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

December 13, 2011

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

These comments address the fourth draft of the Cambodian Law on Associations and Non-Governmental Organizations, which was released by the Royal Government of Cambodia on December 12, 2011. ICNL has reviewed the draft law solely based on a translation[1] of the fourth draft itself and a comparison with earlier draft versions of the law, and not based on a review of the broader legal framework within Cambodia, such as the Cambodian Civil Code, labor law or existing memoranda of understanding that may exist between the Cambodian Government and NGO sector.

ICNL believes that sound legislation is the result of a fully participatory and inclusive consultation process, which provides sufficient opportunity for meaningful dialogue between the government and civil society. We urge the Government of Cambodia to provide a meaningful opportunity for additional dialogue and to take into more fulsome account the views of organizations to be governed by the new law. ICNL stands ready to provide additional information or technical assistance as necessary and appropriate.

[1] ICNL has relied on the unofficial translation provided by the Office of the High Commission for Human Rights (OHCHR) on December 9. We extend our appreciation to OHCHR for the translation.

Executive Summary

As a threshold issue, we commend the Cambodian law drafters for making positive changes to the latest version of the draft Law on Associations and NGOs. To highlight a few improvements:

- **The draft law reduces the minimum membership for associations and NGOs.** An association or NGOs may be formed by a minimum of 3 Cambodian natural persons or legal entities. The minimum membership level of 3 members is consistent with good regulatory practice. Moreover, the ability of legal entities to participate as founders of associations and NGOs – and the corresponding removal of the "alliance" form – simplifies the regulatory approach in the draft law.

- **The draft law removes the prohibition against activity conducted by unregistered associations and NGOs.** Instead, Article 5 states that: "A domestic association or non-governmental organization may be freely established without necessarily obtaining permission or prior notice." In light of this positive modification, it is troubling that community-based organizations must provide "prior written notice" to the "authorities of the commune/Sangkat where they conduct activities." (Article 5) This issue is addressed below.

- **The draft law eliminates notification constraints on associations and NGOs.** In prior draft versions of the law, associations and NGOs were required to "inform in writing the relevant municipal hall or provincial halls …" when implementing activities in a given locale. This requirement, which could have amounted to a substantial burden on program implementation, has been removed.

At the same time, the current draft law raises several fundamental concerns, including the following:

- **The draft law limits eligible founding members of both associations and NGOs to Cambodian nationals.** Consequently, the draft law excludes refugees, stateless persons and others in Cambodia from forming associations or domestic NGOs. This nationality requirement constitutes a clear infringement of freedom of association, which should be available to everyone (i.e., all individuals within the state's territory and subject to its jurisdiction).

- **The draft law fails to ensure that denial of registration is consistent with international law standards.** Article 8 states that the Ministry of Interior "shall examine the documents and legality of the statute of a domestic association or non-governmental organization, and shall decide whether to accept or reject the registration …" Reliance on the "legality" standard would allow the government to base denial on inconsistency with *any provision of law*, whether compliant with international human rights law or not. But denial of registration can only be justified where denial is both "prescribed by law" and "necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others." The "legality" standard fails to limit government decision-making to the confines of this standard. The absence of a clear, limited list of objective grounds for denial could have a disproportionate

impact on groups that engage in advocacy, support unpopular causes, or are critical of the government.

- **The draft law introduces a mandatory notification requirement for community-based organizations (CBOs).** Specifically, Article 5 requires CBOs to provide prior written notice "regarding the name of the organization, objectives and name of organization's president to the authorities of the commune/Sangkat where they conduct activities." In effect, therefore, the operation of CBOs becomes dependent on notification to the government.

- **The draft law provides inadequate standards to guide the government's determination of suspension or termination of an association or NGO.** Within Chapter 6, which addresses suspension and termination, there is no clear and limited list of grounds for denial for domestic associations and NGOs; no requirement for the governmental authorities to provide notice and an opportunity to rectify problems prior to the suspension or termination; and no mention of a right to appeal after suspension or termination. Chapter 7, which spells out administrative measures, does authorize the Ministry of Interior to issue warnings, and in case of non-compliance, decisions to remove an association or NGO from the registration list. There is no indication, however, that the limited safeguards provided in Chapter 7 apply to termination provided for in Chapter 6.

- **The draft law erects barriers to the registration and activity of foreign NGOs.** Among other issues, the draft law outlines a heavily bureaucratic, multi-staged registration process, which lacks procedural safeguards, and is therefore subject to delays and subjective, arbitrary and politicized decision-making. In addition, the draft law limits the registration period for foreign NGOs to no more than three years, effectively requiring periodic re-registration for NGOs interested in more sustained engagement. Furthermore, the draft law imposes a 25% limit on administrative expenses. Grounds for terminating the memorandum are vague and overbroad.

- **The draft law places certain constraints on associations and NGOs.** All associations and NGOs, large and small, domestic and foreign, are subject to the same reporting requirements set forth in Article 25; for small mutual interest associations in particular, compliance could be problematic. Issues may also arise under Article 22 of the draft law, which seems to preclude international donors from implementing aid projects in partnership with organizations that are not registered.

Analysis

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

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

> 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
>
> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

International law creates a presumption against any state regulation that would amount to a restriction of recognized rights.[2] The ICCPR lists only four permissible grounds for state interference; those grounds are an exhaustive list. It is the state's obligation to demonstrate that any interference is justified; interference can only be justified where it is prescribed by law, in the interests of a legitimate government interest, and "necessary in a democratic society." The ICCPR Human Rights Committee has stated, in its General Comment 31(6): "Where such restrictions are made, states must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right."[3]

I. Restrictions on Founding Members

Issue: Article 4 of the draft law defines associations and NGOs as groups of "Cambodian natural persons or legal entities". Article 6, in setting forth the registration criteria, requires associations and NGOs to have at least three "Cambodian founding members". Laudably, the draft law reduces the minimum number of founding members to three, which is a threshold consistent with international norms. Unfortunately, however, the draft law continues to insist upon Cambodian nationality for founders. In addition, the draft law insists that the three founders be of majority age (18).

Discussion: The Universal Declaration of Human Rights recognizes, in Article 2(1), that "*everyone* is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind …" (emphasis added) The ICCPR, in Article 2(1), illuminates this point, explicitly stating that the rights of the ICCPR extend "to all individuals within its [the state's] territory and subject to its jurisdiction." The ICCPR Human Rights Committee, in its General Comment No. 15, explained that "the rights set forth in

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

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

the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness;" and that "Aliens receive the benefit of the right of … freedom of association."[4]

The draft law, with respect to both associations and domestic NGOs, limits eligible founding members to Cambodian nationals, and thereby excludes refugees, stateless persons and others in Cambodia from forming associations or domestic NGOs. (Articles 4, 6) This nationality requirement constitutes a clear infringement of the principles highlighted above, and therefore a clear violation of the freedom of association, as protected by the ICCPR and other international instruments.

In addition, Article 6 requires that the three Cambodian founding members be 18 or older. In other words, minors are restricted from founding associations. This is potentially problematic, especially in light of Cambodia's 1992 accession to the UN Convention on the Rights of a Child (CRC). Article 15 of the CRC requires State Parties to "recognize the rights of the child to freedom of association and to freedom of peaceful assembly" and limits restrictions to "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." While there may be strong reasons to require parental consent or supervision for certain ages, a blanket prohibition applicable to all minors will be difficult to justify under the CRC standard.

Recommendation: Revise draft law to conform establishment criteria to international norms relating to freedom of association. More specifically, amend Articles 4 and 6 to eliminate the nationality requirement for founding members and to ensure that everyone (i.e., all individuals within the state's territory and subject to its jurisdiction), minors included, is eligible to form associations and NGOs.

II. Registration Requirements

Issue: Chapter 2 of the draft law generally outlines the registration requirements and procedures for a domestic association and NGO. Article 5 now states that associations and NGOs "may be freely established without necessarily obtaining permission or prior notice." Article 6 requires associations and domestic NGOs to have "at least three Cambodian founding members"; an office in Cambodia; and a governing statute. The contents of the governing statute are outlined in the same article. Article 7 lists the documentation required in support of an application for registration, including the application form, governing statute, a letter stating the office address "recognized by the Commune or Sangkat Chief", and "Profiles of each founding member with a recent 4x6 photograph." Article 8 prescribes the registration procedures, including the review of the application by the Ministry of Interior, applicable timelines, and the right to appeal. Article 9 affirms that the applicant becomes a legal entity upon approval by the Ministry of Interior.

Discussion: The right to obtain legal entity status is well protected in international law. Article 22 of the ICCPR would have little meaning if individuals were unable to form NGOs and attain legal entity status.[5]

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

The UN Special Representative on Human Rights Defenders has noted that "NGOs have a right to register as legal entities and to be entitled to the relevant benefits."[6]

As noted by the ICCPR Human Rights Commission, states employing a registration system must ensure that it is truly accessible, with clear, speedy, apolitical, and inexpensive procedures in place.[7] The registration body should be guided by objective standards and restricted from arbitrary decision-making.[8] Safeguards are commonly used to help ensure a well-implemented registration process. Examples include a clear and limited list of objective grounds for refusal of registration; a fixed time period for the government review of applications; a written explanation to the applicant in case of refusal; and the right to appeal, in case of refusal, to an independent court. Article 14 of the ICCPR enshrines the right to a fair hearing by a competent, independent, and impartial tribunal,[9] and Article 2(3) guarantees the right to an effective remedy.[10]

While the fourth draft law includes certain critical safeguards – such as a fixed time period for government review (45 days), a written explanation in case of denial[11], the ability to make modifications to the application, and the right to appeal to a court – fundamental flaws remain. Most notably, the fourth draft law fails to include a clear and limited list of objective grounds for denial of registration. Article 8 authorizes the Ministry of Interior to "examine the documents and the legality of the statute"

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

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

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

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

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

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

[11] Based on the translation, ICNL understands that the Ministry is obligated to provide a written explanation to applicants in case of denial. The Ministerial obligation to provide a written explanation should apply not only where inviting the applicant to modify the application, but also in the case of outright denial. If this is not clear, then we recommend affirming this safeguard.

and to decide "whether to accept or reject the registration" of the organization. It is not clear if the "legality" standard is intended to limit government discretion in deciding to accept or reject registration; it is not clearly presented as the sole basis for denial. Even if "legality" is intended as the sole criterion for denial, however, it is not consistent with international law. It would allow the government to base denial on inconsistency with *any provision of law*, whether compliant with international human rights law or not. Denial of registration clearly amounts to interference with freedom of association, and consequently can only be justified where denial is both "prescribed by law" (meaning that the law is accessible and that concerned persons are able to foresee the consequences of their actions) and "necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others." The "legality" standard fails to limit government decision-making to the confines of this standard. The absence of a clear, limited list of objective grounds for denial could have a disproportionate impact on groups that engage in advocacy, support unpopular causes, or are critical of the government.

Additional concerns include:

- Documentation requirements. The draft law, in Article 7, requires that registration applicants submit "Profiles of each founding member with a recent 4x6 photograph". The term "Profiles" is undefined and could lead to open-ended inquiries by the government into the biographies of the founding members. Moreover, it is unclear how this information would be used. As stated above, *everyone* has the right to associate. The submission of "Profiles of each founding member" could invite government vetting of those individuals seeking to form organizations as legal entities. The problem is compounded by the lack of objective standards in reviewing registration applications; consequently, the founding member profiles could fuel the exercise of unbridled discretion.

- Requirement of office. Article 6 requires associations and domestic NGOs to have "an office in the Kingdom of Cambodia." While it is common in many countries to require that organizations provide an address, requirements to secure actual office space are potentially more burdensome. A central office may be appropriate for well-funded NGOs, but smaller community-based associations and NGOs may lack sufficient resources to support an office. Indeed, such small organizations may simply operate in the community, hold meetings in members' homes, and have no need for a central office. Article 7 additionally requires that registration applicants submit a "letter stating the address of the central office…, recognized by the Commune or Sangkat Chief." The requirement to submit such a letter is an unnecessary bureaucratic step in the registration process, which is likely to lead to delay for registration applicants.

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

- Amend Article 8 to include appropriate safeguards for registration applicants, including a clear and limited list of objective grounds for denial.

- Amend Article 7 to reduce documentation requirements; in the case of founding members, eliminate the vague requirement of "profiles" and simply require their names and addresses.

- Amend Articles 6 and 7 to require that applicants have an address, but not necessarily a central office.

III. Mandatory Notification

Issue: Commendably, Article 5 states that domestic associations and NGOs "may be freely established without necessarily obtaining permission or prior notice." At the same time, however, Article 5 requires community-based organizations (CBOs) to provide "prior written notice regarding the name of the organization, objectives and name of organization's president to the authorities of the commune/Sangkat where they conduct activities."

Discussion: Under Article 22 of the ICCPR, as well as other major international conventions, "freedom of association is a right, and not something that must first be granted by the government to citizens."[12] That associations and NGOs may be formed as legal entities does not mean that individuals can be *required* to form legal entities in order to exercise the freedom of association. The UN Special Representative on human rights defenders stated in her report to the UN General Assembly: "[R]egistration should not be compulsory. NGOs should be allowed to exist and carry out activities without having to register if they so wish."[13]

While Article 5 of the draft law removes the prohibition against unregistered activities of domestic associations and NGOs, it simultaneously raises concerns for community-based organizations. First, Article 5, in the same sentence, affirms the right of CBOs not to be registered and heavily qualifies that right: "A community based organization, according to this law, shall not be required to register, unless provided for in separate laws." This amounts to a promise without a guarantee. Second, Article 5 requires a CBO to provide "prior written notice" to the local authorities where it conducts its activities. A requirement of "prior" notice would seem to condition the ability of CBOs to operate on notification to the government. This requirement may fall short of compulsory registration, but it could still enable local authorities to exercise a substantial – and improper – degree of advance control over community-based organizations.[14]

Recommendation: Amend Article 5 to eliminate the mandatory notification requirement for community based organizations.

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

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

[14] In addition, there may be some confusion regarding the definition of "CBO" and the distinction between a CBO and other associational forms, as highlighted below in Section VII.

IV. Suspension, Termination and Dissolution

Issue: Chapter 6 addresses suspension and termination of associations, NGOs, and foreign organizations.[15] Articles 26 and 27 address voluntary suspension and dissolution, while Articles 28 and 29 focus on involuntary suspension and dissolution, but only superficially, by referring to the dissolution "by court decisions." In the wake of voluntary termination, according to Article 28, remaining assets shall be distributed in accordance "with its organization statute decisions" of the association/NGO. In the wake of involuntary termination, remaining assets shall be distributed in compliance with court decisions.

Discussion: Involuntary termination is a clear example of interference with freedom of association, and like any other government intrusion, must meet the standards outlined in the ICCPR. "The relevant government authority should be guided by objective standards and restricted from arbitrary decision-making."[16] The draft law provides inadequate standards to guide the government's determination of suspension or termination. The draft law does not expressly limit the use of termination as a sanction of last resort. There is no requirement for the governmental authorities to provide notice and an opportunity to rectify problems prior to the suspension or termination, and there is no mention of a right to appeal after suspension or termination. Taken together, the process of suspension and/or termination is open to government manipulation and overreach.

The provisions addressing the distribution of remaining assets would also benefit from additional limits in order to ensure that the assets are transferred to another association/NGO or alliance with the same or similar purposes, as commonly provided in countries around the world.

Recommendation: Revise Chapter 6 to include an exhaustive list of objective grounds for suspension and termination, along with accompanying procedural safeguards as outline above. Revise Article 28 to help ensure that, upon liquidation, assets are transferred to organizations with the same or similar purpose.

V. Foreign Non-Governmental Organizations

Issue: The draft law erects barriers to the registration and activity of foreign NGOs. First, Article 12, read together with Articles 14 and 16, outlines a heavily bureaucratic, multi-staged registration process. Second, Article 15 addresses the budget of foreign NGOs, stating that a foreign NGO "shall have sufficient budget to implement its aid projects" and placing a 25% cap on administrative expenses of a foreign NGO. Third, Article 17 limits the validity of the memorandum of understanding to no more than three years, thereby requiring foreign NGOs to undergo the equivalent of a re-registration process. Fourth, Article 17 authorizes the Ministry of Foreign Affairs to terminate the memorandum, "in the

[15] See section below on "Foreign Non-Governmental Organizations" for commentary on termination of foreign NGOs.

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

event that a foreign association or non-governmental organization conduct activities which jeopardize peace, stability and public order or harm the national security, national unity, culture, customs and traditions of the Cambodian national society."

Discussion: As a threshold issue, Article 4 – at least in translation – presents a somewhat ambiguous definition of a foreign association or NGO as "a group of foreign natural persons or legal entities who agree to establish under the foreign laws for the interests of its members or conducts activities to serve public interests without conducting any activity to generate profits for sharing among their members." ICNL assumes this means that foreign founders may establish a non-membership organization, but if there is ambiguity in the Khmer version, then this should be clarified. The point is that in many countries, foundations, think tanks, and other organizations (including groups such as the East West Management Institute and ICNL) are non-membership organizations.

Registration Procedures. Any foreign association or NGO seeking to operate for more than one year in Cambodia must conclude a memorandum with the Ministry of Foreign Affairs and International Cooperation. The signing of a memorandum is analogous to a registration process and requires the submission of an application, along with supporting documentation. Moreover, there is a multi-tiered approval process:

- First, according to Article 14, a foreign association or NGO "shall discuss and agree with partner ministries/institutions of the Royal Government on aid projects/programs before submitting an application for a memorandum of understanding with Ministry of Foreign Affairs and International Cooperation …" A letter issued by the partner ministry/institution to support the aid projects of the foreign NGOs must be included as part of the application process, as outlined in Article 12.

- Second, according to Article 12, a foreign association or NGO "shall submit an application for the signing of a memorandum to the Ministry of Foreign Affairs and International Cooperation" supported by specified documentation. Certain documentation requirements included in Article 12 raise concerns. First, in the letter requesting to open a foreign office, the foreign applicant must provide "the attachment of the profile of a person requested to be appointed." While it is common for a foreign NGO to be required to designate a representative, the requirement of providing the "profile of a person" is vague. It would be preferable for the law to require the name and contact information of the designated representative. Second, the foreign applicant must submit a "letter indicating the address of the representative office in the Kingdom of Cambodia, from the Commune or Sangkat Chief." It is unclear whether the procuring of such a letter from the Commune or Sangkat Chief is a straightforward, routine task or more of a bureaucratic hurdle that could create delays.

- Third, the Ministry review of the application then follows within 45 days in order to decide "whether or not to sign a memorandum." (Article 13)

- Fourth, the president of the foreign association or NGO in Cambodia shall submit a copy of the organization's bank statement from any bank recognized by the National Bank of Cambodia

within 30 working days after signing the memorandum. The failure to comply could result in the cancellation of the memorandum.

- Fifth, according to Article 16, after the memorandum agreement has been signed, the foreign association or NGO "shall declare its agreement on aid projects to the Council for the Development of Cambodia."

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

Budget of Foreign Non-Governmental Organizations. Article 15 addresses the budget of foreign NGOs. Two concerns arise. First, a foreign NGO "shall have sufficient budget to implement its aid projects" but there is no objective basis provided to determine what constitutes a "sufficient" budget. The vagueness of the term "sufficient" opens the door to subjective and arbitrary governmental decision-making. Second, Article 15 places a 25% cap on administrative expenses of a foreign NGO and defines "administrative expenses" to include "staff's salaries, office equipments, and other expenditures for office functioning." Limits on administrative expenses, even where the regulatory intent is benign, are generally misguided for a number of reasons. First, administrative spending caps are inevitably arbitrary; in light of the diversity in the sizes and types of organization (even if focused solely on foreign NGOs), it is impossible to determine an appropriate percentage for administrative expenses that would be fairly applicable to all organizations. Second, staff salaries in particular are, in many if not most cases, not merely "administrative" in nature, but are rather directly related to the implementation of programs. For example, if ICNL were to provide technical assistance to a ministry seeking, for example, to draft legislation affecting civil society in Cambodia, virtually the entire cost of providing such assistance would be attributable to staff salaries. Surely this could not and should not be artificially limited by some arbitrary 25% standard, unrelated to the nature of the actual costs of providing the service. Third, administrative spending caps limit the integrity and efficiency of the sector, in that certain administrative expenses are essential to ensure sound organizational management, compliance with applicable rules and regulations, and cost-effective delivery of service and programs. Fourth, limits on administrative spending can be exceedingly difficult to enforce, as any definition of what constitutes an administrative expense is likely to pose problems of interpretation. This is certainly true for definition in Article 15; the meaning of "other expenditures for office functioning" will inevitably lead to different interpretations.

Re-registration. Article 17 limits the validity of the memorandum of understanding to no more than three years, and requires those foreign NGOs wishing to continue activities in Cambodia to request an extension of the memorandum. In essence, therefore, foreign NGOs are subject to a re-registration process. The UN Special Rapporteur on the situation of human rights defenders has noted re-registration requirements with concern: "In certain countries NGOs are required to re-register in certain periods, be it every year or more often, which provides additional opportunities for Governments to

prohibit the operation of groups whose activities are not approved by the Government. Requirements for periodic re-registration may also induce a level of insecurity … resulting in self-censorship and intimidation."[17]

Termination of Memorandum. Article 17 authorizes the Ministry of Foreign Affairs to terminate the memorandum, "in the event that a foreign association or non-governmental organization conduct activities which jeopardize peace, stability and public order or harm the national security, national unity, culture, customs and traditions of the Cambodian national society." The grounds for termination are vague and subject to subjective interpretation. How will terms like the "national unity, culture, customs and traditions of the Cambodian national society" be interpreted? Will such a vague standard limit the ability of foreign NGOs to engage in environmental advocacy, human rights, or minority protection? The standard applicable to the termination of domestic organizations is applicable here: "The relevant government authority should be guided by objective standards and restricted from arbitrary decision-making."[18] Moreover, there is no requirement for the governmental authorities to provide notice and an opportunity to rectify problems prior to the suspension or termination, and there is no mention of a right to appeal after suspension or termination. Taken together, the process of terminating the memorandum is open to government manipulation and overreach.

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

- Streamline the registration process and include safeguards to ensure a more objective, consistent, apolitical, and professional registration decision-making process.
- Delete Article 15 in its entirety, or at least the administrative spending limit within Article 15.
- Amend Article 17 to remove re-registration requirement for foreign NGOs and allow for indefinite period of registration. Amend Article 17 to base termination of the memorandum under which a foreign organization operates in Cambodia to objective grounds, with appropriate procedural safeguards.

VI. Supervision

Issue: The draft law places requirements on associations and NGOs relating to reporting to governmental authorities (Article 25) and staff recruitment (Article 23).

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

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

Discussion: Article 22 of the ICCPR limits government supervisory action in clear terms: "No restrictions may be placed on the exercise of this right [freedom of association] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others." The recognition of freedom of association as a right "that must be respected necessarily entails some limits on the degree of regulation … The very essence of the freedom of association is the ability of those belonging to a body to decide how it should be run; this necessitates both a minimalist approach to regulation and very close scrutiny of attempts to interfere with the choices that associations and their members make about the organization of their affairs."[19] Article 25 defines reporting requirements and Article 23 addresses staff recruitment. This section will consider each issue in turn.

Reporting Requirements. Article 25 requires domestic associations and NGOs to submit its annual report on "activities and budget status" to the Ministry of Interior by the end of February; and requires foreign NGOs to submit its annual report on "activities and budget status" to the Ministry of Foreign Affairs "within two (2) months after the end of its fiscal year." Thus, the draft Law takes a "one size fits all" approach to reporting, with all domestic and foreign organizations being subject to the same annual reporting requirement. As an alternative, one could envision a system where organizations with no tax benefits or public funding would be accountable to their members but would have no public reporting requirements. Organizations below a certain threshold would be subjected to simplified reporting, even if they receive tax benefits or public funding. More fulsome reports would only be required of large organizations receiving substantial tax benefits or public funding. Details and distinctions would be worked out after meaningful consultation with civil society.

Staff Recruitment. Article 23 requires associations and NGOs (domestic or foreign) to employ Cambodians "to the maximum extent."[20] It is not clear how compliance with such a vague standard will be determined, and whether the Cambodian Government will have any role in determining compliance. As a general principle to guide organizations in their hiring, this provision is likely to be innocuous. If this provision, however, provides the basis for governmental intervention in the hiring practices of organizations, then such intrusion in the internal affairs could amount to undue interference in an organization's operations.

Cooperation with implementing partners. The precise meaning of Article 22 is not fully clear, at least in translation, but issues could arise, if interpreted to prevent unregistered groups from cooperating with partners for implementing aid projects. Based on such interpretation, international donors might be precluded from implementing aid projects in partnership with organizations that are not registered.

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

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

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

- Regarding Article 25's reporting requirements, consider a graduated reporting requirement that would exempt smaller organizations from reporting, or at least simplify their reporting obligation.

- Revise Article 23 to remove ambiguity of provision requiring employment of Cambodians "to the maximum extent" and clarify Article 22, as necessary and appropriate.

VII. Miscellaneous Issues

Scope of Law. Article 3 states the law applies to registered associations and NGOs "which are conducting activities in the Kingdom of Cambodia." Article 4 then defines the terms "association" and "non-governmental organization" to embrace both domestic and foreign organizations. In addition, Article 4 defines a "community-based organization" as "a group of Cambodian citizens who voluntarily agree to establish, manage and conduct its activities to serve and protect the interests within its local community." From this list of terms in Article 4, it appears that community-based organizations are included within the scope of the draft law. We raise this issue in part because earlier versions of the draft law excluded from the scope of the law "community-based organizations"; clarity on this issue is, of course, critical.

In addition, there are questions relating to the distinction between associations and domestic NGOs and the permissible purposes each can pursue. Reference is made to "the interests of its members" and "public interests" (Article 4). Without any definition provided of "public interests", the Ministry is placed in a position to decide what purposes do and do not qualify, and in turn, what organizations may be registered as NGOs (versus associations).

Funding Sources for Domestic Organizations. Article 19 defines the available resources for domestic associations and NGOs to include donations, contributions, or membership fees; own resources and assets; lawful gifts from natural persons or legal entities; and "Other incomes generated from lawful sources". It is not clear whether this last category is intended to refer narrowly to economic activities, or is intended more broadly to serve as a "catch-all" category which would allow for resources from legitimate sources that are not listed. It is well accepted under international good regulatory practice that associations/NGOs should be allowed to engage directly in economic activities in order to pursue their primary purposes; in light of the importance of this category of funding, the draft law should expressly allow for it. In addition, it is important to ensure, through a "catch-all" phrase, that funding from other legitimate sources is allowed. For example, funding from multilateral organizations, like the UN, or bilateral aid agencies, like USAID or DFID, is not explicitly included in the list of available resources; the inclusion of clear catch-all category would cover this gap.