Marcos Carrillo

Introduction

In order to understand the reality of the legal restrictions on foreign funding affecting civil society organizations in Venezuela, it is necessary to study not only the already enacted legislation but also the Draft Law on International Cooperation (hereinafter, “ICL”) that could be enacted in 2010, which reflects not only the Government’s intentions but also the government practice towards CSOs over the past few years.

I. Types of Restrictions on Foreign Funding

A. Prohibitions Against Foreign Funding

Current legislation: Currently there are no direct legal restrictions targeting donors or recipients of foreign funding. Nonetheless, Venezuela is under an exchange control regime that indirectly may affect foreign funding. Thus, any cooperation must be accomplished in Venezuela’s local currency, Bolivares.

The ICL draft, however, establishes restrictions targeting foreign funding. Indeed, the object of the law is to determine the legal regime for international cooperation. (Article 1) The ICL applies to all activities carried out in the framework of international cooperation, including the reception, transfer, and interchange of goods, services, assets, public and private resources, human, financial, and economic matters, from other countries toward Venezuela and from Venezuela to other countries. (Article 2) Relevant restrictions include the following:

- Article 18 of the ICL draft makes NGO “inscription in the Integrated Registry System [created by this same law] a prerequisite for proper recognition by the State to engage in international cooperation activities with counterparts in other countries.” If the ICL is enacted, inscription in the Integrated Registry System
would also be required to access the fiscal incentives contemplated in Venezuelan tax regulations. (Currently, it is not necessary for CSOs to be registered before a governmental body created specifically to control CSOs; CSOs must only be registered in the public registry like any other legal entity.)

- In accordance with the first transitional regulation of the ICL draft, in the six months following the publication of the ICL, organizations that engage in any activities related to international cooperation must adjust their operational guidelines to those established by and emanating from the decentralized Institution in Charge of International Cooperation.

- Article 6 of the ICL subordinates the areas of international cooperation "preferable to those established in the National Plan for Development." Hence, the areas of international cooperation will be determined by the National Plan.

- Article 7 establishes the priorities of international cooperation, which must be related to "energy, educational, cultural, scientific, technological, social, economic, financial, environmental, commercial, sporting and criminal matters, as well as support for emergency situations." It is important to stress that among these priorities the promotion, protection, or defense of human rights is not included. Hence, foreign funding for these areas is clearly restricted.

Barriers can also appear through unwritten government practices. They have included "de facto" prohibitions to register new human rights NGOs or to register changes in their charters. Also, cases of direct governmental retaliation and prosecution against members of NPOs that exercise the right of freedom of speech or advocacy have been reported. The ICL could give the Government clear and direct legal support for such conduct.

**B. Advance Government Approval**

**Current legislation:** Apart from the exchange control restrictions, which are applicable not only to CSOs but to every legal or natural person, government approval is not required to engage in international cooperation. There have been cases, however, of human rights CSOs whose registration has been obstructed by unwritten government practice.

**ICL draft:** Article 3 defines international cooperation as "all the range of actions, activities and procedures, conducted by countries, international organizations, NGOs and other types of organizations that engage in activities related to international cooperation, destined to transfer resources and capacity to support social, human and economical development. In this sense international cooperation is the means by which the Venezuelan State receives and transfers human resources, goods, assets, services and technology, with the objective of complementing and contributing to development efforts." Article 10 establishes that "...the President will be able to create a decentralized institution which will be in charge of organizing, directing, controlling, coordinating and evaluating all activities related to international cooperation of which the Venezuelan State is part." Reading these two norms together, it can be concluded that not only government approval will be necessary but also there will be complete control of the Government over any aspect of IC.

**C. Penalties for Receipt of Foreign Funds without Official Permission**

**Current legislation:**

The Ley de Ilicitos Cambiarios (Illicit Currency Exchange Law) establishes penalties for any legal person – including a CSO – that violates exchange control laws. Activities considered to violate the Illicit Currency Exchange Law include the purchase or sale, or any conduct that implies receiving or granting, any foreign currency in any amount surpassing 10,000 USD carried out without Banco Central de Venezuela (Venezuelan Central Bank) intervention. Such conduct is subject to a penalty consisting of payment in Bolívares of the amount equivalent to twice the amount of the operation that is being sanctioned. If this amount surpasses 20,000 USD or its equivalent in any other currency, the sanction will
involve a prison sentence for a period of between two and six years, plus a fine amounting to twice the quantity of the operation that is being sanctioned.

Where a CSO needs to buy foreign currency, and fails to declare the received foreign currency, or declares it in a period other than that which is permitted by law, the CSO will be subject to a fine. If the person or entity then fails to prove the legality of the exchange, CADIQUI (the governmental body, within the Ministry of Finance, that is in charge of the exchange control regime) is entitled to confiscate the monies received in a suspicious or presumably illegal way.

In case a CSO requires foreign currency, it must file a request at CADIQUI. Those who fail to use granted money for the alleged purposes will be considered to deviate or improperly use the assigned money and will also be subject to a fine consisting of the payment of twice the amount of the operation, activity, or conduct that is being sanctioned.

It must be observed that Ley Orgánica Contra la Delincuencia Organizada (Organic Law Against Organized Crime) does not limit or define the meaning of "illicit activities," giving an ample margin of discretion to the governmental authorities to define what an illicit activity may be.

In 2004 two members of the NGO Súmate were prosecuted for receiving international aid from the National Endowment for Democracy (a U.S.-based organization), which was allegedly conspiring against the State’s integrity. The prosecution was based on the following:

- **Article 128** of the Criminal Code states that whoever in complicity with a foreign nation or with external enemies, conspires against the State’s integrity or institutions, or whoever by whatever means commits a hostile act, will be sanctioned with imprisonment for a period that ranges from 20 to 30 years.

- **Article 129** of the Criminal Code states that whoever, inside or outside Venezuela, attempts to threaten the country’s independence or its geographical integrity will be punished with imprisonment for a period that can range from 20 to 26 years. This sanction will also apply to whoever requests by any means the intervention of a foreign government to overthrow the Venezuelan Government.

- Finally, **Article 132** of the Criminal Code states that anyone who, inside or outside the national territory, conspires to destroy the country’s republican form of government, will be sanctioned with imprisonment for a period ranging from 8 to 16 years. This sanction will also be applied to those who request international intervention in Venezuelan internal affairs, or to those who through advertisement in the media encourage a civil war or defame the President or any diplomatic or consular officials with regard to the carrying out of their functions in the country in which the defamation is committed.

**ICL draft**: As stated above, Article 18 of the ICL draft establishes that NGO inscription in the Integrated Registry System (established in this same law) is mandatory and is a condition for the Venezuelan State to grant NGOs recognition as entities entitled to engage in international cooperation activities with counterparts in other countries, and also a necessary condition to access the tax incentive program contemplated in Venezuelan tax regulations. Although the ICL draft does not establish a penalty, general criminal law could be applied to the failure to comply, as explained in the preceding paragraphs.

**D. Routing Funding through Government**

**Current Law**: Under current law, there is no requirement to route funding through government ministries or through a designated fund. Due to exchange control, of course, everything related to foreign currency has to be supervised by Venezuela’s Central Bank (Banco Central de Venezuela).
ICL draft: Article 3 of the ICL draft defines international cooperation as a means by which the Venezuelan State receives transfers and exchanges human resources, property, assets, services, and technology from cooperative sources either internal or external, with the objective of complementing and contributing with national efforts in development matters. Based on this definition, it can be concluded that the State is the only subject of international cooperation.

That said, Article 10 of the ICL draft establishes that regardless of the functions assigned to other ministries, the President will be able to create a decentralized institution that will be dependent on the ministry with competence in international cooperation (which is not specified in the draft and therefore will be appointed discretionally by the President), which will have administrative and financial autonomy and will be in charge of executing and supporting policies, plans, programs, and projects related to international cooperation carried out by the State, through lending and administering resources that are destined to activities related to international cooperation. This institution will also be in charge of developing activities related to the organization, direction, control, coordination, follow-up, and evaluation of everything related to International Cooperation in which the Venezuelan state is a part. Hence, it can be concluded that not only will government approval be necessary but also there will be a complete control by the government over any aspect of IC, all of this in accordance with Presidential orders. The funds coming from international cooperation would have to be directed through this entity.

Likewise, Article 13 of the ICL draft establishes that the Fund for International Cooperation and Assistance will count on resources from legacies, donations, and other assets received by the State from other governments, international organizations, and other institutions that are destined to support cooperation. This Fund will also be integrated by all other assets and resources received in accordance to the law.

E. Mandatory Coordination of CSO Activities with Government Agencies

Current Law: Currently there is no mandatory coordination of CSO activities with government agencies.

ICL draft: Article 8 of the draft ICL is clear about this issue, stating that “International Cooperation policies, as an expression of the States’ foreign policy, will aim at coordinating and integrating efforts among international organizations, NGOs, both national and international, and all institutions, organizations, foundations or not-for-profit organizations, whether public or private, and civil society; with the common goal of incentivizing human development, social justice and social welfare.”

F. Taxation on Foreign Funds

Current Law: The current ICL (1958) establishes conditions that are favorable for CSOs and NGOs receiving funds from Venezuela as well as from abroad.

ICL draft: In order to have access to tax exemptions or incentives, registration at a special designated governmental registry will be necessary under Article 18 of the ICL draft.

II. Early Warning Signals for the Legal Restriction

In 2000 the Minister of Internal Affairs and Justice, Luis Miquelena, challenged the legitimacy of CSOs in an act that signaled a turning point in the relations between the National Government and CSOs. The case happened as follows: The Venezuelan Constitution establishes that three of the members of the Consejo Nacional Electoral – CNE – (National Electoral Council) must be nominated by civil society. When certain well-known members of civil society were nominated, the Minister challenged their legitimacy, alleging that their organizations did not elect them. Thus, the Government bypassed the Constitutional order and appointed people unrelated to civil society organizations.

Also in 2000 the Tribunal Supremo de Justicia – Supreme Court of Justice – issued three decisions related to CSOs:
The decisions set forth a restrictive view of civil society, according to which the foundation of civil society must be national security, in accordance with Article 326 of the Venezuelan Constitution. In relation to foreign funding one of the decisions (William Dávila) established that “[T]he Civil Society recognized by the Constitution is the Venezuelan Civil Society .... Thus, as national associations, the CSO representatives can be neither foreigners nor organizations directed, affiliated, funded, financed or supported, directly or indirectly by states, movements or groups influenced either by other states or by international associations, groups or movements with political or economic aims for their own benefit.”

In 2004 the General Prosecutor prosecuted two members of the NGO Súmate (María Corina Machado and Alejandro Plaz), accusing them of receiving international aid from an international organization that was conspiring against the State’s integrity.

In 2006, the first draft of the ICL appeared, without previous consultations with CSOs, and was approved in the first discussion by the National Assembly. During the period 2006-2009 there have been recurring references by Congressmen to the necessity of controlling CSOs.

III. Impact of the Legal Restriction

The Draft ICL has been approved in the first of two National Assembly discussions and it will officially enter into force when approved in the second discussion, which could happen in 2010.

As of 2010, there is a marked tendency toward government centralization in Venezuela. There have been laws passed directed at subordinating States and municipalities to the National Government. Specifically, state and municipal authority in areas of work related to health, education, and security have been reduced and turned over to the National Government. This tendency toward centralization, although not directly targeting NGOs, may very well affect the available resources for their funding. In fact, if the Executive Branch increases control over these resources, the states and municipalities will have less budget capacity for NGO funding, which ultimately will diminish the diversity and independence of funding for NGOs.

IV. Justifications

A. Stated Justifications

The sponsor of the ICL was the National Assembly, specifically the Commission on Foreign Affairs.

The official Government justifications include the following:

- Official government documents and declarations have stated that the Draft ICL is aimed at “protecting national sovereignty and the Latin American identity as a means of bringing welfare and dignity to all persons that have been excluded or affected as a consequence of the foreign imposition of an unfair and exclusive liberal policy model.”

- NGOs must be accountable to the State.

- The Government must control NGOs just as it does any other legal persons.
Nevertheless, no other legal persons are subjected to double registration or subordinated to Government policies unless they need special permission for certain activities, such as acquiring foreign currency at preferential rates (due to the exchange control regime), import or export of merchandise, contracting with the State, and dealing with particular substances, amongst others. In these cases legal persons must be also registered before the competent office.

B. Underlying Motivations

The ICL has been framed in a political context that seeks to restrict citizen’s rights and liberties. The ICL draft is based on a theoretical conception that inverts the natural relations between the State and its citizens, by promoting citizen submission to governmental will. According to the justifications of the ICL given by Congressmen, a further motivation for this statute is the desire to limit foreign influence in domestic affairs. To appeal to the nation’s sovereignty is one of the most commonly used arguments to restrict rights in Venezuela today. Consider the following statements:

- "Lots of them [CSOs] receive money from the National Endowment for Democracy and other institutions linked with the CIA to carry out conspiratorial activities." —Saúl Ortega, former President of the Foreign Affairs Commission of the National Assembly.

- "Organized groups – from civil society – must avoid promoting terrorism or getting involved with drug traffic." —Saúl Ortega, former President of the Foreign Affairs Commission of the National Assembly, June 1, 2006.

- "The ICL will establish control of CSOs’ funding." —Roy Daza, current President of the Foreign Affairs Commission of the National Assembly, May 12, 2009.

- "From a political point of view it is always important to control international cooperation...." —Roy Daza, President of the Foreign Affairs Commission of the National Assembly, May 6, 2009.

- "We cannot accept that lackey and obsequious organizations, that attend different interests from those of the State, distort the meaning of the law.” —Congressman Carlos Escarrá, April 17, 2009.

- "Of course we are going to control NGOs, because that is what the Venezuelan people want. Here we have to control the activities of a group of organizations, hidden behind an NGO and human rights defenders façade, that receive funds from the USA for political aims and to conspire against the Venezuelan Government." —Declarations given by Iris Varela, Venezuelan Congresswoman, April 17, 2009.

C. Evaluation of the Justification

The ICL is contrary to what is established in the Venezuelan Constitution regarding the freedom of association, since the Constitution recognizes not only that "every person has the right to associate with lawful ends in conformity with the law,"9 but also that “the State is obliged to facilitate and permit the exercising of the right of freedom of association."10 In other words, it is a Constitutional mandate that all laws drafted must promote the exercise of rights such as freedom of association and under no pretext act in breach of the Constitution. Specifically, the ICL would violate the constitutional right to freedom of association, in that it would oblige NGOs to register with the Integrated System Registry as a condition for the State to grant NGOs proper recognition as entities entitled to engage in international cooperation activities with their counterparts in other countries (and as a condition to access the tax incentives contemplated in Venezuelan tax regulations).

In order to challenge the ICL, the following legal or policy or factual arguments might be available:
Article 52 of the Venezuelan Constitution establishes the human right of freedom of association in the following terms: "Everyone has the right to associate with licit ends, in conformity with the law. The State will be obliged to facilitate the exercise of this right" (emphasis added). It is worth noting that the previous constitution did not include the latter State obligation.\textsuperscript{11}

Under the Venezuelan Constitution, government regulation, under normal circumstances, must seek to promote or foster CSOs, rather than to control them through State actions.\textsuperscript{12}

In addition, the ICL also violates or threatens basic rights of the Venezuelan Constitution, such as the right to meet publicly or privately, without obtaining permission in advance, for lawful purposes and without weapons;\textsuperscript{13} the right to express freely one's thoughts, ideas or opinions without censorship;\textsuperscript{14} the right to freedom of conscience;\textsuperscript{15} and the right of association for political purposes, through democratic methods of organization, operation, and direction.\textsuperscript{16}

The ICL also may violate rules established in the International Covenant on Civil and Political Rights.

- Article 22.1 states that "Everyone shall have the right to freedom of association with others...." Furthermore, Article 22.2 states that "No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

- The mandatory and duplicative registration envisioned by Articles 17, 18, and 20 of the ICL is a restriction that probably does not meet the standards of Article 22 of the ICCPR.

- The ICL would establish the Fund for International Cooperation and Assistance, which would receive and channel all the international cooperation received by Venezuelan NGOs; this requirement also would probably amount to a limitation that violates Article 22 of the ICCPR.

The American Convention on Human Rights (ACHR) also protects the right of freedom of association and other rights.

- Article 16 of the ACHR protects the right of freedom of association. According to Article 16, the right of freedom of association "shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others." The ICL does not respect these standards.

- Article 3 of the ICL runs counter to Article 13 of the ACHR. Article 3 regulates the transfer of "resources and skills" to support development, whereas Article 13 of the ACHR explicitly includes the right “to seek, receive an impart information and ideas of all kinds.”

V. Responses and Lessons Learned

1. Responses
(a) Participation in the Drafting Process

It is both a constitutional right and an obligation for the National Assembly to include civil society participation in the discussion of draft laws (Article 211 of the Constitution). In 2006, both a representation of universities and a representation of NGOs requested to have formal meetings with the Commission of International Affairs of the National Assembly. The university group was formally received by the President of the Commission and a group of advisors, but the meeting with the NGOs was suspended. None of the suggestions made either by the universities or the NGOs have been included in the draft law so far.

(b) Collective Response of CSOs

CSOs responded by rejecting the draft law, and supported their arguments on constitutional law and human rights grounds. The position taken by CSOs was to reject the draft law firmly, yet to seek to build bridges with the National Assembly in order to suggest changes. CSOs adopted a strategy along four lines:

1. A media campaign;
2. A campaign directly addressed to NGOs’ beneficiaries; and
3. Lobbying international donors. Communication with Congressmen from the Government party has been virtually impossible.
4. Drafting an alternative statute and eventually propose its discussion by the National Assembly.

(c) Response of International Community

A group of important donor country representatives have met several times with representatives of CSOs in order to coordinate responsive action. Donor representatives have played a very important role in lobbying the Government; the lobbying efforts have been very effective, since they have helped to delay the promulgation of the draft law. European countries in particular have made an important effort. The Venezuelan Government is very concerned with maintaining a good international image.

The Inter-American Commission for Human Rights, in its 2006 report on the Situation of the Defense of Human Rights Activists in the Americas, urged States to refrain from promoting laws and policies relating to the registration of human right organizations that use vague or imprecise definitions, as this restricts their establishment and operation. The Commission also urged States to refrain from restricting the financing of human rights organizations; States should permit and facilitate CSOs to access foreign funds, in the context of international cooperation in transparent conditions. Its 2010 report on Venezuela evaluates in detail the situation of Human Rights in general and of freedom of association in particular.

Amnesty International also made comments referring to the draft ICL and said that Venezuelan authorities should ensure that the draft law complies with international law relating to human rights that guarantees the right to defend human rights, freedom of association, and freedom and expression.

2. Lessons Learned

In order to confront unjust laws and actions towards CSOs by strong governments, it is important for CSOs to:

1. Be organized;
2. Solidify CSOs national and international networks;
3. Promote cooperation among CSOs;
4. Have a clear, solid, and insistent media strategy;

5. Lobby international donors and organizations as well as the Government (if possible); and

6. Strengthen links between beneficiaries and CSOs.

3. What Next?

The most recent official information about the status of the draft ICL was given on October 7, 2009, by the President of the Foreign Affairs Commission of the National Assembly, Mr. Roy Daza, in a radio interview. He said that they were going to discuss and approve the ICL soon, but did not specify a date. The priority at the present time is to discuss and approve the Foreign Service Act. Informal sources insist that the ICL could be approved before the end of 2010.

Some activities have proven effective in challenging the ICL and should be carried out in the future as well. For example:

- A group of NGOs has developed a national and international lobbying campaign in order to raise awareness of the consequences of the ICL. This campaign has been effective and must continue and be strengthened so it can reach a greater number of organizations and countries.

- In addition, several seminars have been staged in the countryside and in the capital in order to inform not only NGOs but also NGO beneficiaries of the consequences of the ICL.

- Highly qualified professionals in different spheres must closely monitor this issue.

- It is necessary to strengthen NGOs and coordinate actions among NGOs.

- It is important to engage other segments of civil society, including pressure groups, syndicates, associations, churches, etc.

Eventually, if the law is ultimately passed, responsive strategies may include:

- Challenging the ICL as unconstitutional before the Constitutional Chamber of the Tribunal Supremo de Justicia; and
- Challenging the ICL before the Inter-American Commission on Human Rights, since the Judiciary in Venezuela is clearly biased in favor of the Government.

Finally, CSOs should promote and inform about forms of self-regulation, encouraging transparency and accountability.

Notes

* This paper is made possible with the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of the authors and do not necessarily reflect the views of USAID or the United States Government.

1 Marcos Carrillo, mrcarrillop@gmail.com, is Director General, A.C. Paz Activa, Caracas, Venezuela, as well as Chairman of ADR, Law Faculty, UCAB, Caracas, Venezuela.

The current ICL draft is a rather innocuous statute of only nine articles. The draft reiterates the principle of International Cooperation (article 1), establishes the forms of International Cooperation (articles 2 and 3), provides that International Cooperation must be accomplished through agreements and/or treaties, and conveys special considerations for international cooperation in the area of construction. The statute does not restrict international cooperation and has no regulations relating to NGOs.

The original text is “Que la sociedad civil, tomada en cuenta por el Constituyente, es la sociedad civil venezolana.... Resultado de este carácter nacional es que quienes la representan no pueden ser extranjeros, ni organismos dirigidos, afiliados, subsidiados, financiados o sostenidos directa o indirectamente, por Estados, o movimientos o grupos influenciados por esos Estados; ni por asociaciones, grupos, o movimientos transnacionales o mundiales, que persigan fines políticos o económicos, en beneficio propio." Sentencia William Dávila y otros vs. Ministro de Finanzas Sala Constitucional del 21-11-00.

The three main statutes that have been passed to this purpose are the Reform of the Organic Law of Decentralization, Delimitation and Transference of State Competences, the Ley Especial de Transferencia de los recursos y bienes administrados transitoriamente por el Distrito Metropolitano al Distrito Capital (Special Law for the Transference of the resources temporarily administered by the Metropolitan District to the Capital District), and the recently approved (February 22, 2010) Ley del Consejo Federal de Gobierno.

ICL Exposition of motives.

Roy Daza, President of the Foreign Policy Commission of the National Assembly. El Universal, May 6, 2009.

Idem.

See Article 52 of the Venezuelan Constitution.

Idem.

Article 53 of the Venezuelan Constitution.

Article 57 of the Venezuelan Constitution.

Article 61 of the Venezuelan Constitution.

Article 67 of the Venezuelan Constitution.

In fact, CSO activities must be lawful. Hence the Government can intervene in their activities if a CSO is committing unlawful activities according to the law (e.g., Criminal Code, Law Against Organized Crime). The State can also restrict this right under Martial Law, which can only be declared under exceptional circumstances and is regulated by Articles 337-339 of the Constitution.

Taken from http://www.aiven.org/profiles/blogs/la-propuesta-de-ley-sobre.

Taken from http://www.aiven.org/profiles/blogs/la-propuesta-de-ley-sobre.