Comments on the Draft *Law on Associations and Non-Governmental Organizations* of the Kingdom of Cambodia

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The International Center for Not-for-Profit Law (ICNL) is an international organization that provides technical assistance, research, and education to support the development of appropriate laws and regulatory systems for civil society in countries around the world. ICNL has worked on civil society law reform projects in over one hundred countries; in Asia, ICNL has worked in China, Timor-Leste, Indonesia, Lao P.D.R., Mongolia and Vietnam. ICNL has worked with the United Nations Development Programme, United Nations Volunteers, the Community of Democracies Working Group on Enabling and Protecting Civil Society, the European Union, the Organization for Security and Cooperation in Europe, the United States Agency for International Development, New Zealand AID, the Swedish International Development Agency, human rights groups, private foundations, and scores of in-country colleagues.

These comments address what is labeled as the "First Draft" of the Cambodian Law on Associations and Non-Governmental Organizations, which was released by the Royal Government of Cambodia on December 15, 2010. ICNL has reviewed the draft law solely based on a translation of the draft law itself, and not based on a review of the broader legal framework within Cambodia, such as the Cambodian Civil Code, labor law or existing memoranda of understanding that may exist between the Cambodian Government and NGO sector.

ICNL believes that sound legislation is the result of a fully participatory and inclusive consultation process, which provides sufficient opportunity for meaningful dialogue between the government and civil society. We are therefore hopeful that the public consultation meeting currently scheduled for January 10, 2011 will mark the beginning, and not the end, of an open consultation process, which will allow Cambodian civil society to participate meaningfully in the development of this initiative. ICNL stands ready to provide additional information or technical assistance as necessary and appropriate.

Analysis

Freedom of association is enshrined in the Universal Declaration of Human Rights, the International Covenant for Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and a range of other human rights conventions, treaties and declarations. The Kingdom of Cambodia became a party to the ICCPR on 26 August 1992 and to the ICESCR on 26 May 1992.

Article 22 of the ICCPR guarantees the right to freedom of association as follows:

> 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.
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> 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 (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

International law creates a presumption against any state regulation that would amount to a restriction of recognized rights.[1] The ICCPR lists only four permissible grounds for state interference; those grounds are an exhaustive list. It is the state's obligation to demonstrate that any interference is justified; interference can only be justified where it is prescribed by law, in the interests of a legitimate government interest, and "necessary in a democratic society." The ICCPR Human Rights Committee has stated, in its General Comment 31(6): "Where such restrictions are made, states must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right."[2]

I. Restrictions on Founding Members

Issue: Chapter 2 of the draft law restricts eligible founding members of associations to "Cambodian national founders" (Article 8) and eligible founding members of domestic NGOs to "Cambodian national initiators" (Article 9). In reference to associations, Article 8 also requires a minimum of 21 Cambodian national founders as members, and at least 7 leaders to handle the registration process.

[1] ICNL and the World Movement for Democracy Secretariat at the National Endowment for Democracy, *Defending Civil Society: A Report of the World Movement for Democracy* (2008), p. 30.

[2] ICCPR Human Rights Committee, General Comment No. 31(6), Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004.

Discussion: The Universal Declaration of Human Rights recognizes, in Article 2(1), that "*everyone* is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind …" (emphasis added) The ICCPR, in Article 2(1), illuminates this point, explicitly stating that the rights of the ICCPR extend "to all individuals within its [the state's] territory and subject to its jurisdiction." The ICCPR Human Rights Committee, in its General Comment No. 15, explained that "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness;" and that "Aliens receive the benefit of the right of … freedom of association."[3]

With respect to both associations and domestic NGOs, the draft limits eligible founding members to Cambodian nationals, and thereby excludes refugees, stateless persons and others in Cambodia from forming associations or domestic NGOs. (Articles 8, 9) This nationality requirement constitutes a clear infringement of the principles highlighted above, and therefore a clear violation of the freedom of association, as protected by the ICCPR and other international instruments.

Furthermore, the draft law sets high minimum membership requirements for associations in particular (21 Cambodian national founders and at least 7 leaders to handle the registration process).[4] (Article 8) Such a high minimum threshold almost certainly violates freedom of association for smaller groups. For example, a group of 15-20 individuals who wish to associate to pursue a legitimate collective purpose would not be permitted under the draft law to form an association as a legal entity; this amounts to interference with the right these individuals have to freedom of association. The interference is exacerbated where the law, as is the case with the draft law in Cambodia, prohibits unregistered groups to carry out activities. Recognizing this issue, other countries require a minimum number of only three, or even just two, founding members for associations.[5]

Recommendation: Revise Chapter 2 of the draft law to conform establishment criteria to international norms relating to freedom of association. More specifically:

- Amend Articles 8 and 9 to eliminate the nationality requirement for founding members and to ensure that everyone (i.e., all individuals within the state's territory and subject to its jurisdiction) is eligible to form associations or domestic NGOs.

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[3] ICCPR Human Rights Committee, General Comment No. 15, *The position of aliens under the Covenant* (1986) (http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument).

[4] The requirement of 21 members contrasts starkly with the minimum requirement of 3 members to form a domestic NGO. It is worth noting that associations can pursue either members' interests or public interests, while domestic NGOs can pursue only public interests. The dramatic difference in the minimum number of founding members is likely to mean that groups pursuing public interests will choose to form NGOs, while groups pursuing members' interests will have no other option that the association form, which requires 21 founding members. The issue is further complicated due to the practical challenges in distinguishing between purposes that serve members versus the public interest. A judicial association, for example, may fundamentally be focused on member interests, but also serve the public interest in a more professional judiciary; should such an organization register as an association or a domestic NGO?

[5] While some countries do have higher minimum membership requirements, such requirements would also seem to interfere with the freedom of smaller groups to associate, as protected by the ICCPR. This is particularly true where the law provides for mandatory registration.

- Amend Article 8 by reducing the minimum number of founders for an association from 21 to 3 or 2, which would be consistent with the minimum requirement of members to form a domestic NGO in the draft law, and consistent with international practice.

II. Registration Requirements

Issue: Chapter 2 of the draft law generally outlines the registration requirements and procedures for a domestic association and NGO. Article 12 requires associations and domestic NGOs to "have a central office in the Kingdom of Cambodia." Article 13 addresses the registration fee, which "shall be determined by an Inter-Ministerial Proclamation." Articles 14 and 15 contain the documentation requirements for associations and NGOs. And Articles 16-18 address the registration procedures, including the receipt of the registration application; the examination of the application and response; and the rectification of the application.

Discussion: The right to obtain legal entity status is well protected in international law. Article 22 of the ICCPR would have little meaning if individuals were unable to form NGOs and attain legal entity status.[6] The UN Special Representative on Human Rights Defenders has noted that "NGOs have a right to register as legal entities and to be entitled to the relevant benefits."[7]

As noted by the ICCPR Human Rights Commission, states employing a registration system must ensure that it is truly accessible, with clear, speedy, apolitical, and inexpensive procedures in place.[8] The registration body should be guided by objective standards and restricted from arbitrary decision-making.[9] Safeguards are commonly used to help ensure a well-implemented registration process. Examples include a clear and limited list of objective grounds for refusal of registration; a fixed time period for the government review of applications; a written explanation to the applicant in case of refusal; and the right to appeal, in case of refusal, to an independent court. Article 14 of the ICCPR

[6] See Sidiropoulos and others v. Greece, European Court of Human Rights, 10 July 1998, Reports of Judgments and Decisions, 1998-IV, para. 40 ("That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning.") The language of the ICCPR and the European Convention on Human Rights is virtually identical; in light of this, the European Court's judgments on the scope of the freedom of association have persuasive value for the meaning of the freedom of association as guaranteed by the ICCPR.

[7] Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178, page 21.

[8] Id. ("Where a registration system is in place, the Special Representative emphasizes that it should allow for quick registration … Decisions to deny registration must be fully explained and cannot be politically motivated … NGO laws must provide for clear and accessible information on the registration procedure.")

[9] ICNL and the World Movement for Democracy Secretariat at the National Endowment for Democracy, *Defending Civil Society: A Report of the World Movement for Democracy* (2008), p. 30.

enshrines the right to a fair hearing by a competent, independent and impartial tribunal,[10] and Article 2(3) guarantees the right to an effective remedy.[11]

Many of the draft law's registration requirements impede the ability of an association or NGO to achieve legal entity status through a transparent process. Specific concerns include the following:

- Lack of clear and limited list of grounds for denial of registration.[12] The laws governing the registration of associations or NGOs should provide a clear and limited list of objective grounds for the denial of registration. The draft law includes no such provision. Article 17 authorizes the Ministry of Interior to "examine the documents and the legality of the charter" and to decide "whether to agree or disagree to register" the organization. Article 18 then requires that the Ministry issue a written notification to the applicant where the "content in the application form is not consistent with the Constitution of other laws in force …" Thus, the Ministry can base denial on inconsistency with the Constitution or *any provision of law*, whether compliant with international human rights law or not; moreover, the provision creates a legal loophole whereby a new law could be passed at any time to form the basis for denial. First, it is questionable whether the draft law meets the ICCPR standard which requires that restrictions (in this case, denial of registration) be "prescribed by law." The "prescribed by law" standard means both that the law be accessible (published) and that its provisions be *formulated with sufficient precision to enable the persons concerned to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct*.[13] Second, it is not sufficient for denial simply to have a legal basis, or to be "prescribed by law"; rather, under Article 22 of the ICCPR, the denial of registration must also be "necessary

[10] Article 14 of the ICCPR reads as follows: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

[11] Article 2(3) of the ICCPR reads as follows: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted." Article 8 of the Universal Declaration of Human Rights reinforces this principle: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

[12] In addition, the draft law makes no reference to an opportunity for appeal of the denial of registration to an independent court. While we are not familiar with Cambodian administrative law and recognize that the issue of appeal from administrative decisions may be addressed there, the lack of reference to appeal in the draft law is worrying. The right to appeal is a fundamental safeguard for any government decision-making process, including registration of associations and NGOs. If the broader Cambodian legal framework offers no recourse to a competent, independent and impartial tribunal, then the failure of the draft law to do so would violate Articles 2(3) and 14 of the ICCPR.

[13] See, for example, *N.F. v. Italy*, no. 37119/97, §§ 26-29, ECHR 2001-IX; and *Gorzelik and others v. Poland* [GC], no. 44158/98, §§ 64-65, ECHR 2004-I.

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." These four interests are to be narrowly construed. The expansive formulation in the draft law fails to limit government decision-making to the confines of this standard. The lack of a safeguard in the form of a clear and limited list of objective grounds could have a disproportionate impact on groups that engage in advocacy or expressive activity that supports unpopular causes or is openly critical of government policy or action.

- Extensive documentation requirements. The draft law, in Articles 14-15, requires extensive amounts of information, including "Profiles of the leaders" of the association and domestic NGO (as well as detailed biographical information (age, sex) relating to the list of the 21 founders of an association, and "a recent 4x6 size photograph" for leaders of both associations and domestic NGOs). The term "Profiles" is undefined and could lead to open-ended inquiries by the government into the biographies of the leaders. Moreover, it is unclear how this information would be used. As stated above, *everyone* has the right to associate. The submission of "Profiles of the leaders" could invite government vetting of those individuals seeking to form organizations as legal entities. The problem is compounded by the lack of objective standards in reviewing registration applications; consequently, the leader profiles could fuel the exercise of unbridled discretion.

- Proof of assets. Article 15, which addresses documentation requirements for domestic NGOs, requires applicants to include a letter "disclosing fund deposited in any bank recognized by National Bank of Cambodia." It is not clear if the regulatory intent is to require that all NGO applicants have funds deposited in the bank, or only to require those that do have funds to inform the Ministry authority.[14] As defined in the draft law, both associations and NGOs are membership organizations; in most countries, membership organizations are not required to hold assets at the time of application for registration (or any other time during their life-cycle, for that matter).[15] Indeed, because freedom of association applies to everyone, and not merely to those with assets or funds deposited in banks, requirements to demonstrate the possession of assets or funds almost certainly violate the freedom of association.

- Requirement of office. Article 12 requires associations and domestic NGOs to "have a central office in the Kingdom of Cambodia." While it is common in many countries to require that organizations provide an address, requirements to secure actual office space are potentially more burdensome. A central office may be appropriate for well-funded NGOs, but smaller community-based associations and NGOs may lack sufficient resources to support an office. Indeed, such small organizations may simply operate in the community, hold meetings in members' homes, and have no need for a central office

[14] Moreover, it may be impossible for an applicant to open a bank account prior to being registered.

[15] Foundations or other non-membership form may, by contrast, be required to provide proof of assets, since such organizations are based on property rather than members.

- Registration fee. Article 13 addresses the registration fee, which "shall be determined by an Inter-Ministerial Proclamation." It is crucial that the registration fee not be so expensive as to impede the freedom of association.

Recommendation: Revise Chapter 2 of the draft law to streamline the registration process. More specifically:

- Amend Chapter 2 to include appropriate safeguards for registration applicants, including a clear and limited list of objective grounds for denial and the opportunity for appeal to a competent, independent and impartial tribunal.

- Amend Articles 14 and 15 to reduce documentation requirements; in the case of organizational leaders, eliminate the vague requirement of "profiles" and simply require their names and addresses.

- Amend Article 15 to eliminate the requirement of disclosing funds in the bank.

- Amend Article 12 to require that applicants have an address, but not necessarily a central office.

- Amend Article 13 through the inclusion of language to help ensure that any registration fee that may be determined by Inter-Ministerial Proclamation not be so expensive as to impede the freedom of association.

III. Mandatory Registration

Issue: Article 6 prohibits any activity conducted by unregistered associations and NGOs. Registration is thus mandatory and unregistered groups are banned.

Discussion: The draft law's mandatory registration requirements constitute restrictions on the freedom of association under Article 22 of the ICCPR. Under Article 22, as well as other major international conventions, "freedom of association is a right, and not something that must first be granted by the government to citizens."[16] That associations and NGOs may be formed as legal entities does not mean that individuals can be *required* to form legal entities in order to exercise the freedom of association. As the UN Special Representative on human rights defenders stated in her report to the UN General Assembly: "[R]egistration should not be compulsory. NGOs should be allowed to exist and carry out activities without having to register if they so wish."[17]

Mandatory registration is particularly problematic when registration is difficult to achieve, as is true under this draft law, especially for would-be smaller organizations seeking to address needs at the

[16] Public Interest Law Initiative, *Enabling Civil Society: Practical Aspects of Freedom of Association Source Book* (Budapest 2003), p. 14.

[17] Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178 (1 October 2004) page 21 (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/533/18/PDF/N0453318.pdf?OpenElement).

community level or the interests of members. In such circumstances, individuals are forced to choose between operating as an unregistered group – and therefore illegally – or seeking to comply with burdensome registration requirements. See Section II for an overview of registration requirements.

It is, of course, understood that legal entities will reasonably enjoy different legal rights from those groups which do not have legal personality. The rights of a legal entity, such as limited liability for its members/founders, tax incentives, authority to possess a property title, and the ability to sue and be sued in courts, among other rights, have traditionally made registration of a legal entity an attractive option for associations. The decision about whether or not to register and become a legal entity, however, should be a purely voluntary one. And individuals have the right under international law to associate without registering a legal entity.

Moreover, as a policy matter, enforcement of mandatory registration requirements, and the corresponding prohibition of activities carried out by unregistered groups or organizations, may be difficult to implement and unworkable in practice. No regulatory body responsible for gathering such information has the means to pursue every group (two and more) of individuals who gather together with a differing level of frequency and may be performing the broadest variety of imaginable activities, from trekking and football fans, to chess and silk weaving groups. Furthermore, there is no need for the government to waste its resources in seeking to limit the activities of such groups.

Recommendation: Amend Article 6 to eliminate the mandatory registration requirement and, instead, explicitly allow for unregistered groups to operate.

IV. Suspension, Termination and Dissolution

Issue: Articles 49 and 50 address involuntary suspension and termination of both domestic associations/NGOs or alliances and foreign NGOs, but only superficially, by referring to suspension or termination "by a court's final judgment." In the wake of voluntary termination, according to Article 51, remaining assets shall be distributed "in accordance with the charters or memorandum or decisions" of that association/NGO or alliance. In the wake of involuntary termination, according to Article 52, remaining assets shall be distributed in "accordance with the final court's judgment."

Discussion: Involuntary termination is a clear example of interference with freedom of association, and like any other government intrusion, must meet the standards outlined in the ICCPR. "The relevant government authority should be guided by objective standards and restricted from arbitrary decision-making."[18] The draft law provides inadequate standards to guide the government's determination of suspension or termination. The draft law does not expressly limit the use of termination as a sanction of last resort. There is no requirement for the governmental authorities to provide notice and an

[18] ICNL and the World Movement for Democracy Secretariat at the National Endowment for Democracy, *Defending Civil Society: A Report of the World Movement for Democracy* (2008), p. 31. The UN Special Representative on human rights defenders has stated in regards to dissolution that "Actions by the Government against NGOs must be proportionate and subject to appeal and judicial review. Administrative irregularities … should never be considered as sufficient grounds for closing down an organization." (p. 23)

opportunity to rectify problems prior to the suspension or termination, and there is no mention of a right to appeal after suspension or termination. Taken together, the process of suspension and/or termination is open to government manipulation and overreach.

The provisions addressing the distribution of remaining assets would also benefit from additional limits in order to ensure that the assets are transferred to another association/NGO or alliance with the same or similar purposes, but this is secondary to the issue above.

Recommendation: Revise Articles 49 and 50 to include an exhaustive list of objective grounds for suspension and termination, along with accompanying procedural safeguards as outline above. Revise Articles 51 and 52 to help ensure that assets are transferred to organizations with the same or similar purpose.

V. Foreign Non-Governmental Organizations

Issue: The draft law erects barriers to the registration and activity of foreign NGOs. First, Articles 30-34 outline a heavily bureaucratic, multi-staged registration process. Second, Article 36 requires mandatory collaboration by stating that a foreign NGO "shall collaborate with relevant ministries or institutions of the Royal Government of Cambodia when preparing project plans, implementing, monitoring, aggregating and evaluating the result of the implemented activities." Third, Article 37 limits the validity of the memorandum of understanding to 1-3 years, thereby requiring foreign NGOs to undergo the equivalent of a re-registration process. Fourth, Article 39 addresses the resources and budget of foreign NGOs, stating that a foreign NGO "shall have a sufficient budget to implement its aid projects" and placing a 25% cap on administrative expenses of a foreign NGO.

Discussion: As a threshold issue, Article 4 defines a foreign NGO as "a group of foreign national physical persons, established under foreign law to take action for serving public interests in the Kingdom of Cambodia, without operating any activity to generate profits for sharing among its members." The definition is limited in that it refers exclusively to membership organizations; it therefore excludes the wide array of non-membership not-for-profit organizations that exist around the world. For example, in many countries, foundations, think tanks, and other organizations (including groups such as the East West Management Institute and ICNL) are non-membership organizations.

Registration Procedures. The registration of a foreign NGO is based on the approval and signing of a Memorandum Agreement with the Ministry of Foreign Affairs and International Cooperation.[19] Moreover, there is a multi-tiered approval process:

- First, according to Article 33, a foreign NGO "shall enter into an aid project or program agreement with the leadership of the counterpart ministries or governmental institutions before applying for Memorandum of Understanding with Ministry of Foreign Affairs and International Cooperation …"

[19] Since the process of securing government approval through the signing of a memorandum agreement is tantamount to registration, we use the term registration in these comments.

- Second, according to Article 30, a foreign NGO "shall submit a request for a memorandum agreement to the Ministry of Foreign Affairs and International Cooperation" supported by specified documentation.[20] The Ministry review then follows within 45 days in order to decide "whether to approve or disapprove the memorandum." (Article 32)

- Third, according to Article 34, upon approval of the memorandum agreement, the Ministry sets "a date and venue for signing the memorandum" with the foreign NGO.

- Fourth, also according to Article 34, after the memorandum agreement has been signed, the foreign NGO "shall declare its aid projects or programs to the Cambodian Development Council."

As is the case with the registration process for domestic associations and NGOs, the draft law lacks important safeguards (e.g., objective standards for review and denial of registration and the right to appeal to a competent and independent court) for the registration of foreign NGOs. Taken together with the multi-staged registration process, the registration of foreign NGOs could be beset by delays and subject to subjective, arbitrary and politicized decision-making,

Mandatory Collaboration with Government. Once a foreign NGO has received approval to operate, Article 36 states that a foreign NGO "shall collaborate with relevant ministries or institutions of the Royal Government of Cambodia when preparing project plans, implementing, monitoring, aggregating and evaluating the result of the implemented activities." Collaboration is thus not merely envisioned as an option to be encouraged (as Article 2 seems to suggest, in stating that the purpose of the law is to provide "the opportunity" to collaborate), but rather a mandatory requirement. Moreover, the range of areas for collaboration is wide, extending throughout the program life-cycle, from project preparation through evaluation of results. Thus, there appears to be no room for foreign NGOs to act independently of the Government in addressing public benefit goals or community needs. The UN Special Representative on human rights defenders has noted that "Foreign NGOs … must be allowed to register and function without discrimination, subject only to those requirements strictly necessary to establish bona fide objectives."[21] The draft law, in subjecting foreign NGOs to the additional requirement of collaboration with government, places undue burdens on the activities of foreign NGOs.

[20] Certain documentation requirements raise concerns. (Article 30) For example, as is the case with a domestic NGO, a foreign NGO must submit a "letter disclosing the funds deposited in any bank …" One could question how a foreign NGO, prior to registration, will be able to open a bank account. In addition, a foreign NGO must submit a "name list of Khmer and foreign staff who work in the Kingdom of Cambodia." While it is common for foreign NGOs to designate a representative to serve as the contact point with the regulatory authorities, the state interest in staff identities is not clearly linked with a legitimate government interest.

[21] Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178 (1 October 2004) p. 22 (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/533/18/PDF/N0453318.pdf?OpenElement). Additionally, UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, in her report to the UN General Assembly (4 August 2009, p. 24) (http://www.icj.org/IMG/report_of_sr_on_hrds_to_ga.pdf), emphasized that "Foreign NGOs …

Furthermore, it is not clear how collaboration is envisioned at the various stages of project implementation, but any mechanism seems destined to invite government interference. Imagine, for example, a foreign NGO engaged in human rights defense and required to work with the government in planning and implementing its program activities, as well as monitoring and evaluating the result of the program activities; collaboration with the government through every phase of the program cycle would, inevitably, undermine the NGO's ability to represent objectively the concerns of persons who sought help and advice from it. Finally, the constraints on the freedom of action for foreign NGOs are also a burden of responsibility for government ministries and institutions.

Re-registration. Article 37 limits the validity of the memorandum of understanding to 1-3 years, and requires those foreign NGOs wishing to continue activities in Cambodia to request an extension of the memorandum, supported by a "letter from partner ministries or governmental institutions." In essence, therefore, foreign NGOs are subject to a re-registration process.[22] The UN Special Rapporteur on the situation of human rights defenders has noted re-registration requirements with concern: "In certain countries NGOs are required to re-register in certain periods, be it every year or more often, which provides additional opportunities for Governments to prohibit the operation of groups whose activities are not approved by the Government. Requirements for periodic re-registration may also induce a level of insecurity … resulting in self-censorship and intimidation."[23]

Budget of Foreign Non-Governmental Organizations. Article 39 addresses the resources and budget of foreign NGOs. Two concerns arise. First, a foreign NGO "shall have a sufficient budget to implement its aid projects" but there is no objective basis provided to determine what constitutes a "sufficient" budget. The vagueness of the term "sufficient" opens the door to subjective and arbitrary governmental decision-making. Second, Article 39 places a 25% cap on administrative expenses of a foreign NGO. As a threshold matter, what constitutes an "expense for administrative purposes" is not defined (for example, it is unclear whether it includes the costs of complying with the burdensome registration requirements contained in the draft law or the required "collaboration" detailed in Article 36 and other sections of the law). Limits on administrative expenses, even where the regulatory intent is benign, are generally misguided for a number of reasons. First, administrative spending caps are inevitably arbitrary; in light of the diversity in the sizes and types of organization (even if focused solely on foreign NGOs), it is impossible to determine an appropriate percentage for administrative expenses that would be fairly applicable to all organizations. Second, administrative spending caps limit the integrity and efficiency of the sector, in that certain administrative expenses are essential to ensure sound

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should be subject to the same set of rules that apply to national NGOs; separate registration and operational requirements should be avoided."

[22] The process of registration renewal may be appropriate if the draft law envisions no reporting requirements for foreign NGOs, which seems to be the case, based on the fact that Article 46 ("Annual Reports of Associations or Domestic Non-Governmental Organizations or Alliances …") only applies to domestic organizations. Despite the plain reading of Article 46, the regulatory intent may be otherwise, as Article 53 makes reference to the consequences of foreign NGOs violating Article 46. Clarification of these contradictions is in order.

[23] Report submitted by the UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, in accordance with General Assembly resolution 62/152 (4 August 2009) p. 18 (http://www.icj.org/IMG/report_of_sr_on_hrds_to_ga.pdf).

organizational management, compliance with applicable rules and regulations, and cost-effective delivery of service and programs. Third, limits on administrative spending can be exceedingly difficult to enforce, as any definition of what constitutes an administrative expense is likely to pose problems of interpretation; the problem of interpretation is aggravated where there is no definition of administrative expenses, as is the case with the draft law.

Recommendation: Revise the regulatory approach toward foreign NGOs through the following specific changes:

- Streamline the registration process and include safeguards to ensure a more objective, consistent, apolitical and professional registration decision-making process.
- Revise Article 36 to allow for and/or encourage, but not mandate, collaboration with the Government of Cambodia.
- Amend Article 37 to remove re-registration requirement for foreign NGOs.
- Delete Article 39 in its entirety; alternatively, amend Article 39 to remove the ambiguity relating to what constitutes a sufficient budget and what is included in administrative expenses.

VI. Supervision

Issue: The draft law places requirements on associations and NGOs relating to staff recruitment (Article 41); notification of governmental authorities in connection with opening field offices or conducting activities (Article 43), and in connection with rotating or dismissing staff or members of the organization (Article 44); reporting to governmental authorities (Article 46); and inspection by governmental authorities (Article 48).

Discussion: Article 22 of the ICCPR limits government supervisory action in clear terms: "No restrictions may be placed on the exercise of this right [freedom of association] 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 recognition of freedom of association as a right "that must be respected necessarily entails some limits on the degree of regulation … The very essence of the freedom of association is the ability of those belonging to a body to decide how it should be run; this necessitates both a minimalist approach to regulation and very close scrutiny of attempts to interfere with the choices that associations and their members make about the organization of their affairs."[24] Articles 41, 43, 44, 46 and 48 of the draft law contain ambiguity that could lead to overbroad interpretations and discretion. This section will consider each issue in turn.

[24] Public Interest Law Initiative, *Enabling Civil Society: Practical Aspects of Freedom of Association*, (Budapest 2003), p. 42. Recommendation CM/Rec(2007)14 of the Committee of Ministers of the Council of Europe states, in section VII (#70) that "No external intervention in the running of NGOs should take place unless a serious breach of the legal requirements applicable to NGOs has been established or is reasonably believed to be imminent."

Inspection Authority. Article 48 authorizes the Ministry of Economy and Finance or the National Audit Authority "to examine the financial status reports and properties" of any association or NGO or alliance. Law enforcement searches of the private premises of organizations should only follow when based on a valid search warrant or other court authorizations, and allowing for the presence of an attorney.[25] For more routine examinations, the provision could be strengthened through the inclusion of safeguards, to ensure the right to examine only during ordinary business hours, with adequate advance notice.

Notification Requirements. Article 43 commendably allows associations/NGOs to "open branch offices or conduct activities" both in Phnom Penh and in the provinces of Cambodia. In such cases, however, the association/NGO "shall inform in writing the relevant municipal hall or provincial halls …" Notably, the requirement is to notify and not to seek approval. Nonetheless, the notification requirement relates explicitly not only to opening a branch office, but also the "implementation of activities." This requirement, which would therefore seem to apply to any domestic association/NGO that engages in occasional or episodic activities in a given locale, could amount to an impediment on program activity. For example, an NGO engaged in a one-time assessment of progress toward the UN Millennium Development Goals in the various provinces of Cambodia would be required to notify the relevant government authorities in each province and municipality where the assessment is taking place. While the government may have legitimate interests in NGO activities, requiring notification may be unworkable in practice.

Article 43 goes on to require "relevant municipal and provincial halls to facilitate working performance" of associations/NGOs "as a partnership." No further definition of "partnership" is provided. While partnership is critically important for the success of many projects, and should certainly be allowed for and encouraged where appropriate, "partnership" may not be necessary – or appropriate – for all program activities. Interestingly, the obligation falls explicitly on the governmental authorities rather than the associations/NGOs; it is not clear, however, how governmental authorities will interpret this obligation.

Article 44 requires associations/NGOs that "rotate or terminate or dismiss or remove its staff, members, president or leaders" to inform governmental authorities accordingly. While notification of changes to the content of an NGO's governing documents (which typically does include governing board members) is consistent with good regulatory practice, changes in the staff or membership base of an association or NGO is typically not subject to notification requirements. Changes in membership occur frequently, and requiring notification every time a member joined or resigned from a group would be burdensome on organizations. Moreover, the disclosure of membership will chill the freedom of association in certain kinds of groups, such as associations of stigmatized individuals (e.g., HIV/AIDS sufferers) or groups seeking to advance human rights.

[25] Report submitted by the UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, in accordance with General Assembly resolution 62/152 (4 August 2009) p. 23 (http://www.icj.org/IMG/report_of_sr_on_hrds_to_ga.pdf).

Reporting Requirements. Article 46 requires domestic associations/NGOs and alliances to prepare an annual report on "activities, the status of their budget in the previous year, and action plan for the next year in its office and submit to the Ministry of Interior or Ministry of Foreign Affairs and International Cooperation and the Ministry of Economic and Finance and other relevant ministries."[26] Thus, the draft Law takes a "one size fits all" approach to reporting, with all domestic organizations being subject to the same annual reporting requirement. As an alternative, one could envision a system where organizations with no tax benefits or public funding would be accountable to their members but would have no public reporting requirements. Organizations below a certain threshold would be subjected to simplified reporting, even if they receive tax benefits or public funding. More fulsome reports would only be required of large organizations receiving substantial tax benefits or public funding. Details and distinctions would be worked out after meaningful consultation with civil society.

Staff Recruitment. Article 41 requires associations and NGOs to employ Cambodians "to the maximum extent possible."[27] It is not clear how compliance with such a vague standard will be determined, and whether the Cambodian Government will have any role in determining compliance. The same concerns arise with the requirement of proportionality of staff to programs. How will compliance be determined and who decides? As general principles to guide organizations in their hiring, these provisions are likely to be innocuous. If these provisions, however, provide the basis for governmental intervention in the hiring practices of organizations, then such interference in the internal affairs could amount to undue interference in an organization's operations.

Recommendation: Revise the regulatory approach toward foreign NGOs through the following specific changes:

- Revise Article 41 to remove ambiguity or provisions which require employing Cambodians "to the maximum extent possible" and proportionality of staff to programs.
- Revise Article 43 to limit the notification requirement to the opening of a branch office, and remove the notification requirement for merely conducting activities; and revise Article 43 to guard against government intervention based on facilitating "working performance" of associations/NGOs "as a partnership."
- Revise Article 44 to eliminate the requirement of notification in cases of changes in the staff or membership of an association/NGO.

[26] The provision could benefit from greater specificity, in that it is not clear to which ministry (or ministries) the domestic association/NGO should direct its report. Because the reporting requirement is directed explicitly to domestic organizations, it is also not clear why the Ministry of Foreign Affairs and International Cooperation is included on the list of potential recipients. The ambiguity in this provision is likely to lead to confusion within the NGO sector regarding where to submit the reports, and to confusion within the Government regarding who is responsible for reviewing reports.

[27] ICNL understands that the same requirement is found in the Cambodian labor law, which would seem to make its inclusion here redundant.

- Revise Article 46 to clarify the reporting obligations of domestic associations/NGOs and alliances; consider a graduated reporting requirement that would exempt smaller organizations from reporting, or at least simplify their reporting obligation.

- Revise Article 48 by including procedural safeguards, such as notice of the inspection and the requirement to conduct the inspection during regular business hours.

VII. Miscellaneous Issues

Re-registration. Article 55 requires all domestic associations/NGOs and alliances which have been previously registered to re-apply for registration once the draft Law comes into force. The time period for re-registration is 180 days. Failure to re-apply within 180 days will subject the organization to having its prior registration nullified. Re-registration can be a burdensome process, and there are alternatives, which we'd be pleased to discuss should there be interest.

Funding Sources for Domestic Organizations. Article 38 defines the available resources for domestic associations and NGOs to include member contributions, resources and properties of the organization, gifts from individuals or legal entities, and income generated from legitimate activities. It is commendable that this list allows for membership fees, charitable gifts, and "Other incomes generated from legitimate activities". It is not clear whether this last category is intended to refer narrowly to economic activities, or is intended more broadly to serve as a "catch-all" category which would allow for resources from legitimate sources that are not listed. It is well accepted under international good regulatory practice that associations/NGOs should be allowed to engage directly in economic activities; in light of the importance of this category of funding, the draft law should expressly allow for it. In addition, it is important to ensure, through a "catch-all" phrase, that funding from other legitimate sources is allowed. For example, funding from multilateral organizations, like the UN, or bilateral aid agencies, like USAID or DFID, is not explicitly included in the list of available resources; the inclusion of clear catch-all category would cover this gap.

Legal Status of Foreign NGO. There may be some ambiguity in the draft law regarding the legal status of foreign NGOs. Article 29 states that a foreign NGO "shall have a representative office" in Cambodia; representative offices are often not deemed to be a separate legal entity, but instead an extension of the organization headquartered in the home country. By contrast, Article 35 states that a foreign NGO "will become a legal entity" when the Ministry of Foreign Affairs and International Cooperation signs the Memorandum Agreement; as a legal entity, the foreign NGO would normally be viewed as separate and distinct from the parent organization. The distinction between representative capacity and full legal capacity takes on potential relevance in the event of lawsuits for misconduct, debts and liabilities, and termination and dissolution.

Alliances of Associations and Domestic NGOs: In addressing alliances, we raise two concerns. First, Chapter 3 of the draft law assumes a narrow definition of alliance, limiting its reach to alliances of associations or domestic NGOs only. It is common in other countries to allow the full spectrum of legal entities, including for-profit businesses, cooperatives, foundations, and even government agencies and

municipalities, to form alliances (i.e., associations, federations, umbrella organizations, coordination bodies). Second, Chapter 3 of the draft law lacks fundamental procedural safeguards during the registration process, namely, an exhaustive list of objective grounds for refusal; a fixed time period for governmental review of registration applications; the requirement to provide written notice in case of refusal; and an opportunity for appeal to an independent court. Taken together, these gaps open the door to inconsistency, delay and unpredictability in the handling of applications for the registration of alliances.