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ANALYSIS ON INTERNATIONAL LAW, STANDARDS AND PRINCIPLES

APPLICABLE TO THE

**FOREIGN CONTRIBUTIONS REGULATION ACT 2010 AND
FOREIGN CONTRIBUTIONS REGULATION RULES 2011**

**BY THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGHTS TO
FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION
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1. Introduction

1. The Foreign Contributions Regulation Act (“FCRA 2010” or “the Act”) is stated to be “An Act to... regulate the acceptance and utilization of foreign contribution or foreign hospitality by certain individuals or associations or companies to prohibit acceptance and utilization of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.”¹
2. The Foreign Contributions Regulation Act (FCRA 2010) defines a list of individuals and entities barred from accepting foreign contributions. “Organizations of a political nature” are among them.² Section 9 FCRA 2010 empowers the Central Government, *inter alia*, to prohibit acceptance of foreign contributions where the Government “is satisfied that the acceptance of foreign contribution... is likely to affect prejudicially... public interest.”³ Section 12(4) FCRA 2010 sets out the conditions for registration under the Act. These include

¹ See Foreign Contribution (Regulation) Act, No. 42 of 2010, preamble.

² See section 3 (1) of the Foreign Contribution (Regulation) Act, No. 42 of 2010.

³ See section 9(e)(ii) FCRA 2010.

that the acceptance of foreign contribution is not likely to affect prejudicially, *inter alia*, the scientific or economic interest of the State or the public interest.⁴

3. The Foreign Contributions Regulation Rules, 2011, define “organizations of a political nature” in a broad manner⁵. No clarification of the notions “security, strategic, scientific or economic interest of the State ,” or of “the public interest” is provided for.
4. It has come to the attention of the Special Rapporteur on the rights to freedom of peaceful assembly and of association that the accreditation of many organizations under the FCRA law is currently being reviewed. Many civil society organizations (CSOs) in India depend upon this accreditation to access foreign funding. Moreover, they depend upon foreign funding to carry out their operations and assist millions of Indians in pursuing their political, cultural, economic and social rights. The Special Rapporteur urges the authorities of the Union of India to take this analysis into account as it proceeds with the accreditation process. In addition, several cases are currently pending in different Courts of the Union of India. They regard on the one hand, specific organizations facing operational constraints, limitations and measures imposed upon them under the mentioned law and rules and, on the other hand, challenges to the constitutional validity of stipulations of the Foreign Contributions Regulation Act and Rules of the Union of India. Different state and non-state actors involved in these legal procedures may have an interest in this analysis against international law, standards and principles.
5. It is against this background that the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association submits this information note to the Government of India. It focuses on two questions of international law, standards and principles: (1) Is access to resources, in particular foreign funding, part of the right to freedom of association under international law, standards and principles and more specifically of the right to form an association? (2) If so, on what basis may States restrict access to foreign funding under international law, standards and principles?

2. Summary of the argument

⁴ See section 12(4)(f) FCRA 2010.

⁵ See section 5 of the Foreign Contribution Regulation Rules (2011).

6. For the reasons outlined below, the Special Rapporteur on the right to freedom of peaceful assembly and of association finds that access to resources, including foreign funding, is a fundamental part of the right to freedom of association under international law, standards, and principles, and more particularly part of forming an association. Therefore, any restriction on access to foreign funding must meet the stringent test for allowable restrictions for the right to association developed by the international human rights bodies. Given this narrow test, restricting access to foreign funding for associations based on notions such as “political nature”, “economic interest of the State” or “public interest” violates the right because these terms or definitions are overly broad, do not conform to a prescribed aim, and are not a proportionate responses to the purported goal of the restriction. Such stipulations create an unacceptable risk that the law could be used to silence any association involved in advocating political, economic, social, environmental or cultural priorities which differ from those espoused by the government of the day. These restrictions as defined by the Foreign Contribution Regulation Act (2010) and Rules (2011), do not meet the obligations of the Union of India under international law, standards and principles.

3. The status of access to resources, in particular foreign funding

Issue No. 1. Is access to resources, in particular foreign funding, part of the right to freedom of association under international law, standards and principles?

4.1. Preliminary question of the Indian reservation to the ICCPR

7. The right to freedom of association is incorporated in art 22 of the International Covenant on Civil and Political Rights (ICCPR). In 1979, when acceding to the ICCPR, the Republic of India, formulated a reservation: ‘With reference to (...) article(s) (...) 22 of the International Covenant on Civil and Political Rights the Government of the Republic of India declares that the provisions of the said [article] shall be so applied as to be in conformity with the provisions of article 19 of the Constitution of India.’⁶ Article 22(1) of the ICCPR states that ‘everyone

⁶ Reservation of India to the ICCPR, Chapter IV, https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=1&mtdsg_no=V-3&chapter=4&lang=en#EndDec.

shall have the right to freedom of association with others...'⁷ whereas Article 19 of the Indian Constitution provides the 'right to form an association'. The right to freedom of association as defined by art 22 of the ICCPR, includes the right to form an association⁸.

8. The Human Rights Committee states in its General Comment 24 on issues relating to reservations made upon ratification or accession to the Covenant: 'Nor should (...) reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law.'⁹ Thus, the right to form an association has to be interpreted in conformity with international law, principles and standards for all matters concerning the formation of associations, such as access to resources being an integral part of the right to freedom of association. Restrictions to the right, or any part of the right, must meet the requirements under international law.¹⁰

⁷ International Covenant on Civil and Political Rights, art. 22, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁸ United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, at para. 53, U.N. Doc. A/HRC/20/27 (May 21, 2012), 'The Special Rapporteur emphasizes that the right to form and join an association is an inherent part of the right to freedom of association.'

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf See also UN Declaration on Human Rights Defenders and the Commentary to the Declaration as published by the then Special Rapporteur, July 2011

<http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf>.

⁹ Human Rights Committee, General Comment 24, General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto or in relation to declarations under article 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add.6 (1994), para 19. The Human Rights Committee equally stated, in line with the Vienna Convention on the Law of Treaties (Jan. 27 1980, 331 UNTS 1155) that States may not invoke provision of its internal law as justification for its failure to perform a treaty. Human Rights Committee, General Comment 31, The nature of the general legal obligation imposed on States parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13.

¹⁰ In addition, the Human Rights Committee indicates: 'It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for maintaining reservations is periodically reviewed.' (See Human Rights Committee, General Comment 24, para 20). By lack thereof, it is the Special Rapporteur's interpretation that the Union of India is obliged to fully observe the right to freedom of association as defined in art 22 of the ICCPR.

9. The right to freedom of association is enshrined in article 22 of the ICCPR¹¹. The ICCPR broadly protects the right to freedom of association and permits only narrowly drawn limitations on the right. States' obligations under the ICCPR are twofold. On the one hand, States have a positive obligation to create an enabling environment in which the rights guaranteed by the ICCPR can be exercised. On the other hand, States have the negative obligation to refrain from interference with the rights guaranteed. The right to freedom of association is not an absolute right, but is subject only to the limitations permitted by international law.¹²
10. The right to freedom of association is protected in regional human rights treaties around the world, with language similar to that of Article 22 the ICCPR¹³. In particular, the commissions and courts charged with the authoritative interpretation and enforcement of the European Convention of Human Rights (ECHR) and the American Convention of Human Rights (ACHR) have developed similar jurisprudence to the United Nations Human Rights Committee in recognizing the right to freedom of association and determining the requirements of an allowable restriction. Therefore, even though India is not party to these conventions, the guidance from these bodies further informs the international norms that govern States' obligations to protect the right to freedom of association.

4.2. Access to resources as part of right to freedom of association

11. Given the above clarification on the reservation made by India, the first question can be dealt with: Is access to resources, in particular foreign funding, part of the right to freedom of association under international law, standards and principles?

¹¹ International Covenant on Civil and Political Rights, art. 22, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]; See also Universal Declaration of Human Rights, art. 10, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR]; American Convention of Human Rights, art. 16, 1144 U.N.T.S. 143 (1969) [hereinafter ACHR]; African Charter on Human and People's Rights, Art. 10, June 27, 1981, 21 I.L.M. 58 [hereinafter 'African HR Charter']; European Conv. on Human Rights, art. 11, Nov. 4, 1950, Europe. T.S. No. 155 [hereinafter 'ECHR'].

¹² India acceded to the ICCPR on April 10, 1979. The Indian Supreme Court has held that the rights guaranteed by the Covenant 'elucidate' and 'effectuate fundamental rights guaranteed' by the Indian Constitution. See *People's Union for Civil Liberties v. Union of India* (1997) 3 SCC 433 (where the Court found that '...it would suffice to state that the provisions of the covenant [ICCPR], which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such.)

¹³ See *supra* note 11.

A. The right to access foreign funding is protected by Article 22.

12. The FCRA is applicable to a variety of individuals and associations.¹⁴ The focus of this analysis is on associations as per the Special Rapporteur's mandate. The right to access funding is a direct and essential component of the right to freedom of association. Many CSOs, and especially human rights organizations, function as 'not-for-profit' entities and therefore depend almost exclusively on external sources of funding to carry out their work. Therefore, 'undue restrictions on resources available to associations impact the enjoyment of the right to freedom of association and also undermine civil, cultural, economic, political and social rights as a whole.'¹⁵

13. For these reasons, the Human Rights Committee¹⁶ – the body charged with authoritative interpretation and enforcement of the ICCPR – has consistently expressed concern over foreign funding restrictions as an impediment to fully realizing the right to freedom of association. For example, after reviewing Egyptian legislation which required non-governmental organizations (NGOs) receiving foreign funding to register with the government, the Committee stated that:

The State Party should review its legislation and practice in order to enable non-governmental organizations to discharge their functions without impediments, which are inconsistent with the provisions of article 22 of the Covenant, such as prior authorization, funding controls, and administrative dissolution.¹⁷

14. The Human Rights Committee reiterated this concern when evaluating an Ethiopian law prohibiting Ethiopian NGOs from obtaining more than 10% of their budget from foreign donors. The law in question also prohibited NGOs considered by the government to be 'foreign', from engaging in human rights and democracy related activities. The Committee stated:

¹⁴ The Foreign Contribution (Regulation) Act, No. 42 of 2010; Indian Code (2010), v. 51, Section 3. Hereinafter, the reference 'FCRA' is used to refer to both the Foreign Contribution Regulation Act (2010) and the Foreign Contribution Regulation Rules (2011), unless it flows from the context that either one of them is meant specifically.

¹⁵ See also United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, at para. 9, U.N. Doc. A/HRC/23/39 (April 24, 2013) [Hereinafter UN SR Access to Resources Report] http://freeassembly.net/wp-content/uploads/2013/04/A.HRC_23.39_EN-funding-report-April-2013.pdf

¹⁶ Hereinafter referred to as Human Rights Committee.

¹⁷ U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Egypt*, at para. 21, U.N. Doc. CCPR/CO/76/EGY (November 28 2002), [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.76.EGY.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.76.EGY.En?Opendocument).

The State party should revise its legislation to ensure that any limitations on the right to freedom of association and assembly are in strict compliance with articles 21 and 22 of the Covenant, and in particular it should reconsider the funding restrictions on local NGOs in the light of the Covenant and it should authorize all NGOs to work in the field of human rights. The State party should not discriminate against NGOs that have some members who reside outside of its borders.¹⁸

15. The United Nations General Assembly echoed this principle in the Declaration on Human Rights Defenders which states, '[e]veryone has the right, individually and in association with others, to solicit, receive, and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means'¹⁹ The Special Representative of the Secretary-General on the situation of human rights defenders has also stated 'governments must allow access by NGOs to foreign funding as a part of international cooperation, to which civil society is entitled to the same extent as Governments.'²⁰
16. The Human Rights Council resolution 22/6 calls upon States to ensure 'that no law should criminalize or delegitimize activities in defense of human rights on account of the origin of funding thereto'. In addition, art 2 of the International Covenant on Economic, Social and Cultural Rights requires States to 'take steps, individually or through international assistance and cooperation [...] to the maximum of their available resources' for the progressive realization of the rights in in the Covenant. Reading this jointly with art 11 of the same Covenant, which recognizes the essential importance of international co-operation based on free consent for the realization of rights, the conclusion is that States have the obligation to mobilize resources available within the society at large, including the ones available from the international community²¹.

¹⁸ U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Ethiopia*, at para. 25, U.N. Doc. CCPR/C/ETH/CO/1 (August 19, 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/448/95/PDF/G1144895.pdf?OpenElement>.

¹⁹ *Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, U.N. General Assembly, U.N. Doc. G.A. Res. 53/144, 9 December 1998, art. 13 (under this framework, States are supposed to adopt legislation to facilitate and not impede the solicitation, receipt and use of resources.) [Hereinafter Declaration on Human Rights Defenders].

²⁰ Special Representative of the Secretary-General on the Situation of Human Rights Defenders, United Nations General Assembly, A/59/401 (2004) at para. 82(l).

²¹ Human Rights Council, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, at para. 31, U.N. Doc. A/HRC/20/27 (May 21, 2012),

17. In his 2012 report to the United Nations Human Rights Council, the Special Rapporteur on the rights to freedom of peaceful assembly and of association underscored that ‘the ability to access funding and resources is an integral and vital part of the right to freedom of association.’²² The report explains:

The ability to seek, secure and use resources is essential to the existence and effective operations of any association, no matter how small. The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources.²³

B. Regional human rights mechanisms protecting the right to access foreign funding as part of the right to association

18. The European and Inter-American human rights systems have also found that restricting access to funding may infringe on an NGO’s right to freedom of association.²⁴ The European Court of Human Rights (ECtHR) – the entity charged with enforcement of the European Convention on Human Rights (ECHR) – has confirmed that a Member State measure that restricts an NGO’s access to funding may infringe its right to the freedom of association.²⁵ The Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission of Human Rights (IACHR) are the main institutions responsible for enforcing and interpreting ACHR rights. The IACHR has determined that ‘the right to receive international funds in the context of international cooperation for the defense and promotion of human rights is protected by freedom of association, and the State

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf.

²² See also Human Rights Council, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, at paras. 67-68, U.N. Doc. A/HRC/20/27 (May 21, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf.

²³ UN SR Access to Resources Report, *supra* note 12 at para. 8.

²⁴ See ECHR, *supra* note 11; ACHR, *supra* note 11.

²⁵ In *Ramzanova v. Azerbaijan*, the ECtHR found that ‘even assuming that theoretically the association had a right to exist pending the state registration, the domestic law effectively restricted the association’s ability to function properly without legal entity status. It could not, inter alia, receive any ‘grants’ or financial donations that constituted one of the main sources of financing of non-governmental organizations in Azerbaijan. Without proper financing, the association was not able to engage in charitable activities which constituted the main purpose of its existence.’ *Ramzanova v. Azerbaijan*, App. No. 44363/02, Eur. Ct. H.R. (2007), para. 59, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79301>.

is obligated to respect this right without any restrictions that go beyond those allowed by the right of freedom of association.²⁶ The IACHR has found that restrictions on receiving ‘international funding to defend political rights’ are not permitted by international law.²⁷

19. Based upon these and other decisions by regional human rights mechanisms, the Human Rights Committee, the UN General Assembly, and the report of the U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association, access to resources, in particular foreign funding, are considered to be part of the right to freedom of association under international human rights law.

4. Conditions for legitimate restrictions to foreign funding

Issue No. 2. If the right to access resources is part of the right to freedom of association, when and how may States restrict access to foreign funding under international law, standards and principles?

20. Restrictions on foreign funding create significant barriers for NGOs to function. Because access to foreign funding is a part of the right to association, any restriction must meet the requirements set forth in the ICCPR, which only permits restrictions on freedom of association under narrowly tailored circumstances.²⁸ Again, it is instructive to note that the same test is applicable to restrictions on the right to freedom of association as guaranteed in Article 11 of the ECHR and Article 16 of the ACHR.
21. The Human Rights Committee explained in *Belyatsky v. Belarus*, that restrictions on the right to freedom of association must meet the following three requirements: (1) prescription by law; (2) the law may be imposed solely to protect national security or public safety, public order, public health or morals, or

²⁶ Inter-American Commission on Human Rights, *Democracy and Human Rights in Venezuela*, para. 585, OEA/Ser.L/V/II. Doc. 54 (December 30 2009).

²⁷ Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas*, (December 31 2011) [Hereinafter IACHR Report] at para. 185 (noting that ‘a situation different from the one just described would be one in which an organization was proselytizing on behalf of a certain political party or candidate to a particular post. Under this circumstance, the activity would not be protected by the aforementioned standard.’).

²⁸ *Infra*.

the rights and freedoms of others; and (3) the restrictions must be ‘necessary in a democratic society.’²⁹ The Human Rights Committee elaborated that the protection afforded by Article 22 extends to all activities of an association.³⁰ The jurisprudence of the ECtHR and the IACtHR has also held that allowable restrictions on the right to freedom of association must meet the same, enumerated three-prong test.³¹

A. Prescribed by Law

22. The Human Rights Committee has explained that, to meet the requirement that a restriction be ‘prescribed by law’, a restriction must be ‘formulated with sufficient precision to enable an individual to regulate his or her own conduct accordingly and it must be made accessible to the public.’³² Furthermore, to fulfill this prong, ‘the law itself has to establish the conditions under which the rights may be limited.’³³ In order to meet this principle of legality, the law should not use vague, imprecise, or broad definitions of legitimate motives for restricting the establishment of an NGO.³⁴ A law cannot allow for unfettered discretion upon those charged with its execution.³⁵
23. It is acknowledged that it is difficult to attain absolute precision in the framing of laws. However, any restriction on a CSO’s access to foreign funding must be precisely drafted so as to eliminate the possibility of arbitrary or overly-broad

²⁹ Aleksander Belyatsky et al. v. Belarus, U.N. Human Rights Committee, Communication No. 1296/2004, U.N. Doc. CCPR/C/90/D/1296/2004, at para. 7.3 (July 24, 2007). [hereinafter Belyatsky].

³⁰ Korneenko, et. al v. Belarus, U.N. Human Rights Committee, Communication No. 1274/2004, CCPR/C/88/D/1274/2004 (10 November 2006) [hereinafter Korneenko].

³¹ ECHR, *supra* note 11; ACHR, *supra* note 11; See *Koretskyy v. Ukraine*, App. No. 40269/02, Eur. Ct. H.R. (2008), para. 43, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85679>; *Gorzelik v. Poland*, App. No. 44158/98, Eur. Ct. H.R. (2004), para. 53, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61637>; *Sidiropoulos*, App. No. 26695/95, para. 32; *Case of Escher et al. v. Brazil*, Preliminary Objects, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 200, para 173 (July 6, 2009).

³² U.N. Human Rights Committee, *General Comment No. 34(Article 19: Freedom of opinion and expression)* para. 25, U.N. Doc. CCPR/C/GC/34 (12 September 2011) [Hereinafter General Comment No. 34]. See also *See Koretskyy v. Ukraine*, App. No. 40269/02, Eur. Ct. H.R. (2008), para. 47, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85679>. See *Case of Kimel v. Argentina*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C.) No. 177, para 63 (May 2, 2008); *Case of Uson Ramirez v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 207, para 56 (November 20 2009).

³³ U.N. Human Rights Committee, *General Comment No. 27(Freedom of movement, Art. 12)*, para. 12, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999) [hereinafter General Comment No.27] (Article 12 of the ICCPR includes exactly the same language regarding restrictions on the right to freedom of movement as article 22.).

³⁴ IACHR Report, *supra* note 22, at Recommendation 17.

³⁵ General Comment No. 34, *supra* note 32 at para. 25.

interpretations of its terms.³⁶ For example, in *Zhechv v. Bulgaria*, the ECtHR found that the term 'political activity' was too broad and open to so many potential interpretations that most activities carried out by any organization could be considered a political activity.³⁷

24. Where access to foreign funding is restricted or prohibited on the basis of the particular activity of an organization, the law would need to provide a definition that was precise enough to allow such organizations to be on notice. The FCRA defines 'political nature' to include:

- (i) organisation having avowed political objectives in its Memorandum of Association or bylaws;
- (ii) any Trade Union whose objectives include activities for promoting political goals;
- (iii) any voluntary action group with objectives of a political nature or which participates in political activities;
- (iv) front or mass organisations like Students Unions, Workers' Unions, Youth Forums and Women's wing of a political party;
- (v) organisation of farmers, workers, students, youth based on caste, community, religion, language or otherwise, which is not directly aligned to any political party, but whose objectives, as stated in the Memorandum of Association, or activities gathered through other material evidence, include steps towards advancement of political interests of such groups;
- (vi) any organisation, by whatever name called, which habitually engages itself in or employs common methods of political action like 'bandh' or 'hartal', 'rasta roko', 'rail roko' or 'jail bharo' in support of public causes.³⁸

25. On its face, the FCRA³⁹ does not provide the necessary precision required for clarity and notice. It lists examples of groups that could be defined as having a 'political nature', but does not provide further definitions or examples for the terms 'political objectives,' 'political activities,' or 'political interests.' This appears

³⁶ See *Ezelin v. France*, App. No. 11800/85, Eur. Ct. H.R. (1991), paras. 21–22, 45, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57675>.

³⁷ See *Zhechev v. Bulgaria*, App. No. 57045/00, Eur. Ct. H.R. (2007), para. 55, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81209> ('For instance, in the present case these courts [Bulgarian national courts] deemed that a campaign for changes in the constitution and the form of government fell within that category. In another recent case these same courts had, more questionably, stated that the 'holding of meetings, demonstrations, assemblies and other forms of public campaigning' by an association campaigning for regional autonomy and alleged minority rights also amounted to political goals and activities within the meaning of Article 12 § 2 of the Constitution of 1991.)

³⁸ Foreign Contribution (Regulation) Rules, (Union of India) 2011.

³⁹ FCRA (Act and Rules).

to give the government broad discretionary powers that could be applied in an arbitrary and capricious manner. In the same manner as the imprecise language at issue in the Zhechv case, the definition of ‘political nature’ in the FCRA appears to be overly broad and could encompass almost all potential activities of an organization, including those that are allowed and even encouraged by the ICCPR to exist, such as promoting knowledge of basic rights and participation in government.

26. Further, section 12(4)(f) of the FCRA disqualifies from eligibility to receive foreign funding all those whose actions may be construed as “likely to affect prejudicially... the economic interest of the State” or “public interest”. These terms are not defined in a way that would enable a CSO to know in advance whether its activities could reasonably be construed to be in violation of the Act.

B. Legitimate Aim

27. Allowable restrictions on freedom of association are further limited to those which protect national security or public security, public order (ordre public), public health or morals, or the protection of the rights and freedoms of others. These legitimate aims must be interpreted strictly.⁴⁰
28. States that restrict access to foreign funding for civil society organizations have tended to argue that such restrictions are necessary for national security or to protect public order.⁴¹ The Human Rights Committee has found that when a State invokes national security and protection of public order as a reason to restrict the right to freedom of association, the State party must prove the precise nature of the threat.⁴² Restrictions on the right to freedom of association based on national security concerns must refer to the specific risks posed by the association; it is not enough for the State to generally refer to the security

⁴⁰ U.N. General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, at para. 19, U.N. Doc. A/61/267 (August 16, 2006).

⁴¹ See, e.g., Kay Guinane, *U.S. Counterterrorism Developments Impacting Charities*, 10 Int’l J. Not-for-Profit L. 1, Dec. 2007, at 3, available at http://www.icnl.org/research/journal/vol10iss1/special_1.htm; Mark Sidel, *Counterterrorism and the Enabling Legal and Political Environment for Civil Society: A Comparative Analysis of ‘War on Terror’ States*, 10 Int’l J. Not-for-Profit L. 3, June 2008, at 7 available at http://www.icnl.org/research/journal/vol10iss3/special_2.htm.

⁴² Mr. Jeong-Eun Lee v. Republic of Korea, U.N. Human Rights Committee, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 at para. 7.3 (2005); See also IACHR Report, *supra* note 22, at para. 166.

situation in the specific area.⁴³ The national security justification is most likely to be seen as a legitimate aim when a CSO / NGO endorses⁴⁴, either directly or indirectly, terrorist activities.⁴⁵ Similarly, measures intended to prevent crime and disorder will be deemed to have a legitimate aim where the CSO /NGO calls for violence, crime, or a complete rejection of democratic principles.⁴⁶

29. National security may also justify restrictions on the funding of political parties participating in elections for public office. In *Parti Nationaliste v. France*, a Basque separatist political party in France was prohibited from receiving funding from foreign sources. The ECtHR found that the restriction on foreign funding of associations involved in promoting candidates for public office – unlike vague restrictions on the activities of organization involved in ‘political activities’ – had the legitimate aim of preserving national security.⁴⁷ Similarly, the IACHR has distinguished foreign funding restrictions for political parties or organizations speaking on behalf of a political party as not falling within the protected standard discussed above.⁴⁸

30. In this case, the FCRA’s stated purpose is ‘to prohibit acceptance and utilization of foreign contribution or foreign hospitality for any activities detrimental to the national interest.’⁴⁹ This stated purpose is not among those specifically enumerated in the ICCPR. Economic or public interests are neither one of the enumerated bases for limiting fundamental human right in the ICCPR. National interest or economic interest of the State is not synonymous with national

⁴³ See *Freedom and Democracy Party (ÖZDEP) v. Turkey*, App. No. 23885/94, Eur. Ct. H.R. (1999), paras. 44-48, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58372>. See *Parti Nationaliste Basque-Organization Regionale D’Iparralde v. France*, App. No. 71251/01, Eur. Ct. H.R. (2007), para. 47, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80897>.

⁴⁴ For the purpose of this analysis the terms NGO and CSO are used interchangeably.

⁴⁵ See *Rekvenyi v. Hungary*, App. No. 25390/94, Eur. Ct. H.R. (1999), para. 30, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58262>. See *Parti Nationaliste Basque-Organization Regionale D’Iparralde v. France*, App. No. 71251/01, Eur. Ct. H.R. (2007), para. 47, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80897> (The ECtHR found that the restriction on foreign funding of associations involved in promoting candidates for public office – unlike vague restrictions on the activities of organization involved in ‘political activities’ – had the legitimate aim of preserving national security).

⁴⁶ See *United Communist Party of Turkey v. Turkey*, App. No. 133/1996/752/951, Eur. Ct. H.R. (1998), para. 26, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58128>.

⁴⁷ See *Parti Nationaliste Basque-Organization Regionale D’Iparralde v. France*, App. No. 71251/01, Eur. Ct. H.R. (2007), para. 47, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80897>.

⁴⁸ IACHR Report, *supra* note 22, at para 185.

⁴⁹ See Introduction of the FCRA (Act, 2010).

security or public order⁵⁰. The legislation does not clearly define ‘national interest’, ‘economic interest of the state’ or ‘public interest’ and appears to allow the government power to restrict the right to freedom of association for any number of government purposes beyond ‘national security or public security, public order (ordre public), public health or morals, or the protection of the rights and freedoms of others.’

C. Necessary in a Democratic Society

31. For restrictions to be ‘necessary in a democratic society’, they must be proportional. The Human Rights Committee has explained ‘they [the restrictions] must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.’⁵¹ Thus, ‘the mere existence of reasonable and objective justifications for limiting the right to freedom of association is not sufficient’⁵². The Human Rights Committee has clarified that the State must demonstrate that the restrictions placed on the right are in fact necessary to avert a real and not only a hypothetical danger⁵³. In other words, the State measure must pursue a pressing need, and it must be the least severe (in range, duration, and applicability) option available to the public authority in meeting that need.⁵⁴
32. Applying the same standard, the ECtHR has consistently held that restrictions on the right that are vague and potentially applicable to an exceedingly large number of parties, and that impose onerous and burdensome requirements on NGOs, are disproportionate to the State’s purported objectives. In addition, measures that inflict overly severe punitive sanctions on NGOs that fail to comply with otherwise reasonable legal formalities are likely to be disproportionate.⁵⁵ Similarly, drastic measures, such as the dissolution of a NGO or barring it from carrying out its primary activity, can only be proportionate in extreme cases, such

⁵⁰ See U.N. Doc A/HRC/31/66, para. 31: ‘National, political or government interest is not synonymous with national security or public order.’

⁵¹ U.N. Human Rights Committee, General Comment No. 27, *supra* note 33 at para. 14; See Arslan v. Turkey, App. No. 23462/94, Eur. Ct. H.R. (1999), para. 46, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58271>.

⁵² Lee v Republic of Korea, Communication No. 1119/2002, Views adopted on 20 July 2005, para 7.2.

⁵³ U.N. Human Rights Committee, *Aleksander Belyatsky et al v. Belarus*, Communication No. 1296/2004, UN Doc. CCPR/C/90/D/1296/2004, 24 July 2007, para 7.3.

⁵⁴ See Lee v Republic of Korea, para 7.2.

⁵⁵ See Tebieti Mühafize Cemiyeti & Sabir Israfilov v. Azerbaijan, App. No. 37083/03, Eur. Ct. H.R. (2009), para. 63, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94854>.

as when an association incites violence or advocates for the destruction of democracy.⁵⁶

33. A complete or blanket ban on access to foreign funding for groups engaged in activities of a 'political nature' in order to maintain and protect a vague 'national interest' does not meet the ICCPR's proportionality requirement. The same applies to groups engaged in activities which may be determined contrary to the 'economic interest of the state' or 'public interest'.

First, a total ban is never the least restrictive measure available to the State. Second, bans on access to foreign funding can lead to the de facto dissolution of a CSO, particularly those engaged in activities which may challenge vested domestic interests. Indeed, such activities are explicitly protected under the ICCPR, which safeguards the right of associations and individuals to express ideas that are unpopular or critical of the government. The Human Rights Committee has recognized that such free expression of ideas is necessary to ensure the proper functioning of government and is therefore 'a cornerstone of a democratic society.'⁵⁷ The Human Rights Committee has said 'the reference to a 'democratic society' in the context of article 22 indicates, in the Committee's opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favorably viewed by the government or the majority of the population, is a cornerstone of a democratic society.'⁵⁸ Any restriction that renders this right illusory is not permitted.

34. In this case, the broad objective pursued by the FCRA, the broad discretion allowed for the government in applying the law, and the measure of a total ban on access to foreign funding for those CSOs or associations found to be of a 'political nature' or acting against economic or national interest by the State is likely to disproportionately impact those associations engaged in critical human rights work, those which address issues of government accountability and good governance, or represent vulnerable and minority populations or views.

⁵⁶ See *Refah Partisi (the Welfare Party) v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, Eur. Ct. H.R. (2003), paras. 98-100
<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60936>.

⁵⁷ *Viktor Korneenko et al. v. Belarus*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/88/D/1274/2004, Communication No. 1274/2004, para. 7.3 (2006).

⁵⁸ *Kungurov*, *supra* note 14, at para. 8.4; *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzigen of Sri Lanka v. Sri Lanka*, U.N. Human Rights Committee, Communication No. 1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005) at para. 7.2.

5. Conclusion

35. Despite its reservation to the ICCPR, the Union of India remains obligated to interpret the right to form an association as defined in its constitution in conformity with international law, standards and principles. Under international law, standards and principles, the right to form an association includes the right to access resources, including foreign funding. Any restriction on accessing funding, including foreign funding, is a restriction on the right to freedom of association and must be evaluated against the legal framework discussed above to meet the narrowly tailored regime developed by the Human Rights Committee.
36. The Special Rapporteur on the rights to freedom of peaceful assembly and of association finds that the restrictions of the Foreign Contribution Regulation Act and Rules are not in conformity with international law, principles and standards. The Foreign Contribution Regulation Act and Regulations appear to contravene the Union of India's obligations under the ICCPR to ensure the rights of all under its jurisdiction to free association because it imposes a total ban on associations' access to foreign funding on vaguely defined grounds for a broad purpose not included in the ICCPR's enumerated list of legitimate aims.
37. The Special Rapporteur invites all State and non-state actors in the Union of India to take this analysis into account and encourages the Union of India to uphold its obligations under international law.

This analysis is being brought to the attention of the Union of India.

Mr. **Maina Kiai** (Kenya) was designated by the UN Human Rights Council as the first Special Rapporteur on the rights to freedom of peaceful assembly and of association in May 2011. Mr. Kiai has been Executive Director of the International Council on Human Rights Policy, Chair of the Kenya National Human Rights Commission, Africa Director of the International Human Rights Law Group, and Africa Director of Amnesty International.

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