



**AFRICAN UNION**  
African Commission on  
Human & Peoples' Rights

# Report

of the Study Group  
on Freedom of  
Association &  
Assembly in Africa

"Freedom of Association, as Pertaining to Civil Society, and Freedom of Assembly in Africa:  
A Consideration of Selected Cases and Recommendations "

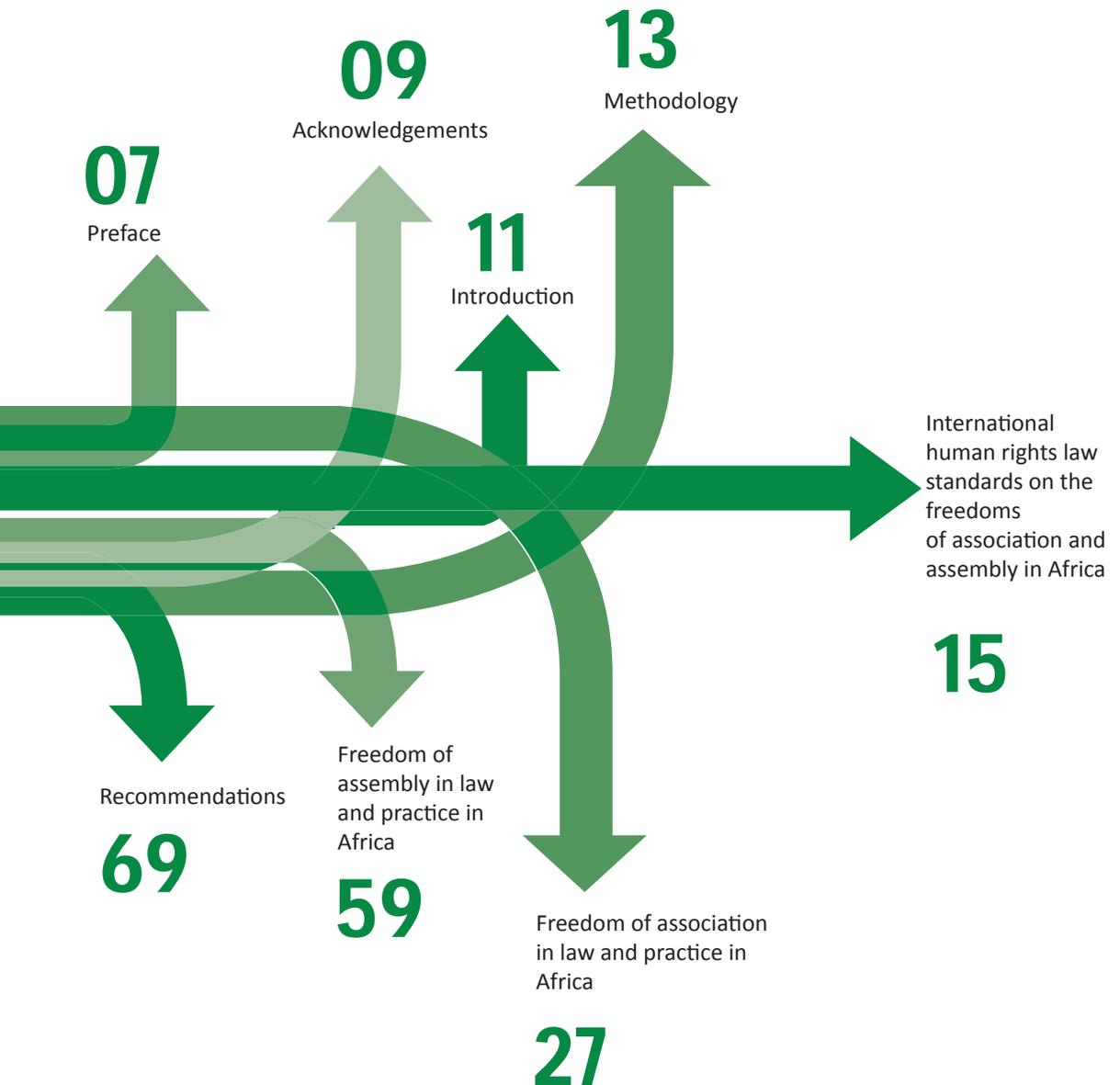


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## Preface

I am pleased and honored that the African Commission on Human and Peoples' Rights has asked me to write the preface for this important report.

I naturally have strong opinions on the subject of the rights to freedom of peaceful assembly and of association – not just because I cover these rights as UN Special Rapporteur, but also because I am a lifelong African human rights defender, civil society member and citizen. These rights are dear to me personally and professionally, and rarely in my lifetime have I seen them so systematically under siege.

In Ethiopia, independent human rights NGOs have been nearly exterminated thanks to a 2009 law that limits foreign funding to local NGOs, even as the government itself relies heavily on foreign funding and investment. In 2013, Kenya tried to enact similar restrictions.

In Zimbabwe, we have seen a wave of brutal repression against peaceful assemblies. In Uganda and Nigeria, we have seen

draconian laws that essentially eliminate assembly and association rights for the LGBTI community. And in Uganda again, “walking to work” has essentially been made illegal for some citizens and there are restrictions on how many people can gather together, even peacefully. The same is true in Burundi where people are only allowed to jog singularly or in duos at most. The list of examples goes on, as readers will see in this report. Even more disturbing than the repression itself, perhaps, are the various rationales for limiting assembly and association rights. Our governments claim that foreign-funded associations are neo-colonial fronts acting at the behest of foreigners, even as they themselves court and receive foreign funding. They claim that peaceful assemblies lead to chaos. They say that homosexuality is a foreign concept that runs counter to “African values,” as though anyone decides at a given moment to be heterosexual.

In doing all of this, they insinuate that the rights to freedom of peaceful assembly and of

Assembly and association rights are universal values. These rights satisfy people's fundamental desire to take control of their own destinies: the need to speak out, to work together for the common good, to hold their leaders accountable, and to do all of this as an autonomous, self-selected group

association – and by extension all fundamental rights – are somehow “un-African.” In short, they claim to know better than the people they govern.

These excuses are insults to every person on this continent, especially since most of our traditional societies believed in tolerance, and the right to peacefully assemble and associate.

Assembly and association rights are universal values. These rights satisfy people’s fundamental desire to take control of their own destinies: the need to speak out, to work together for the common good, to hold their leaders accountable, and to do all of this as an autonomous, self-selected group. You don’t have to agree with these pursuits or even like them. But if they’re doing it peacefully and not inciting violence, the act of organizing or speaking out cannot be criminalized. It’s none of your business. More importantly, it’s none of the government’s business.

Let me emphasize that people’s desire to speak out and organize is not a cultural construct. It is not

specific to a particular place and time. It’s virtually biological, born from our common human heritage and rooted in the simple fact that every civilization is built upon cooperation and collaboration. It is human nature – and human necessity – that people come together to collectively pursue their interests. And it can’t be stopped no matter how many laws are created to try to do so.

This is why this report is so important. It represents a positive affirmation of the rights to freedom of peaceful assembly and of association by Africans and for Africans. It is a statement that assembly and association rights are a powerful tool to promote dialogue, pluralism, broadmindedness, tolerance and civic participation. But most critically, it embraces these rights as our own and condemns those who would take them away from us.

In Solidarity,

**Maina Kiai,**

**UN Special Rapporteur on the rights to  
freedom of peaceful assembly and of  
association**



## Acknowledgment

The Special Rapporteur on the Situation of Human Rights Defenders in Africa, Attorney Reine Alapini Gansou (the “Special Rapporteur”), on behalf of the African Commission on Human and Peoples’ Rights (the “African Commission”) and members of the Study Group on Freedom of Association (the “Study Group”), would like to express appreciation to stakeholders who contributed to the conception, development and presentation of this Report on Freedom of Association and Assembly in Africa for consideration and adoption by the African Commission.

Indeed, the significance of freedom of association and assembly in Africa is well established as it is clear that a number of human rights concerns on the continent are related to these two important themes.

The Special Rapporteur would like to express her gratitude to the members of the Study Group, namely:

The International Service for Human Rights;  
The Institute for Human Rights and Development in Africa;  
The West African Human Rights Defenders Network;  
The East and Horn of Africa Human Rights Defenders Project;  
The African Centre for Democracy and Human

Rights Studies;  
The Cairo Institute for Human Rights Studies;  
The Central African Human Rights Defenders Network; and Human Rights Institute of South Africa

The Study Group was the linchpin for this report and the high quality of its work is evident throughout. Particularly, the Special Rapporteur would like to thank Honorable Commissioner Lucy Asuagbor, former Special Rapporteur on the Situation of Human Rights Defenders in Africa, for the wealth of expertise she brought to the quality of the report, as well as her dedication throughout the entire process of producing this document.

The preparation of this report was also greatly facilitated by many partners including Professor Mabassa Fall from the International Federation for Human Rights (FIDH) and the World Organization against Torture (OMCT), Thibaut Guillet, Professor Ibrahim Salami, Martin Jones, Dr. Waruguru Kaguongo, Irene Petras, Emerson Sykes, and Arnold Tsunga.

Our special thanks goes to our consultants Alassani Tigry, former official of Organisation Internationale de la Francophonie (OIF), and Dr. H el ene Ramos dos Santos for their technical and academic support during the preparation of this report.

The final preparations of this report were conducted by an Editorial Committee led by John Foley from the EHAHRDP,

Christopher Roberts from the CIHRS and Clement Nyaletsossi Voule from ISHR. The French translation of this report was provided by the FIDH; Jean-Philippe Ahoua; and the Special Rapporteur's assistants, Olivia Tchamba, Christian Rumu and Hubert Gouleyo.

Finally, the Special Rapporteur sincerely thanks the Pan African Human Rights Defenders Network and the International Center for Not-for-Profit Law for the financial contribution for the publication of this report.



# Introduction

The African Commission on Human and Peoples’ Rights (the “Commission”) created the Study Group on Freedom of Association with the adoption of Resolution ACHPR/Res.151 (XLVI) 09 at its 46th Ordinary Session. The resolution expressed the Commission’s decision to “initiate a study on the laws governing freedom of association and practices that violate freedom of association in Africa, to ensure wider dissemination of the said study, and take effective measures to ensure that States take into account the outcomes and findings of the said study”. The freedom of assembly was added to the Study Group’s mandate with the adoption of Resolution ACHPR/Rés.229 (LII) 2012 at the 52nd Ordinary Session.

This report is the culmination of that study and seeks to inform the Commission as to the current state of the freedoms of association and assembly in law and practice in Africa. The report also seeks to inform African States and civil society of the rights and responsibilities inherent in the freedoms of association and assembly and to highlight several examples of state practice that does and does not meet international legal norms and standards. By expounding on the content of the freedoms of association and assembly and highlighting illustrative examples, this report seeks to advance the continental discussion on the protection of civil society, and particularly human rights defenders.

The United Nations Declaration on Human Rights Defenders of 1998, which was adopted at the UN General Assembly by consensus, formally recognises the vital work of human rights defenders and provides for their support and protection in the context of their work. The Declaration affirms that everyone, individually and in association with others, has the right to submit to governmental and public bodies, criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms<sup>1</sup>. Since the adoption of the Declaration, regional human rights bodies have codified and developed these principles yet further. In June 2004, the Council of the European Union adopted the European Union Guidelines on Human Rights Defenders. In 2004, the African Commission on Human and Peoples’ Rights established the mandate of the Special Rapporteur on Human Rights Defenders, under whose guidance this study has been conducted. This report therefore forms part of both a global and African discourse.

The Commission initiated this study in light of the visible trend of shrinking space for civil society and the persistent targeting of human rights defenders in Africa in their work. These unfortunate developments in Africa should be understood as part of a global trend of increasing

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1 United Nations General Assembly, ‘Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, 8th March 1999, Article 8(2).

restrictions of freedoms of association and assembly through legal tools. This trend can be attributed in part to the rapid growth of civil society in Africa (and globally) since the 1990s and the parallel reaction by some governments to assert control over the civil sector, particularly by trying to silence human rights defenders.

of assembly. Political parties, labor unions, and other types of organizations are also protected by the right to freedom of association, but they are not addressed in this report for pragmatic reasons.

This report reaffirms the primacy and universality of freedoms of association and assembly, and suggests that African states should recognise the inherent value in creating and fostering an enabling environment for the realisation of these, and other, rights. The report contains numerous examples of legal restrictions on freedoms of association and assembly that appear to be “borrowed” from one country by another. Just as some States appear to be exchanging ‘worst practices’, this report also presents examples of ‘best practices’ for defending and promoting the freedoms of association and assembly. This report seeks to empower human rights defenders and other civil society actors to be better equipped to overcome legal challenges they may face by employing successful strategies undertaken by colleagues elsewhere on the African continent.

This report deals with the right to freedom of association as it pertains to civil society organizations,<sup>2</sup> with special attention to human rights defenders,<sup>3</sup> and with the right to freedom

<sup>2</sup> There is no consensus on the definition of “civil society organizations”. It is used here to mean non-profit organizations formed in the pursuit of the collective interests of members and/or the public good.

<sup>3</sup> As per the language of Resolution ACHPR/Res.151 (XLVI) 09.

There is no specific definition of who is or can be a human rights defender. The Declaration on human rights defenders refers to “individuals, groups and associations ... contributing to ... the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals.” UN Declaration on Human Rights Defenders, Annex I, fourth preambular paragraph.



## Methodology

1. This report was compiled based on submissions by Study Group members regarding the experience of freedoms of association and assembly in their respective sub-regions. The authors undertook additional desk research to ascertain relevant legal norms and to verify factual information. The Study Group also convened three roundtable workshops: the first was held in Yamoussoukro, Ivory Coast in 2012 to create a work plan for the Study Group; the second was held in Cotonou, Benin in 2013 to review a draft report; and the third was held in Accra, Ghana in 2014 to validate the final draft report with the help of several expert resource persons.

2. For practical reasons, the study focused on examples from certain countries: Togo, Ghana, Kenya, Ethiopia, Egypt, Tunisia, Cameroon, Chad, Mozambique and Zimbabwe. Country examples were chosen to provide a representative overview of the different and specific experiences in Africa on this issue. Moreover, other countries were mentioned for comparison sake.





# International human rights law standards on the rights to freedom of association and assembly

1. The rights to freedom of association and assembly are possessed by every human being. In addition to rights in their own regard, they are enabling rights – their existence is both necessary for and part and parcel of democracy, and where they are respected, they can be utilized to pursue the fulfillment of others rights. This report explores the extent to which these rights are fulfilled in Africa. Part one, immediately below, explores the international legal framework relating to these rights – although it should be emphasized that this list is not comprehensive, aiming instead only to highlight several of the most important reference points. Part two addresses freedom of association, and part three freedom of assembly. The report ends with a brief conclusion.

2. As will be clear from reading the report, there are numerous positive examples and reasons for optimism. The overwhelming reality, however, is that the rights to freedom of association and assembly continue to be inadequately respected in practice, and numerous changes must be made to the law and practice of African countries in order for individuals to be able to fully enjoy these rights. The intent of this report is to highlight the issues faced in practice, in order to point the way towards a more positive approach to these crucial areas in future.

## III. A. Rights to freedom of association and assembly in universal and regional international law

### III.A.1. African regional law

#### **Articles 10 and 11 of the African Charter of Human and Peoples’ Rights (1981)**

(Article 10) *1. Every individual shall have the right to free association provided that he abides by the law.*

*2. Subject to the obligation of solidarity provided for in Art. 29 no one may be compelled to join an association.*

(Article 11) *Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.*

#### **Article 8 of the African Charter on the Rights and Welfare of the Child (1990)**

*Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.*

### **Articles 12, 27 and 28 of the African Charter on Democracy, Elections and Governance (2011)**

(Article 12) *State parties shall... 3. Create conducive conditions for civil society organizations to exist and operate within the law.*

(Article 27) *State parties shall commit themselves to... 2. Fostering popular participation and partnership with civil society organizations;*

(Article 28) *State Parties shall ensure and promote strong partnerships and dialogue between government, civil society and private sector.*

### **III.A.2. Universal international law**

#### **Article 3 of the Convention Concerning Freedom of Association and Protection of the Right to Organise (No. 87), International Labour Organisation (1948)**

- 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*
- 2. The public authorities shall refrain from any interference.*

#### **Article 15 of the 1951 Refugee Convention**

*Right of Association: As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same*

*circumstances.*

#### **Articles 21 and 22 of the International Covenant on Civil and Political Rights (1966)**

(Article 21) *The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the 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.*

(Article 22) *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 (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.*

#### **Article 15 of the International Convention on the Rights of the Child (1989) (hereafter CRC)**

*1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.*

*2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the 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.*

**Articles 26 and 40 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)**

(Article 26)1. *States Parties recognize the right of migrant workers and members of their families:*

(a) *To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;*

(b) *To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;*

(c) *To seek the aid and assistance of any trade union and of any such association as aforesaid.*

2. *No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.*

(Article 40)1. *Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests.*

2. *No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.*

**Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance (2000)**

7. *Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.*

**Article 29 of the Convention on the Rights of Persons with Disabilities (2006)**

*States shall guarantee to person with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to...* (b) *Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including: (i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties...*

### III.A.3. Other useful sources

#### **Article 20 of the Universal Declaration of Human Rights (1948)**

(1) *Everyone has the right to freedom of peaceful assembly and association.*

(2) *No one may be compelled to belong to an association.*

#### **Articles 5 and 12 of the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998) (hereafter UN Declaration on Human Rights Defenders)**

(Article 5) *For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: [...]*

(b) *To form, join and participate in non-governmental organizations, associations or groups;*

(c) *To communicate with non-governmental or intergovernmental organizations.*

(Article 12)<sup>1</sup> *1. Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.*

*2. The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.*

*3. In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.*

#### **UN Human Rights Council Resolution 21/16 (2012)<sup>1</sup>**

*States [have an] obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law.*

*[R]espect for the rights to freedom of peaceful assembly and of association, in relation to civil society, contributes to addressing and resolving challenges and issues that are important to society, such as the environment, sustainable development, crime prevention, human trafficking, empowering women, social justice, consumer protection and the realization of all human rights.*

<sup>1</sup> This is one of many UN resolutions touching on the right to freedom of association and assembly; all are available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=189](http://ap.ohchr.org/documents/dpage_e.aspx?m=189).

### **UN Human Rights Council Resolution 25/20 (2014)**

This resolution provides general guidelines relating to the right to freedom of peaceful assembly.

### **ACHPR Resolution 5/1992 on the Right to Freedom of Association**

- 1. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standards;*
- 2. In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom;*
- 3. The regulation of the exercise of the right to freedom of association should be consistent with State's obligations under the African Charter on Human and Peoples' Rights.*

### **Article 28 of the Kigali Declaration (2003)**

*Recognizes the important role of civil society organizations (CSOs) in general and human rights defenders in particular, in the promotion and protection of human rights in Africa, calls upon Member States and regional institutions to protect them and encourage the participation of CSOs in decision-making processes with the aim of consolidating participatory democracy and sustainable development, and underscores the need for CSOs to be independent and transparent.*

### **OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly (2010)**

The guidelines provide extensive detail on the standards and approach that should be taken by states relative to freedom of peaceful assembly.

### **Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/66/290 (2011)**

In this report the Special Rapporteur discusses the implications of many rights, including the rights to freedom of association and assembly, relative to access to the internet.

### **Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/17/28 (2011)**

The report addresses issues relating to the right to freedom of assembly and rules relating to the use of lethal force.

### **All reports of the UN Special Rapporteur on the right to freedom of peaceful assembly and association**

## III.B. Principles framing analysis of rights

### III.B.1. Non-discrimination and equality

3. A guiding principle throughout international human rights law is the prohibition of discrimination. The principle is present in all major human rights treaties, and must be read as complementary to and informative of other provisions. The provision is complemented by the right to equality. In the African Charter, the preamble as well as articles 3, 13, 15, 18, 19, 22 and 28 refer explicitly to these principles.

### III.B.2. Limitations

4. International human rights law allows restrictions to be imposed on rights, including the rights to freedom of association and assembly, where those restrictions are (1) provided by law; (2) serve a legitimate aim; and (3) are necessary in a democratic society. While states will often argue that the limitations they have imposed by law are legitimate, the vast majority of restrictions imposed in the countries explored below contradict these standards,<sup>2</sup> and are hence violations of the countries' obligations under international law, and of the rights of those countries' citizens. Limitations on rights should always be strictly scrutinized.<sup>3</sup>

<sup>2</sup> For an example of states' tendency to refer in a broad and vague manner to the categories mentioned in section II.2, without adequate justification or legitimacy, see *Constitutional Rights Project and Anther v Nigeria*, Comm Nos 143/95 and 150/96 (1999), para 53.

### III.B.2.1. Principle of legality

5. The principle of legality means that the limitation must be prescribed by law, and that law must be of general application<sup>4</sup> and must have been in place prior to the act in question (the principle of non-retroactivity). The law must be accessible, and formulated in clear language of sufficient precision to enable persons to regulate their conduct accordingly.<sup>5</sup> Constitutional jurisprudence from Africa has helped to clarify this concept, including through emphasizing that the proper procedure must have been followed in making the law,<sup>6</sup> and by emphasizing that overly broad limitations are illegitimate.<sup>7</sup> The African Commission has emphasized this requirement as well.<sup>8</sup>

<sup>3</sup> See, e.g., *Attorney-General v Dow*, Botswana Court of Appeal (1992), paras 66-73.

<sup>4</sup> The African Commission has found laws in violation of the Charter rights based on failure to respect this principle; see *Media Rights Agenda and Others v Nigeria*, Comm Nos 105/93, 128/94, 130/94, 152/96 (1998), para 71; *Constitutional Rights Project and Others v Nigeria*, Comm Nos 140/94, 141/94 and 145/95 (1999), paras 43-44; *Constitutional Rights Project and Another v Nigeria*, Comm No 102/93 (1998), para 59.

<sup>5</sup> See, e.g., *The Law Society of Zimbabwe v The Minister of Transport and Communications and Another*, Supreme Court of Zimbabwe (2004), paras 21-22.

<sup>6</sup> *Malawi Law Society and Others v President and Others*, Malawi High Court (2002). The case also provides strong support, based on Malawi's constitution, for the inability of a body other than a legislature to issue law (in the form of a presidential decree, for example) that impacts substantially on rights concerns. Para 21. See also *Dzvova v Minister of Education, Sports and Culture and Others*, Supreme Court of Zimbabwe (2007), paras 37-55.

<sup>7</sup> *Obbo and Anther v Attorney-General*, Supreme Court of Uganda (2004), paras 52-56.

<sup>8</sup> See *Jawara v The Gambia*, Comm 147/95 & 149/96 (2000); *Constitutional Rights Project and Others v Nigeria*, Comm 140/94, 141/94 and 145/95 (1999), para 40. The manner in which the Commission describes the legality requirement in the later case is particularly important: as it notes, language in the Charter noting that a right may be restricted by law "does not however mean that national law can set aside the right to express and

### III.B.2.2. Legitimate Purpose

6. Any restrictions imposed by law must be for a legitimate purpose. International human rights law recognizes restrictions based on national security, public order, public health or morals,<sup>9</sup> or the rights and freedoms of others; the African Charter refers to “the rights of others, collective security, morality and common interest.”<sup>10</sup> The broad language of these categories should not be mistaken for a broad authorization however; in each instance of potential limitation the state must

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disseminate one's opinions guaranteed at the international level; this would make the protection of the right to express one's opinion ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed the whole essence of treaty making.” As such, the other elements discussed below must be considered as well. See also *Malawi African Association and others v Mauritania*, Comm 54/91, 61/91, 98/93, 164-196/97 & 210/98 (2000), para 102; *Media Rights Agenda v Nigeria*, Comm No 224/98 (2000), paras 74-75; *Interights and Others v Mauritania*, Comm 242/2001 (2004), para 77; *Article 19 v Eritrea*, Comm 275/2003 (2007), paras 92, 105; *Amnesty International v Zambia*, Comm 212/98 (1999), para 42; *Purohit and Another v The Gambia*, Comm 241/2001 (2003), para 64.

9 As the Human Rights Committee has noted, any limitations “for the purpose of protecting morals must be based on principles not deriving exclusively from a singly tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.” HRC General Comment No 34, para 32, quoting HRC General Comment No 22, para 8.

10 Article 27(2). This clause has been interpreted by the African Commission as the Charter's limitations clause; see, e.g., *Media Rights Agenda and Others v Nigeria*, Comm Nos 105/93, 128/94, 130/94, 152/96 (1998), para 68; *Constitutional Rights Project and Others v Nigeria*, Comm Nos 140/94, 141/94 and 145/95 (1999), para 41. Article 11 of the Charter contains its own list, referring to “national security, the safety, health, ethics and rights and freedoms of others.” For all substantive purposes, the two lists, and that in international law generally, should be understood as implying the same content.

clearly define the precise purpose served, as well as showing that the measure in question is necessary and proportionate, as discussed below.

7. The requirement of legitimate purpose is supported by the jurisprudential trends on the continent.<sup>11</sup> It is also supported by the UN Special Rapporteur on Freedom of Association and Assembly.<sup>12</sup> The African Commission has also found limitations to be a violation of rights where they do not have a legitimate purpose.<sup>13</sup>

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11 See, e.g., *Ndyanabo v Attorney General*, Tanzania Court of Appeal (2002).

12 A/HRC/23/39 (2013), para 23.

13 *Malawi African Association and others v Mauritania*, Comm Nos 54/91, 61/91, 98/93, 164-196/97 & 210/98 (2000), para 111. For further emphasis on the need for limitations to be imposed in defence of a legitimate purpose, see *Interights and Others v Mauritania*, Comm No 242/2001 (2004), paras 77-79; *Constitutional Rights Project and Others v Nigeria*, Comm Nos 140/94, 141/94 and 145/95 (1999), para 41. For more on illegitimate grounds for limitation, and the illegitimacy of grounding limitations in popular approval in particular, see *Legal Resources Foundation v Zambia*, Comm No 211/98 (2001), par 65-70.

### III.B.2.3 Principle of necessity in a democratic society

8. In addition to complying with the principle of legality, and being aimed at a legitimate purpose, any limitations on rights must be necessary means of securing those ends within a democratic society.<sup>14</sup> As the Human Rights Committee has made clear, in order to meet this standard limitations must conform to the principle of proportionality:

“they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected.”<sup>15</sup>

9. The South African Constitution provides a more thorough statement of the various factors to be considered under the proportionality test, noting the necessity of considering:

“(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.”<sup>16</sup>

<sup>14</sup> See, e.g., *Bhe and Others v Magistrate, Khayelitsha and Others*, South African Constitutional Court (2004), paras 68-73.

<sup>15</sup> Human Rights Committee, General Comment No 27, para 14; General Comment No 34, para 34.

<sup>16</sup> South African Constitution, Art 36(1). The test formulated by Judge Dickson in the *Oakes* decision is also well known and has been cited in African jurisprudence; under that test, proportionality requires that “First, the measures adapted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly,

10. As the Human Rights Committee moreover emphasizes, “The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.”<sup>17</sup>

11. The requirement of proportionality has been stressed by jurisprudential trends on the continent,<sup>18</sup> as well as by the African Commission.<sup>19</sup> African jurisprudence,<sup>20</sup> including the jurisprudence of the Commission,<sup>21</sup> has also stressed that the burden of proving that limitations are justified is on the state.

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the means, even if rationally connected to the objective in this first sense, should impair as little as possible' the right or freedom in question... Thirdly there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance.” *R v Oakes*, [1987] LRC (Const) 477, 500. Quoted in *Attorney-General v 'Mopa*, Lesotho Court of Appeal (2002), para 33.

<sup>17</sup> Human Rights Committee, General Comment No 27, para 15; General Comment No 34, para 34.

<sup>18</sup> See, e.g., *Ndyanabo v Attorney General*, Tanzania Court of Appeal (2002); *Attorney-General v 'Mopa*, Lesotho Court of Appeal (2002), para 33; *Obbo and Anther v Attorney-General*, Supreme Court of Uganda (2004), paras 28-31, 42-51; *Inspector-General of Police v All Nigeria Peoples Party and Others*, Court of Appeal of Nigeria (2007), para 23-33.

<sup>19</sup> *Interights and Others v Mauritania*, Comm No 242/2001 (2004), paras 77-79; *Constitutional Rights Project and Others v Nigeria*, Comm Nos 140/94, 141/94 and 145/95 (1999), para 42.

<sup>20</sup> *Attorney-General v 'Mopa*, Lesotho Court of Appeal (2002), para 34; *Obbo and Anther v Attorney-General*, Supreme Court of Uganda (2004), para 62.

<sup>21</sup> *Media Rights Agenda and Others v Nigeria*, Comm Nos 105/93, 128/94, 130/94, 152/96 (1998), para 71; *Constitutional Rights Project and Others v Nigeria*, Comm Nos 140/94, 141/94 and 145/95 (1999), para 43; *Malawi African Association and others v Mauritania*, Comm Nos 54/91, 61/91, 98/93, 164-196/97 & 210/98 (2000), para 111.

### III.C. Content of the rights to freedom of association and assembly

12. Various international sources, including prominently the UN Special Rapporteur on Freedom of Association and Assembly, have clarified when restrictions to these rights are illegitimate, as well as the steps necessary to ensure the fulfillment of these rights. The African Commission has also developed a strong body of jurisprudence in this area. These sources are examined below. The standards here, and those developed in the report, represent the balance found in international law between the rights and the other concerns mentioned in the discussion of the limitations analysis above.

#### III.C.1. Freedom of association

13. The right to freedom of association applies to “any group of individual or legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests.”<sup>22</sup>

14. This right covers civil society organizations as well as trade unions, political parties, foundations, professional associations, religious associations, online associations, cooperatives, and any other forms of group not-for-profit activity. This report does not

address all associations, however, but rather only the standards applicable to civil society associations; it should be emphasized here, however, that the right to form other forms of association, trade unions and political parties in particular, is also often under attack and inappropriately limited on the continent, and all such violations constitute a violation of the right to association guaranteed by international law and the African Charter.

15. The UN Special Rapporteur emphasizes that unregistered associations are protected by the right – a state cannot ban or sanction associations for failure to register.<sup>23</sup> The right to freedom of association is not limited to nationals or adults, and notes that there is no good reason for requiring more than 2 individuals to form an association.<sup>24</sup> No one may be compelled to belong to an association, and associations are free to choose their members.<sup>25</sup> In addition to allowing unregistered associations, the law should allow for the formation of legally registered associations that are accorded certain benefits; the registration procedure should be easily accessible, prompt, and non-discriminatory, and should take the form of notification.<sup>26</sup> Should the authorities refuse registration, they must provide clear and legally justified reasons for the rejection, and a prompt judicial appeal must be available, and once registration is granted, it should not be necessary to have it renewed.<sup>27</sup>

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22 Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, para 51, quoting Report of the SR of the S-G on human rights defenders, A/59/401, para 46.

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23 Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, para 56.

24 Ibid, para 54.

25 Ibid, para 55. See also *Nkpa v Nkume*, Nigerian Court of Appeal (2000), para 51.

26 A/HRC/20/27, paras 57-58, 60.

27 Ibid, paras 61-62.

16. Associations must be free to pursue a wide range of activities, including exercising their rights to freedom of expression and assembly. They must be able to “express opinion, disseminate information, engage with the public and advocate before Governments and international bodies for human rights, for the preservation and development of a minority’s culture or for changes in law, including changes in the Constitution.”<sup>28</sup> Not only must the state not interfere with these rights;<sup>29</sup> it must protect associations from others who might seek to interfere with them.<sup>30</sup> The internal organization and activities of associations are a matter for the associations themselves, and the authorities must not interfere with them or violate associations’ right to privacy.<sup>31</sup> In particular, the government should refrain from interfering with citizens’ capacity to join associations, or stacking associations with government representatives and then providing such bodies wide discretionary powers in an effort to control civil society space.<sup>32</sup>

17. Associations must have free access to funding, both domestically and internationally.<sup>33</sup> Moreover, international associations should be subject to the same notification procedure as national associations.<sup>34</sup> Suspension or dissolution of an association may only be applied where there is “a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law.”<sup>35</sup> In no cases should membership in an association alone be taken as grounds for criminal charges; in practice, this is generally linked to ungrounded prosecution by authorities of associations they disapprove of for political reasons.<sup>36</sup> Adequate remedies must be made available to rectify violations of the right to freedom of association.<sup>37</sup>

28 Ibid, para 64. See also *International Pen and Others (on behalf of Saro-Wira) v Nigeria*, Comm Nos 137/94, 139/94, 154/96 and 161/97 (1998), paras 107-110, which finds a violation of the right to freedom of association where the government takes action against an association because it does not approve of its positions.

29 On state harassment of individuals for positions it disapproves of violating the right to freedom of association, see *Aminu v Nigeria*, Comm No 205/97 (2000), paras 22-23; *Huri-Laws v Nigeria*, Comm No 225/98 (2000), paras 47-49; *Ouko v Kenya*, Comm No 232/99 (2000), paras 29-30.

30 A/HRC/20/27, paras 63-64.

31 Ibid, paras 64-65.

32 *Civil Liberties Organisation (in respect of Bar Association) v Nigeria*, Comm No 101/93 (1995), paras 14-16.

33 A/HRC/20/27, paras 67-72. For more detail, see Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, paras 8-42.

34 A/HRC/20/27, para 59.

35 Ibid, para 75. For more on the inappropriate dissolution of associations, see *Interights and Others v Mauritania*, Comm No 242/2001 (2004), paras 80-84; the case concerns a political party, but the caveat relative to dissolution applies to all associations.

36 See *International Pen and Others (on behalf of Saro-Wira) v Nigeria*, Comm Nos 137/94, 139/94, 154/96 and 161/97 (1998), paras 107-110. For more on inappropriate criminal measures against associations, see *Malawi African Association and others v Mauritania*, Comm Nos 54/91, 61/91, 98/93, 164-196/97 & 210/98 (2000), paras 106-07.

37 A/HRC/20/27, para 81.

### III.C.2. Freedom of assembly

18. An assembly is “an intentional and temporary gathering in a private or public space for a specific purpose.”<sup>38</sup>

19. The right to freedom of assembly adheres in the people; as such, a state should employ a notification rather than an authorization regime.<sup>39</sup> The purpose of such regime should be to assist the state authorities in fulfilling their role in promoting and protecting the conduct of assemblies along with public safety.<sup>40</sup> The notification procedure should be easily accessible, and notification should not be required too far in advance; no notification should be necessary for small or spontaneous assemblies.<sup>41</sup>

20. Laws governing freedom of assembly must not impose blanket prohibitions, such as on assemblies at certain times or locations; the speech content of the assembly must not be restricted, except where it meets the strict guidelines defining incitement to hatred; restrictions must always be proportionate, and prohibition only imposed as a measure of last resort.<sup>42</sup> Authorities must facilitate assembly

38 Ibid, para 24.

39 Ibid, paras 26, 28. See also *Inspector-General of Police v All Nigeria Peoples Part and Others*, Nigeria Court of Appeal (2007), paras 16, 23, 25; *New Patriotic Party v Inspector General of Police*, Ghana Supreme Court (2000), paras 26, 38-39, 48, 54; *Amnesty International and Others v Sudan*, Comm Nos 48/90, 50/91, 52/91 and 89/93 (1999), paras 81-82.

40 A/HRC/20/27, paras 27-28.

41 Ibid, paras 28-29; see also A/HRC/23/39, paras 51-55, 57 and in particular para 54, which provides more detail as to overly bureaucratic notification regimes, and 57, which notes there should be no fee for notification.

42 A/HRC/20/27, para 39; see also A/HRC/23/39, paras 56, 59, 61-63. On incitement to hatred, see Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes

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21. sight and sound of the target audience.<sup>43</sup> The conduct of assemblies must be recognized as a use of public space as legitimate as any other; as such, the free flow of traffic or other such ends must not take precedence over public assemblies.<sup>44</sup> Where the authorities impose restrictions on an assembly, they must provide full, legally backed reasons to the assembly organizers in a prompt manner, and expedited judicial appeal must be available.<sup>45</sup>

23. Organizers should not be subject to sanctions merely for failure to notify the authorities,<sup>46</sup> should not incur financial charges for the provision of public services, and should in no circumstances be made liable or considered responsible for the unlawful conduct of others.<sup>47</sup>

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incitement to discrimination, hostility or violence. On blanket prohibitions see *Malawi Law Society and Others v President and Others*, Malawi High Court (2002), para 30. On freedom of expression in the context of assemblies, see *International Pen and Others (on behalf of Saro-Wira) v Nigeria*, Comm Nos 137/94, 139/94, 154/96 and 161/97 (1998), para 110.

43 A/HRC/20/27, para 40; A/HRC/23/39, paras 60, 65-66.

44 A/HRC/20/27, para 41; A/HRC/23/39, para 67.

45 Ibid, para 42; A/HRC/23/39, paras 47-48, 64.

On ability to challenge in court generally, see *New Patriotic Party v Inspector General of Police*, Ghana Supreme Court (2000), paras 38, 48.

46 See *Malawi African Association and others v Mauritania*, Comm Nos 54/91, 61/91, 98/93, 164-196/97 & 210/98 (2000), paras 108-11.

47 A/HRC/20/27, paras 29, 31; A/HRC/23/39, paras 77-78. See also *International Pen and Others (on behalf of Saro-Wira) v Nigeria*, Comm Nos 137/94, 139/94, 154/96 and 161/97 (1998), paras 105-06.

24. The authorities are under an obligation to protect and promote the conduct of peaceful assemblies;<sup>48</sup> this is particularly important in the context of simultaneous demonstrations, and relative to agents provocateur and counter-demonstrators.<sup>49</sup> Where an individual bad actor is involved in violent or unlawful activity, the authorities should remove him rather than breaking up the assembly.<sup>50</sup> An assembly should not be dissolved merely for failure to notify.<sup>51</sup> Excessive force must never be used to break up an assembly, and the only circumstance justifying the use of firearms is the imminent threat of death or serious injury.<sup>52</sup>

25. Individuals whose rights are violated in the context of assemblies must have access to effective remedies and accountability must be ensured, without exception.<sup>53</sup>

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48 In contrast to this obligation, it is often the government itself which impedes the right to freedom of assembly, for instance by preventing individuals from traveling to meetings or punishing them for doing so; see *Law Office of Ghazi Suleiman v Sudan (II)*, Comm No 228/99 (2003), para 56.

49 A/HRC/20/27, paras 30, 33.

50 *Ibid*, para 25.

51 *Ibid*, para 29. *Inspector-General of Police v All Nigeria Peoples Part and Others*, Nigeria Court of Appeal (2007), para 16.

52 *Ibid*, paras 34-35.

53 *Ibid*, paras 77-81.



# IV

## Freedom of association in law and practice in Africa

### Overview

1. Positively, freedom of association is recognized in the constitutions of numerous countries in Africa.<sup>1</sup> Positive statements

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1 **Egypt:** Art. 75 of the 2014 Constitution: “Citizens have the right to form non-governmental organizations and institutions on a democratic basis, which shall acquire legal personality upon notification. They shall be allowed to engage in activities freely. Administrative agencies shall not interfere in the affairs of such organizations, dissolve them, their board of directors, or their board of trustees except by a judicial ruling. The establishment or continuation of non-governmental organizations and institutions whose structure and activities are operated and conducted in secret, or which possess a military or quasi-military character are forbidden, as regulated by law.” **Tunisia:** Art 35 of the 2014 Constitution: “The freedom to establish political parties, syndicates, and associations is guaranteed. The statutes and activities of parties, syndicates, and associations commit to the provisions of the Constitution, the law, financial transparency, and to the renunciation of violence.” **Ghana:** Art. 21(1) of the 1992 Constitution: “(1) All persons shall have the right to [...] (e) freedom of association, which shall include freedom to form or join trade unions or other associations, national or international, for the protection of their interest”; **Togo:** Art. 30 of the 2002 Constitution: “L’Etat reconnaît et garantit dans les conditions fixées par la loi, l’exercice des libertés d’association, de réunion et de manifestation pacifique et sans instruments de violence”; **Ethiopia:** Art. 31 of the 1995 Constitution: “Everyone shall have the right to form associations for whatever purpose. Associations formed in violation of the appropriate laws or associations formed with the objective of overthrowing the constitutional order or associations carrying out these activities shall be prohibited.” **Kenya:** Art. 36 of the 2010 Constitution:” (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. (2) A person shall not be compelled to join an association of any kind. (3) Any legislation that requires registration of an

in constitutions are not always dispositive however; Ethiopia, for instance, recognizes in Article 31 of its Constitution that “everyone shall have the right to form associations for whatever purpose”, but in practice the purposes of associations, and human rights aims in particular, are sharply limited.

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association of any kind shall provide that—(a) registration may not be withheld or withdrawn unreasonably; and (b) there shall be a right to have a fair hearing before a registration is cancelled. ; **Cameroon:** Preamble of the 1972 Constitution (as amended in 1996): “[T]he freedom of communication, of expression, of the press, of assembly, of association, and of trade unionism, as well as the right to strike shall be guaranteed under the conditions fixed by law”; **Chad:** Art 27 of the 1996 Constitution (as amended in 2005): “The freedoms of opinion and of expression, of communication, of conscience, of religion, of the press, of association, of assembly, of movement, of demonstration and of procession are guaranteed to all.”; **Zimbabwe:** Art. 58 of the 2013 Constitution: “(1) Every person has the right to freedom of assembly and association, and the right not to assemble or associate with others; (2) No person may be compelled to belong to an association or to attend a meeting or gathering”; **Mozambique:** Art. 52 of the 1990 Constitution (as revised in 2004): “1. All citizens shall enjoy freedom of association. 2. Social organisations and associations shall have the right to pursue their aims, to create institutions designed to achieve their specific objectives and to own assets in order to carry out their activities, in accordance with the law. 3. Armed associations of a military or paramilitary nature, as well as associations that promote violence, racism, xenophobia or pursue aims that are against the law, shall be prohibited.” **Art. 78:** “1. Social organisations, as associations with their own interests and affinities, play an important role in promoting democracy and in the participation of citizens in public affairs. 2. Social organisations contribute to achieving the rights and freedoms of citizens, as well as towards raising individual and collective awareness in the fulfilment of civic duties.”

2. The right to freedom of association applies to “any group of individual or legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests.”<sup>2</sup>

3. Legislation regulating the formation of civil society associations exists in the majority of countries as well. Such legislation generally complies with the Special Rapporteur’s definition of civil society associations, comprising the elements of a voluntary group of persons, not-for-profit nature, and common purpose. In some countries civil society associations are regulated under the same law as companies; this is not necessarily a problem, as long as the proper framework for civil society associations is established. In other countries, such as Mozambique, the same law regulates political parties, trade unions and other associations. This is a serious problem, as the different nature of political parties, trade unions and civil society organizations necessitates that a different legal framework be employed relative to each such category.<sup>3</sup> Another problem is encountered in Ethiopia and Zimbabwe, where specific regimes have been adopted to govern and restrict human rights organizations, rather than allowing these organizations to function under the rules generally applicable to associations. In

Ethiopia, an organization that pursues the protection and promotion of human rights can only register as an Ethiopian Charity or Society, the type of association submitted to the most severe limitations. In Zimbabwe the Private Voluntary Organizations (PVO) Act regulates civic organizations involved in humanitarian work, charity work and legal aid<sup>4</sup>, and imposes the most severe limitations on these organizations.

2 Report of the SR on the right to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, para 51, quoting Report of the SR of the S-G on human rights defenders, A/59/401, para 46.

3 In Togo, a group of NGOs constituted to revise the 1901 French Law on associations went further still, by arguing that even relative to civil society organizations, the legal regime should be different depending on the purposes of the association. The preparatory documents of that working suggest potential differentiation depending on whether the purpose of the association is sport, cultural, scientific, professional, development, religious or charitable.

4 PVO Act, Part 1, Section 2: “private voluntary organization” means any body or association of persons, corporate or unincorporate, or any institution, the objects of which include or are one or more of the following— (a) the provision of all or any of the material, mental, physical or social needs of persons or families; (b) the rendering of charity to persons or families in distress; (c) the prevention of social distress or destitution of persons or families; (d) the provision of assistance in, or promotion of, activities aimed at uplifting the standard of living of persons or families; (e) the provision of funds for legal aid; (f) the prevention of cruelty to, or the promotion of the welfare of, animals; (g) such other objects as may be prescribed; (h) the collection of contributions for any of the foregoing; but does not include— (i) any institution or service maintained and controlled by the State or a local authority; or (ii) any religious body in respect of activities confined to religious work; or (iii) any trust established directly by any enactment or registered with the High Court; or (iv) any educational trust approved by the Minister; or (v) any body or association of persons, corporate or unincorporate, the benefits from which are exclusively for its own members; or (vi) any health institution registered under the Health Professions Act [Chapter 27:19], in respect of activities for which it is required to be registered under that Act; or [amended by Act 6/2000 with effect from the 2nd April 2001.] (vii) any psychological health premises registered under the Psychological Practices Act [Chapter 27:11] in respect of activities for which it is required to be registered under that Act; or [inserted by Act 6/2000 with effect from the 2nd April 2001.] (viii) anybody or association in respect of activities carried on for the benefit of a hospital or nursing home which is approved by the Minister; or (ix) any political organization in respect of work confined to political activities; or (x) the Zimbabwe Red Cross Society established by the Zimbabwe Red Cross Society Act [Chapter 17:08]; or (xi) such other bodies, associations or institutions as may be prescribed.”

## Recommendations:

4. National constitutions should guarantee the right to freedom of association, which must be understood in a broad manner consistent with international human rights law; where a constitution states that the essence of this right shall be defined by law, this should in no way be interpreted to allow limitations which do not comply with the principles of legitimate purpose, proportionality and necessity..
5. The legal regimes governing civil society associations, political parties, and labor unions should be different, and in all cases should comply with international human rights standards.
6. The legal regime may encompass not-for-profit associations as a specific type of corporate organization or as a separate form of organization, provided that the appropriate rules are respected in each case and no confusion is thereby created.
7. Human rights organizations should be subject to legal regimes no more strict than those applicable to associations generally.

## Informal associations

8. The right to freedom of association is a right adhering in the people; as such, people should be free to form and operate informal associations with or without the authorization of the state; and indeed, any banning of informal associations would also violate the core principle of legality, as it would be impossible to define with sufficient clarity what do and do not constitute informal associations, given the natural tendency of persons to work together to pursue common ends. The Special Rapporteur has clearly articulated this position, noting that “the right to freedom of association equally protects associations that are not registered”.<sup>5</sup>
9. Despite this, several states in Africa have purported to ban informal associations, in a violation of the right to freedom of association that indicates an opposition on the part of the states in question to the core notion of the right to freedom of association and the notion that their people have rights more broadly.

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5 A/HRC/20/27, para 56. The Open Society Institute has noted that, because informal civic organizations form the largest part of the civic sector, protecting them from state interference is at least as important for the realization of fundamental rights as is protecting formal civic organizations. Open Society Institute, Guidelines for laws affecting civic organizations, London, 2004, 21.

10. Registration is mandatory in Zimbabwe<sup>6</sup>, Kenya, Ethiopia<sup>7</sup> and other countries<sup>8</sup>. The legislation in Zimbabwe is particularly repressive. The PVO Act of 1995 is sometimes used as a tool to prevent associations from commencing or continuing to carry out activities, or from seeking financial support from any source unless registered.<sup>9</sup> Any person who takes part in management or control of an unregistered voluntary organisation is guilty of an offence<sup>10</sup>. This has been applied in the case of several local and international human rights organisations, including those providing humanitarian services. In 2012, twenty-nine NGOs were suspended from operating in the Masvingo Province after being accused of failing to register with the local authorities.

## Recommendation:

11. States should not require associations to register in order to be allowed to exist and to operate freely. States' legitimate interest in security should not preclude the existence of informal associations, as effective measures to protect public safety may be taken via criminal statute without restricting the right to freedom of association.

12. At the same time, associations have the right to register through a notification procedure in order to acquire legal status, obtain tax benefits and the like.

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6 PVO Act, Section 6.

7 In Ethiopia, the law foresees the compulsory registration of an association falling into one of the three existing categories provided by the Charities and Societies Agency (CSA);

8 In Algeria, Law No. 12-06 on Associations, adopted on 12 January 2012, creates a system of compulsory prior authorisation, in which the authorities have wide power to refuse to register associations.

9 PVO Act, Section 6 (1): "no private voluntary organization shall commence or continue to carry on its activities or seek financial assistance from any source unless it has been registered in respect of a particular object or objects in furtherance of which it is being conducted."

10 PVO Act, Section 6 (3a): "Any person who contravenes subsection (2) or (3) shall be guilty of an offence and liable— (a) in the case of a contravention of subsection (2), to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment; (b) in the case of a contravention of subsection (3), to a fine not exceeding level four or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment.

## Association establishment criteria

13. Blanket restrictions on those who can found associations, whether based on age, nationality, sexual orientation and gender identity or other discriminatory categories are unlawful. In addition, past criminal conduct should only be a bar to the formation of an association where the nature of that conduct directly raises reason for concern relative to the purpose of the association.

14. International norms concerning best practice have coalesced towards defining 'associations' broadly and intuitively. The UN Special Rapporteur considers as best practice legislation that requires no more than two persons to establish an association.<sup>11</sup> That is the case in Tunisia,<sup>12</sup> Togo and Ghana. In Cameroon, the law does not specify the number of founders necessary, which is problematic as it leaves the matter to the discretion of the authorities. In practice, at least 5 founders are always required.<sup>13</sup> Egypt<sup>14</sup> and Mozambique require a minimum of 10 individuals; in Algeria,<sup>15</sup> the minimum number depends on the type of association, and may be from 10 to 25 individuals; in Sudan, a minimum of 30 is required. Tunisian law allows foreign residents to found associations.<sup>16</sup> This provision is positive and should be emulated. At the same time, the privilege should be extended to cover all those with a status

more permanent than that of tourist, whether they have acquired full residency or not. The CRC is clear that children have the right to freedom of association; despite this, several countries have adopted a legal minimum age, respectively 13 in Tunisia, 16 in Togo, and 18 in Algeria, for example. Children should be free to participate in the formation of associations in accordance with their evolving capacities and in full conformity with the CRC.

15. In Burundi, organizations are required to obtain police clearance of the good conduct, character and moral standards of all founding members. Similarly in the Democratic Republic of Congo, certificates of good conduct must be presented for all officers charged with administrative or managerial functions.<sup>17</sup> In Mozambique, criminal records must be submitted with the notification of the creation of the association.

## Recommendations:

16. Domestic legal regimes should require no more than two people to establish an association.

17. States should review and limit restrictions placed on the ability to form associations; in particular, children and non-nationals in de facto residence should be able to establish associations, and in no cases should inappropriate discrimination, including discrimination based upon race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status, be applied relative to the founding of associations.

11 A/HRC/20/27, para. 54.

12 Decree 88 of 2011, Art. 2.

13 Law 90/053 of 1990.

14 Law 84 of 2002, Art. 1.

15 Law 12-06 of 2012, Art. 6.

16 Decree 88 of 2011, Art. 8.

17 Article 4, decree-law 004 of 2001.

18. Past criminal conduct should not as such be a bar to the formation of an association.

## Establishment procedures

19. As stressed above, associations should be able to freely register in order to acquire additional benefits from the state.<sup>18</sup> This registration should be governed by a notification procedure, in which the association is able to register itself simply by informing an impartial administrative body of its existence and supplying certain basic information.

20. Unfortunately, however, this basic requirement that registration should be governed by notification is often contravened by the practice of African states, which violate the essence of the right to freedom of association by establishing discretionary procedures of authorization to govern the registration of associations. In Kenya, for instance, the authorities are granted wide discretionary powers to refuse to register an association.<sup>19</sup> Kenya's former NGO Board had no guidelines, and therefore possessed an unregulated power over the activities of NGOs, including prescribing terms and conditions contained in the certificate of registration of an NGO. In August 2013, the National Gay and Lesbian Human Rights Commission received a letter from the NGO Board refusing its registration under the pretext that the constitution "is silent about same-sex marriage".

21. In some countries, a notification regime is instituted in theory but not in practice. On the other hand, several African countries provide a positive example, as they have set up notification or declaratory procedures. This is

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<sup>18</sup> In Ghana, for instance, NGOs have reported that they have registered in order "to acquire legal status with the attendant benefits, such as the ability to sue and be sued and charitable status." Article 19, p. 27.

<sup>19</sup> Societies Act CAP 108 Revised Edition 2009 (1998), Sec. 11. PBO Act 2013, Section 16.

true for instance in Tunisia.<sup>20</sup>

22. In addition to the clear violation of imposing an authorization rather than a notification system, states may impose through law and practice numerous other obstacles to the ability to register. They may do this, for instance, by requiring excessive information from registering associations. This is the case for instance in Mozambique, where the registrar may require associations applying for registration to supply any further information in connection with its application which he may deem necessary. In addition, associations are required to submit documents they must obtain from the authorities, which can often be difficult to obtain. These, among other provisions, present serious obstacles to registration and provide the authorities with wide discretionary powers to make decisions about applications for registration.

23. Alternatively, national procedure may be unduly burdensome and delayed, leading to restrictions of the right to freedom of association in practice. Among other reasons, this may be due to lack of clarity regarding the registration procedures; complex documentation requirements; prohibitively high registration fees; and/or excessive delays in the registration process. The United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association noted, following his January 2014 country visit to Rwanda, the “striking” contrast between the quick and straightforward registration requirements for businesses, compared with the far more burdensome, time consuming

and bureaucratic requirements for NGOs<sup>21</sup>.

24. In Angola, for instance, a number of government bureaucracies get involved in this process and actively apply inconsistent criteria, leading to confusion and redundancy and making registration highly inaccessible. NGOs are required to begin the registration process at the grassroots level, by requesting an initial certificate from the Ministry of Justice or a Provincial Commissioner.<sup>22</sup> The Ministry of Justice in many cases requires NGOs to “first seek approval from the national body tasked with responsibility over civil society operations” (the Unit for the Coordination of Humanitarian Aid, UTCAH). UTCAH may in turn request the authorization of the Ministry of Justice or other ministries before approving the authorization. This process of going back and forth between ministries can go on for years.

25. In Burundi, associations are required to register in Bujumbura, the capital city, as some of the required registration documents are only issued there; many cannot afford the travel expenses, however, and hence are effectively prevented from registering.

26. In the Democratic Republic of Congo, registration requires both the approval of “the Minister who has jurisdiction over the specified sector of activities’ in which the organization intends to operate”, as well as the approval of

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20 Art. 12 Decree 88 of 2011 notes that the association will be considered legally constituted upon the sending of a letter with basic information.

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21 Statement by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association at the conclusion of his visit to the Republic of Rwanda, 27th January 2014, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14201&LangID=E>

22 According to the Angolan Law of associations 14/91 (Art.13) and Regulatory Decree 84/02, associations only working at the local or provincial level must register with the Provincial Commissioner in their area.

the Ministry of Justice, and potentially of the provincial governor as well.<sup>23</sup>

27. In several other countries, the authorities are granted an excessive amount of time between their receipt of notification and the registration of the association. In Egypt the administration has 60 days,<sup>24</sup> and in Algeria between 30 and 60 days.<sup>25</sup> In Zimbabwe the situation is even worse, as the law imposes no temporal requirement at all. Under Tunisian law, an association is allowed to submit notice of its legal status as soon as it obtains a receipt from the authorities that its notification has been received; should no receipt be delivered, the association can in any case submit notice of its legal status after 30 days.<sup>26</sup> Togo's law provides a positive example, requiring that a receipt be provided to associations 5 days after their notification.<sup>27</sup> In practice, this is not respected.

28. Alternatively, the authorities may deter the formation of associations by requiring that excessive fees be paid to obtain registration. Fees are excessive where they prevent the registration of associations that would otherwise obtain legal status. Currently, both Senegal and Gambia for instance require that certain fees be paid, 1000 CFA and 2000 Dalasi respectively. The Senegalese fee is clearly reasonable; the Gambia fee is not obviously excessive, but regard must always be had to

the financial situation in the country and the hardship that a particular fee imposes.

29. Where registration has been refused, the law should require that the administrative body provide clear, legally substantiated reasons for the refusal, and that the association be able to challenge that decision, including through a prompt appeal to the courts. Unfortunately, few of the countries surveyed provided for these rules in their laws on association.

30. Finally, once registration has been granted, an association should not be required to re-register. In Kenya, associations must re-register annually, in Sierra Leone every two years, and in Zambia every five years. In Egypt, re-registration is required when articles of incorporation are amended.<sup>28</sup> In all cases, these rules subject associations to unnecessary and burdensome additional costs, and impose the threat that their legal status may be revoked if they operate in a manner the authorities disfavor. Associations are put in a difficult situation under these conditions, as they are deterred from engaging in certain areas, and their ability to plan multi-year projects is undermined.

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23 Arts 4 & 5, law 004/2001.

24 = Law 84 of 2002, Art.6.

25 Law 12-06 of 2012, Art.27.

26 Decree 88 of 2011, Art. 11.

27 Law on associations of 1901, Art.5. In practice, the situation is far less ideal however, as the actual receipt may only come after months or years, or not even after several years.

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28 Law 84 of 2002, Art.10.

## Recommendations:

31. Registration must be governed by a notification rather than an authorization regime. This means that legal status should be acquired preferably following the submission of a simple set of documents outlining the basic details relative to the association. An impartial and apolitical body should make the decision, and in no cases should the decision be governed by discretion, but rather by clear legal criteria.

32. The requirements and procedure for registration should be clear. The administrative authority in charge of registration should make sure that the procedure and its decisions are accessible and transparent.

33. Only one body should be tasked with registering associations.

34. In no cases may an association be prevented from registering through being required to submit documents it can only obtain from the authorities, where the authorities do not promptly and efficiently supply such documents.

35. Legal status should promptly follow an association's notification, and the law should specify a time period of no more than 30 days in which the authorities may respond to the notification. Authorities should always respond as promptly as possible; should they fail to respond, the law should provide for legal status to be conferred upon the organization at that time, and require the authorities to provide official documentation to the association attesting to its legal status.

36. A registration fee may be imposed to cover administration fees, provided that this fee is not such as to deter any association from registering in practice.

37. Should the authorities refuse an association registration, they must provide clear, legally substantiated reasons for doing so, and the law should specify that the association have the right to challenge their judgment, including through prompt appeal to a court.

38. Associations should not be required to re-register on a periodic basis.

## Aims and activities

39. Associations should be free to determine and execute their own aims, activities, and priorities. In many African countries, states place unwarranted limitations on permissible activities for associations, with the effect (and indeed, often the aim) of limiting the space for human rights monitoring and advocacy, public discourse, and critical engagement between civil society and the state. These restrictions contradict guarantees of citizens' rights under constitutions and international human rights law.

40. Most commonly, African states purport to limit associations from engagement in 'political' or 'public policy issues', terms so broad that the effect is often to undermine the core functions of a healthy civil society. In both law and practice, such restrictions can prevent associations from providing a meaningful and necessary counterbalance to state power.

41. Sometimes, limits on activities take the form of broad and vague laws which are used as a pretext to allow States to prohibit associations they find politically objectionable. In Kenya, registration may be refused if there is "reasonable cause to believe that the society has among its object, or is likely to pursue or to be used for, any unlawful purpose, or any purpose prejudicial to or incompatible with peace, welfare or good order in Kenya;" (1998 Societies Act, Section 11). In several francophone African countries, including Togo and Cameroon, overly broad and vague language was largely inspired by the French law of 1901, the relevant provision of which read: "Associations contrary to the constitution, the law and public policy as well as those whose purpose is to undermine especially security,

the integrity of the national territory, national unity, national integration or the republican character of the State shall be null and void."<sup>29</sup>

42. In Kenya, where the Constitution guarantees freedom of association, the Public Benefits Organizations Act (passed in January 2013, but yet to come into force at the time of writing) prohibits NGOs from political campaigning<sup>30</sup>. In Mozambique, decree no. 55/98 forbids organisations that deal with emergency relief, rehabilitation and development, from involvement in political activities of any kind. Angolan law prohibits NGOs from participating in "all activities of state organs; electoral processes; and from influencing national policy through the government or parliament"<sup>31</sup>. In Swaziland, associations are prohibited from engaging in public policy matters<sup>32</sup>, and those that have attempted to do so have met with considerable

29 Law on associations of 1901, Art.3.

30 PBO Act, Section 66(3).

31 Angolan Law of Association (14/91 of 11 May 1991), Article 8 (See: USAID NGOSI 2009: Angola, p.41, available at: [http://pdf.usaid.gov/pdf\\_docs/PNADW488.pdf](http://pdf.usaid.gov/pdf_docs/PNADW488.pdf)). In 2007, the Director of the Angolan Government's Technical Unit for the Coordination of Humanitarian Aid (UTCAH) announced in a meeting with national and international NGOs that the Government would soon cease the activities of NGOs which in its view did not serve the population or the government. Four prominent human rights organisations, the Associação Justiça, Paz e Democracia, Mãos Livres, the Angolan branch of the Open Society Initiative of Southern Africa, and the Open Society Foundation, as well as the local housing rights organisation SOS-Habitat were accused of inciting people to react violently against governmental institutions and authorities, and the government threatened to ban them.

32 See: Deane Stuart 2009 "Chapter 12: Swaziland" IN Denis Kadima and Susan Booysen (eds) Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy, EISA, Johannesburg, 475-477. Online: <http://www.eisa.org.za/WEP/swacso.htm>.

hostility and resistance from the state<sup>33</sup>.

43. Many African states require NGOs to obtain prior authorization or approval before undertaking programmatic activities. These measures have been used as an excuse to restrict independent funding and to channel aid through government-endorsed or planned programs. In Tanzania for example, the NGO regulatory body is mandated to “facilitate and coordinate activities of non- governmental organizations” and “to provide policy guidelines to NGOs for harmonizing their activities in the light of the national development plan”<sup>34</sup>.

44. In some cases, notably Sudan and Ethiopia, ‘permissible activities’ for associations are expressly curtailed for organisations in receipt of foreign sources of funding. Ethiopia has some of the most restrictive and controversial laws governing NGOs in the world. Since 2009, the *Proclamation to Provide for the Registration and Regulation of Charities and Societies* has introduced sweeping prohibitions on permissible activities for NGOs that receive more than 10% of their funding from foreign sources. In effect, all forms of human rights monitoring and advocacy have been outlawed, and the effect on civil society more broadly has been chilling. In Sudan, civil society organisations are only able to obtain foreign funding for humanitarian activities (and are required to seek government authorization in any event).

45. Some African states place legal or de facto restrictions on associations working on sexual orientation and gender identity issues. In both Mozambique and Cameroon LGBTI associations have been prevented from registering. In Uganda, the widely condemned Anti-Homosexuality Act 2014 introduces criminal penalties for associations working on such issues<sup>35</sup>.

## Recommendations:

46. Restrictions placed by states on permissible activities should be clearly defined in law, and be in accordance with international human rights instruments. Compliance with the principle of legality means any limitations must not be overly broad or vague.

47. Acceptable limitations on the activities of civil society associations include limiting engagement in for-profit activity (although fundraising initiatives to support the association’s not-for-profit activities should be allowed), anti-democratic activities, incitement to hatred, or establishing an armed group. All such limitations must be interpreted and applied strictly and not abused.

48. There should be no blanket restrictions on permissible activities, and associations should be expressly permitted, inter alia, to engage on matters relating to politics, public policy, and human rights, as well as to conduct fundraising activities.

49. The receipt of foreign funding should in no way effect an association’s ability to engage in the full range of legitimate activities.

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33 Swaziland: NGOs want law to provide operational guidelines (Report). Online: <http://reliefweb.int/report/swaziland/swaziland-ngos-want-law-provide-operational-guidelines>

34 The Non-Governmental Organizations Act 2002, sections 7 (1)(c) and 7 (1)(i)

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35 The Anti Homosexuality Act 2014, section 13 (2)

50. Permission should not be required to undertake particular activities.

## Oversight bodies

51. The right to freedom of association is intended in part to ensure the existence of a vibrant civil society that exists in a space separate from political parties and the governance of the state. As such, the registration and oversight of associations should be governed by an apolitical body, which makes its determinations based on objective criteria and without ulterior political motives. Moreover, security and intelligence authorities should not be given a special role in overseeing associations; while they may naturally investigate association activities under their general mandates to explore criminal activities, providing a special role to such authorities relative to civil society is invariably in practice an indication that the authorities view civil society as a whole and indeed their own people as a threat that must be managed and kept under control.

52. Unfortunately, in practice several countries have violated this principle by including an oversight role for political or security bodies and actors in the oversight of associations. While Egypt remains governed by the law of 2002 as of the date of this report, several draft associations bills were discussed over the course of 2013 and a new law is expected soon. Among other aspects, some of these draft laws attempted to formalize the role of political and security forces in the oversight of associations, by proposing that a body composed in part of government ministers and security agency officials be responsible for overseeing certain matters relating to associations. While provisions to this effect are not in the law currently, it is widely understood that the decisions of the relevant

body are influenced by political concerns and that the security agencies play a major role in improperly overseeing civil society.

### **Recommendation:**

53. Matters relating to associations should be determined by an impartial and apolitical bureaucratic body, in accordance with clear criteria laid out by law and with sharply constrained discretion.

## **Oversight powers**

54. Associations require and should be entitled to a necessary degree of privacy and operational freedom. Whilst there is a balance to be struck between transparency and privacy, associations should be free from excessive state oversight into their internal structures and activities. In many African countries, the state oversight powers for associations are notably far more onerous and intrusive than for businesses.

55. In Zimbabwe, state oversight powers are both disproportionate and highly overt. The Minister of Public Service is responsible for appointing members of the Private Voluntary Organisations Board, four of whom must be government appointees<sup>36</sup>. The board has wide ranging powers, including the power to determine wage policies, and to suspend staff members. The Interception of Communications Act empowers the government to intercept mail, phone calls and emails without court approval<sup>37</sup>.

56. Many countries require associations to disclose and/or publish details of their funding sources, and details of their key staff members. Whilst there is a legitimate expectation that associations should conform to lawful and proportionate standards of transparency and regulatory oversight, states should ensure that such requirements are only imposed where they are necessary and for a legitimate purpose.

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36 PBO Act of 2013, Section 35.

37 Interception of Communication Act of 2007, Part III "Application for lawful interception of communication".

57. In Kenya, the proposed Public Benefits Organization (PBO) Act of January 2013 ostensibly seeks to promote transparency within the sector. As well as requiring information to be disclosed concerning an organization's financial assets, the act would require organizations to disclose personal particulars about their officers, including their residential addresses.

58. In Ethiopia, the Charities and Societies Agency (CSA), an institution of the Federal Government, was created by the Charities and Societies Proclamation of 2009 with the purported objective of enabling and encourage charities and societies "to develop and achieve their purposes in accordance with the law" to ensure that they operate legally (621/2009, Art 5 (1) (3)). The CSA can require organizations to furnish any information or document in their possession (Art. 85), must approve income-generating activities (Art. 103 (1)) and has control over funding and accounting (621/2009, Art 77 (1)). Such requirements move far beyond regulation, into an intrusive and institutionalized form of state oversight and control.

59. In Tunisia, associations are required to publicize in the media and inform the government of all foreign funding sources<sup>38</sup>. While requiring transparency and proper accounting procedures from associations is reasonable, the requirements of article 41 are unduly burdensome and may serve to deter some associations from receiving appropriate funding. These provisions should be removed, as the Tunisian law otherwise guarantees adequate procedures to ensure appropriate financial regulation.

60. In Egypt, recent draft associations laws have floated the idea that government agents might be able to enter the premises of associations and inspect their documents at will.

61. In the Democratic Republic of Congo NGOs are required to "inform the Minister of Planning about their development activities, projects for implementation and the financial resources they have raised in order to carry out activities."<sup>39</sup> They must submit information on the acquisition and use of any funds to the ministers of justice and finance within 3 months of such acquisition or use.<sup>40</sup> This is purportedly to enable the state to monitor foreign sources of funding, so as to curtail inflow of funds from perceived enemies of the state.

62. In Zambia<sup>41</sup>, NGOs are required to submit annual reports and information on their activities, sources of funding, and the personal wealth of their officials. Criminal and civil penalties are in place for a failure to report. While reporting requirements are reasonable, criminal penalties for failure to report are excessive.

63. In Algeria, associations are not only required to inform public authorities of changes to their statutes or executive structure within 30 days<sup>42</sup>, but must also transmit to

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39 The Democratic Republic of Congo, General Enforceable Provisions of Non-Profit Making Organisations and Charitable Corporations Law N° 004/2001 of July 2001, Art. 44.

40 Ibid, art 15.

41 See "Zambia: NGOs fear Law will hobble their activities", IRIN, 26 August, 2009, <http://www.irinnews.org/Report/85860/ZAMBIA-NGOs-fear-law-will-hobble-their-activities>

42 Law 12-06 of 2012, Art. 18.

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38 Decree 88 of 2011, Art.41

the authorities copies of the minutes of the meetings of their general assemblies<sup>43</sup> - a requirement that undermines the necessary operational privacy and independence which associations require to meaningfully operate.

### Recommendations:

64. The authorities must not be given excessive powers of oversight relative to associations – for example, associations should not be required to provide excessive personal information as to their members or officers.

65. Reporting requirements must not be overly burdensome. Yearly reporting requirements are generally adequate – an association should not be required to report on every project or acquisition of funding. Prior reporting requirements are particularly inappropriate.

## Internal organization

66. Associations should be free to determine their own internal structure and rules of decision-making, provided they are not abusive. In some countries however the authorities attempt to violate this freedom by prescribing in excessive detail how associations must be organized and operate; this is the case for example under Egypt's law, which imposes overly detailed requirements as to the composition and functioning of the association's general assembly<sup>44</sup> and board of directors.<sup>45</sup>

### Recommendation:

67. Law or regulation should not dictate the internal organization of associations, which is a matter for the associations themselves.

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43 Law 12-06 of 2012, Art. 19

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44 Law 88 of 2002, Art. 24 -31.

45 Law 88 of 2002, Art. 32-40.

## Financial regulations and monitoring procedures

68. Funding is an obvious and fundamental right and requirement for associations, but is increasingly an entry point through which governments exert control over permissible activities for associations, and often their very existence. There is a marked trend across the continent in which states are increasingly using funding restrictions as a means to subvert the essential role of civil society.

69. All states have an entirely legitimate right to counter activities that endanger national security or that are contrary to public interest. Increasingly however, these principles are being used as a pretext to restrict lawful and necessary foreign funding for civil society organizations and NGOs. Given the magnitude of this issue, the UN Special Rapporteur on Freedom of Association and Assembly dedicated his 2013 report to this issue<sup>46</sup>. He noted that “[i]n recent years, the protection of State sovereignty or of the State’s traditional values against external interference has also been increasingly invoked to restrict foreign funding or to launch slander offensives against those receiving foreign funding” (para.27). As he further noted, in a number of cases, “[p]rotection of State sovereignty is not just an illegitimate excuse, but a fallacious pretext which does not meet the requirement of a “democratic society” (para.32).

70. As mentioned earlier in this report, Ethiopia has some of the most extreme funding restrictions for associations of any country in the world.<sup>47</sup> The Charities and Societies Proclamation (No. 621/2009) has had a devastating impact on individuals’ ability to form and operate associations effectively, and has been the subject of serious alarm expressed by several United Nations treaty bodies.<sup>48</sup> Indeed, this Proclamation applies the definition of “resident association” to all domestic NGOs that receive more than 10% of their funding from foreign sources, and also prohibits them from engaging in numerous human rights activities, in particular those in relation to the rights of women and children, handicapped persons, ethnic issues, conflict resolution, governance and democratisation. Legislation not only prohibits associations working in rights-based areas from receiving more than 10 per cent of their funding from foreign sources, but also requires associations to allocate at least 70 per cent of their budget to programme activities and no more than 30 per cent to administrative costs, which are broadly defined.

71. In a country where 95% of local NGOs received more than 10% of their funding from abroad in 2009, and in which local sources of funding are virtually non-existent, this doubly restrictive legislation directly affects the ability of domestic human rights NGOs to conduct their activities. Numerous NGOs have had to abandon their activities due to the “suspension” ordered by the authorities. Others have been forced to operate from abroad, making it all but impossible to conduct

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<sup>46</sup> On this question, see also Annual Report 2013 of the Observatory for the Protection of Human Rights Defenders (FIDH-OMCT), “Violations of the right of NGOs to funding: from harassment to criminalisation”, March 2013.

<sup>47</sup> Para.28

<sup>48</sup> CAT/C/ETH/CO/1, para. 34; CCPR/C/ETH/CO/1, para.25.

meaningful and independent human rights monitoring. Moreover, several NGOs have had their funds blocked by the Charities and Societies Agency (ChSA), including the Human Rights Council (HRCO), the first independent Ethiopian civil society organization mandated to monitor and report on human rights in the country. The HRCO was forced to close nine of its twelve local offices in December 2009, and its Nekemte office in 2011, due to lack of funding. The ChSA decided to freeze HRCO foreign funds even though this financial support was granted before the entry into force of Proclamation No. 621/2009 and some of the funds were not from foreign sources. In February 2011, the ChSA rejected an appeal submitted by the HRCO, arguing wrongly that the latter had not provided documents proving the domestic source of some of the funds, even though the HRCO had submitted relevant extracts of its 18 most recent audited annual reports. On October 19, 2012, the Supreme Court rejected HRCO's appeal.

72. The example of Ethiopia is increasingly relevant, as similar laws and practices are being discussed or adopted in other African countries. In late 2013, the Miscellaneous Amendments Bill, which was rejected by the Kenyan parliament, sought to limit associations from receiving more than 15% of their funding from foreign sources.

73. In Egypt the authorities must approve all funds, whether from domestic or foreign sources, received by associations registered under the 2002 associations law.<sup>49</sup> In practice, the authorities frequently refuse to approve funds for associations. For example, the authorities' refusal to approve grants awarded to the New Woman Foundation forced the

organization to drastically cut staff and reduce activities.<sup>50</sup>

74. Similar trends can be observed across the continent. In Morocco<sup>51</sup>, foreign funding must be reported to the government; in Libya<sup>52</sup> and Sudan<sup>53</sup>, all funding must be reported to the authorities. In Algeria, access to funding is limited<sup>54</sup>. In Zimbabwe,

75. while there is no general ban preventing NGOs from receiving funding from abroad, associations engaged in activities related to voter education must obtain approval from the Zimbabwe Electoral Commission and disclose their sources of funding. In Cameroon, only

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50 CIHRS, "The Forum of Independent Human Rights NGOs Condemns Increasing Restrictions on Civil Society, Warns of Draft Legislation to Paralyze NGOs in Egypt," available at: <http://www.cihrs.org/?p=6090&lang=en>.

51 Decree-law 1-58-378 of 1958, Art. 32bis.

52 Draft law on association of 2012, Art.12. Associations must make public in the paper or on their websites receipt of funding from a foreign source within 1 month from the receipt of such funding and must submit a report to the government within 2 weeks of receiving funding from any source, local or foreign.

53 Voluntary and Humanitarian Work (organization) Act of 2006, Art.7

54 Law No. 12-06 on Associations, adopted in January 2012, contains numerous restrictions, in particular in relation to the search, collection and utilisation of funds from abroad. It prohibits "all associations from receiving funds from the legations and foreign non-governmental organisations" (Article 30), except in cases of "cooperative relations duly established with foreign associations and [international NGOs]" authorised by the competent authorities, or "express agreement of the competent authority". Articles 40 and 43 provide that any funding from "foreign legations" obtained in violation of Article 30 may result in suspension or dissolution of the NGO by the administrative court. NGOs fear discretionary interpretation of this law by the authorities. Moreover, the vagueness of its provisions, coupled with the impossibility for most NGOs to register, severely constrains their ability to finance themselves and to benefit from overseas funding.

associations which have been recognized as for the public benefit may receive private donations.<sup>55</sup>

## Recommendations:

76. States' legal regimes should codify that associations have the right to seek and receive funds. This includes the right to seek and receive funds from their own government, foreign governments, international organizations and other entities as a part of international cooperation to which civil society is entitled, to the same extent as Governments.<sup>56</sup>

77. Any restrictions placed on funding must be in accordance with international legal standards, be for a legitimate reason, and be clearly codified in law.

78. Yearly reporting is an adequate means by which to assure transparency and accountability. Audits may be required of organizations above a reasonable budgetary threshold; such audits should be appropriate in scope and frequency to the nature of the organization, and not such as to be overly burdensome or to hinder the association's operation. The law should not require associations to make public their sources of funding other than through such yearly reports.

## Public support systems

79. In addition to granting legal existence and tax benefits, a state may support the existence of civil society organizations through public support systems. Many countries in Africa recognize the possibility for associations to be granted the status of "public benefit association" and consequently receive certain public funding and other benefits, although the rules concerning and effects of such designation are different from country to country.

80. While providing additional benefits such as public funding to public benefit associations is generally positive, such systems can be used in a negative way if they are used to distribute funds and benefits in a discretionary, partisan manner to those organizations the authorities favor, and to refuse such status to organizations they oppose. Moreover, care must be taken to ensure that public funding does not infringe the independence of associations, or improperly infringe their discretion as to the manner in which they operate.

81. Unfortunately, the law and practice of many countries in Africa relative to public benefit associations and public funding contravenes these principles.

82. In Egypt, the 2002 law grants the president the power to bestow, upon the request of the association concerned, and to remove at his discretion public interest status from associations, as well as to determine what privileges are enjoyed as a result of such status.<sup>57</sup> The law gives the Minister of Social Affairs the power to essentially merge the work

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55 Article 11, law 90/053 of 1990.

56 A/HRC/20/27 (2012), para.34.

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57 Law 84 of 2002, Arts. 49-50.

of public interest associations into the work of the government, to discontinue the activities assigned to them, to withdraw projects from them or to replace their boards.<sup>58</sup> More recent drafts have continued to follow this tradition by preserving excessive discretion in the granting of public benefit status and envisioning excessively close relationships between public benefit associations and the government. The freedom of association is infringed on both fronts, as in both instances the autonomy and independence of civil society space and operation is violated.

83. In Mozambique, associations may request a 'Declaration of Public Utility' if they pursue a purpose of general interest and cooperate with the government in providing services. Their designation as such is subject to the discretion of the authorities, however. This is particularly harmful in that a designation as an association of Public Utility is generally necessary in order to be exempt from taxes.<sup>59</sup> In addition, even though there are procedures under the law for additional tax exemptions and other benefits for associations, most associations fail to utilize the opportunity in these areas because of insufficient access to information. While the government has delivered some funds to associations via local development funds, a lack of transparency and equity as to the criteria by which such funds are awarded has persisted, despite suggestions from civil society as to how to improve the procedure and criteria.

84. In Togo, associations can request public benefit status after three years of functioning.<sup>60</sup> It is not clear that this three-year delay is reasonable, however.

### Recommendation:

85. Public support to associations is positive. Care must be taken to ensure that such support is distributed in an apartisan manner, and that the granting of support is not used as a tool for the government to exert undue influence over civil society.

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58 Ibid, Arts. 51-53.

59 It is also possible to obtain an exemption from VAT upon formal request, but this merely duplicates the problem of discretion.

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60 Law on associations of 1901, Art. 10.

## Membership, federations, and government-sponsored associations

86. The right to freedom of association is fundamentally premised on the idea that the government should distance itself from the sphere of civil society organization; while it should provide positive enabling conditions, it should not go so far as to set up or require certain types of association, as this would be to annul the essence of freedom of association and to replace it with government dictate. Similarly, the government may not require that any individual join an association, as the right to freedom of association implies just as strongly the right not to associate as the right to join an association.<sup>61</sup>

87. Some countries have set a positive example in moving some way towards recognizing these principles. The Kenyan Constitution of 2010 explicitly states, for instance, that “a person shall not be compelled to join an association of any kind” (Sec. 36(2)). In Togo, civil society is free to create umbrella networks on it deems important; such networks have in fact been formed to work on the environment, women’s rights, economic transparency, and other issues.

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<sup>61</sup> It should be noted here once again that professional associations are a separate area from civil society in general, and in certain cases it may be reasonable to require membership of a particular professional association, or other form of license, in order to operate in a certain profession. This is by no means true of all professional associations however; journalism, in particular, must not be regulated by the state in this manner. More detail on rules in this area would require a separate focused study.

88. Other countries, however, exhibit the opposite trend. Current Egyptian law creates a national federation of associations and defines its tasks,<sup>62</sup> something that recent drafts have not abandoned. Recent drafts have also included the national creation of exclusive regional associations. It is not appropriate for the state to interfere in civil society space by setting up such organizations, however, as the creation of regional and national associations should be a matter for national associations to determine through aggregating together in whatever formulations they desire. In practice, the creation of such associations by law appears an attempt by the state to give itself another tool by means of which to exert leverage over civil society.

89. On the other hand, the state may take the positive measure of providing that civil society be consulted on or involved in governance issues in certain sectors. Where such measures do not constitute an interference with the freedom of civil society, they are positive. Civil society organizations should moreover not be restricted to consulting with the government in only one area.

90. Provisions for the consultation of civil society via umbrella organizations exist in Ghana, for instance. Ghana is one of the few countries in Africa with constitutional provisions aimed at institutionalizing channels of communication and co-operation between civil society and several state bodies. The law foresees the mandatory representation of civil society associations on several state bodies (including the Rules of Court Committee, the National Media Commission, the Policy Council, regional Police Committees, and the Prisons

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Law 84 of 2002, Art.69-70.

Service council). Overall, “[t]he government has... come to see NGOs as an important agent in rural development and has expressed willingness to develop collaborative ventures. NGOs are seen as important implementers of rural development with particular skills in community organisation.”<sup>63</sup>

91. Governments also interfere with civil society space through the creation of organizations commonly referred to as GONGOs, or government-organized NGOs. GONGO's may be organizations created by the governing authorities, or which otherwise directly serve their interests while adopting the form of civil society organizations. The 31 December Women's Movement formed by President Rawlings and his wife in 1982 to support the “revolution” in Ghana is one example of such an organization. In addition to interfering with domestic civil society space, governments, particularly non-democratic regimes that have been in power for extended periods of time, often utilize GONGOs to attempt to interfere with the freedom and effective exercise of international civil society spaces, including human rights fora.

## Recommendations:

92. Individuals must not be required to join associations, and must always be free to leave them.

93. The state should not stipulate by law the existence of particular or exclusive regional or national federations of associations, as

whether or not to create federations should be determined freely by civil society actors.

94. The law should permit and facilitate the authorities' consultation of civil society, including through the formation of umbrella organizations. Such organizations, where freely and appropriately formed, may also be utilized to adopt, promulgate and enforce principles and standards of conduct and management.<sup>64</sup> Associations should be able to join as many such organizations as they may constructively contribute to.

95. Governments should respect the independence of domestic and international civil society space.

63 Denkabe, A., 'An Overview of the Non-Governmental Sector in Ghana' in Drah, F.K., and Oquaye, M., *Civil Society in Ghana*, (FES, Accra, 1996), p.156.

64 Open Society Institute, Guidelines for laws affecting civic organisations, London, 2004, 96.

## Federation and cooperation

96. The right to freedom of association does not end at the borders of any particular association of course; rather, the right grants associations and their members the ability to cooperate with one another, as formally or informally as they may desire and find useful relative to the particular issues they confront. The situation here should be analogous to that of the right of individuals to form associations – associations should always be free to collaborate informally, and should moreover be able to form federations with legal status via the same procedures involved in obtaining legal status for an association (the difference being that legal persons, rather than natural persons, notify to register the federation).

97. Unfortunately, many African countries attempt to limit such cooperation among associations, either by banning all forms or working together – and particularly the cooperation of domestic and international organizations – or by requiring special discretionary permission from the government to form an official network, or the like. In Egypt for example, in early 2013, the Egyptian Organization for Human Rights received a warning from the Ministry of Insurance and Social Affairs stating that no “local entity” is allowed to engage with “international entities” without permission from “security bodies,” on instructions from the prime minister<sup>65</sup>. Recent Egyptian draft laws have suggested requirements ranging from having associations inform the government even in the case of brief and informal collaboration

with a foreign association, to requiring that official status be obtained for any network. Algerian law currently requires approval from the Interior Minister in order for associations to create networks with foreign associations, and the approval of the authorities for any cooperation.<sup>66</sup>

### Recommendation:

98. States must allow the free creation and operation of informal networks of associations and cooperation among associations, both nationally and internationally. Associations should be free to create formal federations via a procedure substantively equivalent to that by which individuals create formal associations.

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65 CIHRS, “Egyptian Rights Defenders at UN: Human Rights Crisis in Egypt Must Be Addressed,” available at: <http://www.cihrs.org/?p=6172&lang=en>.

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66 Law of 2012, Arts. 22 & 23.

## Foreign and international associations

99. Civil society is now increasingly globalized and interconnected. Informal communication and co-operation, and formal partnerships between national and international associations are central to the realization of the right to freedom of association. Regional and international NGOs, as part of global civil society, should be afforded the same rights and protections as all other types of associations.

100. A number of African countries place burdensome and disproportionate restrictions on the registration and operation of foreign associations. Whilst these are sometimes codified in law, many states apply *de facto* restrictions on foreign associations through complex, time consuming, and deliberately bureaucratic registration and renewal procedures.

101. In Ethiopia, the *Charities and Societies Proclamation 2009* effectively prohibits all international associations from having any meaningful presence in the country. Foreign NGOs, defined deliberately widely so as to encompass domestic organizations in receipt of more than 10% of foreign funding, are effectively banned from carrying out all human rights activities.

102. In Egypt, foreign associations must request and be granted permission to operate by the Ministry of Foreign Affairs. Foreign associations are required to provide detailed and intrusive information on the financing

of their projects.<sup>67</sup> Recent drafts have been similarly restrictive in this area.

103. In Togo, the law does not address international or regional NGOs, and so in practice they cannot obtain legal status.

104. In Kenya, the requirements for foreign organizations to register branch offices are generally similar to those of local organizations. However they are required to submit, along with their application for registration, a certificate of foreign registration and to pay 22,000 Kenyan Shillings (approximately 295 USD) as an application fee.

105. In Cameroon, foreign associations must obtain the permission of both the minister of foreign affairs and the minister of territorial administration in order to undertake any project.<sup>68</sup>

106. In Mozambique, registration is mandatory for foreign NGOs. Decree 55/98 regulates both the registration and activities of foreign NGOs. They must register with the Ministry of Foreign Affairs and Cooperation, and are required to provide significant details on their organization's projects, staffing, and finances. Foreign associations must renew their registration every two years, and submit activity reports, tax declarations and other documentation. The preamble to the law justifies the need for the establishment of a legal framework for foreign NGOs because of their complementary role to government initiatives in rehabilitation and development. Foreign NGOs are forbidden to conduct or promote acts of a political nature.

67 See Ministry of Social Affairs decree 178/2002.

68 Article 16(1), law 90/053 of 1990.

## Recommendations:

107. An association that is incorporated under the laws of one country (a 'foreign association') that has, or intends to have, operations, programs, or assets in another country should be allowed to establish a branch office in that other country and should be permitted to enjoy all of the rights, and be subject to all of the same lawful requirements of local associations.<sup>69</sup>

108. An association that is established in one country should be allowed to receive cash or in-kind donations, transfers or loans from sources outside the country as long as all generally applicable foreign exchange and customs law are satisfied.<sup>70</sup>

109. The procedure for obtaining legal status for an international association should be no more burdensome than that required of national associations; and once legal status is obtained, the same provisions that apply to national associations should apply to international ones.

## Sanctions

110. In several African countries, the potential for excessive civil and criminal sanctions is a tool used by the State to undermine the right to free association.

111. In broad terms an association, as a legal person, is responsible solely for activities carried out under those auspices. Individuals, similarly, are responsible for their own actions. It is essential that this distinction be recognized in states' domestic laws and practices, and that in no cases liability improperly imputed from one actor to another. Under Tunisian law for example, the individual founders, members and employees of an association are not considered personally responsible for the legal obligations of the association.

112. Circumstances where criminal as opposed to civil sanctions apply to associations should be extremely narrow, and the rare exception rather than the norm. Criminal sanctions should only be relevant when a recognized criminal offence (in accordance with international standards) has been committed, and proven by an impartial court of law.

113. In many African countries, excessive civil and criminal sanctions are frequently applied to associations, and individual members of the same, for purported 'offences' that do not conform to international or regional human rights standards. For example, in Zimbabwe any person who takes part in management or control of an unregistered voluntary organisation is guilty of an offence. The same applies also and not exclusively, in Zambia, Algeria and Uganda.

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69 Drawing on Open Society Institute, Guidelines for laws affecting civic organisations, London, 2004, 87.

70 Drawing on Open Society Institute, Guidelines for laws affecting civic organisations, London, 2004, 89.

114. In Egypt, sweeping and disproportionate sanctions can be applied to associations, including dissolution, for purported offences that are either defined broadly (or not defined at all) or not recognized under international law. An association can be dissolved where it acquires or sends funds from abroad, violates the law, public order or morals, affiliates with a foreign association, or uses its funds for purposes other than those for which it was established<sup>71</sup>. On 4 June 2013, the Cairo Criminal Court sentenced 43 Egyptian and foreign staff members of five international civil society organisations to between one and five years in prison and a fine of 1000 EGP for having established and administered unlicensed branches of foreign organizations in Egypt and received funding from abroad.<sup>72</sup>

115. In Sudan criminal sanctions, confiscation of funds or deportation of foreigners are all potential sanctions, which may be imposed even relative to actions which should invoke no penalty whatsoever.

116. In Ethiopia, the 2009 Anti-Terrorism Proclamation has been used to jail journalists and opposition party members for peacefully exercising their freedom of association. The African Commission has openly expressed concern as to the “excessive restrictions placed on human rights work”<sup>73</sup> in Ethiopia.

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71 Law 84 of 2002, Art. 42. Also problematic is article 76, which establishes special penal sanctions for offenses related to associations.

72 CIHRS, “20 Egyptian Organizations in Solidarity with NGO Workers Sentenced to Prison: Politically Motivated Case a Fatal Blow to Freedom of Expression and Association,” available at: <http://www.cihrs.org/?p=6759&lang=en>.

73 ACHPR Resolution 218, 2 May 2012.

117. In Kenya the state retains wide and effectively discretionary powers that allow it to fine, suspend or cancel the registration certificate of Public Benefit Organizations<sup>74</sup>. The discretionary nature, and vaguely defined terms under which such excessive sanctions can be applied is a source of considerable concern, and an existential threat to many associations.

118. In other countries, states have selectively used controversial provisions of their law, including in some cases non-repealed colonial era laws, to target and dissolve associations. For instance, several countries’ penal codes penalizes ‘sedition’, an overly broad and vague term which has been used to criminalize opposition to the authorities. Provisions which make it an offence to publish any defamatory or insulting material concerning high-ranking government authorities are used to similar effect. In Rwanda in 2004, ten members of the independent human rights NGO LIPRODHOR were forced into exile following publication of a controversial report of the parliamentary committee in charge of “investigations on the possible propagation of the genocidal ideology in the country”; the parliamentary committee also proposed the dissolution of the organization.

## Recommendations:

119. Criminal sanctions are inappropriate in an associations law.

120. In all cases sanction should apply only to the entity that has committed the offense, and not be improperly imputed from association to individuals or vice versa.

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74 PBO Act of 2013, Sections 18 & 19.

121. Civil sanctions, suspension or dissolution of an association should only be considered in grave offenses. In all cases such action may only be taken following court judgment, and the exhaustion of all available appeal mechanisms.

## Government and 3rd party harassment

122. Associations and individual members of associations - especially human rights organizations - are frequently subject to harassment from the state, whether retributively or with the intention of disrupting ongoing or future activities. By its very nature, harassment is at times difficult to both recognize and quantify. Nonetheless, there is a growing body of jurisprudence before the African Commission that illustrates some of the more common trends, including smear campaigns, targeted travel bans, deportation, and arbitrary arrest and detention.

123. With regard to the Nigerian state's harassment of the Civil Liberties Organisation, the African Commission held that "the persecution of the members of an NGO dedicated to the respect of human rights is an attempt to undermine its ability to function in this regard, [and] amount[s] to an infringement of articles 9 and 10 of ACHPR."<sup>75</sup>

124. Unlawful and arbitrary arrest and detention of association members is a frequently applied state tactic. In a case concerning Nigeria,<sup>76</sup> the African Commission found Nigeria guilty of violating the right to freedom of association by virtue of the arbitrary arrest and detention of a Nigerian citizen on the basis of his political activities. Sudan has previously been condemned by the Commission for similar practices.<sup>77</sup> In a

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75 ACHPR, 225/98 Huri - Laws / Nigeria (2000).

76 ACHPR, 205/97 Kazeem Aminu / Nigeria (2000).

77 ACHPR, 48/90-50/91-52/91-89/93 Amnesty International, Comité Loosli Bachelard, Lawyers'

case brought against Mauritania,<sup>78</sup> various individuals were imprisoned under the law, charged with belonging to criminal or secret associations. The government did not provide any evidence however, and the Commission also found that the law in question was too vague. In a case concerning Kenya,<sup>79</sup> the African Commission found a violation of the right to freedom of association where a student union leader was forced to flee the country due to his political opinions and student union activities.

125. In a number of cases, association members have been subject to international travel bans so as to disrupt their activities. In August 2011, two members of the Regional Human Rights League in the Great Lakes Region (LDGL) were barred by Rwandan authorities from leaving the country, in order to travel to Burundi in the course of their work. The African Commission has previously condemned the Gambia for preventing members of political parties from traveling out of the country<sup>80</sup>.

126. Governments, whether publicly or via state controlled media, have orchestrated smear campaigns aimed at undermining and delegitimizing associations. This has been a recurrent trend in Rwanda, for example, over the course of several years.

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Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa / Sudan (1999).

78 ACHPR, 54/91-61/91-96/93-98/93-164/97\_196/97-210/98 Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme / Mauritania (2000).

79 232/99 John D. Ouko / Kenya (2000).

80 147/95-149/96 Sir Dawda K. Jawara / Gambia (The) (2000).

127. In 2011, the Egyptian authorities – including SCAF leaders and the ministers of international cooperation, justice, social solidarity, and information – launched a smear campaign against civil society organizations in the media, accusing them of working for foreign interests and agendas.<sup>81</sup> It was later announced that judicial investigations had been initiated into hundreds of organizations in connection with allegations of high treason, and the media hype was fed by daily leaks from the investigating committee formed by the minister of justice in order to look into the foreign funding of civil society.<sup>82</sup>

81 For information concerning these campaigns, content and parties see: Essam Al-Deen Mohamed Hassan, "Hamlat Al-Tashheer We Al Tamweel Al-Agnabby, Kera'ae Fi Al-Hagma A'ala Al-Gama'eyyat Al-Ahleyya We Monthamat Al-Mogtama'a Al-Madany", Working paper presented at a talk on "Ehanat Al-Qanoun We Hamlet Al-Karaheyya, Sep. 19 2011

82 For more information on the attacks on human rights organizations and civil society, see:

- Cairo Institute for Human Rights Studies, "The Case Against Foreign NGOs Must be Closed and Responsible Ministers Held Accountable," Mar. 11, 2012, <<http://www.cihrs.org/?p=1786&lang=en>>.

- Human Rights Watch, "Egypt: Drop Charges in Non-Profit Group Cases," Mar. 7, 2012, <<http://www.hrw.org/news/2012/03/07/egypt-drop-charges-non-profit-group-cases>>.

- Human Rights Watch, "Egypt: Rights Activists at Risk of Prison," Feb. 5, 2012, <<http://www.hrw.org/news/2012/02/05/egypt-rights-activists-risk-prison>>.

- Cairo Institute for Human Rights Watch, "Beyond NGOs: The Battle for Egypt – Bahey El-Din Hassan," Mar. 7 2012, <<http://www.cihrs.org/?p=1757&lang=en>>.

- Cairo Institute for Human Rights Studies, "Orchestrated Campaign Against Human Rights Organizations: Facts Absent; the Public Intentionally Mised," Feb. 15 2012, <<http://www.cihrs.org/?p=1234&lang=en>>.

- Amnesty International, "Egypt: Stop Holding NGOs Hostage," Feb. 7, 2012, <<http://www.amnesty.org/en/news/egypt-stop-holding-ngos-hostage-2012-02-07>>.

- Amnesty International, "Egypt Must End Attacks on Civil Society," Mar. 1, 2012, <<http://www.amnesty.org/en/news/egypt-must-end-attacks-civil-society-2012-03-01>>.

128. Following the elections in 2012, the government appointed by the Freedom and Justice Party also participated in this smear campaign. For example, on October 14 the Ministry of Insurance and Social Affairs held a press conference at which it claimed that it had “refused to allow some civil society organizations to receive money from foreign sources linked to Israel,” without giving the names of the donating bodies or of the organizations which were going to receive these funds. The apparent aim of this was to generalize these charges to all civil society organizations.<sup>83</sup>

129. In the context of this campaign, 43 employees of foreign organizations working in Egypt were referred to trial on various charges related to their work at these organizations.<sup>84</sup>

130. In addition to refraining from interfering with associations themselves, states must ensure that associations are free from interference by non-state actors as well. In the human rights context in particular, for example, the 1998 United Nations Declaration on Human Rights Defenders requires States to adopt protective measures for human rights defenders. The laws in both Tunisia and Libya are positive in this regard, as both explicitly forbid public authorities from obstructing activities of an association, and require them to take all necessary measures to protect associations from attacks by others on their

rights.<sup>85</sup> It is essential that states ensure concrete protection mechanisms are in place for associations, and that such mechanisms do not undermine their right to autonomy and independence.

## Recommendations

131. States should respect, in both law and practice, the right of associations to carry out their activities without harassment of any kind.

132. States should protect associations from interference by third parties and non-state actors.

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83 Cairo Institute for Human Rights Studies, “After President Morsi’s First 100 Days: Worrying Indications for the Future of Human Rights; Major Crises Remain Unresolved.”

84 See above section on ‘Sanctions’ for further information.

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In Tunisia, decree 88 of 2011, Art. 6-7

## Access to remedies

133. The right to a remedy is a fundamental right. In the context of associations, there are numerous areas where access to the courts is particularly important – individuals must have access to a court to challenge any decision denying them the ability to form an association; to challenge the harassment of their association or other undue surveillance or interference; and to challenge any attempt to suspend or dissolve the association, which must not go into effect until the appeals process has run. It is important, moreover, that procedures for reference to the courts relative to decisions to refuse registration provide for prompt decisions. In addition and more broadly, individuals must always be able to challenge the constitutionality of laws or procedures relating to association.

134. Some positive examples arise in African countries. In Egypt, the law grants associations the ability to contest negative registration decisions;<sup>86</sup> the law does not grant a similar right to foreign associations, however.<sup>87</sup> Positively, Article 75 of Egypt's new constitution prevents the authorities from interfering in the affairs of associations or dissolving them without a judicial ruling.

135. In Cameroon too, associations can appeal refusal of registration to the courts; they are only given 10 days in which to do so however, a time frame that should be extended (the courts

are then given 10 days to respond; the tight time frame in this regard is extremely positive, as it will prevent the effective refusal of formal status to associations through dilatory tactics, frequently encountered in practice).

136. In other countries, such as Togo, the law does not stipulate what will occur should the authorities object to the formation of an association.

137. In Zimbabwe, the Constitution guarantees citizens' right of access to the courts. Where the NGO Board sanctions an NGO, the association may approach the High Court, and though the process may be lengthy, it is possible to get positive judgments from the courts.

138. In order for the right to a remedy to be effective, not only must individuals have the right to appeal to and effective access to the courts; in addition, the courts themselves must be independent and willing to take action to uphold rights. In its 2001 Report on Freedom of Association and Freedom of Assembly, Article 19, analyzing the past decade, declared that "[j]udiciaries around the sub-continent have taken advantage of the changed political-legal environment to take a bold stance in protection of human rights. From east to west, judiciaries have used powers conferred on them by the bills of rights to strike down laws found to be in breach of fundamental rights and freedoms even on the basis of international instruments signed but not yet ratified by the relevant parliaments. Among the statutes that have been so purged are those which impinged on freedom of association and assembly; they have been declared "colonial relics" which

<sup>86</sup> Law 84 of 2002, Part 1 Chap.1, Art. 6. The law in Egypt also allows for the creation of a committee to attempt to amicably settle disputes between the authorities and an association. Such a mechanism is positive; it is crucial, however, that such mechanisms not be used to prevent the potential of recourse to the courts.

<sup>87</sup> See Decree 178 of 2002.

have no longer a place in Africa.”<sup>88</sup> While the optimism this statement evinces is certainly merited, systems remain extremely uneven, and judicial systems more willing and able to enforce right in some countries than others.

139. In Kenya, like the countries mentioned above, decisions of the authorities to refuse registration or dissolve an association can be challenged in court.<sup>89</sup> While it is a case concerning a political party, the case of *Medo Misama v. Attorney General & Another* is instructive; in that case, both the Kenyan High Court and the Kenyan National Human Rights and Equality Commission (KNHREC) judged the Registrar of Societies’ decision to refuse registration of the applicant’s political party to be problematic. Both courts held that the Registrar had given insufficient reasons in denying the application for registration. The positive trend exemplified by this case is recent, as up until the early 2000s Kenyan courts rarely differed with government authorities.

140. On 26 February 2011, a Tunisian administrative court overturned a 1999 decree which had been issued by the interior minister to prevent the establishment of the National Council for Liberties, thus allowing the organization to undertake its work in Tunisia. On 22 April 2011, an administrative court similarly ruled in favor of the establishment

of the National Observatory for Freedom of Press, Publication, and Creative Expression.<sup>90</sup>

141. Other countries demonstrate enduring problems. In Mozambique, the 2003 Constitution protects the right of access to justice and establishes a Human Rights Commission. Budgetary constraints, the inability of people living in poor communities to afford legal fees, minimal legal aid, lack of information and difficult to meet formal procedural requirements all make the right of access to justice less effective in practice however; constraints are such that the court system itself remains underdeveloped, for instance. While the Constitution recognizes quasi-judicial and informal judicial processes, in an attempt to bring justice closer to the people, no policies have been adopted to facilitate conflict resolution and restorative justice. While the law recognizes community tribunals, such tribunals are notorious for breaching constitutional values, especially the dignity of women, as their proceedings are adjudicated by traditional patriarchal structures and are often discriminatory.

## Recommendations:

142. The authorities must clearly detail the legal basis for all of their decisions concerning associations, and associations or their individual members should always be able to challenge those decisions in independent courts. Associations should be granted a reasonable time in which to formulate their appeals, and prompt decisions should be

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88 Article 19, Freedom of Association and Assembly. Unions, NGOs and Political Freedom in sub-Saharan Africa, 2001, 10-11.

89 Societies Act CAP 108 Revised Edition 2009 (1998), Sec. 15 (1) (3)As in the case of the NGOs, appeals against refusals to create a society can be done before the Minister within 30 days of the refusal, and appeals against the Minister’s decision presented in the High Court within 30 days of the decision.

90 See the 2011 annual report of the Cairo Institute for Human Rights Studies, “Fractured Walls, New Horizons,” available at: <http://www.cihrs.org/wp-content/uploads/2012/06/the-report-e.pdf>.

required from the courts relative to initial registration decisions.

143. Courts should be genuinely accessible to ordinary individuals.

144. Individuals must be able to challenge any negative instance of law or practice on the basis of the right to freedom of association.

## Access to information

145. To operate effectively and lawfully, associations require a simple and transparent means of accessing applicable legislation and information concerning their rights and responsibilities. In particular, associations in Africa are often thwarted by lack of knowledge about notification procedures, the legal and administrative framework as a whole, and avenues for redress.

146. In Zimbabwe, the 2013 Constitution guarantees access to information held by any person or the State, and further extends the right to permanent residents, including juristic persons and the media as long as the information is requested for the public interest<sup>91</sup>. Zimbabwe is yet to develop a law to enable this right, however, so the right is yet to be realised in practice.

147. In Mozambique, access to information is a right protected in the constitution under section 48. However, with the exception of the law on freedom of the press, there is no law promoting and protecting the right to information; a proposal from civil society submitted in 2005 was never adopted. In addition to the absence of legislation, the right to receive and disseminate information

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91 Art. 62 of the Constitution of 2013: "(1) Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability. (2) Every person, including the Zimbabwean media, has the right to access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right."

is negatively effected by practices of the government, including the intimidation of journalists, arbitrary arrests, shootings, assault, seize of materials and destruction of properties. While recent initiatives by the government to develop innovative strategies of disseminating information in the country through internet and other electronic media are positive, they are still highly inadequate in a country lacking extensive electronic infrastructure.

148. Tunisia has enacted the first legal framework to govern access to information<sup>92</sup> of any country in North Africa; while the law could be improved, it has many positive characteristics that should be emulated.

## Recommendations

149. National constitutions should codify the right to freedom of information, and domestic legal regimes should establish an independent, efficient, and non-partisan mechanism to ensure citizens' access to the same.

150. The body responsible for associations should be charged with ensuring access to information relative to associations, including ensuring that information on all procedures relating to associations is available to all, clear and easy to understand, and that information is collected and publicly available on all decisions relating to associations.

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92 Decree 41/2011.





# Freedom of assembly in law and practice in Africa

## Overview

1. The right to freedom of assembly is widely recognized in the constitutions of African countries.<sup>1</sup> Several countries have adopted

1 **Egypt:** Constitution of 2014, Art 73: “Citizens have the right to organize public meetings, marches, demonstrations and all forms of peaceful protest, while not carrying weapons of any type, upon providing notification as regulated by law. The right to peaceful, private meetings is guaranteed, without the need for prior notification. Security forces may not to attend, monitor or eavesdrop on such gatherings.” **Tunisia:** Art. 36 of the Constitution of 2014: “The right to peaceful assembly and demonstration shall be guaranteed and exercised as per the procedural regulations provided for by law without prejudice to the essence of this right. **Ethiopia:** Article 30 of the 1995 Constitution states: “Everyone has the right to assemble and to demonstrate together with others peaceably and unarmed, and to petition. Appropriate regulations may be made in the interest of public convenience relating to the location of open-air meetings and the route of movement of demonstrators or, for the protection of democratic rights, public morality and peace during such a meeting or demonstration”. **Kenya:** Article 37 of the Constitution of Kenya (Revised 2010) states: “Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities”. **Ghana:** Constitution, Art. 21(1) d. “All persons should have the rights [...] to freedom of assembly including freedom to take part in procession and demonstration. **Togo:** Art. 30 of the Constitution of 2003- « *L’Etat reconnaît et garantit dans les conditions fixées par la loi, l’exercice des libertés d’association, de réunion et de manifestation pacifique et sans instruments de violence. L’Etat reconnaît l’enseignement privé confessionnel et laïc* ». **Cameroon:** Constitution of 1972 (as amended in 1996), Art.11: “Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others. ; **Chad :** Constitution of 1996 (as amended in 2005), Art.

specific legislation to govern assemblies, including Egypt, Tunisia, Ethiopia, Mozambique, Cameroon, Chad and Togo. In other countries, such as Kenya, Ghana and Zimbabwe, public order laws are used to govern the holding of assemblies.<sup>2</sup> Some legislation distinguishes different types of assemblies, with different rules applied to each type; while this does not necessarily present a problem, such distinctions should not be used, as they often are, to impose inappropriate restrictions relative to

27: “The freedoms of opinion and of expression, of communication, of conscience, of religion, of the press, of association, of assembly, of movement, of demonstration and of procession are guaranteed to all. They may only be limited for the respect of the freedoms and the rights of others and by the imperative to safeguard the public order and good morals. The law determines the conditions of [their] exercise. **Mozambique:** Article 51 of the Constitution of 2004 “All citizens shall have the right to freedom of assembly and demonstration, within the terms of the law.”. **Zimbabwe:** Art.58) of the Constitution of 2013: (1) Every person has the right to freedom of assembly and association, and the rights not to assemble or associate with others.”

2 **Egypt:** Law n.107 of 2013; **Ethiopia:** Peaceful Demonstration and Public Political Meeting Procedure Proclamation n. 3 of 1991; **Kenya:** Public Order Act of 2003 (as amended in 2009). **Ghana:** Public Order Act n. 491 of 1994. **Togo:** Law n.10 of 2011 fixant les conditions d’exercice de la liberté de réunion et de manifestation pacifiques publiques. **Cameroon:** Law n.55 of 1990. **Chad:** Ord. on peaceful associations and manifestations of 1962. Law n.45 of 1994. Electoral Code of 2008; Law on National Electoral Commission of 2010; Law on political parties of 2009, Law on political opposition in Chad of 2009; Good behavior Code. **Mozambique:** Act 9 of 1991 as amended by Act 7 of 2001. **Zimbabwe:** Public Law Order and Security (POSA) Act 2002 replaced Law and Maintenance Act (LOMA) enacted in 1991.

certain categories of assembly. Of course, as the UN Special Rapporteur on Freedom of Peaceful Assembly and Association has noted, the right to freedom of assembly entails the right to freedom of *peaceful* assembly. At the same time, it is important to recognize that “an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behavior.”<sup>3</sup>

2. An assembly is “an intentional and temporary gathering in a private or public space for a specific purpose.”<sup>4</sup>

3. The UN Special Rapporteur on Human rights defenders noted in 2006 that, regrettably, there have been more cases reported of restrictive laws being introduced and reintroduced in the field of assembly than there have been reports of legislation being changed in order to conform to international standards.<sup>5</sup> Unfortunately, in Africa at least this remains the case. Most national laws still require official written permission to hold assemblies, rallies and demonstration, rather than creating a notification regime that respects the right to freedom of assembly.<sup>6</sup> National security and public order are grounds often used to deny the right to free assembly. Excessive force has frequently been used in responding to protests, and other meeting the authorities disfavor disrupted. Governments also rely on national security laws to respond to exposure

or criticism of their human rights practices. Freedom of assembly is a key enabling right, necessary for human rights defenders to do their work and for a free and democratic society to function. Attacks on the right undermine not only freedom of assembly, but human rights and governance by the people more broadly.

## Recommendations:

4. National constitutions should guarantee the right to freedom of assembly, which must be understood in a broad manner consistent with international human rights law; where a constitution states that the essence of this right shall be defined by law, this should in no way be interpreted to allow improper limitation of the right.

## Notification framework

5. The right to freedom of assembly resides in the people. As such, a state’s duty is to facilitate the conduct of peaceful assembly, and any legal framework implemented should be aimed at this purpose. Central to this is the imposition of a notification regime – while it is reasonable that the state ask individuals who plan in advance large public assemblies to submit notice of such, it is not reasonable to require assemblies to be authorized. Authorization regimes are unfortunately often encountered in practice however, evincing states that view the assembly of individuals as a threat to be controlled and that fail to respect the core of the right.

6. An authorization system exists, for instance, in Ethiopia.<sup>7</sup> In Cameroon, Zimbabwe and

3 A/HRC/20/27, para 24, quoting ECtHR, *Zilibergerg v Moldova*, ATpp No 61821/00 (2004).

4 Ibid, para 24.

5 A/61/312, para 62.

6 A/61/312, para. 62.

7 Peaceful Demonstration and Public Political Meeting Procedure Proclamation n. 3 of 1991.

Mozambique<sup>8</sup>, a system of notification is in place on paper. In practice however, the authorities subvert freedom of assembly by refusing to issue receipts on the grounds that the meeting will perturb “public order” and by failing to respond to the notification of an impending meeting and then issuing a ban shortly before the meeting is held, or while it is in progress. In Cameroon, for example, Article 3 of the law on the system of meetings and public demonstrations requires that organizers of public events provide three days notice to relevant authorities, and be granted a permit prior to the public gathering taking place. Although prior state authorization is not required, in practice the state often refuses to grant permits to assemblies critical of the government.<sup>9</sup> In Egypt, assemblies are prohibited from threatening “national unity”, the meaning of which is particularly vague. In addition, some security officials are simply unaware of the law, and ask for an “authorization notice” prior to meetings. As a result people are often accused of illegal assemblies on the grounds that they have not received authorization.

7. Notification must not be required too far in advance of an assembly. Different countries have different standards in this regard; notification must be made not less than 8 days in Algeria, 5 days in Egypt and Ghana, 4 days in Mozambique and Zimbabwe, 3 days in Cameroun and Kenya, and 2 days in

Ethiopia. Shorter time periods are preferable, although there should also be sufficient time for organizers and state authorities to iron out any differences as to event details, including through prompt appeal to judicial authorities if necessary, as discussed further below. 2 days is the international standard; slightly longer periods may be reasonable where necessary, but many of the periods discussed above seem clearly excessive.

8. In addition, the notification procedure must not be overly demanding or bureaucratic. In Egypt, for instance, the law requires that 5 people sign the notification, which is excessive.

9. As noted above, the core recognition behind the need for notifications regimes is that the right to assembly is a right adhering in the people. As such, notification is positive, but should not be required in all circumstances. In the case of small public gatherings or gatherings leading to no disruption to others, no notification should be necessary. Unfortunately, this is often not recognized by states. In addition, it is not possible to submit notification in the case of spontaneous assemblies, in reaction for instance to particular political decisions, and states should clearly carve out an exception to the notification requirement that applies in such cases. The authorities must still protect and facilitate such demonstrations when they occur. Legislation in several countries, such as Cameroon, creates a specific exception for religious meetings and gatherings based on cultural traditions; in Ghana, religious meetings, charitable, social and sporting gatherings are similarly exempted. There is no problem with such exceptions, provided they are not used in part in order to be able to make regular procedures more restrictive.

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8 Act 9 of 1991, Article 10 (1), requires demonstrations and gatherings in public places to be preceded by notification of the purposes of the event to be sent to the civil and police authorities of the area.

9 United States Department of State, 2010 Country Reports on Human Rights Practices - Cameroon, April 8, 2011, available at: <http://www.unhcr.org/refworld/docid/4da56ddd5.html>.

10. The true implementation of a notification regime does not rest merely on the word used by the law, as already explored in part above. Rather, it is also core to the idea of a notification regime that no sanctions be imposed merely for failure to notify, as to do so would be to punish people for exercising their right. Rather, sanctions may be imposed only when lack of notification is combined with demonstrable harms. Similarly, no assembly should be dispersed merely for failure to notify. Unfortunately, these standards are often violated in African countries.

### Recommendations:

11. Countries should implement notification rather than authorization regimes, that are effective in law and in practice.

12. Assembly organizers should not be required to submit notification too far in advance, or to fulfill overly bureaucratic procedures; authorities should be required to respond to notification expeditiously.

13. Exceptions should be created for small and spontaneous assemblies.

14. In no case should assembly organizers be penalized or an assembly dispersed merely for failure to notify.

## Content of assemblies

15. In addition to the imposition of authorization rather than notification regimes, governments often restrict the right to freedom of assembly, as well as the right to freedom of expression, by imposing improper limits on the content those assemblies may address. In Algeria, for instance, the law prohibits assemblies that oppose the political establishment;<sup>10</sup> it is precisely such assemblies that the right to freedom of assembly is intended to protect, however.

### Recommendation:

16. States must fully respect in law and practice the right to freedom of expression through assembly. Discrimination among assemblies based on the content of the expression involved is illegitimate.

## Conditions and prohibitions

17. Assemblies should generally be allowed to occur without limitation. In some cases, certain limitations may be necessary however. Any such limitations must comply with the principles of necessity and proportionality, any be in support of a legitimate interest. The authorities must facilitate the ability of the assembly to occur within sight and hearing of its target audience. Assembly must be recognized as a core right of no less value than other uses of public space such as informal commerce or the free flow of traffic. In no cases should blanket prohibitions be imposed. Prohibition should only be used

<sup>10</sup> Law 89-28 of 1989, Art. 9.

as a measure of last resort where no other less intrusive response would achieve the specific purpose pursued. In all cases, the authorities must promptly communicate their decision to assembly organizers, together with a clear statement of their legal grounding. Procedures for the mutual resolution of any conflict as to limitations imposed are positive; in all cases, prompt resort to an independent court to determine the matter must be possible.

18. Unfortunately standards in these areas are frequently contravened. In Algeria, children are prohibited from assembling. In Mozambique, assemblies are prohibited if conducted in public or private buildings, and in public places less than 100 metres from the headquarters of governments bodies, including the Presidency, the Assembly of the Republic, the Government, the courts and Constitutional Council, military or militarized installations, prisons, diplomatic and consular offices, and the headquarters of political parties.

19. In other countries, the free flow of traffic is given privileged status over the conduct of assemblies. In Sudan for instance, the law prohibits assemblies that “disrupt the functioning of public utilities, which may include roadways or government institutions.”<sup>11</sup>

20. In addition, law and practice around the imposition of conditions and prohibition is often extremely problematic. In Zimbabwe the law grants police discretionary power to prohibit or condition assemblies. In Libya, the law gives the authorities unlimited power to arbitrarily adjust the time or place of the assembly, including if the assembly infringes

the very vague grounds of ‘impeding the interests of the State’.<sup>12</sup>

21. Some positive practice is also available. In Ghana, the law states that police must have “reasonable grounds to believe that the event may lead to violence or endanger public defense, public order, public safety, public health or the running of essential services or violate the rights and freedoms of other persons, in order to request the organizers to postpone the special event to any other date or reallocate the special event”.<sup>13</sup> Where the authorities suggest a changed condition, the organizer has 48 hours in which to accept the change or not, and if the changes are not accepted, the police authorities are required to take the matter to a judicial authority for a final decision.<sup>14</sup>

## Recommendations:

22. No blanket prohibitions should be imposed.

23. Any limitations imposed must comply with the principles of necessity and proportionality, any be in support of a legitimate interest.

24. Assembly must be recognized as a core right of no less value than other uses of public space such as informal commerce or the free flow of traffic.

25. The law must not allow assemblies to be limited based on overly vague or inappropriate

12 Art. 6.

13 Public Order Act of 1994, Section 1(4).

14 Public Order Act of 1994, Section 1(6).

11 Law 65 of 2012, Art. 3.

grounds, such as where they 'impede the interests of the state.'

26. Even when imposing restrictions, the authorities must facilitate the ability of an assembly to take place within sight and hearing of its target audience.

27. Prohibition should only be used as a measure of last resort where no other less intrusive response would achieve the specific purpose pursued.

28. The authorities must promptly communicate their decision to assembly organizers, together with a clear statement of their legal grounding.

29. Prompt resort to an independent court to determine any dispute between organizers and the state must be available.

## **Non-liability of organizers**

30. The inappropriate penalization of assembly organizers is clearly contrary to international law. While an assembly's organizers should cooperate with law enforcement authorities in ensuring that an assembly is conducted peacefully, it is ultimately the responsibility of the authorities to ensure the protection and peaceful conduct of assemblies. Similarly, assembly organizers must not be held financially liable for the provision of public services during assemblies or the unlawful conduct of others.

31. Unfortunately, several countries attempt to impose excessive responsibilities and accountability on organizers, in order to be able to deter the organization of assemblies. This is the case in North Africa for instance, where law generally requires that a bureau be created for every assembly, that is given security responsibilities and potentially held accountable should 'public order' be infringed. In Ghana, organizers or any individual found to have been responsible for the damage caused to public order will be liable to pay for the cost of the damage.

### **Recommendation:**

32. In no case should a country attempt to deter assemblies by imposing excessive responsibilities or liabilities on assembly organizers.

## Protecting assemblies

33. In addition from enacting a proper framework relative to assemblies, states have a responsibility to protect assemblies from third parties who would improperly interfere with them.

34. In Kenya the law allows the authorities to refuse permission for assemblies to occur when other assemblies are already occurring<sup>15</sup>. Rather than issuing blanket refusals, however, the authorities should take measures to ensure that it is possible to conduct simultaneous assemblies peacefully.

## Recommendations

35. States should ensure the protection of assemblies from interference by third parties and non-state actors.

36. Simultaneous protests and counter-demonstrations should not be banned; rather, public safety authorities should ensure that all demonstrations may proceed peacefully.

## Grounds for dispersal

37. Assemblies, by their very nature, involve a diverse array of participants, and the potential exists for individual participants to act violently and/or unlawfully. In such circumstances, it is essential that the rights of other participants to the assembly are not

<sup>15</sup> Public Order Act of 2003 (as amended in 2009), Section 5(4): "Where, upon receipt of a notice under subsection (2), it is not possible to hold the proposed public meeting or public procession for the reason that notice of another public meeting or procession on the date, at the time and at the venue proposed has already been received by the regulating officer, the regulating officer shall forthwith notify the organizer.

undermined or usurped due to the actions of the minority.

38. Where individuals participating in a public assembly commit violent or otherwise unlawful acts that endanger public safety, authorities should make every effort to remove those individuals without dispersing the assembly as a whole.

39. Dispersal of such assemblies should therefore be a measure of last resort. On the rare occasions where deemed necessary, dispersal should only be undertaken where violence occurs, or where the perceived threat of violence is genuine and imminent. Dispersal should never be undertaken based merely on a failure to comply with minor conditions.

40. In Mozambique (Art. 7 Act 91/9) and Zimbabwe (Section 25, POSA), the police are granted wide powers to disrupt a gathering or public meeting if they are deemed to endanger public order.

41. In Egypt, the police are granted overly broad powers to disperse demonstrations. Article 10 codifies the police's duty to secure freedom of movement. Whilst reasonable *per se*, care must be taken in practice to balance this duty with citizens' right to free assembly, and the state's duty to promote and protect the same.

42. In Cameroon, a representative of the authorities may be selected to attend public meetings; this authority may take charge of dispersing the meeting, where requested to do so by the board.<sup>16</sup>

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<sup>16</sup> Art 5, law 053/1990.

## Recommendations

43. States should only disperse public assemblies in rare and lawfully prescribed circumstances and as a last resort, and only where there is violence or an imminent threat of violence.

44. Where violence or other unlawful acts are undertaken by isolated individuals, the police authorities should remove those individuals rather than taking action against the assembly as a whole.

## Use of force and accountability

45. There are examples from across the continent where states' military and security forces have intervened to disperse demonstrations with disproportionate and lethal force.

46. In Egypt, some 850 people were killed and thousands injured during clashes with security forces which occurred during the wave of pro-democracy protests between January 25 and February 11, 2011. During the transitional period that followed, increasing criticism of the Supreme Council of the Armed Forces for manner in which it administered the country during this period was accompanied by escalating acts of repression against demonstrations, resulting in some 100 additional deaths in the context of protests by November 2011. Dozens more demonstrators were killed throughout the course of 2012 due to the continued use of excessive force by the police, the military police, and the armed forces.

47. After President Morsi took office, violations to the right to assembly and peaceful protest became even more severe, as supporters of the president and of the Muslim Brotherhood and its Islamist allies took part in attacks against demonstrations held to protest the direction in which the president and the Muslim Brotherhood were taking the country.<sup>17</sup> The most violence came, however, after the military ousted President Morsi from power in mid-2013, with estimates of the number of deaths resulting from the unjustified use of

<sup>17</sup> Cairo Institute for Human Rights Studies, "Will the Ittihadiyya Clashes Become a Routine Model to Settle Political Disputes in Egypt?" Dec. 26, 2012, available at: <<http://www.cihrs.org/?p=5361&lang=en>>.

lethal force by security forces to disperse two Muslim Brotherhood sit-ins reaching 1000 on August 14, 2013 alone.<sup>18</sup>

48. Other countries' security forces have engaged with public demonstrations in similarly violent and disproportionate ways. In Tunisia, public protests throughout late 2010 to early 2011 were violently repressed by security forces. In Ethiopia, in March 2013, demonstrators were reportedly ordered to disperse by security officials despite having notified authorities of their intention to hold a demonstration (see HRCO 124th Special Report, Current Situation of the Right to Peaceful Assembly and Demonstration, March 2013)

49. In South Africa, in August of 2012, more than 30 people were killed at Lonmin platinum mine, where they were demonstrating concerning conditions of their employment and their treatment by the authorities.

50. In Sudan, the past several years have witnessed numerous protests on behalf of a range of causes; response by the authorities is frequently severe, with individuals frequently killed, injured and detained, in a climate of zero accountability.

51. In May 2013 in Kenya, peaceful "Occupy Parliament" demonstrations challenging MPs' motion to increase their salaries were met with violence from the security forces. During this peaceful demonstration, seventeen HRDs were arrested, assaulted and injured by police,

in contravention of Articles 33 and 37 of the constitution. The seventeen were taken before court and charged with breach of peace, participating in a riot and cruelty to animals.

52. Accountability is absolutely crucial in all cases in which excessive force is used, including the application of suitably severe sanctions.<sup>19</sup>

## Recommendations

53. States should ensure that their policing of assemblies is in harmony with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, including by ensuring that the use of force is only applied as a last resort and to the minimum extent necessary, and that the use of lethal force is only justified in defence of life.

54. In any cases where excessive use of force is alleged there must be a full investigation, and any and all responsible must be held accountable.

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<sup>18</sup> Cairo Institute for Human Rights Studies, "Egypt: No Acknowledgement or Justice for Mass Protester Killings; Set Up a Fact-Finding Committee as a First Step," Dec. 10, 2013, available at: <<http://www.cihrs.org/?p=7670&lang=en>>.

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<sup>19</sup> See, e.g., A/HRC/17/28, para 63.

## Sanctions

55. As mentioned earlier, assemblies by their very nature involve a diverse array of participants, and the potential exists for individuals to act violently and/or unlawfully. In such circumstances, whilst it is appropriate that criminal prosecution be pursued against the individuals responsible, neither criminal nor civil sanctions should be sought against either the organizers or peaceful fellow participants.

56. In contrast, the laws in several states in Africa proscribe excessive sanctions for a wide variety of offenses, including several acts consistent with the right to freedom of assembly. Such legislation clearly demonstrates an attempt to deter assemblies by applying harsh penalties to those exercising the right.

57. In Cameroon, Algeria, and Morocco, criminal penalties exist for those participating in non-authorized demonstrations.<sup>20</sup> In Zimbabwe, persons who refuse to comply with a police order to disperse the gathering are guilty of a criminal offence.

## Recommendations

58. Sanctions should only be applied in narrow and lawfully prescribed circumstances, and only in accordance with the judgment of an impartial, independent and regularly constituted court.

59. All sanctions must be strictly proportionate to the gravity of the offense in question.

60. Liability must always be personal, such that neither the organizers nor fellow peaceful participants of a public assembly be subjected to sanctions of any kind on the basis of acts committed by others.

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<sup>20</sup> In Cameroon, see art 231 of the penal code, which allows for a punishment of up to 6 months in prison for anyone who organizes a public meeting or demonstration without submitting the necessary information or in violation of conditions imposed, as well as for anyone who misleads the authorities as to the purpose of the meeting.

# VI

## Compilation of the Recommendations

### Freedom of Association

#### I. General

##### *General*

1. National constitutions should guarantee the right to freedom of association, which must be understood in a broad manner consistent with international human rights law; where a constitution states that the essence of this right shall be defined by law, this should in no way be interpreted to allow limitations which do not comply with the principles of legitimate purpose, proportionality and necessity.

2. The legal regimes governing civil society associations, political parties, and labor unions should be different, and in all cases should comply with international human rights standards.

3. The legal regime may encompass not-for-profit associations as a specific type of corporate organization or as a separate form of organization, provided that the appropriate rules are respected in each case and no confusion is thereby created.

4. Human rights organizations should be subject to legal regimes no more strict than those applicable to associations generally.

##### *Informal Associations*

5. States should not require associations to register in order to be allowed to exist and to operate freely. States' legitimate interest in security should not preclude the existence of informal associations, as effective measures to protect public safety may be taken via criminal statute without restricting the right to freedom of association.

6. At the same time, associations have the right to register through a notification procedure in order to acquire legal status, obtain tax benefits and the like.

#### II. Relating to the acquisition of legal personality

##### *Association establishment criteria*

7. Domestic legal regimes should require no more than two people to establish an association.

8. States should review and limit restrictions placed on the ability to form associations; in particular, children and non-nationals in de facto residence should be able to establish associations, and in no cases should inappropriate discrimination, including discrimination based upon race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status, be applied relative to the founding of associations.

9. Past criminal conduct should not as such be a bar to the formation of an association.

### ***Establishment Procedures***

10. Registration must be governed by a notification rather than an authorization regime. This means that legal status should be acquired following the submission of a simple set of documents outlining the basic details relative to the association. An impartial and apolitical body should make the decision, and in no cases should the decision be governed by discretion, but rather by clear legal criteria.

11. The requirements and procedure for registration should be clear. In case of refusal of registration, an association should have the right to appeal. The administrative authority in charge of registration should make sure that the procedure and its decisions are accessible and transparent.

12. Only one body should be tasked with registering associations.

13. In no cases may an association be prevented from registering through being required to submit documents it can only obtain from the authorities, where the authorities do not promptly and efficiently supply such documents. In case of denial of registration, all associations should have the right to review.

14. Legal status should promptly follow an association's notification, and the law should specify a time period of no more than 30 days in which the authorities may respond

to the notification. Authorities should always respond as promptly as possible; should they fail to respond, the law should provide for legal status to be conferred upon the organization at that time, and should require the authorities to provide official documentation to the association attesting to its legal status.

15. A registration fee may be imposed to cover administration fees, provided that this fee is not such as to deter any association from registering in practice.

16. Should the authorities refuse an association registration, they must provide clear, legally substantiated reasons for doing so, and the law should specify that the association have the right to challenge their judgment, including through prompt appeal to a court.

17. Associations should not be required to re-register on a periodic basis.

### III. Relating to the purposes and activities of associations

#### *Aims and Activities*

18. Restrictions placed by states on permissible activities should be clearly defined in law, and be in accordance with international human rights instruments. Compliance with the principle of legality means any limitations must not be overly broad or vague.

19. Acceptable limitations on the activities of civil society associations include limiting engagement in for-profit activity (although fundraising initiatives to support the association's not-for-profit activities should be allowed), anti-democratic activities, incitement to hatred, or establishing an armed group. All such limitations must be interpreted and applied, but not abused.

20. There should be no blanket restrictions on permissible activities, and associations should be expressly permitted, inter alia, to engage on matters relating to politics, public policy, and human rights, as well as to conduct fundraising activities.

21. The receipt of foreign funding should in no way affect an association's ability to engage in the full range of legitimate activities. An association may also receive funding from State institutions, if applicable.

22. Permission should not be required to undertake particular activities.

### IV. Relating to the oversight of associations

#### *Oversight Bodies*

23. Matters relating to associations should be determined by an impartial and apolitical bureaucratic body, in accordance with clear criteria laid out by law and with sharply constrained discretion.

#### *Oversight Powers*

24. The authorities must not be given excessive powers of oversight relative to associations – for example, associations should not be required to provide excessive personal information as to their members or officers.

25. Reporting requirements must not be overly burdensome. Yearly reporting requirements are generally adequate – an association should not be required to report on every project or acquisition of funding. Prior reporting requirements are particularly inappropriate.

#### *Internal Organization*

26. Law or regulation should not dictate the internal organization of associations, which is a matter for the associations themselves.

## V. Relating to the financing of associations

### *Financial regulations and monitoring procedures*

27. States' legal regimes should codify that associations have the right to seek and receive funds. This includes the right to seek and receive funds from their own government, foreign governments, international organizations and other entities as a part of international cooperation to which civil society is entitled, to the same extent as Governments.

28. Any restrictions placed on funding must be in accordance with international legal standards, be for a legitimate reason, and be clearly codified in law.

29. Yearly reporting is an adequate means by which to assure transparency and accountability. Audits may be required of organizations above a reasonable budgetary threshold; such audits should be appropriate in scope and frequency to the nature of the organization, and not such as to be overly burdensome or to hinder the association's operation.

### *Public support systems*

30. Public support to associations is positive. Care must be taken to ensure that such support is distributed in a partisan manner, and that the granting of support is not used as a tool for the government to exert undue influence over civil society.

## VI. Relating to national and international federations and cooperation among associations

### *Membership, federations, and government-sponsored associations*

31. Individuals must not be required to join associations, and must always be free to leave them.

32. The state should not stipulate by law the existence of particular or exclusive regional or national federations of associations, as whether or not to create federations should be determined freely by civil society actors.

33. The law should permit and facilitate the authorities' consultation of civil society, including through the formation of umbrella organizations. Such organizations, where freely and appropriately formed, may also be utilized to adopt, promulgate and enforce principles and standards of conduct and management. Associations should be able to join as many such organizations as they may constructively contribute to.

34. Governments should respect the independence of domestic and international civil society space.

### *Federation and cooperation*

35. States must allow the free creation and operation of informal networks of associations and cooperation among associations, both nationally and internationally. Associations should be free to create formal federations via a procedure substantively equivalent to that by which individuals create formal associations.

### *Foreign and international associations*

36. An association that is incorporated under the laws of one country (a 'foreign association') that has, or intends to have, operations, programs, or assets in another country should be allowed to establish a branch office in that other country and should be permitted to enjoy all of the rights, and be subject to all of the same lawful requirements of local associations.

37. An association that is established in one country should be allowed to receive cash or in-kind donations, transfers or loans from sources outside the country as long as all generally applicable foreign exchange and customs law are satisfied.

38. The procedure for obtaining legal status for an international association should be no more burdensome than that required of national associations; and once legal status is obtained, the same provisions that apply to national associations should apply to international ones.

## **VII. Relating to sanctions, including dissolution, applied against associations**

### ***Sanctions***

39. Criminal sanctions are inappropriate in an associations law.

40. In all cases sanction should apply only to the entity that has committed the offense, and not be improperly imputed from association to individuals or vice versa.

41. Civil sanctions, suspension or dissolution of an association should only be considered in grave offenses. In all cases such action may only be taken following court judgment, and the exhaustion of all available appeal mechanisms.

## **VIII. Relating to interference with associations**

### ***Government and 3<sup>rd</sup> party harassment***

42. States should respect, in both law and practice, the right of associations to carry out their activities without harassment of any kind.

43. States should protect associations from interference by third parties and non-state actors.

## **IX. Relating to other rights issues integrally related to the right to freedom of association**

### ***Access to remedies***

44. The authorities must diligently and clearly detail the legal basis for all of their decisions concerning associations, and associations or their individual members should always be able to challenge those decisions in independent courts. Associations should be granted a reasonable time in which to formulate their appeals, and prompt decisions should be required from the courts relative to initial registration decisions.

45. Courts should be genuinely accessible to ordinary individuals.

46. Individuals must be able to challenge any negative instance of law or practice on the basis of the right to freedom of association.

### ***Access to information***

47. National constitutions should codify the right to freedom of information, and domestic legal regimes should establish an independent, efficient, and non-partisan mechanism to ensure citizens' access to the same.

48. The body responsible for associations should be charged with ensuring access to information relative to associations, including ensuring that information on all procedures relating to associations is available to all, clear and easy to understand, and that information is collected and publicly available on all decisions relating to associations.

## Freedom of Assembly

### I. General

#### *General*

49. National constitutions should guarantee the right to freedom of assembly, which must be understood in a broad manner consistent with international human rights law; where a constitution states that the essence of this right shall be defined by law, this should in no way be interpreted to allow improper limitation of the right.

### II. The need for a notification framework

#### *Notification framework*

50. Countries should implement notification rather than authorization regimes, that are effective in law and in practice.

51. Assembly organizers should not be required to submit notification too far in advance, or to fulfill overly bureaucratic procedures; authorities should be required to respond to notification expeditiously.

52. Exceptions should be created for small and spontaneous assemblies.

53. In no case should assembly organizers be penalized or an assembly dispersed merely for failure to notify.

### III. Relating to limits on assemblies

#### *Content of assemblies*

54. States must fully respect in law and practice the right to freedom of expression through assembly. Discrimination among assemblies based on the content of the expression involved is illegitimate.

#### *Conditions and prohibitions*

55. No blanket prohibitions should be imposed.

56. Any limitations imposed must comply with the principles of necessity and proportionality, any be in support of a legitimate interest.

57. Assembly must be recognized as a core right of no less value than other uses of public space such as informal commerce or the free flow of traffic.

58. The law must not allow assemblies to be limited based on overly vague or inappropriate grounds, such as where they 'impede the interests of the state.'

59. Even when imposing restrictions, the authorities must facilitate the ability of an assembly to take place within sight and hearing of its target audience.

60. Prohibition should only be used as a measure of last resort where no other less intrusive response would achieve the specific purpose pursued.

61. The authorities must promptly communicate their decision to assembly organizers, together with a clear statement of their legal grounding.

62. Prompt resort to an independent court to determine any dispute between organizers and the state must be available.

#### ***Non-liability of organizers***

63. In no case should a country attempt to deter assemblies by imposing excessive responsibilities or liabilities on assembly organizers.

#### **IV. Relating to the protection of assemblies**

##### ***Protecting assemblies***

64. States should ensure the protection of assemblies from interference by third parties and non-state actors.

65. Simultaneous protests and counter-demonstrations should not be banned; rather, public safety authorities should ensure that all demonstrations may proceed peacefully.

#### **V. Relating to the dispersal of assemblies, and sanctions applied**

##### ***Grounds for dispersal***

66. States should only disperse public assemblies in rare and lawfully prescribed circumstances and as a last resort, and only where there is violence or an imminent threat of violence.

67. Where violence or other unlawful acts are undertaken by isolated individuals, the police authorities should remove those individuals rather than taking action against the assembly as a whole.

##### ***Use of force and accountability***

68. States should ensure that their policing of assemblies is in harmony with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, including by ensuring that the use of force is only applied as a last resort and to the minimum extent necessary, and that the use of lethal force is only justified in defence of life.

69. In any cases where excessive use of force is alleged there must be a full investigation, and any and all responsible must be held accountable.

## Sanctions

70. Sanctions should only be applied in narrow and lawfully prescribed circumstances, and only in accordance with the judgment of an impartial, independent and regularly constituted court.

71. All sanctions must be strictly proportionate to the gravity of the offense in question. Liability must always be personal, such that neither the organizers nor fellow peaceful participants of a public assembly be subjected to sanctions of any kind on the basis of acts committed by others.

### General

72. States should ensure that all relevant personnel are fully trained in the standards relating to freedom of association and assembly.

73. States should take measures to promote, nationally and internationally, knowledge of standards relating to freedom of association and assembly, and the effective fulfillment of those rights.





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