incorporate disinformation from politically-motivated sources,²⁵ as well as classified governmental databases. They require collection and submission of extensive personal information about a CSOs' leadership and key individuals who would work on funded programs. USAID's Partner Vetting System is a prime example of the problems that arise from this system.²⁶

These screening programs do not necessarily provide reasons for flagging a group or individual, and false positives are common. There is very limited recourse for either CSOs or persons who are erroneously flagged.

²⁵ Namir Shabibi and Ben Bryant, "VICE News Reveals the Terrorism Blacklist Secretly Wielding Power Over the Lives of Millions," Feb. 4, 2016
<https://www.vice.com/en/article/pa4mgz/vice-news-reveals-the-terrorism-blacklist-secretly-wielding-power-over-the-lives-of-millions>

²⁶ Charity & Security Network, "Issue Brief: USAID's Partner Vetting System," February 2016
https://charityandsecurity.org/issue-briefs/pvs_issue_brief/

As intrusive as such measures are on their face, vagueness in legal standards has led to “overcompliance” that takes a zero tolerance approach. In addition, it enables politically-motivated actors to pressure donors to cease funding for CSOs that they disagree with. These excessive requirements are harmful not only to CSOs, but to the beneficiaries they exist to support.

CASE STUDY

Donor vetting requirements create barriers to hiring program staff, impinge on associational rights

A European civil society organization (referred to as CSO-Y to protect its relationship with donors) is facing significant barriers to hiring staff due to donor vetting requirements that exceed official vetting standards. This case illustrates the ways in which overcompliance infringes on rights of association and assembly.

This case involves funding from USAID for work in Syria, Iraq, and Afghanistan. CSO-Y, a member of the Charity & Security Network, reports that they are required to submit vetting/screening data beyond what is required in applicable USAID Mission Orders (footnote) (see Annex II and III) for Syria and Afghanistan. In each instance, the Mission Orders required applicants for grants to submit detailed biographic information on “key individuals” involved in governance of the organization and implementation of the program. The requirement extends to subgrantees as well. However, CSO-Y is also required to submit such information for job applicants whose positions would meet the broad definition of “key individuals.”

As a result, CSO-Y has lost several highly qualified candidates because of false positive results. The problem is exacerbated by how the screening process works. There are two different approaches—USAID’s Partner Vetting System and procedures required in other areas.

In the case of Syria, the Partner Vetting System rules apply. CSO-Y must collect the biographical data and submit it to USAID, which in turn screens it against unspecified government databases. (Note: this goes beyond official lists of designated terrorists, which is public information.) If there is a positive result, the grant applicant is notified and given seven days to ask for reconsideration. However, the Mission Order does not require USAID to share the nature of the derogatory information, putting an enormous burden of disproving false positives on the applicant.

In the case of Iraq and Afghanistan, screening is covered by the Mission Order and requires applicants to conduct screening based on similar biographical details using a commercial screening tool specified by USAID. Proof of screening results for each individual must be submitted. False positives can result from similar names, outdated data such as home addresses and other reasons. The burden is on CSO-Y to investigate and disprove false

positives. Since the commercial screening tool does not provide details on the reasons for the positive result, CSO-Y faces the dilemma of informing otherwise highly qualified applicants (and former staff re-applying) that they cannot be considered for unknown reasons or taking on the burden of figuring out what the problem is and whether it can be addressed.

In the Iraq, Syria and Afghanistan cases, CSO-Y reports that this situation has had the following negative outcomes:

- *Challenges recruiting qualified staff*—it has not been able to hire the best applicants because of false positives. In one case it wanted to rehire a staff person who had ten years of experience with the organization and had left. It got a false positive vetting result and was unable to do so. CSO-Y also could not provide any relevant information on why this former staff did not pass the screening process, and/or on where to obtain such information.
- *Safety and security challenges* for staff tasked with conducting the vetting process.
- *Negative impacts on program planning, operations, and effectiveness.*
- *Significant increases in compliance costs* creates a barrier to accessing funding from foreign assistance donors.
- *Infringes on associational rights of applicants as well as CSO-Y.* Applicants are asking for explanations about negative vetting results, as they are effectively blacklisted without explanation or recourse.
- *In the specific case of Syria, arbitrary standards for beneficiary vetting:* The Syria Mission Order requires vetting for beneficiaries who receive stipends for things like lodging and transportation for training, and educational programs of over \$500. This has the effect of distorting program implementation and is contrary to CSO-Y's values of nondiscrimination between beneficiaries. CSO-Y reports it has heard from other CSOs that they move programs from one population to another to avoid this requirement, rather than design programs based on need or effectiveness criteria.
- *Challenges to complying with domestic privacy laws, data protection laws and non-discrimination ethics.*

The overcompliance problem adds to the inherent burdens the Partner Vetting System and similar screening requirements place on the rights of association and assembly. The issues raised fall into two primary categories: CSO-Y's ability to respect both human rights standards and domestic law, and emergence of "soft law" standards that pressure other donors to impose requirements that similarly infringe on associational and assembly rights, and in some cases, international humanitarian law standards.

Donor freezing and cutting funds pending investigations in response to politically motivated attacks on civil society and political pressure

One of the more egregious developments with respect to civil society funding and their ability to operate occurs when donors freeze or suspend funding while an investigation is ongoing or

make conclusions that establish extreme responsibilities on NGOs with respect to association. In other words, the mere accusation of wrongdoing has led to funds being frozen and/or future funding being denied before any evidence is provided or reviewed. In one case, political pressure resulted in a funding cut despite a report that cleared the CSO.

Following intense political pressure from the Israeli government and allied organizations, the Dutch government cut funding to a Palestinian NGO that aids farmers in areas targeted for Israeli settlement expansion, the Union of Agricultural Work Committees (UAWC). This was despite an independent investigation that found no links to terrorism.²⁷

The defunding decision capped a long-running campaign by the Israeli government and allied groups to defund UAWC and other groups working in Palestine,²⁸ based on claims of ties to the Popular Front for the Liberation of Palestine (PFLP), which is on the U.S. and EU terrorist lists. UAWC was cleared of such allegations by an Australian government investigation in 2012²⁹ and by the Dutch in June of 2019.³⁰

In October 2019 UAWC notified the Dutch government that two of its employees were arrested by the Israeli government in connection with a bombing that killed Israeli teenager Rina Shnerb. The two employees, who had no connection to programs funded by the Dutch government, were fired.³¹

The Dutch Ministry of Foreign Affairs (MFA) ordered an independent investigation and suspended funding to UAWC pending the outcome in July 2020.

The investigation, carried out by Proximities Risk Consultancy, was broadened to examine alleged ties to the PFLP from 2007-2020. It did not begin until February 2021, eight months after funding was suspended. The final report, which was not made public, was submitted to the MFA

²⁷ Letter from the Dutch Foreign Ministry to the Dutch Parliament, Jan. 5, 2022.

<https://charityandsecurity.org/wp-content/uploads/2022/01/BZ-Letter-to-Parliament-external-review-UAWC.pdf>

²⁸ Charity & Security Network. *The Alarming Rise of Lawfare to Suppress Civil Society: The Case of Palestine and Israel*. Sep. 28, 2021.

<https://charityandsecurity.org/wp-content/uploads/2021/09/The-Alarming-Rise-of-Lawfare-to-Suppress-Civil-Society.pdf>

²⁹ Australia Palestine Advocacy Network. "Senator Nick Xenophon – spoke on the legal attack by Israeli organisation, Shurat Ha-Din, on Australian-funded aid programming operated by World Vision and the Union of Agricultural Work Committees." Oct. 30, 2012.

<https://apan.org.au/auspol/senatotr-nick-xenophon-spoke-on-the-legal-attack-by-israeli-organisation-shurat-ha-din-on-australian-funded-aid-programming-operated-by-world-vision-and-the-union-of-agricultural-work-committees/>

³⁰ Kees van Baar, Kingdom of the Netherlands. "Response to UKLFI letter dated May 13, 2019." June 16, 2019.

<https://charityandsecurity.org/wp-content/uploads/2021/09/Response-to-UKLFIs-Letter.pdf>

³¹ Charity & Security Network. "Dutch Government Cuts Funding to NGO Despite Investigation Clearing it of Terror Ties." Jan. 13, 2022.

<https://charityandsecurity.org/news/dutch-government-cuts-funding-to-ngo-despite-investigation-clearing-it-of-terror-ties/>

for its consideration in November 2021. On Jan. 6, 2022 the MFA sent a letter to Parliament summarizing the results and its decision to defund UAWC.³² The letter noted that:

“The external review shows that *no evidence has been found* of financial flows between the UAWC and the PFLP. Nor has any proof been found of organizational unity between the UAWC and the PFLP or of the PFLP’s providing direction to the UAWC.” (emphasis added)

“In the case of the UAWC, there is no question of the Netherlands making funds available directly to a listed organization, because neither the UAWC nor its staff are on the EU sanctions list.”

“[T]here are no indications that UAWC staff or board members have used their position at the UAWC to organize or support terrorist activities.”

The MFA’s decision to defund UAWC was based on contradictory findings about alleged links between some UAWC staff and board members between 2007 and 2020 and civil society organizations the investigators considered to be part of the PFLP network. Noting that none of these groups are on EU or UN terrorist lists, the MFA letter said, “the government does not consider that it [the investigation] made sufficiently clear to what extent these organisations are actually under the PFLP’s direction or control.”

Based on these alleged individual ties, the letter said there was “sufficient reason in the government’s view to no longer fund the UAWC’s activities.” The justification was that UAWC “should have realized that this is an undesirable situation for donors – or should at least have been conscious of the sensitivity of these ties – and should have informed donors of the situation.”

This establishes a classic Catch-22 standard: UAWC, which the letter noted has a policy that staff may not be politically active and is barred from policing the political expression of its board and staff, is nevertheless expected to report such staff to donors when there are alleged ties, even to groups that are not on EU or UN terrorist lists. In other words, grantees are expected to spare the ministry from controversy by reporting on staff or board members’ activities outside of their employment or face loss of funding.

The MFA said its Ramallah office has already “intensified its due diligence” by requiring those applying for project funds to answer, “explicit questions about how an organization deals with employees or board members who may be part of organizations that are on the EU or UN sanctions list.”

³² Letter from the Dutch Foreign Ministry to the Dutch Parliament, Jan. 5, 2022.
<https://charityandsecurity.org/wp-content/uploads/2022/01/BZ-Letter-to-Parliament-external-review-UAWC.pdf>

The fallout from the Dutch decision has been swift and growing. UAWC’s statement responding to the decision characterized it as a “breach of trust” based on political pressure, noting its cooperation with the investigation and saying the report “findings reflect UAWC’s status and existence as an independent organization.”³³ It also expressed shock that the MFA would base its decision on allegations “resembling the toxic allegations of Israeli groups like NGO Monitor. This decision also contradicts the letter and spirit of reassurances the European Union has provided to Palestinian civil society, when clarifying in a March 2020 letter to PNGO that it ‘does not ask any civil society organization... to discriminate against any natural person based on his/her political affiliation.’”

On Jan. 10 the European Legal Support Center and The Rights Forum issued a joint statement strongly condemning the Dutch decision.³⁴ The statement noted that the Israeli government put UAWC and five other Palestinian groups on its terrorist list in October 2021. It noted a report issued that month by ELSC that “identified 12 attempts in the Netherlands – between 2015 and 2020 – by pro-Israel advocacy groups to pressure Dutch donors... to defund civil society organisations supporting the Palestinian people.” The two groups called on governments and other donors to maintain their funding for UAWC.

The case of UAWC and the Dutch government is only the most recent example of this dynamic. There are other examples which are described in the Charity & Security Network’s comprehensive report *The Alarming Rise of Lawfare*³⁵ that provides in-depth case studies of similar examples.

Conclusion and Recommendations

As our comments and input have shown, there are significant impediments to freedom of peaceful assembly and of association related to restrictions from donors based on disproportionate restrictions intended to mitigate risk of terrorist financing as well as faulty or unproven links to terrorism.

As the Special Rapporteur states, international humanitarian law and international human rights law clearly protect civil society so that groups may “seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources.” Currently, there are gaps in these protections.

³³ UAWC. “UAWC Shocked and Saddened by Dutch Government Decision to End Funding.” Jan. 5, 2022. <https://www.uawc-pal.org/news.php?n=3615010&lang=1>

³⁴ European Legal Support Center. “The ELSC and The Rights Forum condemn Dutch government’s decision to defund UAWC.” Jan. 10, 2022. <https://elsc.support/news/the-elsc-and-the-rights-forum-condemn-dutch-governments-decision-to-defund-uawc>

³⁵ Charity & Security Network. *The Alarming Rise of Lawfare to Suppress Civil Society: The Case of Palestine and Israel*. Sep. 28, 2021. <https://charityandsecurity.org/wp-content/uploads/2021/09/The-Alarming-Rise-of-Lawfare-to-Suppress-Civil-Society.pdf>

Thus, we recommend that the Human Rights Council:

- 1) include Freedom of Association and Assembly for civil society as an integral part of the Council's Universal Periodic Reviews. As part of this consideration, the HRC should reject extreme definitions of "association" that stretch the credulity of direct linkages of individuals or organizations. Moreover, in such cases or in such jurisdictions where questionable linkages are made, the HRC should call for transparency from the government or authority making such claims or basing a decision on such claims.
- 2) encourage Member States and the financial sector to take concrete steps to mitigate barriers current law, policy and practices create for civil society access to resources.

As Special Rapporteur Kiai stated in his 2012 report cited above, "States have a responsibility to address money-laundering and terrorism, but this should never be used as a justification to undermine the credibility of the concerned association, nor to unduly impede its legitimate work."