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A Treatise on Amendments to the Regulation on Non-profit Companies in Relation to Civil Society Organisations

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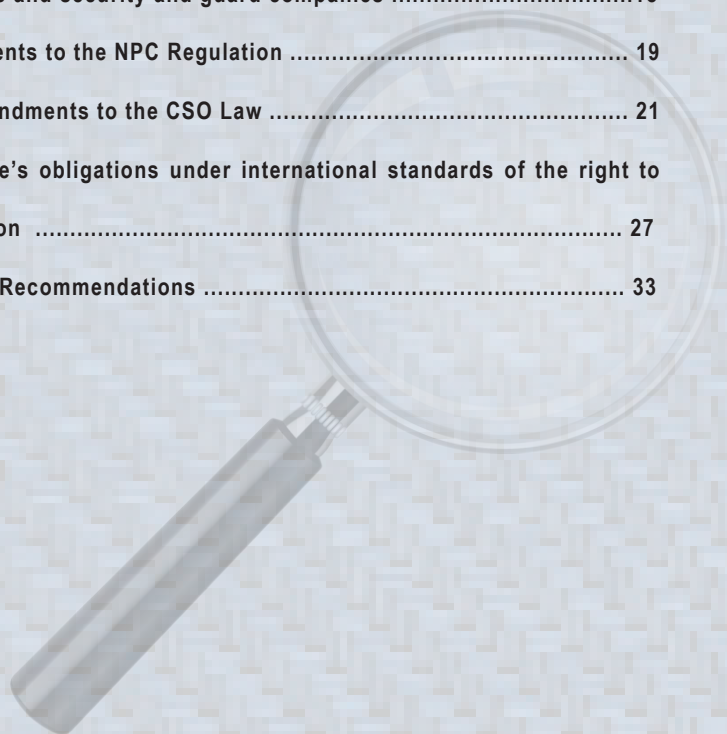
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INTRODUCTION

On 7 July 2015, the Palestinian Council of Ministers passed a regulation, amending the Regulation on Non-Profit Companies No. 3 of 2010, which was promulgated by the government on 15 February 2010. The new regulation is designed to subject funding sources of Non-Profit Companies (NPCs) to government control and prior approval

The new Regulation No. 8 of 2015 (NPC Regulation) comprises three articles. According to Article 1, it is a condition precedent that NPCs obtain prior approval from the Council of Ministers to receive grants, donations, and funding, and NPCs must provide reasons for the funding. Article 2 provides for repealing all previous laws or regulations that contradict provisions of the amendment Article 3 states that the NPC Regulation will enter into force on the date it is published in the Palestinian Official Gazette

This paper discusses the NPCs that are the subject of this Regulation. It explores the connection between NPCs and civil society organisations (CSOs) and justifications for the amendment, as provided by the government in the Council of Ministers' session of 7 July 2015, during which the Regulation was passed. These justifications are allegedly based on the Government Legislative Plan, National Development Plan (NDP) 2014-16, and Palestinian legislation relating to NPCs. The paper also assesses the constitutionality and legality of this amendment and whether it is consistent with international standards given that the State of Palestine acceded, *without reservation*, to fundamental human rights conventions. This requires the government to have the will and determination to enforce international obligations on legislative and policy levels, with a view toward safeguarding the rule of law, promoting rights and public freedoms, and driving a nation-wide development process

According to the NPC Regulation, the government provides itself with broad powers to intervene in NPC's financial resources without restrictions or controls, or the possibility of complaints. Accordingly, numerous

¹ Palestinian Official Gazette, Issue 113, July 2015.

questions are raised about the significance, implications, and timing of this amendment. Laws and regulations are already in force governing various aspects of NPCs. These laws and regulations provide that the Ministry of National Economy (MoNE) is the competent authority for monitoring and control of NPCs. In addition, according to the 2004 Law of the State Audit and Administrative Control Bureau (SAACB), administrative and financial operations of all companies, including NPCs, are subject to SAACB control. NPCs are now also controlled and monitored by the Palestinian Anti-Corruption Commission (PACC). In its session (01/59/17/CoM/R.H) of 7 July 2015, the Council of Ministers, in addition to amending the NPC regulation, ²subjected NPCs to the 2005 Anti-Corruption Law

In order to present a full picture and understand the significance of the various amendments, this paper will track previous amendments made by the Executive Authority (namely the President and government) to the regulations on NPCs and CSOs.. Both CSOs and NPCs seek to achieve the same goals and objectives. It is apparent that legislative interventions into both involve the same intentions and implications; the Executive seeks to exercise dominion and control over CSO and NPC activities. To do so, the Executive uses a *financial pretext* or creates oversight bodies other than those provided for by original, relevant legislation. This paper will help clarify the shift from former *types of intervention*, to the current ones .exercised by the Executive and their implications on the ground

2 Palestinian Official Gazette, Issue 113, July 2015.

1. What are NPCs ?

The Jordanian Company Law No. 12 of 1964 (1964 Company Law), in force in the West Bank, does not include any provisions on NPCs. These were introduced by the Law by Decision No. 6 of 2008, promulgated by President Mahmoud Abbas, which amends the 1964 Company Law Entitled Non-Profit Companies, Article 4 of the said Law by Decision provides that “[n]on-profit companies, which take the form of private shareholding companies, may be registered on a special register and shall be called non-profit companies.” The Law by Decision refers all provisions relating to NPCs, including registration procedures, activities, goals, control, and financial resources, to a special regulation to be passed by the Council of Ministers.³

Based on the said Law by Decision, the Council of Ministers passed Regulation No. 3 of 2010 to govern all aspects, including control mechanisms, of NPCs. According to provisions of Regulation No. 3, a NPC is an organisation that does not aim for profit. Financial returns, if any, may not be distributed to relevant shareholders. These will be used to accomplish the NPCs’ goals and expand its activities. As it takes the form of a private shareholding company, shares are not issued for public offering. NPC shareholders’ liability is limited to the contribution of each to the NPC capital. The purpose of NPCs is to deliver a service or an economic, social, cultural, community or development-oriented activity. NPCs work towards enhancing standards of living in social, health, occupational, artistic, sports, cultural or educational areas. NPCs are registered by the Company Registrar of the MoNE in line with the procedures prescribed by Regulation no. 3.⁴

3 Article 4 of the Law by Decision No. 6 of 2008, Amendment of the 1964 Company Law. Palestinian Official Gazette, Issue 76, 20 June 2008.

4 See Articles 1-5 of the Regulation on Non-Profit Companies No. 3 of 2010. Palestinian Official Gazette, Issue 85, 6 May 2010.

2. NPCs and CSOs

The goals and objectives of NPCs raise a question about how they differ from CSOs. CSOs are governed by the Law on Charitable Associations and Civil Society Organisations of 2000 (CSO Law). Both NPCs and CSOs enjoy an independent juridical personality and full legal capacity, but are regulated by different laws.

As outlined in the CSO Law, both NPCs and CSOs share the same goals and objectives. The CSO Law defines community activity of CSOs as “[a]ny social, economic, cultural, community, developmental or other service or activity, undertaken voluntarily or optionally, that would lead to the enhancement of the social, health, professional, material, spiritual, artistic, sports, cultural or educational levels of citizens in society.”⁵ The difference between NPCs and CSOs lies in registration procedures and the ministry responsible for each, MoNE for NPCs and Ministry of Interior (MoI) for CSOs. Oversight bodies and management mechanisms of each also vary.

Although NPCs and CSOs do not seek profit, both share the same social, economic, cultural and development goals and objectives. They are subject to the same international standards on the right to freedom of association, particularly those set by, *inter alia*, the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), general comments of international treaty bodies, and reports of the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

As stated above, this paper comments on the various aspects and implications of the amendments made to the NPC Regulation. It also investigates the scope and implications of amendments introduced to the CSO Law, either directly by means of laws by decision or indirectly by means of presidential decrees and government decisions. The paper explores how consistent these legislative measures, which target NPCs and CSOs, are with international human rights standards.

⁵ See Definitions, Article 2 of the 2000 Law on Charitable Associations and Civil Society Organisations. Palestinian Official Gazette, Issue 32, February 2000.

3. Explanatory memorandum of the NPC Regulation

The government failed to issue an explanatory memorandum with the NPC Regulation, to identify the purpose of and grounds for the amendments to the NPC Regulation, the need for this amendment, and the expected impact of the amendment on NPC operations. Besides explaining whether and why it is a legislative priority, an explanatory memorandum states if and how the amendment is compatible with relevant international standards. Palestine has acceded to fundamental human rights conventions, which require that obligations be positively reflected in national law and policy-making processes. To this end, the government needs to provide answers to these, and other questions, by issuing an explanatory memorandum to be attached to the NPC Regulation.

The absence of an explanatory memorandum makes clear the purpose, goals, and objectives of the amendment targeted at NPCs. It also makes clear why the government vested itself with unchecked, uncontrolled and broad powers relating to government decisions on NPC sources of funding, and failed to provide a time period for filing complaints against relevant government decisions. Therefore, the absence of an explanatory memorandum gives rise to *serious concerns* about a governmental approach aimed at dominating and controlling NPCs. Government intervention creates significant challenges to NPC operations and their capability of delivering tasks, achieving of goals, and freely carrying out activities. It further disrupts potential growth and development of NPCs, which are relatively new legislatively, and are still in the early stages of development.

In addition, the absence of an explanatory memorandum is in violation of the Government Legislative Plan. According to Chapter 2 of the Guidance Manual on the Government Legislative Plan, “proposals on the draft laws and bylaws (regulations) are accompanied by an explanatory memorandum. The explanatory memorandum must include the justifications for giving the priority to the submitted draft laws and bylaws; the social, economic and political impact which is anticipated to be created by the law; the need to address the problem proposed... Proposals of ministries or government bodies with regard to draft laws and bylaws, which do not include explanatory memoranda, shall not be admitted.”⁶

⁶ Government Legislative Plan, Chapter 2: Guidance Manual on the Government Legislative Plan, p. 17 ff. It is worth noting that the Government Legislative Plan is not published on the Government website www.palestinecabinet.gov.ps (Last accessed, 20 August 2015).

4. Scope of territorial applicability of the NPC Regulation

Both the Regulation on Non-Profit Companies No. 3 of 2010, dated 15 February 2010, and the amendment to the regulation, introduced on 7 July 2015, are based on the Jordanian Company Law No. 12 of 1964 in force in the West Bank only, and the Law by Decision No. 8 of 2008, amending the 1964 Company Law.

The NPC Regulation is not based on company laws operative in the Gaza Strip, including the Company Law No. 18 of 1929 and Law on General Partnerships No. 19 of 1930, which date back to the British Mandate period. Accordingly, the Law by Decision on Non-Profit Companies and the NPC Regulations of 2010 and the 2015 are only applicable in the West Bank.

In principle, this approach contradicts provisions of the Government Legislative Plan, including chapters on the Concept of the Government Legislative Plan, Guidance Manual of the Government Legislative Plan, and Government Legislative Policies. Explicitly, the Plan provides for the need to maintain legislative consistency and address duplicate legislative enactments in the West Bank and Gaza Strip. Legislative priority should be given to removing anomalies and consolidating the legal system in Palestine.⁷

This government approach also unveils a *profound flaw* in the government's prioritization of legislation. This is in spite of the fact that company laws that are in force in the Gaza Strip and West Bank date back to the British Mandate and Jordanian periods, and are in urgent need of update and consolidation. New company-related legislation will contribute to supporting and boosting the Palestinian economy. Implementation of the NDP 2014-16 will be informed by this legislation as well as by international human rights standards, particularly after the State of Palestine acceded to relevant international conventions. However, this approach is still absent from the government's agenda and priorities.

This flaw in the government's prioritization of legislation is also inconsistent with the Government Legislative Plan, especially the criteria that is to be taken into account when the Government Legislative Plan is developed and implemented. The Plan explicitly stipulates:

⁷ Government Legislative Plan, p. 14 ff.

- “Prioritising regulations that amend long-standing legislation, which no longer meet the needs of the Palestinian society and pose legal inconsistency between Gaza and West Bank. Thereby, the Palestinian legal system will be duly consolidated.
- Focusing on priority amendments, whereby older regulations are amended before more recent ones, even in the case that there is equal need to amend both.
- Prioritising items of legislation that amend or repeal Israeli military orders with a view toward achieving legal independence and abandoning the Israeli occupation’s legacy.
- Giving priority to legislation and regulations, on which the implementation of international conventions or treaties is contingent.”⁸

8 Government Legislative Plan, p. 15.

5. Government justifications to promulgate the NPC Regulation

Since an explanatory memorandum was not introduced, the justifiability of the government's passing of the NPC Regulation must be explored. To do so, reference has been made to the minutes of the Council of Ministers' Session No. 59 of 7 July 2015, during which this amendment was passed. The session minutes include a single paragraph on the NPC Regulation: "The Council of Ministers has approved a regulation amending the Regulation on Non-Profit Companies No. 3 of 2010. NPCs will be subject to control by relevant institutions. The Council of Ministers will be informed of the funding sources of these companies as well as of expenditures, ensuring that external aid is directed to serve our people in accordance with national priorities and consistent with governmental policies and development plans."⁹

In this context, Mr. Hatem Sarhan, Company Controller at the MoNE, made a press statement, asserting that "[t]his amendment to the NPC Regulation has been introduced as the result of many concerns generated by a widespread phenomenon of NPC registration. Some non-experts think that this step is motivated by a financial benefit. This is untrue, however. The amendment targets local and foreign NPCs.¹⁰ According to the 2010 NPC Regulation, foreign NPCs refer to those companies which establish branch offices in Palestine for non-profit purposes."¹¹

⁹ See the Council of Ministers' Session No. 59, 7 July 2015,

<http://www.palestinecabinet.gov.ps/WebSite/AR/ViewDetails?ID=22536> (in Arabic) (Last accessed, 20 August 2015).

¹⁰ See Al Hadath al Filistini, 43, "Regulation Amending the Regulation on Non-Profit Companies between Interpretation and Exposition", <http://www.alhadath.ps/article.php?id=11d20f7y18686199Y11d20f7>, 17 July 2015, (in Arabic) (Last accessed, 20 August 2015).

¹¹ Regulation on Non-Profit Companies No. 3 of 2010, Article 13.

6. Discussion of the government justifications for the NPC Regulation

Neither the grounds provided for the amendment during the Council of Ministers' Session of 7 July 2015, nor the press release made by the MoNE Company Controller, present convincing or adequate justifications for enacting the NPC Regulation, for the following reasons:

1. Contrary to the government's claim and according to existing legislation, NPCs are subject to control by relevant authorities. With reference to Article 213 of the Company Law No. 12 of 1964 (Chapter 11 under the heading of Government Control), "[t]he Minister of National Economy and Company Controller at the Ministry of Economy may control shareholding companies in all that is related to the enforcement of the provisions of this Law and the regulations issued in accordance with it. They may, at any time, assign the company auditor, or delegate another auditor, at the expense of the company to audit its accounts, records, and all its operations." Article 215 of the Law prescribes that "[t]he Company Controller shall have the right to view by himself, or through the employees he delegates for this purpose, the records, books, documents and papers of any company. The company's board of directors must provide all that is necessary to facilitate this.."
2. The Law by Decision No. 6 of 2008, amending the 1964 Company Law, provides the government with almost absolute control over NPCs, allowing intervention in its various activities through a regulation to be passed by the Council of Ministers. Article 4 of the Law by Decision provides that "[n]on-profit companies, which take the form of private shareholding companies, may be registered on a special register to be called Non-Profit Companies. A special regulation to be issued for this purpose shall outline their provisions, conditions, goals, the operations they are entitled to exercise, control thereof, the manner and method by which they receive aid and donations, sources of funding, manner of expenditure, liquidation, outcome of their properties upon liquidation, data they

must submit to the Company Controller, and all relevant issues.” This is incompatible with the international standards highlighted by the Special Rapporteur on the rights to freedom of peaceful assembly and of association in the important report submitted to the Human Rights Council on 24 April 2013. As emphasised below, states must respect these standards.¹²

3. The Regulation on Non-Profit Companies No. 3 of 2010, issued on the basis of the 2008 Law by Decision, covers all aspects of NPCs, including administrative and financial control by relevant bodies. Article 6 of the Regulation provides that “[t]he non-profit company shall submit to the Company Controller an annual report on the operations and activities it performed, and its sources of funding. The annual report shall be enclosed with the NPC’s budget, which is signed by the authorised signatories of the company and its auditor.” Article 10 provides that the “Company Controller shall control non-profit corporations in all that is related to the enforcement of the provisions of law and this Regulation. To do so, he may assign the company’s auditor, or delegate another auditor or any employee from the management, at the expense of the company, to audit its records and all its operations. In the event provisions of the law, this Regulation, or the company bylaws are violated, the company shall afford the expenses of auditing as determined by the Minister of National Economy as the occasion may be.” Article 14 also authorises the Minister of National Economy, based on a recommendation from the Company Controller at the Ministry, to issue a warning to any NPC, requesting that it adjust its position before it is scheduled for “liquidation” within one month from the date of the warning. A warning is issued if, *inter alia*, a NPC violates provisions of the law or this Regulation (i.e. the 2010 NPC Regulation), exercises operations and activities that do not fall

12 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, Human Rights Council, Twenty-third session, 24 April 2013, A/HRC/23/39. Full report is posted on

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf.

(Last accessed, 20 August 2015).

within its goals and objectives, does not operate for a period of a year or ceases its operations, and fails to adjust its position within two months from the date on which the Controller requests that it adjusts its position.

4. Since all administrative and financial activities carried out by NPCs are controlled by several relevant bodies (the MoNE, SACCB, and PACC), the question is: In spite of all pieces of legislation that provide for strict control of NPCs, why does the government insist on breaching international standards and providing itself with broad powers to exercise financial control over funding sources of these companies through the new NPC Regulation? The government must answer this *crucial question* given that the reasons it cites are not convincing or justifiable, and legal provisions presented above refute the government's claims.

What does the government intend to achieve by the passage of this amendment? Why is the government violating provisions of the law, and why did it choose this time period for passing the amendment? If clear answers are not provided in order to remove doubts and concerns generated by passage of the NPC Regulation, these inquiries may lead to the conclusion that the government has a "black list" of NPCs, and that it wants to deal or do away with these NPCs through this amendment. The amendment that is based on a law that already provides for administrative and financial control over NPCs. And therefore, the government's legal justification of a need for monitoring is baseless, as are other reasons cited. The question posed will remain valid, as shown below.

5. According to the Council of Ministers' session minutes, through this amendment the government seeks to "ensure that external aid is directed to serve the Palestinian people in accordance with national priorities and consistent with government policies and development plans." These justifications pose further questions, which require clear answers from the government. These include:
 - a. Who decides national priorities of the Palestinian people? Does the government have the right to solely decide and impose what it considers as a national priority, disregarding principles

of dialogue, community partnership, and openness with civil society and relevant stakeholders? In light of the absent role of the Palestinian Legislative Council (PLC) and dysfunctional legislative and oversight powers, why was not the Regulation presented for public debate before it was approved?

- b. The government provides itself with the power to exercise prior approval and almost absolute control over NPCs, and therefore holds sway over their activities using financial pretext. Is this compatible with national priorities? What are the potential effects of these broad government powers on the role and future of NPCs? Given that NPCs seek to achieve the same goals and objectives of charitable associations and CSOs, are these almost absolute government powers consistent with international standards on the right to freedom of association?
- c. If by requiring prior approval the government seeks to ensure that grants and external financial aid delivered to NPCs are channelled to serve the Palestinian people, what about control over grants and external financial aid the government receives? Why did the Minister of Finance refuse to engage civil society in the debate over the 2015 general budget? Despite continued dysfunction of the PLC and absence of parliamentary oversight of the general budget - the most significant tool of control over government performance - why does the Minister continue to avoid, and postpone, involvement of civil society in the 2016 budgeting process? In this context, several messages were sent to the Minister, including by the Civil Society Team to Support General Budget Transparency.¹³ The government's budget relies heavily

13 Established in 2010, the Civil Society Team to Support General Budget Transparency is a civil coalition that works towards promoting transparency principles and accountability systems in public financial management, particularly the general budget. It comprises a number of Palestinian civil society organisations, including Al-Haq. The Team sent several letters to Mr. Shukri Bisharah, Minister of Finance, to discuss the 2015 budget before it would be approved and to answer relevant inquiries. However, the Minister ignored these letters before and after the 2015 budget, which totalled US \$5.018 billion, and was endorsed on 23 June 2015. The Team sent the last letter on 8 July 2015, but the Minister apologised and refused to meet with the Team members. In the absence of the PLC, the Minister of Finance, and the broader government, continues to refrain from involving the Team and other stakeholders in discussions and oversight of the general budget.

on external grants and assistance. Notably, in the 2015 general budget, external funding was estimated at ILS 7.410 billion, including ILS 3.120 billion to support the Public Treasury account and ILS 4.290 billion to cover development expenditures.¹⁴

- d. If the NPC Regulation is consistent with government policies as the government claims, how does it explain breaching the Government Legislative Plan? If it is also congruent with the NDP 2014-16, how does the government explain Section 6.1 of the NDP, which addresses building effective partnerships and diligent coordination with stakeholders. The government states: "Naturally, bringing about positive change in our country is the joint responsibility of all of these stakeholders in the spirit of common purpose and coordinated action. However, line ministries and government bodies, of course, bear a special responsibility for consolidating and driving effective and efficient partnerships, including the private sector, civil society, local government institutions, and international development partners."¹⁵
- e. Mr. Hatem Sarhan, Company Controller, made a statement to the *Al Hadath al Filistini* newspaper, explaining that the amendment to the NPC Regulation has been introduced as a result of many concerns generated by an increase in companies registering as NPCs. The Company Controller must make clear the scope and grounds of these concerns. In reality, NPC activities and financial resources are subject to the Company Controller, who reviews financial and administrative reports and budgets endorsed by the authorised signatories and auditors of NPCs. If there has been an increase in companies registering as NPCs, as stated

14 See the Law by Decision No. 9 of 2015 on the General Budget of the Fiscal Year 2015, Palestinian Official Gazette, Issue 113, July 2015,

www.pmo.ps/documents/10192/654251/%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D9%85%D9%88%D8%A7%D8%B2%D9%86%D8%A9%20%D8%A7%D9%84%D8%B9%D8%A7%D9%85%202015.pdf/ee68ed72-6911-407d-abe3-5e1b2b6d086d (Last accessed, 20 August 2015).

15 See the NDP 2014-16, Section 6.1, p. 105,

http://www.mopad.pna.ps/en/images/PDFs/Palestine%20State_final.pdf (Last accessed, 20 August 2015).

by the Company Controller, what are the causes for concern as long as relevant regulations govern NPC activity based on the rule of law? In addition, the international conventions to which Palestine is now a member, particularly the ICCPR, require the government and its various bodies, to work towards ensuring the *right* to freedom of association.

7. Holding companies and security and guard companies

The Law by Decision No. 6 of 2008 amending the 1964 Company Law does not only address NPCs, but also discusses holding companies. These are public shareholding companies which exercise financial and administrative control over one or more company(s), commonly known as affiliates. The holding company possesses more than half of the capital of the affiliates, or entirely controls the formation of the boards of directors.¹⁶

Holding companies are so influential that they exercise control over and dominate all of the Palestinian national economy sectors. Nonetheless, the said Law by Decision does not address procedures for control over these holding companies. It only states that the holding companies are bound by the *general rules* on public shareholding companies under the old 1964 Compan. The Law by Decision also provides that these general rules are not applicable to holding companies if they contradict the nature of the holding companies' operations.

Activities carried out by security and guard companies have created predicaments and put individual rights and freedoms at risk. According to Al-Haq's field monitoring activity, a large number of citizens and law enforcement agencies have complained about actions taken by these companies, including the use of tear gas and other arms. However, special legislation is not in place to regulate and control these activities. Security and guard companies are still governed by the general rules of private shareholding companies, under the old Company Law of 1964.

In his report to the Human Rights Council on funding associations, the Special Rapporteur on the rights to freedom of peaceful assembly and of association addresses this grave anomaly between how states treat associations - including NPCs with similar goals and purposes - and commercial companies. He calls on states "to avoid measures that disproportionately target or burden civil society organizations, such as imposing onerous vetting rules, procedures or other CSO-specific requirements not applied to the corporate sector in general."¹⁷

¹⁶ For further information on the definition, provisions, purposes, and methods of incorporation of holding companies, see Article 4 of the Law by Decision No. 6 of 2008 on Amendment of the 1964 Company Law.

¹⁷ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, para. 24.

8. Notes on amendments to the NPC Regulation

Article 1 of the 2015 NPC Regulation, which amends the 2010 NPC Regulation, provides: “A new paragraph shall be supplemented to Article 11 of the Regulation on Non-Profit Companies No. 3 of 2010. It shall bear number 4 [and reads] as follows: (4) It shall be a condition precedent to obtain prior authorisation from the Council to accept grants, donations, aid, and funds and to state the purpose thereof.”

The original Article 11 of the 2010 NPC Regulation provides that “(1) The company shall have the right to launch activities and establish income-generating enterprises, on condition that it uses their proceeds in the service of its purposes; (2) The company shall have the right to possess movable and immovable properties in order to achieve its purposes and goals; and (3) The company shall have the right to receive grants, aid and donations for its projects from foreign agencies, provided that such grants, donations, aid or funding are unconditional.”

After an examination of the amendment introduced by the new NPC Regulation as well as the operative legislation that regulates NPC operations and proscribes relevant tasks, powers and responsibilities, Al-Haq comments as follows:

- a. The 2015 NPC Regulation contradicts provisions of the 1964 Company Law as well as the Law by Decision No. 6 of 2008, amending the 1964 Company Law. According to Chapter 11 on Government Control under the Company Law of 1964, the control over all shareholding companies is limited to the MoNE. This power is exercised by the Minister of National Economy and Company Controller. Accordingly, the Law does not give the Council of Ministers (i.e. the government) any mandate at all. The 2008 Law by Decision is primarily premised on the 1964 Company Law. Having made some amendments to the 1964 Company Law, the Law by Decision vests the government with the power to promulgate a regulation to govern all aspects of NPCs, including administrative and financial issues, sources of funding, and control. However, the Law by Decision does not empower the government to require prior authorisation for funding. As such, the new Regulation derogates from legal parameters prescribed by the 1964 Company

Law (the original legislation) and the 2008 Law by Decision amending the 1964 Company Law. It violates provisions of both enactments by creating a new government mandate not provided by either.

- b. By enacting the 2015 NPC Regulation, the government has impinged on the 1964 Company Law and 2008 Law by Decision. It also violates the rule of law as a constitutional basis established by Article 6 of the Amended Basic Law. Contrary to Articles 69 and 70 of the Basic Law, the government has deviated from parameters of relevant constitutional mandates and contravened constitutional principles. Also, according to Article 67 of the Amended Basic Law, the government has infringed on the “constitutional oath,” according to which Palestine pledges to respect the law.
- c. The new amendment of the NPC Regulation does not provide any procedures, controls, or time periods for NPCs to obtain the Council of Ministers’ prior authorisation of grants, donations, and funding. The question is: What if a NPC applies to the government to receive prior authorisation for funding, but the government does not reply either negatively or positively? What would occur given that no time period has been set for the government’s response?
- d. As a prerequisite to receive prior authorisation from the government, the new NPC Regulation obliges NPCs to state the *purpose* of the funding they seek. By contrast, the amendment does not provide that the government decision be *reasoned* if it refuses the source of funding, nor does it provide a time period for the government to make a decision in this regard. The amended Regulation does not allow for potential complaints to be made against the government if approval is denied or the government fails to make a decision. It also does not permit a challenge against government decisions at courts of law. The legal drafting of the new NPC Regulation allows the government broad power to control financial resources and activities of NPCs, further increasing concerns about the motives and purposes of the government. In addition to a lack of convincing justifications, the government has exclusively discussed and approved the NPC Regulation without participation by civil society actors and relevant stakeholders.

9. Comments on amendments to the CSO Law

Executive (President and government) intervention is not limited to NPC activity. It also intervenes regularly in charitable associations and CSOs. This is a proof of the Executive's suspicion and discomfort with the role played by these associations, especially in the field of defence of human rights and promotion of the development process.

The CSO Law, respective amendments, and the Bylaw (Regulation) issued by the Council of Ministers in 2003, govern oversight of registration procedures, activities, financial and administrative reports, and liquidation of CSOs. According to applicable procedures and the official body legally designated to exercise control, these powers are assigned to the Ministry of Interior or a competent ministry, within the jurisdiction of which the main activity of a CSO falls.

CSOs are also subject to the PACC control. The Anti-Corruption Law No. 1 of 2005 provides that "chairpersons, board members and all employees of charitable associations and civil society organisations shall be subject to the provisions of this Law and to the control exercised by the Palestinian Anti-Corruption Commission." CSOs are further controlled by the SACCB. The Law on the State Audit and Control Bureau No. 15 of 2004 prescribes that "civil society organisations, charitable associations and unions shall be subject to the provisions of this Law and control of the Bureau."

Additionally, CSOs are subject to audit and internal control procedures, as well as control exercised by donors, including required reporting to ensure disbursement of funds in respective areas.

It appears that the Executive's concerns with CSOs and NPCs are increasing over time. This could explain the Executive's distrust of official oversight bodies which follow-up on performance of CSOs and NPCs, along with relevant regulations. Despite the plethora of oversight bodies and the multi-layered regulatory framework, the Executive seeks unrelentingly to create *alternative control bodies* at the expense of the rule of law. These actions also shed light on the debate between the Executive and its organs relating to the introduction of extensive amendments to the CSO Law. These are

underpinned by a variety of pretexts and justifications, including a need for consolidated government control over CSO activities, financial resources, goals and purposes. The Executive discusses these increased controls under the guise of necessity due to the presence of “external agendas” and “national priorities.” This all reflects the Executive’s suspicion of CSOs, which is not only evident through internal discussions but is very clearly laid out through the language employed in various legislative interventions.

Below are examples of the Executive’s legislative interventions in CSOs:

Presidential Decision on Establishment of an Advisory Committee to the President for Charitable Associations Affairs

Issued in May 2015, this Presidential Decree provides for the establishment of a five-member Advisory Committee for Charitable Associations Affairs. The Decision does not provide any criteria for membership on the Committee, including competence, specialisation, or proven work experience in community activity.

In addition to requiring the Committee to implement any tasks assigned by the President, the Decision provides that the Committee prepare a “comprehensive detailed report” on charitable associations operating and registered in Palestine. Although it was established three months ago, no Committee activity has been reported. Currently, there are no statements or discussions about the draft report it is tasked to develop, nor has the Committee reached out to CSOs in relation to this report. The Presidential Decision explicitly provides that the Committee “shall be implemented and enter into force as of the date of its promulgation.”

It is worth noting that the phrase, “The Committee shall implement any tasks assigned by the President” is broad and vague, and may be inconsistent with items of legislation on CSO activities.

According to the Presidential Decision, the Committee submits reports on the outcomes of its activity to the President only –ignoring the fact that this information may also concern CSOs, the public, or the government at large. This raises a question about the Executive’s mind-set and view of CSOs and their roles. It also puts in question the significance and implications of the Executive’s approach, and its conviction and willingness to accept the

principles of partnership and openness.

Presidential Decree on Establishment of the Commission for Civil Society Organisations Affairs

Promulgated on 25 December 2012, this Presidential Decree provides for establishment of the Commission for Civil Society Organisations Affairs. The Decree provides that the Commission will be tasked with coordinating and regulating functions between all Palestinian and foreign CSOs as well as various government bodies. It will contribute to setting and identifying national priorities in various sectors in partnership with CSOs and all government bodies in order to develop joint national approaches for cross-cutting development. The Commission is also tasked with ensuring that CSO's activities are free and independent, and compliment the government's work. The Commission will also encourage volunteerism, develop it as a concept, and institutionalize it. The Commission is also tasked with submitting annual reports on relevant operations to the President.¹⁸

The Decree was amended by a Presidential Decree enacted on 31 July 2013, which replaces the phrase "President of the Palestinian National Authority" with "President of the State." The amending Decree also adds a new paragraph, providing that the Commission will be allocated a financial appropriation from the general budget. It deletes the paragraph which requires the head of the Commission to submit annual reports to the President.¹⁹ According to the amending Decree, the Commission is to submit annual reports to a specific agency.

Interestingly, although it highlights a significant participatory, coordinated and integrated role in setting national priorities and development initiatives, the Presidential Decree was not enacted on grounds of partnership and dialogue. Despite the fact that it was promulgated more than two and a half years ago, any significant activity of the Commission for Civil Society Organisations Affairs or implementation of assigned tasks has not been reported. Even though both address CSOs, linkages are not in place between the Presidential Decision on Establishment of an Advisory Committee to the

¹⁸ Palestinian Official Gazette, Issue 102, October 2013.

¹⁹ Palestinian Official Gazette, Issue 102, October 2013.

President for Charitable Associations Affairs and the Commission for Civil Society Organisations Affairs. However, both enactments may provide an entry point for direct amendments that target the CSO Law.

It should be noted that this Presidential Decree, including relevant amendments, violates the Amended Basic Law and CSO Law. As confirmed by Article 69 of the Basic Law, the Council of Ministers, rather than the President, is empowered to establish or revoke public bodies and institutions, appoint chairpersons, and supervise their operations, but this must be provided for by law. According to Article 91 of the same Law, no portion of the Public Treasury funds may be allocated or spent for any purpose whatsoever except in accordance with the Law.

Creation of a new body (i.e. Commission for Civil Society Organisations Affairs) is not provided for by the CSO Law. To assign the Commission to work with CSOs and to oblige CSOs to coordinate with it in the context of setting national priorities is an intervention that breaches the CSO Law, and is outside the boundaries of the President's exclusive powers according to the Amended Basic Law.

Law by Decision, Amendment of the Law on Charitable Associations and Civil Society Organisations

On 27 April 2011, the President promulgated this Law by Decision which amends Article 39 of the CSO Law. The said Article regulates how CSOs' funds will be disposed of after a decision on their dissolution is made. Originally, the Law regulated disposition of CSOs' funds in the manner described by respective CSO bylaws. If not provided by relevant bylaws, the Mol transferred dissolved CSOs' funds to other organisations with similar goals.

According to the Law by Decision, funds of dissolved CSOs will be transferred primarily to the "Public Treasury" through the Mol or to CSOs with similar purposes.²⁰ This amendment is inconsistent with constitutional provisions set by Article 43 regarding laws by decision issued by the President. Most notably, decisions that have the power of law must be issued "in cases of necessity that cannot be delayed". The fact that dissolved CSOs' funds are transferred primarily to the Public Treasury is a form of *confiscation* of

²⁰ Palestinian Official Gazette, Issue 91, October 2011.

such funds. In this context, Article 21(4) of the Palestinian Amended Basic Law provides that “[c]onfiscation shall be in accordance with a judicial ruling.” Contrary to relevant regulations that identify their independent juridical personality and functions, the Law by Decision treats CSOs as government agencies or public institutions. This does not promote CSO’s freedom, or protect and promote their role in society.

Presidential Decree on Licences of Associations and Civil Society Organisations

The President promulgated this Decree during the state of emergency on 20 June 2007. The Decree provides the Minister of Interior with broad authorities and powers to review all licences of associations, institutions and CSOs, issued by former Ministers of Interior or government agencies. As deemed fit by the Minister or the body he authorises, measures can be taken against associations and agencies, including closure, adjustment of positions, etc. The Decree obliges all existing associations and CSOs to adjust their positions within one week from the date of notification. According to the Decree, necessary legal action will be taken against noncompliant CSOs.²¹

Although the state of emergency expired by the constitutional force of Article 110 of the Basic Law, no legislative process has been initiated to repeal the Presidential Decree in question. In addition to infringing on provisions of the Basic Law²² and CSO Law,²³ the Decree is still in force in spite of the fact that Palestine has acceded to fundamental human rights conventions without reservation.

Decision of the Council of Ministers on the Associations and Organisations that Exercise Illegal Activities

Based on the Presidential Decree on Licences of Civil Society Organisations, the Council of Ministers passed this Decision during the state of emergency on 20 June 2007. The Decision empowered the Minister of Interior to immediately implement procedures against associations and CSOs which

²¹ Palestinian Official Gazette, Issue 71, August 2007.

²² See Articles, 6, 14, 15, 21(4), 26(2), 32, 38, 98, and 111.

²³ See Articles 6, 10, 13, 37, 38, 41, and 42.

carry out illegal activities, including implementing any measures to end the activities of noncompliant organisations. The decision also requires the Minister to submit weekly reports of his activities to the Council of Ministers.²⁴

The comments above relating to the Presidential Decree on Licences of Civil Society Organisations also apply to this Decision of the Council of Ministers. It breaches provisions of the Basic Law and CSO Law. Even though the state of emergency expired by force of the Basic Law, no legislative process has been initiated to repeal this Decision. In fact, legislative acts passed during the state of emergency have provided an entry point for the Executive to close down *dozens* of charitable associations and CSOs, particularly those operating in the West Bank.²⁵

²⁴ Palestinian Official Gazette, Issue 71, August 2007.

²⁵ See Al-Haq Position Paper on the Ministry of Interior's Decision to Dissolve 103 Civil Society Organisations, 20 October 2007, <http://www.alhaq.org/attachments/article/155/Position%20Paper%20on%20Dissolved%20CSOs%20-%20English.pdf> (Last accessed on 20 August 2015).

10. State of Palestine's obligations under international standards of the right to freedom of association

The fact that Palestine acceded without reservation to many international conventions, including primary human rights treaties, requires the Executive to take a different approach to dealing with CSOs and NPCs and to addressing legislative and policy issues. This approach should be based on the principles of dialogue, partnership, and openness. An enabling environment should be created to help CSOs and NPCs freely carry out their activities and play their role in civil, political, economic, social and cultural spheres. As safeguarded by the Basic Law and relevant international conventions, NPCs and CSOs will be able to maintain their rights and independence. In addition the Executive should deal with these NPCs and CSOs positively, with a focus on and commitment to the practical implementation of the international conventions on the ground.

Stressing the right to freedom of association, Article 20 of the Universal Declaration of Human Rights provides that “[e]veryone has the right to freedom of peaceful assembly and association.” Article 22 of the ICCPR further confirms this right: “(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (2) 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, the protection of public health or morals or the protection of the rights and freedoms of others...” On 2 April 2014, the State of Palestine acceded to the ICCPR, which entered into force for Palestine as of 2 July 2014.

Monitoring international obligations of state parties to the ICCPR, the Human Rights Committee provides that restrictions on the right to freedom of association may not be imposed or implemented in a manner that puts in jeopardy, substantially derogates from, and renders useless the right itself. Restrictions must be provided by law, designed to serve lawful purposes,

and be necessary in a democratic society that works towards materialising these purposes/goals.²⁶

In his report to the Human Rights Council, dated 24 April 2013, the Special Rapporteur asserts that financial resources of CSOs are the most significant issue under his mandate. Given the significance of this report, below are the key points covered by the report. Though extensive, the quote is designed to demonstrate how the State of Palestine needs to address the right to freedom of association, including financial resources that comprise an essential component of this right in line with international standards.

a) Ability of associations to access financial resources: a vital part of the right to freedom of association

Most relevant points in this section include:²⁷

- 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.
- Access to resources is important, not only to the existence of the association itself, but also to the enjoyment of other human rights by those benefitting from the work of the association. Hence, 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.
- In recent years, civil society actors have been facing increased

²⁶ Human Rights Committee, General Comment 10, Article 19 of the ICCPR. Also see Rishmawi, Mirvat, *The Right of Association in Arab Countries: A Guide*, p. 26 ff. In this context, the Special Rapporteur on the rights to freedom of peaceful assembly and of association states: The phrase “a democratic society” places the burden on States imposing restrictions to demonstrate that the limitations do not harm the principles of “pluralism, tolerance and broadmindedness.” Associations, whether domestic- or foreign-funded, should therefore be free to promote their views.” Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, para. 32.

²⁷ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, paras. 8-42.

control and undue restrictions in relation to funding they received, or allegedly received. Combined with the global financial crisis that has compelled some donors to reduce funding, this situation has, in many instances, led to a decline in the number of associations and a decrease in or readjustment of the activities of existing ones, or in the worst cases, the extinction of some associations. This problem is not isolated and exists in all parts of the world, usually as a result of undue restrictions occurring when an association: (a) seeks; (b) secures; or (c) uses financial resources; and these measures aim, in many cases, to silence the voices of dissent and critics.

- On 21 March 2013, the Human Rights Council adopted resolution 22/6, in which it called upon States to ensure that reporting requirements “do not inhibit functional autonomy [of associations]” and “do not discriminatorily impose restrictions on potential sources of funding.”
- In communication No. 1274/2004, the Human Rights Committee observed that “the right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association to freely carry out its statutory activities. The protection afforded by article 22 [of the ICCPR] extends to all activities of an association [...]”
- Other United Nations treaty bodies have emphasized the obligation of States to allow civil society to seek, secure, and utilize resources, including from foreign sources. The Committee on Economic, Social, and Cultural Rights highlighted this issue when it expressed “deep concern” with Egypt’s Law No. 153 of 1999, which “gives the Government control over the right of NGOs to manage their own activities, including seeking external funding.”
- The Special Rapporteur underlines that legislation limiting foreign funding to registered associations only violate international human rights norms and standards pertaining to freedom of association. Furthermore, he recalls that the formation of associations should not be subject to a prior authorization procedure, but rather regulated by a system of notifications that is simple, easily accessible, non-

discriminatory, non-onerous and free of charge.

- Despite these clear legal obligations that not only call upon States to avoid placing restrictions, but also to facilitate access to funding, civil society actors are in too many instances subject to regulations put in place to control, rather than enable access to funding...He underscores again that freedom should be the rule, and restrictions the exception. He also underlines that one of the key principles of freedom of association is the presumption that the activities of associations are lawful.
- The Special Rapporteur notes with concern laws and practices that constrain civil society organizations from seeking, receiving or utilizing foreign funding...Under international law, problematic constraints include, *inter alia*, outright prohibitions to access funding; requiring CSOs to obtain Government approval prior to receiving funding; requiring the transfer of funds to a centralized Government fund... these constraints violate article 22 of the International Covenant on Civil and Political Rights and other human rights instruments, including the International Covenant on Economic, Social and Cultural Rights.
- The obligation for associations to route funding through state channels; to report on all funds received from foreign sources and how these are allocated or used (e.g. Kyrgyz Republic); to obtain authorization from the authorities to receive or use funds (e.g. Jordan, Sudan) all constitute human rights violations.
- It is paradoxical that some of the States stigmatizing foreign-funded associations in their own countries are receiving foreign funding themselves (in the form of loans, financing or development assistance), often in substantially greater amounts than that flowing to CSOs in their country. Others are the very same States providing funding to associations abroad, while rejecting foreign funding for associations in their own countries. But what is clear is that these new trends have a dramatic effect on civil society as they have not only resulted in restrictions to the enjoyment of freedom of association, but also led to further human rights violations.

- The Special Rapporteur wishes to highlight that there is an inherent contradiction in States restricting funding to associations, while at the same time receiving increased funding through international cooperation. He believes that instead of aiming to limit the participation of civil society actors, aid effectiveness rather aims to provide all relevant stakeholders, including associations, with greater influence to contribute to, *inter alia*, poverty reduction, strengthening of democratic reforms and human rights promotion... In the context of on-going discussions related to the post-2015 Millennium Development Goals, the Special Rapporteur believes that civil society involvement and contributions to development are paramount, and that States should exert all efforts to support, rather than inhibit, their work.

b) Conclusion and recommendations

Below are key conclusions and recommendations of the Special Rapporteur's report on the right to freedom of association, with a particular focus on funding:²⁸

- The Special Rapporteur considers the two issues discussed in the present report to be critical for the enjoyment of the rights to freedom of peaceful assembly and of association. He expresses serious concern that undue barriers to funding are put in place, especially in a climate of harassment and exclusion of civil society actors on one hand, and in the context of a global financial crisis on the other.
- In a framework of on-going democratic reforms in several countries across the world and of discussions related to the post-2015 Millennium Development Goals Agenda, he believes States have the obligation to facilitate, not restrict, access for associations to funding, including from foreign sources, so that they can effectively take part in the democratic process and enrich post-Millennium Development Goals talks, and ultimately contribute to development.
- As general recommendations, the Special Rapporteur calls upon States:

²⁸ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, paras. 79, 81, and 82.

- a. To create and maintain, in law and in practice, an enabling environment for the enjoyment of the rights to freedom of association and of peaceful assembly;
- b. To ensure that any restriction complies with international human rights norms and standards, in particular in line with the strict test of necessity and proportionality in a democratic society, bearing in mind the principle of non-discrimination;
- c. To ensure that a detailed and timely written explanation for the imposition of any restriction is provided, and that said restriction can be subject to an independent, impartial and prompt judicial review;
- d. To ensure that those who violate and/or abuse the rights of individuals to freedom of association and of peaceful assembly are held fully accountable by an independent and democratic oversight body and by the courts of law.

11. Conclusions and Recommendations

Below are Al-Haq's conclusions and recommendations regarding the amendments introduced by the 2015 NPC Regulation, and its nexus to direct and indirect amendments to the CSO Law in light of international standards on the right to freedom of association.

- Al-Haq believes that justifications made by the government for promulgation of the 2015 NPC Regulation seem to be unconvincing in light of the strict control mechanisms set by legislative acts already in force. Al-Haq views with deep concern the significance, objectives, grounds and implications of this amendment. It enables the government control NPC activities through requiring prior authorisation for funding sources.
- Al-Haq views with great concern legislative interventions that target CSOs on financial grounds. Contrary to the law, the government has created oversight bodies to substitute those established under relevant regulations. From time to time, a debate takes place within government agencies relating to the introduction of extensive amendments to the CSO Law. Driven by a variety of pretexts, justifications and claims, this debate does not involve CSO representatives and other stakeholders.
- Al-Haq views with deep concern the attitude by which the Executive continues to deal with CSOs and NPCs. Cited under various pretexts, this approach is grounded in suspicion and doubt. In the absence of a functioning PLC, this approach ignores CSO's role in discussing legislation, public policy, and decision-making processes. The suspicion and alienation by the Executive has negatively impacted human rights and public freedoms as well as nation-wide development of all sectors.
- Al-Haq is of the opinion that the 2015 NPC Regulation is in violation of the Government Legislative Plan and NDP 2014-16. It is also inconsistent with the underpinning Jordanian Company Law No. 12 of 1964 and Law by Decree No. 6 of 2008 Amendment of the

Company Law. Both enactments do not vest the government (Council of Ministers) with any legal power to require prior authorisation and control over NPC financial resources. Through this Regulation, the government has violated the rule of law as a constitutional foundation that must be respected. It has also deviated from constitutional powers outlined by the Amended Basic Law.

- Al-Haq believes that the 2015 NPC Regulation and former legislative acts produced by the Executive target, *inter alia*, NPCs. In particular, the 2008 Law by Decision, Amendment of the 1964 Company Law violates international standards highlighted by the Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association. This also applies to legislative measures that impose restrictions on NPC operations.
- Al-Haq recommends that necessary legal action be taken to *withdraw* the NPC Regulation No. 8 of 2015. To terminate it, all legal effects created by the Regulation should be revoked retrospectively. It should be treated as if it had not existed or produced any effect. The Executive should review all legislative acts, which target NPCs and CSOs, ensuring consistency with international standards, particularly the recommendations provided by the Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association.
- Al-Haq recommends that a serious, prompt action be implemented to put an end to the Executive's approach to dealing with CSOs and NPCs. Under a variety of pretexts, justifications and claims, the Executive acts with suspicion when dealing with these organisations and companies. The Executive ignores the role of CSOs, NPCs and other stakeholders in legislative, public policy, and decision-making processes.
- Al-Haq emphasises the significance of, and need for, adopting a process of constructive dialogue and effective partnership as a basis for implementation of international obligations after the State of Palestine acceded to international human rights conventions. Based on openness, cooperation and integration, these conventions

require an enabling environment to be effectively implemented on the ground. In line with international standards, continuous efforts will be made to promote the situation of human rights and public freedoms, and to promote a nationwide development process. This approach will reflect a true image of the State of Palestine and demonstrate Palestinian capability of fulfilling international obligations to the world.