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Letter from the Editor

This issue of the *International Journal of Not-for-Profit Law* features a special section on Ethics and Civil Society. **David Shulman**, a professor of anthropology and sociology at Lafayette College, Easton, Pennsylvania, examines deception in the nonprofit workplace, based on research conducted for his book *From Hire to Liar* (2007). **Michael Bisesi**, a professor who directs the Center for Nonprofit and Social Enterprise Management at Seattle University, concentrates on ethical lapses of nonprofit boards, especially lapses resulting from board members' failure to fulfill their "duty of curiosity."

In our lead article, **Michael Edwards** dissects "philanthrocapitalism," the widespread belief that foundations and not-for-profit organizations should adopt business thinking and marketing methods. One of the leading scholars of civil society, Edwards is the author of the newly published *Just Another Emperor? The Myths and Realities of Philanthrocapitalism* and many other books and articles.

"Defending Civil Society," a report by the **International Center for Not-for-Profit Law** and the **World Movement for Democracy**, surveys legal constraints confronting civil society around the world. It then addresses governmental justifications for these legal barriers and articulates principles, grounded in international law, to protect civil society.

In addition, **Ibrahim Saleh**, an assistant professor of journalism and mass communication and director of the Connect Project "Popular Diplomacy" at The American University in Cairo, analyzes violence in Arab civil society and some of the factors that fuel it. Finally, **Reginald Akujobi Onuoha**, a lecturer in law at the University of Lagos, looks at the discriminatory rules of inheritance in Nigeria and the role of nongovernmental organizations in fighting for change.

As always, we gratefully acknowledge our authors for their incisive and timely articles.

Stephen Bates

Editor

International Journal of Not-for-Profit Law

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ETHICS AND CIVIL SOCIETY

**More Lies than Meet the Eyes:
Organizational Realities and Deceptions
in Nonprofit Organizations**

David Shulman¹

This essay offers an elementary categorization of different types of deception in nonprofit organizations. Using a perspective drawn from organizational sociology and my own research into workplace lying, I suggest that understudied forms of deception in nonprofit organizations can be explained by distinct organizational constraints within which nonprofits work. In particular, I argue that early-exit labor markets, small size, constant pressure to acquire financial resources, and an overwhelming sense of moral calling together explain why my respondents reported more deceptions in nonprofit than in for-profit organizations.

Introduction

For my recent book, *From Hire to Liar: The Role of Deception in the Workplace*, I researched how employees at for-profit and nonprofit organizations encountered and engaged in deception in their everyday work. I noticed that respondents from nonprofit organizations seemed to report observing more deceptive behaviors than their counterparts at for-profits did. This finding raises questions about why deceptive behaviors might, paradoxically, be more pervasive in ostensibly unselfish organizations than in profit-seeking ones. Here, I offer some tentative answers and informally explore deception in nonprofit work as a general area for further research.

We are all familiar with moral proclamations that people should never lie, and that lying (other than telling “kindly” white lies) is viewed as an unprincipled behavior. In this essay, I do what many find objectionable: separate moral condemnation from the analysis of lying. A sociological perspective adopts a practical character rather than a purely ethical stance. The goal is not to assume idealistic frameworks but to study people’s real behaviors and identify the conditions under which their conduct falls short of cultural ideals. To that end, this essay explores different types of nonprofit deceptions and identifies the inducements and organizational contexts that may explain the relative prevalence of lying in nonprofit organizations.

In the working context of a nonprofit, career mobility is likely limited, people burn out, they face pressure to accumulate financial resources, the organization may be driven by a motivating righteous fervor, and the typical organization's small size enables a less bureaucratic approach with more discretionary autonomy. Given these

¹ David Shulman, shulmand@lafayette.edu, is a professor in the Department of Anthropology and Sociology at Lafayette College in Easton, Pennsylvania. He is the author of *From Hire to Liar: The Role of Deception in the Workplace* (2007). Copyright 2007 by David Shulman.

circumstances, it is not unreasonable to expect to find pressures and opportunities to act deceptively. The same factors are often noted to play a role in deception in for-profit organizations, where people face competition, encouragement to be team players, pressure to identify with the organization's goals, and often freedom from scrutiny. When similar circumstances exist in nonprofits, perhaps even to a greater extent, then deception is, from a sociological standpoint, a perhaps predictable outcome.

Categorizing Deceptive Behaviors among Nonprofits: The Big Crimes

As a starting point, I offer some elementary distinctions among deceptions that may exist in a nonprofit organization. In Figure 1, I divide such deceptive behaviors into three non-exhaustive categories: *understudied nonprofit deceptions*; *universal workplace deceptions* that occur everywhere, as part of working in general; and *criminal deceptions*, which tend to attract the most media and scholarly attention. The bottom right column in Figure 1 identifies traditional scholarly approaches to analyzing these types of deceptions among nonprofit organizations.

By far, criminal deceptions are the most harmful. This category includes theft and embezzlement, financial conflicts of interest, misrepresenting the amount of money that goes to overhead, defrauding the government and the public, fake charity scams, and other dummy organizations that act as deceptive fronts for lobbying or for-profit interests. Explanations of such deceptions often include individual immorality and greed, predatory marketplace tactics, and poor auditing, enforcement, and social controls. Reviews by Greenlee et al. (forthcoming) and reports by ACFE (2006) provide examples of such crimes. Millions of dollars are no doubt lost from them. These crimes also produce damaging publicity fallout that makes it vital to assure the public and the government that most nonprofits are trustworthy.

Nonprofits are also victims of deceptive and corrupt schemes by outsiders. Bribery, theft of supplies by third parties, and corrupt clients and government officials warrant greater attention, particularly in an international context where nonprofits operate under dramatically varying conditions. Deceptions by predatory insiders within nonprofits are just one side of the criminal equation.

I should also note an important qualification to the crime category. For a variety of reasons, published assessments and newspaper articles may be skewed toward reporting major criminal scandals in the United States. If so, we need greater information on global variations of criminality and nonprofits, to qualify any conclusions based solely on the US context. Compared to the United States, other countries' punishments, offenses, and controls are likely to differ. The distinctions between the public, private, and third sectors in the United States are not uniformly applicable, either. Studies of global variations in crime and lying among nonprofits would offer a valuable contribution, even if only for establishing analytic frameworks that would make meaningful comparisons possible. In this essay, I stress organizational structure and context as one basis of comparison, but I recognize that there are others.

FIGURE 1: AN INFORMAL CLASSIFICATION OF DECEPTIONS AMONG NONPROFIT ORGANIZATIONS

{1} Understudied Types of Nonprofit Deception	Explanations for Deceptions that Are More Understudied Among Nonprofits
<p>Favoritism Among Clients Misleading Donors Withholding Information from Competitors Budget Diversion to Pet Causes Smaller and Diverse Organizations</p> <p><u>{2} Traditional Forms of Workplace Deception</u> Shirking/Goofing Off Hiding Exploiting Workers Passing Off Work Feigning Deference Hidden Gender and Race Discrimination Exaggerating Accomplishments Avoiding Blame for Problems</p>	<p>Early-Exit Labor Markets Smaller Size Pressure for Resources Moral Pressures Autonomy</p>
<p>{3} More Infamous Deceptions Among Nonprofits</p> <p>Theft/Embezzlement Fraud Through a Fake Charity Scam Financial Conflicts of Interest Duplicate Grant Making Lobbying with a Misleading Name Commercializing the Nonprofit in Partnership with For-Profit Partner Tax Evasion Hiding Overhead Versus Cause Spending Misreporting Donation Amounts Bribery in Order to Operate Theft by Clients or Corrupt Parties</p>	<p>Traditional Criminology and Conventional Wisdom Explanations</p> <p>Predatory Marketplace Tactics Unprincipled Individuals /Greed Poor Controls/Misplaced Trust</p>

The Understudied Nonprofit Deceptions

My focus here is on forms of deception that are less apparent and more widespread than outright criminality, though perhaps less damaging too. In *From Hire to Liar*, I argue that scholarship on workplace deception is hampered because researchers primarily spotlight major acts of deception, such as white collar financial crimes that are not typical of everyday workplace lies, such as shirking work and lying to clients. While people may lie to commit economic crimes, that is just one aspect of deception that may exist in the workplace. People may lie for all sorts of reasons unrelated to economic crime. In nonprofit and for-profit organizations alike, workers may lie to avoid criticism, take undeserved credit for successes, goof off, feign a sick day, and pretend to like coworkers and clients more than they really do. Such deceptions are pervasive, and some are actually helpful in carrying out the day's work, but their significance is often overlooked.

Understudied workplace deceptions among nonprofits fall into two principal categories: universal workplace deceptions and deceptions that are more immediately applicable to nonprofit organizations. Regarding the former, analysts should recognize the nonprofit as just another type of workplace, with typical forms and magnitudes of deception. Workers in many organizations, including the interns and volunteers commonly associated with nonprofits, may shirk work, pretend to like difficult coworkers, feign deference to bosses, cover up transgressions that could lead to negative public reactions, and hide discrimination and exploitation of various kinds – or at least witness such behaviors on the part of others. Whether the organization is nonprofit or for-profit, workers must still put on a show, worry about how supervisors perceive them, try to avoid blame for mistakes, and appear to be doing what they are supposed to be doing even if they are not. Everyday, mundane, informal deceptions such as these have been the subject of little research in general, much less research comparing for-profit and nonprofit settings.

The third category in Figure 1 covers deceptions that are particularly common in nonprofits. These include favoritism (and hiding it) in treating or serving certain clients, seeking funds through misleading pitches or elaborate exaggerations, withholding information from competitors about grant sources, and diverting funds to favored pet causes. Despite their pervasiveness, these deceptions have received scant attention among scholars.

It is important to note that nonprofits vary greatly, from gigantic NGOs to neighborhood volunteer organizations. Their missions likewise vary, from promoting arts performances in a community to preserving forests. The sort of scandal that rocked the National Capital United Way, in which Oral Suer stole hundreds of thousands of dollars, cannot happen in an organization with a budget of a few hundred dollars a year. Variations in organizational context and social controls make different forms of malfeasance possible, as well as different types of lies. Although the media and scholars tend to focus on crimes in large NGOs, less noticeable but pervasive deceptions exist among thousands of smaller nonprofit organizations around the world.

Data from Nonprofit Respondents and Distinct Organizational Contexts of Nonprofits

Respondents in *From Hire to Liar* provided many examples of understudied or less noticed deceptions among nonprofits. These included misrepresenting how donations would be spent when making pitches to potential financial donors; misleading actual donors about how their funds were being spent; making claims of working to solve problem X but instead working on problem Y; lying about other budgetary aspects; mistreating lower-level staff; deceiving others concerning racism and sexism; and mistreating clients that a nonprofit serves. While for-profit interviewees provided analogous tales of serious deceptions, a difference emerged: the deceptions seemed to play a more critical role in the economic viability and day-to-day running of nonprofits. I cannot prove that this distinction is ubiquitous, nor do I wish to do so. This distinction just manifested itself in my interviews and observations across dozens of organizations and raises issues that merit further study.

In general, nonprofits face greater organizational vulnerabilities and dependencies than for-profit organizations, such as uncertain budgetary prospects. I believe that this difference helps explain the greater reports of deception among nonprofits. A further explanation may be the notion that the means justify the ends: a mission to do good may rationalize and obscure deception. Nonprofits may face greater obstacles than for-profits in pursuing successful outcomes and achieving publicity. Would it be so surprising that deception may be a tool for overcoming those obstacles? For example, are problems always as bad as some nonprofit agencies portray them? Are all statistics accurate? Consider how some debates between advocacy nonprofits and their targets are wars of persuasion, in which corporate lobbyists and nonprofits engage in battles of exaggeration and selective misrepresentation to a potentially uncritical news media that are attracted to sensationalism and conflict.

There are entrenched nonprofit giants, such as some colleges and religious organizations, and then there are smaller and more localized nonprofit organizations. Non-criminal deception is most commonly overlooked in the smaller nonprofit organizations that pursue a distinct mission. That mission may be environmental or developmental, or it may focus on arts and humanities. Such a nonprofit may comprise local activists who seek to address a local problem, such as poverty, environmental racism, drug abuse, homelessness, domestic violence, or high school dropouts.

Many respondents at these nonprofits reported deceptions in the universal category – that is, the category that applies equally to for-profit enterprises. They noticed people who passed off work to colleagues, such as by suddenly disappearing when it was time to organize and implement mass mailings. Many respondents reported people who pretended to like others more than they actually did. Many, too, reported workers who took credit for someone else's work. Some employees and volunteers gave themselves ornate titles though their work was relatively mundane, such as secretaries who termed themselves administrators. These types of deceptions involve managing social relationships and workplace status, and they occur in many organizations. In other words, workers commonly attempt to stay out of trouble, advance in an organization, and lie to deal with unpleasant people and situations.

Deceptions that are more applicable to nonprofits, I believe, rest partly on four factors that set nonprofits apart from for-profit enterprises: nonprofits have early-exit labor markets and high turnover; they are smaller and always in search of resources; they can involve a strong ideological commitment among members; and they may operate under less scrutiny and social control.

I begin with turnover. Several of my respondent organizations were large, but even there, most had no more than three or four longtime, full-time employees. These were generally middle-aged men and women who depended on part-time volunteers, interns, and low-paid employees to carry out tasks. For the intern and the low-paid employee, work at the organization provided the gratification of seeking to do good things, but also, importantly, it provided a way to earn an experiential chit that would help the individual get into college, graduate school, or a better job. Also, low-level positions were sometimes filled by people who had been in trouble of some kind and were working themselves out of that trouble. Though these two groups of low-level workers differ in nature and prospects, both could be cycled quickly in and out of the organization, moving away at a semester's end or as other opportunities (or troubles) beckoned. Funding shortfalls, too, could propel those at the low end of the hierarchy on their way.

These factors illustrate several structural vulnerabilities to deception. Short-term employees typically lack knowledge about how things work, and thus must depend on the longer-term boss. When lower-level people leave after a semester or a few months while the boss remains, the result is a perpetual asymmetry of knowledge. The intern or low-level employee also has little incentive to challenge the boss, because of ignorance or inexperience, or because of fear of reprisal, respect for the commitment of the boss or the desire to cultivate a potential reference.

The infusion of new blood primarily at low levels, while midlevel managers stay entrenched, often produces great discretion for these managers, particularly in smaller organizations. These outfits become known as "one-man" or "one-woman" operations, where a committed individual claims to be doing nearly everything. Control of information confers a tremendous advantage in operating the organization and in seeking publicity.

Size also helps foster deception in nonprofits. Small organizations often operate in an environment with limited funding, and they compete with other nonprofits to get it. People who sought new sources of funding often complained that professionals at other nonprofits withheld information or even misrepresented them to funders. A further factor is that nonprofits often are populated by moral entrepreneurs, who believe strongly in their cause and are surrounded by compelling evidence of crises demanding quick action. Improperly diverting resources may come more easily when one can morally rationalize it as the only way to address a dire crisis. In a working environment where worst-case scenarios are seared into people's minds, combined with strident calls to action, an impulse to contribute in any way possible may be overwhelming.

This helps explain the apparent paradox that more lying occurs among altruistic nonprofits than among assumedly greedy corporations. A deeper assessment, though, reveals that complete honesty is a costly luxury. While a nonprofit seeks to ameliorate a

crisis, its funding, at least among smaller organizations, is often meager. As Brecht noted in *Threepenny Opera*, “first comes food, then morals.” If serving the mission requires shortcuts, the impetus to use any means necessary may become overwhelming – and the result may be more altruistic than not.

Consider also that salaries at nonprofits are lower than at for-profits; payment at nonprofits in part comes from a sense of taking action and doing good work. Identification with the organization can lead to a greater commitment to the cause, which may in turn produce the same energetic pursuit of money as for-profit organizations exhibit. The drive to profit may be measured in different currency, but both involve maximizing returns. The industry of professional fundraisers who employ a variety of tactics to solicit donations further blurs the distinction of deceptive “sales techniques” between nonprofits and for-profits.

Favoritism in Shaping the Direction of Work

Workers favored by higher-ups often receive more interesting and challenging assignments than other workers do. I heard accounts of this type of favoritism over and over. My explanation is that managers in nonprofits have more discretion in assigning work than their for-profit counterparts do. Perhaps profit-making organizations also are larger and produce more fixed services, whereas nonprofit organizations are typically smaller and produce more abstract and variable products that are open to discretion.

Favoritism in nonprofits also took the form of diverting resources to the pet causes of high-level workers. There were two variations here. One occurred when higher-ups wanted to devote more resources to a pet cause than were already allocated. The other type occurred when high-level workers favored some clients of the nonprofit over others. The first was mainly budgetary, the second more individualized, but both involve deception.

In the first case, respondents favored causes in several fashions. The general pattern was to shift resources from one cause to another. In the case below, money for a favored program is siphoned off secretly:

Well, I think that what the person who signed the checks, the executive director, his whole action was deceptive for the funders. That, you know, they represented that they have all these type of programs that were working great; here is what the children's program is doing. And they were using what the children's program was doing and pretending like they wholeheartedly supported it, in order to get these huge funds, because that's where the money is, in children's programs. And then they would actually use those funds for their own programs, for the literacy training, for the jobs program.

In this case, one program's money is diverted to another. All informants at nonprofits observed money from one donation or grant diverted to a different initiative. Sometimes this diversion was written into the plan of the donation or grant, so that donors knew that their money might be distributed elsewhere. But informants also gave accounts of money being redirected in undisclosed ways. For example, one community organizer noted:

Somewhere in the neighborhood of \$10,000 was supposed to be used on video equipment, tapes, whatever, to be used to make educational films and documentaries on the problems. No money was spent or allocated for that. No equipment was purchased. And the explanation was that all the other programs required so much more time and resources so that we couldn't do that.

Respondents who provided these accounts never believed that people took any money to line their own pockets; nobody engaged in deception to get rich. They just wanted to support favored causes, which again rests on a moral motive that may not exist in the for-profit sector. Switching money to other causes sometimes led nonprofit workers to hoard money, hide funding sources, and fight over resources. Shifting funds in this fashion is clearly a form of shadow administration involving deception. For example, some informants described bait-and-switch schemes in which money was sought for project A but actually devoted to project B or to a general fund from which all projects drew. An environmental fundraiser explained:

I think there's also misrepresentation to people who give money that they think they're giving money to a specific project, when in fact it's going into a general fund. That had happened to some donors I've seen, and it infuriates me, especially, I've been involved in pitching a proposal, saying, hey, we're going to use your money to do this work, and then when it gets to the door, it's swiped up by the general fund.

Another informant described deceptions within organizations about leads on potential sources of funding:

Just, people withholding, or not sharing, information about upcoming projects and leads, or donors, with other people. So that, you know, somebody says, "Hey, I heard you got a good lead on, you know, some money for doing the same kind of work that we've been interested in doing." And people have said, "Well, you know, it's not, nothing's said, I don't know what's happening yet." So, when it comes to donors and getting cash, there's an incredible amount of deception, until the money's actually in the door. And even when it's in the door, there's a hoarding of that, as a sugar daddy, for that program. And that goes straight up to the top. The president actually hoards a certain set number of foundations and organizations that give money, as his own pet sources. Nobody can touch them, and everybody knows that it's up to him.

These deceptions also occur between organizations:

These other groups in our coalitions ... we see as being deceitful. And one common method of doing this is, yeah, they're sending in grant proposals to foundations, including our organization and other small organizations' names on them, saying, yes we were working with these guys. And getting money to do that, without actually including us in on the take. And we find out, through whatever channels and mechanisms we can, we see actual grant proposals with our names included on them, as working with

these organizations, and then they do grants for \$350,000 and we get zero of that money. So there's a lot of distrust between organizations.

In some nonprofit organizations whose primary mission is serving troubled individuals, certain clients may be favored over others. For example, one intern observed favoritism at her nonprofit based on client behavior. If a client acts in ways that make him or her easier to manage, she said, then that client is favored over others:

A: Here was a huge example, which I continued to think about for quite a long time, when two individual kids were being decided upon at the same time.

Q: "Decided upon" means allowed to stay or forced to leave?

A: Yes. And one of them, even though he had had sex with five other females on the unit – which only one of those would be grounds for immediate dismissal – was allowed to stay on because he was a personal favorite for the site head. And I would presume I could say that he was because, he was – smiled, funny, always allowed the staff members to forget – in other words, was funny to the extent that he was a release for them, and allowed them to kind of forget the pressure....

Q: So he eased your day on the job?

A: Yes. Much easier to handle. Whereas, the person they were deciding upon simultaneously was, uh – had not committed any crime that was as great as this other guy, but there was a general dislike for him because he didn't happen to acknowledge the staff members. He would mumble. He was kind of dirty. He just didn't communicate with them at all, and you know, openly showed dislike for them, but he never made any comments or insults or anything like that. But he had kept a solid job for a while, but the fact that they did not like him, as a sort of consensus, they were ready to dismiss him and keep the former person.

Q: What grounds did they use to justify it?

A: Very, very few grounds to justify it.

Q: But they would never say that it was done based on subjectivity?

A: I don't think they would say that. That would be admitting that there were no grounds for their decisions, that there were no set policies. However, in the middle of a meeting, they would just say, "How do we all feel about X." And they would sit there talking about him in almost a sort of – in again, almost a sort of gossipy way. Almost – Oh, I like this, I don't like this. And I felt that none of these decisions were based on any sort of technical grounds, whatever.

Small size, meager resources, and greater discretion for managers may encourage greater deception. An exacerbating factor is that nonprofits are moral entrepreneurs, so deceptions can often be morally rationalized.

Conclusion

Respondents I interviewed in *From Hire to Liar* who worked in nonprofit organizations observed more serious deceptions than those working in for-profit organizations did. By *serious*, I do not mean criminal, but deceptions that were more actively tied to running and maintaining the organization as a whole. For-profit organizations featured a great deal of deception associated with trying to secure upward mobility and lying about one's accomplishments. A competitive environment and market also spurred deception in both cases. However, the different constraints on nonprofit organizations – such as the need for money to address problems, the moral aspect of the work, and the different hierarchical structure – may help explain why deceptions occurred there more frequently than they did in for-profits.

To offer this conclusion is not to state that nonprofits are more exploitative than for-profits are. Rather, the situation of nonprofits is direr, which may lead to deception to survive and serve a mission, an organizational-level issue. By contrast, the situation of for-profits can be more stable economically, which may prompt workers to lie to get ahead as individuals rather than to secure the organization's survival. Ironically, lying in nonprofits may be altruistic lying.

This essay is meant to offer food for thought. Further comparisons of deception in for-profit and nonprofit organizations would be useful. I also believe that cross-cultural variations and the varying organizational and situational constraints can illuminate the intriguing paradox that deception may be more pervasive in nonprofits. If those deceptions enable nonprofits to survive, perhaps a return to the first principles of moral debate is in order: does a socially valuable end – namely, the continuing viability of meeting the organization's goals – justify deceptive means?

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ETHICS AND CIVIL SOCIETY

The Penalty of Nonprofit Leadership

Michael Bisesi¹

In every field of human endeavor, he that is first must perpetually live in the white light of publicity.

--Cadillac advertisement, 1915²

This new era also demands from public (as well as private) organizations increased fiscal accountability. We must use our resources efficiently and intelligently both to husband them and to underscore our credibility to those who provide them – the government and our donors.

--Michael Heyman, former Secretary of the Smithsonian Institution, 2007³

It is a bizarre achievement to show great skill in avoiding obstacles of one's own creation.

--Oxford University Faculty Report, 1966⁴

Although it seems like just a few days ago, it has now been a quarter century since I first taught “Business and Public Issues” in a large state university. After the class discussed a case involving a difficult ethical dilemma, an undergraduate accounting student came to see me.

“Where is the solution manual?” she asked.

She had solution manuals for her accounting courses. She figured that this class must have one too.

Imagine how much better the nonprofit world might be with a solution manual for ethical dilemmas. No more gray areas, no more judgment calls, just a handy checklist that managers and others could use whenever problems arise.

¹ Michael Bisesi is Professor and Director of the Center for Nonprofit and Social Enterprise Management at Seattle University. He also has held executive positions with a foundation and with a large nonprofit organization.

² Cadillac advertisement titled “The Penalty of Leadership,” *Saturday Evening Post*, January 2, 1915.

³ Bowsher, C.A. et al., “A Report to the Board of Regents of the Smithsonian Institution,” June 18, 2007.

⁴ Oxford University, *Faculty Report on the Future of the University* (1966).

“Build a Better Life by Stealing Office Supplies”

Cartoonist Scott Adams has made a fortune by drawing Dilbert, a hapless engineer in a dysfunctional corporation. One of my favorite compilations of Dilbert cartoons is called *Build a Better Life by Stealing Office Supplies*. (My other favorite: *Always Postpone Meetings with Time-Wasting Morons*, good advice for all.) One interpretation of “stealing office supplies” is that certain ethical transgressions are virtually universal.

Nonetheless, David Shulman contends that nonprofit employees “report observing more deceptive behaviors than their counterparts at for-profits did.” His study “explores nonprofit deceptions and identifies the inducements and organizational contexts that may explain the relative prevalence of lying in nonprofit organizations.” He proposes several possible explanations, including the following:

- Limited career mobility.
- Pressure to accumulate financial resources.
- Less bureaucracy with more discretionary authority.⁵

However, a quick look at some articles published in the *Journal of Business Ethics* over the last twenty years suggests that nonprofits are not necessarily unique:

- Business people’s perceptions of unethical practices have changed over time.
- Hindrances to change include financial and technological barriers as well as inadequate knowledge and resources.
- Altruism still matters.⁶

Of course, even a solution manual would not necessarily guarantee ethical behavior, as illustrated by the dozens of unopened Enron ethics booklets that were reported to be big sellers on eBay. Enron’s collapse is a stark reminder that organizations and leaders may come and go, but the need for ethical principles is timeless.⁷

⁵ Shulman, D., “More Lies than Meet the Eyes: Organizational Realities in Nonprofit Organizations,” *International Journal of Not-for-Profit Law*, April 2008.

⁶ Zinkhan, G.M., et al., “MBAs’ Changing Attitudes Toward Marketing Dilemmas: 1981-1987,” *Journal of Business Ethics* 8:963-974 (1989); Fukukawa, K., et al., “Mapping the Interface Between Corporate Identity, Ethics, and Corporate Social Responsibility,” *Journal of Business Ethics* 76:1-5 (2007); Fritzsche, D.J., et al., “Personal Values’ Influence on the Ethical Dimension of Decision Making,” *Journal of Business Ethics* 75:335-343 (2007).

⁷ In the interest of full disclosure, readers should be aware of some “baggage” I bring to this assignment, although enough time has passed that I believe it is “checked” rather than “carry-on.”

During most of the 1990s, I was Senior Vice President of the United Way of the Texas Gulf Coast (Houston). In 1992, William Aramony, who had served as President of the United Way of America since 1970, was found to have used organizational resources for personal gain. A firestorm erupted in the nonprofit sector concerning executive compensation and other management practices. I learned a lot about crisis management.

Duct Tape, Paint Brushes, and Mother Teresa with an MBA

The special role of nonprofits may create unrealistic expectations that ultimately burden these organizations. Consider a nonprofit board meeting I once attended. This organization purchased a marginally acceptable office building because of the location and the price. In their haste to close the deal, however, the board neglected to budget for maintenance. Normal wear and tear soon led to peeling paint on the walls and duct tape on the carpet. Board members realized that something had to be done. After various expensive ideas were considered at the meeting, the board treasurer (the chief financial officer of a major corporation) suggested that the staff be called in on a Saturday, handed paint brushes, and given assignments.

The paint-brush proposal exemplifies what I call the “Mother Teresa with an MBA Syndrome”: the widespread belief that nonprofits must be extremely well-run but cost as little as possible to operate, irrespective of the nature of the work and the credentials of those who perform it. In the white light of publicity, this syndrome can contribute to problems of credibility and trust.

Credibility and Trust

Nonprofit organizations are legal constructs personified by those who lead them, so individual credibility is crucial to organizational credibility. The credibility of nonprofit leaders is complicated by the often intangible or even invisible nature of the work. Leaders of slow- or no-feedback organizations may be hard-pressed to evaluate programs. Some programs operate with a lengthy time horizon: for example, a child support program that begins with prenatal care for the mother and continues through high school graduation. Other programs must be evaluated based on whether something did not happen: for example, programs to prevent homelessness, substance abuse, and domestic violence.

Significant ethical lapses usually can be traced back to the governing board. The standard litany of nonprofit board responsibilities includes the duties of care, loyalty, and obedience. It could be argued, however, that no duty may be more important than what corporate governance expert Nell Minow has referred to as the “duty of curiosity.”⁸

I also had direct experience with Enron during the period, including many meetings in the executive offices on the 50th floor of the Enron building. The convicted (and now deceased) chairman, Ken Lay, chaired the United Way's 75th anniversary campaign in 1997. At the end of that decade, I was Managing Director of Program Services at the Greater Houston Community Foundation. The board included Enron CEO Jeff Skilling, who in 2006 was convicted and sentenced to 24 years in prison.

By the time Enron imploded in late 2001, I had relocated some 2,000 miles away to Seattle, but the sting of deception and betrayal was no less painful. Friends and former neighbors lost jobs and pensions, nonprofits lost financial support (e.g., \$5 million of the Houston United Way's \$75 million came from Enron), and even the Houston Astros had to change the name of their new stadium from Enron Field to Minute Maid Park.

⁸ Quoted in “Commentary: Lessons of the ‘Hollinger Chronicles,’” *Business Week*, September 13, 2004.

Indeed, according to a major governance study, “Behind every scandal or organizational collapse is a board (often one with distinguished members) asleep at the switch.”⁹

The cases that follow are both prime examples and cautionary tales. The saga begins with some 65 years of complaints about coffee and doughnuts.

American Red Cross

In 1942, Secretary of War Henry Stimson ordered the Red Cross to charge American soldiers in Europe five cents for coffee and donuts, because soldiers of other Allied nations had to pay and Stimson wanted to maintain morale amongst the Allies. The anger and resentment continues to this day, with veterans and their families calling for boycotts of the Red Cross, especially during United Way campaigns. The protests prompted the Red Cross to issue an official apology on Veterans Day 2007.¹⁰ Americans have forgiven Germany and Japan for World War II, but still hold a grudge against the Red Cross.

The coffee-and-doughnuts furor is not the only reason for the Red Cross's compromised organizational immune system. It also has suffered from adverse publicity regarding its management of blood banks. A larger and partly related problem has been discontinuity at the top: over the last two decades, the American Red Cross has had a dozen or so leaders, either “permanent” or interim.

Fast forward to 2001 and beyond. While complaints about the CEO's decisions and style surfaced after September 11, the ultimate responsibility belonged to the board:

- The congressionally chartered board had 50 members: seven government officials, twelve corporate/business/academic leaders, and 30 from local chapters.
- “We hired a change agent for a culture resistant to change.”
- The board had a history of overstepping its role and authority.
- The board misled the new CEO regarding Food and Drug Administration concerns about the blood centers

After giving mixed signals, the board finally dismissed the CEO, prompting her to reply: “Maybe you wanted more of a Mary Poppins and less of a Jack Welch.” The board has gone through about a half-dozen leaders since 2001.¹¹

⁹ Chait, R., et al., *Governance as Leadership: Reframing the Work of Nonprofit Boards* (New York: Wiley, 2005).

¹⁰ “Red Cross Apologizes for Charging for Coffee, Doughnuts,” <http://www.nbc4.com/news/14571907/detail.html>.

¹¹ Sontag, D., “Who Brought Bernadine Healy Down?” *The New York Times Magazine*, December 23, 2001; Strom, Stephanie, “Firing Stirs New Debate over Red Cross,” *The New York Times*, November 29, 2007.

J. Paul Getty Trust

The legacy of a wealthy oilman, the J. Paul Getty Trust “is a charitable trust, governed by a board of trustees, which operates a public art museum and several other programs, including an art conservation institute, the Getty Research institute and a grant program.”¹² Already hobbled by accusations of questionable antiquities acquisitions, the Trust found itself on the front page of *The Los Angeles Times*. An investigation by the newspaper led to an inquiry by the California Attorney General, which found such improper activities and board deficiencies as the following:

- Use of charitable funds to buy artwork for retiring trustees.
- Use of charitable resources for the CEO’s private benefit, when he assigned Trust employees to run his personal errands.
- Improper expenditures in paying consulting fees to a graduate art student.

The California Attorney General appointed an independent monitor to review the Trust's reforms.

Seattle Marathon

A local example serves as a reminder that every community should look carefully at its own organizations. Readers of *The Seattle Times* awoke on November 26, 2007, to the headline “Just 1% of Seattle Marathon money goes to charity.”¹³ More such headlines followed.

The organization's annual event brought in more than \$1 million, but its charity partner received just \$12,000. During nearly 40 years of operation, there had never been an audit. After weeks of relentlessly adverse publicity, the board finally ordered an audit.

Smithsonian Institution

The Smithsonian is an iconic and unique American nonprofit. Though quasi-governmental, it serves as a role model for nonprofits, particularly those active in the arts and culture.

Revelations about dubious management practices of the Secretary (CEO) provoked a public outcry. The Board of Regents named an Independent Review Committee (IRC) to review management practices and make recommendations.

To its credit, the IRC reported that Board actions or inactions are key to understanding the need for reform. Indeed, the most significant finding was the clear imperative to “correct the underlying deficiencies in its organizational structure, decision making and financial controls that allowed inappropriate management conduct to go undetected.” The IRC report found “failures of governance and management” to be the “root cause” of these problems: among other things, an “antiquated” governance system,

¹² Lockyer, B., "Report on the Office of the Attorney General's Investigation of the J. Paul Getty Trust," October 2, 2006.

¹³ Perry, N., “Just 1% of Marathon money goes to charity,” *The Seattle Times*, November 26, 2007.

insufficient oversight of management, and “failure to engage in the active inquiry of [the CEO] and Smithsonian management that would have alerted the Board to problems.”

Put another way, the Board needed to exercise its “duty of curiosity.” If it had, the following problems could have been addressed more quickly and effectively:

- Excessive executive compensation.
- Inadequate monitoring of expense accounts.
- Inadequate internal financial controls and audit activities.

A more diligent board might or might not have addressed other, more subjective questions:

- Was the CEO’s disposition truly “ill-suited for the position of Secretary?”
- Did the board have enough information to fully understand the impact of declining private grants, contributions, and business revenue?
- Was Smithsonian Business Ventures germane to the organization's mission?

The IRC concluded with a dozen recommendations, several of which could serve every nonprofit board as a template for due diligence:

- Executive expenses should be audited.
- Executive compensation should be competitive and transparent.
- The board should be active in governing, with a chair who can provide time and proper oversight.
- The board should be reorganized to allow the appointment of Regents with needed expertise.
- Internal financial controls and audit functions should be strengthened.
- Executives should seek approval of the Regents before serving on the boards of other nonprofit organizations.

The 108-page report concludes with a word-to-the-wise warning: “Failure to take voluntary action [to reform governance structures] will likely lead, ultimately, to action by Congress, state legislatures, and the courts, to impose reforms from without, just as it did in the case of the corporate world.”¹⁴

¹⁴ Bowsher, C.A. et al., "A Report to the Board of Regents of the Smithsonian Institution," June 18, 2007.

Final Thoughts

A translation of an ancient proverb admonishes that "where there is no vision, the people perish." Subsequent renderings suggest in similar fashion that "without inspired guidance, a people falls into anarchy," and "where there is no prophecy, the people cast off restraint." Vision, guidance, prophecy—all must come from above.

Staff members of a given nonprofit organization may or may not disproportionately take office supplies and commit other forms of deception. But much larger problems come from board members who fail to understand the organization's role and their own role within it.

Board members must discover and address problems, or else face the potential penalty of scandal. Diligent leadership is essential. There are no shortcuts and, unfortunately, no solution manuals.

Yet it is important to remember that the penalty of nonprofit leadership, while quite real, is only one side of the coin. The other side represents the privilege of nonprofit leadership, namely helping to shape the future of the community for all.

ARTICLE

"Philanthrocapitalism" and Its Limits

Michael Edwards¹

It is six o'clock on a Saturday afternoon, and the Swan Lake Fire Department Ladies Auxiliary are cleaning up after their latest community rummage sale. Not much money changed hands today, but plenty of warm clothes did, much needed with the onset of winter in this upstate New York town. Prices varied according to people's ability to pay, and those who couldn't pay at all—like the mother who brought all her money in dimes, quarters and pennies inside a ziplock plastic bag—were simply given what they needed, and driven home to boot. "Imagine what this would have cost me at Wal-mart?" was what she told her driver.

In some ways, there is nothing special about this story, which is repeated a million times a day in civil society groups that act as centers of solidarity and sharing. In another sense, it is profoundly important, because it represents a way of living and being in the world that is rooted in equality, love and justice, a radical departure from the values of competition and commerce that increasingly rule our world. It is not that the Ladies Auxiliary is a community free of markets—like everyone else, they have to make a living and raise funds to support their work, and they keep meticulous accounts. But when it comes to their responsibilities as citizens, they have decided to play by a different set of rules—grounded in rights that are universal, not access according to your income, recognizing the intrinsic value of healthy relationships that cannot be traded off against production costs or profit, and living out philanthropy's original meaning as "love of humankind."²

Across the universe, meanwhile, a very different form of philanthropy is taking shape. Nicknamed "philanthrocapitalism" by journalist Matthew Bishop,³ its followers believe that business thinking and market methods will save the

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² "Philanthropy"... "love of mankind, especially as shown by contributing to the general welfare." Chambers Dictionary, New Edition.

³ M. Bishop (2007) "What is philanthrocapitalism?" Alliance, March, p30.

world—and make some of us a fortune along the way. Bobby Shriver, Bono’s less famous partner in the Red brand of products, hopes that sales will help “buy a house in the Hamptons” while simultaneously swelling the coffers of the Global Fund for TB, malaria and AIDS.⁴ It is a win-win situation—gain without pain—and the price of entry to the world’s “most elite club,” as *BusinessWeek* describes the “Global Philanthropists’ Circle” that is sponsored by Synergos in New York.⁵ If only we can make foundations and non-profits operate like businesses and expand the reach of markets, great things will be within our reach, much greater than all the traditional activities of civil society combined.

From Bill Clinton to Bill Gates, the rich and famous are lining up to boost the claims of this new paradigm. According to journalist Jonathan Rauch, ex-President Clinton wants to “repurpose business methods and business culture to solve the world’s problems ... and he hopes to reinvent philanthropy while he’s at it.”⁶ “The profit motive could be the best tool for solving the world’s problems, more effective than any government or private philanthropy,” says Oracle founder Larry Ellison.⁷ “Wealthy philanthropists have the potential to do more than the Group of Eight leading nations to lift Africa out of poverty,” says “rock star” economist Jeffrey Sachs.⁸ “If you put a gun to my head and asked which one has done more good for the world, the Ford Foundation or Exxon,” says Buffet and Berkshire Vice-Chairman Charles Munger, “I’d have no hesitation in saying Exxon.”⁹ “The most pressing environmental issues of our time will be ... solved when desperate governments and nongovernmental organizations (NGOs) finally surrender their ideologies and tap the private sector for help.”¹⁰ “This,” says Jeff Skoll, who co-created eBay, “is our time.”¹¹

What lies behind the rise of this phenomenon? The philanthrocapitalists are drinking from a heady and seductive cocktail, one part “irrational exuberance” that is characteristic of market thinking, two parts believing that success in business

⁴ Cited in “The New Wave of American Philanthropy,” NonProfit Times newsletter, January 7th 2007. To be fair to Bono and Shriver, “Product Red” is one of the better “embedded giving” schemes on the market, insisting on detailed contracts with companies who participate so that buyers can see how much of the price they pay will find its way to the Global Fund. See also S. Strom, “Charity’s Share From Shopping Raises Concern,” *The New York Times*, December 13th 2007.

⁵ *BusinessWeek*, Nov 26th 2007.

⁶ J. Rauch (2007) “This is not charity,” *Atlantic Monthly*, October, p66.

⁷ Cited in W.K. Kellogg Foundation (2003) “Blurred Boundaries and Muddled Motives: a world of shifting social responsibilities,” p12.

⁸ “Philanthropy can eclipse G8 on poverty,” *Financial Times*, September 4th 2007.

⁹ “Buffett rebuffs efforts to rate corporate conduct,” *Los Angeles Times*, May 7th 2007.

¹⁰ “Richard C. Morais on Philanthropy,” *Forbes.com*, December 23rd 2007.

¹¹ *Ibid*, p6.

equips them to make a similar impact on social change, a dash or two of the excitement that accompanies any new solution, and an extra degree of fizz from the oxygen of publicity that has been created by the Gates-Buffer marriage and the initiatives of ex-President Clinton.

There is justifiable excitement about the possibilities for progress in global health, agriculture and access to micro-credit among the poor that have been stimulated by huge investments from the Gates Foundation, the Clinton Global Initiative and others. New loans, seeds and vaccines are certainly important, but there is no vaccine against the racism that denies land to “dalits” (or so-called “untouchables”) in India, no technology that can deliver the public health infrastructure required to combat HIV, and no market that can reorder the dysfunctional relationships between different religions and other social groups that underpin violence and insecurity.

Philanthrocapitalism should certainly help to extend access to useful goods and services, and it has a positive role to play in strengthening important areas of civil society capacity, but social transformation requires a great deal more than these two things. Despite their admirable energy and enthusiasm and genuine intent, the philanthrocapitalists risk misfiring when it comes to much more complex and deep-rooted problems of injustice.

Philanthrocapitalism offers one way of increasing the social value of the market, but there are other routes that could offer equal or better results in changing the way the economic surplus is produced, distributed and used: the traditional route that uses external pressure, taxation and regulation; the philanthrocapitalist route that changes internal incentives and gives a little more back through foundations and corporate social responsibility; and more radical innovations in ownership and production that change the basis on which markets currently work. We don't know which of these routes carries the greatest long term potential, though all of them rely on civil society as a vehicle for innovation, accountability, influence and modified consumption, and especially for getting us from reformist to transformational solutions. I suspect that civil society will be able to play those roles more effectively from a position of diversity and strength. “It's the difference that makes the difference,” remember, so working together but independently may be a better way forward than dissolving our differences in some soggy middle ground. In the real world, there is no gain without pain, no seamless weaving of competition and cooperation, service and self interest, inequality and fairness. If something seems too good to be true, it probably is.

“What could possibly be more beneficial for the entire world than a continued expansion of philanthropy?” asks Joel Fleishman in his book that lionizes the venture capital foundations.¹² Well, over the last century, far more has

¹² J. Fleishman (2007) “The Foundation: A Great American Secret—How Private Wealth is Changing the World,” New York: Public Affairs, 2007.

been achieved by governments committed to equality and justice, and social movements strong enough to force change through, and the same might well be true in the future. No great social cause was mobilized through the market in the twentieth century. The civil rights movement, the women's movement, the environmental movement, the New Deal, and the Great Society—all were pushed ahead by civil society and anchored in the power of government as a force for the public good. Business and markets play a vital role in taking these advances forward, but they are followers, not leaders, “instruments in the orchestra” but not “conductors.”

“We literally go down the chart of the greatest inequities and give where we can affect the greatest change,” says Melinda Gates of the Gates Foundation,¹³ except that some of the greatest inequities are caused by the nature of our economic system and the inability of politics to change it. Global poverty, inequality and violence can certainly be addressed, but doing so requires the empowerment of those closest to the problems and the transformation of the systems, structures, values and relationships that prevent most of the world's population from participating equally in the fruits of global progress. The long-term gains from changes like these will be much greater than those that flow from improvements in the delivery of better goods and services. After all, only the most visionary of the philanthrocapitalists have much incentive to transform a system from which they have benefited hugely.

So where are the examples of philanthropy that supports organizations that really make a difference? There are thousands of them scattered widely across the world through civil society, but very few receive support from the philanthrocapitalists. I'm thinking of groups like “SCOPE” and “Make the Road by Walking” in the United States, which build grassroots organizations, leadership and alliances in communities that are most affected by social and economic injustice in Los Angeles and New York respectively. Established after the Los Angeles riots in 1992, SCOPE addresses the “root causes of poverty” by nurturing new “social movements and winning systemic change from the bottom up.”¹⁴ It has involved almost 100,000 low-income residents in community action to secure a \$10 million workforce development program with the Dreamworks Entertainment Corporation, developed a regional healthcare program funded by local government, initiated the Los Angeles Metropolitan Alliance to link low income neighborhoods with each other across the city and upwards to regional solutions, and launched the California State Alliance that links twenty similar groups throughout the state to develop new ideas on environmental policy, government responsibility, and reforms in taxation and public spending.

¹³ “Melinda Gates goes Public,” by Patricia Sellers, www.CNNMoney.com, January 7th 2008.

¹⁴ “Strategic Concepts in Organizing and Policy Education.” See www.scopela.org.

Make the Road New York opened its doors in 1997 in the Bushwick section of Brooklyn to build capacity among immigrant welfare recipients, but soon expanded its focus to combat the systemic economic and political marginalization of residents throughout New York. Since then it has collected over \$1.3 million in unpaid wages and benefits for low income families through legal advocacy and secured public funding for a student success center to meet the needs of immigrants.¹⁵ Both organizations are part of the Pushback Network, a national collaboration of community groups in six states that is developing a coordinated strategy to change policy and power relations in favor of those they serve from the grassroots up.

Outside the U.S. there are lots of similar examples. Take SPARC (Society for Promotion of Area Resource Centers) in Mumbai, India, which has been working with slum dwellers since 1984 to build their capacities to fight for their rights and negotiate successfully with local government and banks.¹⁶ SPARC—whose motto is “breaking rules, changing norms, and creating innovation”—sees inequality as a “political condition,” the result of a “deep asymmetry of power between different classes,” not simply “a resource gap.”¹⁷ SPARC has secured large scale improvements in living conditions (including over 5,500 new houses, security of tenure for many more squatters, and a “zero-open defecation campaign”), but just as importantly, it has helped community groups to forge strong links with millions of slum dwellers elsewhere in India and across the world through Shack Dwellers International (SDI), a global movement that has secured a place for the urban poor at the negotiating table when policies on housing are being developed by the World Bank and other powerful donors.

Housing is just a concrete expression of a much deeper set of changes that are captured in the following quotation from Arif Hasan, who works with SDI from his base in Karachi, Pakistan. “Traveling in different parts of the city as I did,” he writes after the unrest that followed Benazir Bhutto’s assassination in December 2007, “you see nothing but burnt-out cars, trucks and trailers, attacked universities and schools, destroyed factories and government buildings and banks, petrol pumps and ‘posh’ outlets—all symbols of exploitation: institutions where the poor cannot afford to study; businesses where they cannot get jobs; government offices where they have to pay bribes and where they are insulted and abused. This is not a law and order situation, but an outpouring of grief and anger

¹⁵ Make the Road by Walking, email to supporters, December 6th 2007. See www.maketheroadny.org.

¹⁶ “Society for the Promotion of Area Resource Centers.” See www.sparcindia.org.

¹⁷ SPARC Annual Report 2005 pp 3 and 16. The Gates Foundation has promised to invest in SDI but there are concerns (on both sides) about whether they will stick with the slow process of institutional development that underpins SPARC’s ability to lever large-scale improvements in housing and sanitation, and not just invest directly in the capital required to provide these things.

against corruption, injustice and hunger.... This is a structural problem that requires a structural solution.”¹⁸

Groups like these do deliver tangible outputs like jobs, health care and houses, but more importantly they change the social and political dynamics of places in ways that enable whole communities to share in the fruits of innovation and success. Key to these successes has been the determination to change power relations and the ownership of assets, and put poor and other marginalized people firmly in the driving seat, and that’s no accident. Throughout history, “it has been the actions of those most affected by injustice that have transformed systems and institutions, as well as hearts and minds,” as the Movement Strategy Center in Oakland, California puts it.¹⁹

This is why a particular form of civil society is vital for social transformation, and why the world needs more civil society influence on business, not the other way around—more cooperation not competition, more collective action not individualism, and a greater willingness to work together to change the fundamental structures that keep most people poor so that all of us can live more fulfilling lives. Would philanthrocapitalism have helped to finance the civil rights movement in the U.S.? I hope so, but it wasn’t “data-driven,” it didn’t operate through competition, it couldn’t generate much revenue, and it didn’t measure its impact in terms of the numbers of people who were served each day, yet it changed the world forever.

If I was ever invited to address the philanthrocapitalists, what would I say? First, a big vote of thanks for taking up the challenge of “entrepreneurship for the public good.”²⁰ Without your efforts, we wouldn’t be having this debate, and the world would be further from the commercial and technological advances required to cure malaria and get micro-credit to everyone who needs it. But second, don’t stop there. Please use your wealth and influence to lever deeper transformations in systems and in structures, learn much more rigorously from history, measure the costs as well as the benefits of your investments, be open to learning from civil society and not just teaching it the virtues of business thinking, and re-direct your resources to groups and innovations that will change society forever, including the economic system that has made you rich. That’s not much to ask for, is it?

Venture philanthropists and social entrepreneurs are pragmatic people, with little appetite, I’ll wager, for lectures in political science; they could argue that action is vital in the here and now while we move slowly along the path to social transformation. That’s fair enough, I think. Pragmatism is a feature of civil society

¹⁸ Cited in an email from Joel Bolnick to SDI members dated January 9th 2008.

¹⁹ See www.movementstrategy.org.

²⁰ Cited in K. Schneider, “Win Fabulous Prizes, All in the Name of Innovation” *The New York Times*, November 12th 2007.

too, and neither wants to make the “best the enemy of the good.” Small victories are still victories, and a vaccine against HIV/AIDS would be a very big victory indeed. “I don’t believe there is a for-profit answer to everything,” says Pierre Omidyar, “but if for-profit capital can do more good than it does today, foundations can concentrate their resources where they are most needed,” a welcome dose of common sense in a conversation dominated by hype.²¹ No one is forcing Omidyar, Gates, Skoll and the rest to give billions of dollars away (they could have kept it for themselves). So how can we cooperate in moving forward together?

The first thing we need to do is to pause, take a very deep breath, and create space for a different kind of conversation. Philanthrocapitalism is seductive for many different reasons—the allure of a new magic bullet, set against the reality of plodding along, step by step, in the swamps of social change; the glitz and glamour of gaining entry to a new global elite; and the promise of maintaining a system that made you rich and powerful while simultaneously pursuing the public good. We all want our place in history as the ones who saved the world, but this is surely immature. Will “social enterprise end up intoxicated by virtue, breathing its own exhaust,” as a report from Sustainability concluded?²² At least Bill Clinton’s enthusiasm is tempered by some boundaries: “What I long to do,” he says, “is to see this [approach] integrated into every philanthropic activity from now on, *where it is appropriate*,”²³ and “where it’s appropriate” may be a small but not unimportant part of the picture as a whole. I think it is time to launch a “slow food movement” for the philanthrocapitalists, in order to help them savor the complexities of what’s involved. It’s not that our old ideas about social transformation were perfect; it’s that our new ideas are imperfect too, and almost certainly won’t turn out as planned. There is no place for triumphalism in this conversation.²⁴

What we do need is a good, old-fashioned, full-throated public debate, to sort out the claims of both philanthrocapitalists and their critics, and to inform the huge expansion of philanthropy that is projected over the next forty years. So here’s the \$55 trillion-dollar²⁵ question: Will we use these vast resources to pursue

²¹ Cited in McGray (2007) op. cit.

²² Sustainability (2007) op. cit., p44.

²³ Cited by Rauch (2007) op. cit., p66, my emphasis added; plus see B. Clinton (2007) *Giving*, New York: Knopf, in which he articulates a wider range of avenues in which all of us can participate.

²⁴ Bruce Sievers, one of the few commentators who has criticized philanthrocapitalism in public, often makes this point. See B. Sievers (2001) “If pigs had wings: the appeals and limits of venture philanthropy,” Issues in Philanthropy Seminar, Georgetown University, Washington, DC, November 21st 2001; and *Alliance* (2006) Volume 11 (3), September, p23.

²⁵ Estimates of future giving vary widely, but the latest figures give up to \$27.4 trillion in “charitable bequests,” \$41 trillion in “accumulated assets passed to the next generation,” and \$55.4 trillion in “total charitable donations” in the U.S. between 1998 and 2052. National Philanthropic Trust: Philanthropy Statistics. Available at www.nptrust.org/philanthropy.

social transformation, or just fritter them away in spending on the symptoms? The stakes are very high, so why not organize a series of dialogues between philanthrocapitalists and their critics, on the condition that they shed the mock civility that turns honest conversation into Jell-O. There isn't much point in staying in the comfort zone, forever apart in different camps, like the World Economic Forum and the World Social Forum that take place in splendid isolation each and every year.²⁶ Deep rooted differences about capitalism and social change are unlikely to go away, so let's have more honesty and dissent before consensus, so that it might actually be meaningful when it arrives.

Philanthrocapitalism is the product of a particular era of industrial change that has brought about temporary monopolies in the systems required to operate the knowledge economy, often controlled by individuals who are able to accumulate spectacular amounts of wealth. That same era has produced great inequalities and social dislocations, and past experience suggests that such wealth will be politically unsustainable unless much of it is given away, just as in earlier decades when Ford, Rockefeller and Carnegie found themselves in much the same position.

Effective philanthropists do learn from their experience and the conversations they have with others. Melinda Gates, for example, describes this process well: "Why do something about vaccines but nothing about clean water? Why work on tuberculosis but not on agricultural productivity? Why deliver mosquito nets but not financial services?"²⁷ Of course, there is another set of questions waiting to be answered at a much deeper level—why work on agricultural productivity but not on rights to land? Why work on financial services but not on changing the economic system? But these are challenges that face all foundations and they are best addressed together, since all of us have much to learn from others. Rather than assuming that business can fix philanthropy, why not put all the questions on the table and allow all sides to have their assumptions tested? Who knows, this kind of conversation might lead us far beyond the limitations of the current debate and closer to that ultimate prize of an economic system that can sustain material progress with far fewer social, personal and environmental costs.

²⁶ Some efforts have been made to link the two via video-conference, but not with any great success.

²⁷ Melinda French Gates, Remarks to the Annual Conference of the Council on Foundations, Seattle, 2007.

ARTICLE

Defending Civil Society

International Center for Not-for-Profit Law

**World Movement for Democracy Secretariat at the
National Endowment for Democracy**

Executive Summary

Civil society is facing serious threats today across the globe. An offensive against the spread of democracy has spread and intensified. This ongoing backlash against democracy has been characterized by a pronounced shift from outright repression of democracy, human rights and civil society activists and groups to more subtle governmental efforts to restrict the space in which civil society organizations (“CSOs”)—especially democracy assistance groups—operate. Too many regimes still employ standard forms of repression, from activists’ imprisonment and organizational harassment to disappearances and executions. But in other states—principally, but not exclusively authoritarian or hybrid regimes—these standard techniques are often complemented or pre-empted by more sophisticated measures, including legal or quasi-legal obstacles such as **barriers to entry** to discourage or prevent the formation of organizations, and **barriers to resources** to restrict organizations’ ability to secure the resources required to carry out their activities.

Governments have tried to justify and legitimize such obstacles as necessary to enhance accountability and transparency of non-governmental organizations (“NGOs”); to harmonize or coordinate NGO activities; to meet national security interests by countering terrorism or extremism; and/or in defense of national sovereignty against foreign influence in domestic affairs. This report exposes such justifications as rationalizations for repression, and, furthermore, as violations of international laws and conventions to which the states concerned are signatories.

The report articulates well-defined **international principles protecting civil society** (see below), already embedded in international law, including norms and conventions that regulate and protect civil society from government intrusion. These principles include: the right of NGOs to entry (that is, the right of individuals to form and join NGOs); the right to operate to fulfill their legal purposes without state interference; the rights to free expression and to communication with domestic and international partners; the right to seek and secure resources, including the cross-border transfer of funds; and the state’s positive obligation to protect NGO rights.

The report concludes by calling upon:

- international organizations and governments to endorse the report and the principles it identifies;

- civil society organizations to conduct national and regional discussions to mobilize support for the reform of legal frameworks governing them; and
- democracy assistance organizations to distribute and promote the report and its recommendations to its partners and grantees.

International Principles Protecting Civil Society

To protect civil society organizations from the application of the legal barriers described in this paper, this section seeks to articulate principles that govern and protect CSOs from repressive intrusions on the part of governments.

Principle 1: The Right to Entry (Freedom of Association)

(1) International law protects the right of individuals to form, join and participate in civil society organizations.

(a) Broad scope of right. Freedom of association protects individuals in their right to establish a wide range of civil society forms, including trade unions, associations, and other types of NGOs.

(b) Broadly permissible purposes. International law recognizes the right of individuals, through NGOs, to pursue a broad range of objectives. Permissible purposes generally embrace all 'legal' or 'lawful' purposes and specifically includes the promotion and protection of human rights and fundamental freedoms.

(c) Potential founders. The architecture of international human rights is built on the premise that all persons, including non-citizens, enjoy certain rights, including freedom of association.

(2) Individuals are not required to form a legal entity in order to enjoy the freedom of association.

(3) International law protects the right of individuals to form an NGO as a legal entity.

(a) The system of recognition of legal entity status, whether a "declaration" or "registration/incorporation" system, must ensure that the process is truly accessible, with clear, speedy, apolitical, and inexpensive procedures in place.

(b) In the case of a registration/incorporation system, the designated authority must be guided by objective standards and restricted from arbitrary decision-making.

Principle 2: The Right to Operate Free from Unwarranted State Interference

(1) Once established, NGOs have the right to operate free from unwarranted state intrusion or interference in their affairs. International

law creates a presumption against any state regulation that would amount to a restriction of recognized rights.

(a) Interference can only be justified where it is prescribed by law, to further a legitimate government interest, and necessary in a democratic society. States must refrain from restricting freedom of association through vague, imprecise, and overly broad regulatory language.

(b) It is incumbent upon the state to ensure that applicable laws and regulations are implemented and enforced in a fair, apolitical, objective, transparent and consistent manner.

(c) Involuntary termination or dissolution must meet the standards of international law; the relevant government authority should be guided by objective standards and restricted from arbitrary decision-making.

(2) NGOs are protected against unwarranted governmental intrusion in their internal governance and affairs. Freedom of association embraces the freedom of the founders and/or members to regulate the organization's internal governance.

(3) Civil society representatives, individually and through their organizations, are protected against unwarranted interference with their privacy.

Principle 3: The Right to Free Expression

Civil society representatives, individually and through their organizations, enjoy the right to freedom of expression.

(a) Freedom of expression protects not only ideas regarded as inoffensive or a matter of indifference but also those that offend, shock or disturb, since pluralism is essential in a democratic society. NGOs are therefore protected in their ability to speak critically against government law or policy, and to speak favorably for human rights and fundamental freedoms.

(b) Interference with freedom of expression can only be justified where it is prescribed by law, in the interests of a legitimate government interest, and necessary in a democratic society. States must refrain from restricting freedom of expression through vague, imprecise, and overly broad regulatory language.

(c) Stemming from the well-recognized protection of individuals to freedom of assembly, NGO representatives have the right to plan and/or engage in the advocacy of legal aims, including human rights and fundamental freedoms.

Principle 4: The Right to Communication and Cooperation

(1) Civil society representatives, individually and through their organizations, have the right to communicate and seek cooperation with

other elements of civil society, the business community, international organizations and governments, both within and outside their home countries.

(2) Individuals and NGOs have the right to form and participate in networks and coalitions in order to enhance communication and cooperation, and to pursue legitimate aims.

(3) Individuals and NGOs have the right to use the Internet and web-based technologies to communicate more effectively.

Principle 5: The Right to Seek and Secure Resources

Within broad parameters, NGOs have the right to seek and secure funding from legal sources. Legal sources must include individuals and businesses, other civil society actors and international organizations, inter-governmental organizations, as well as local, national, and foreign governments.

Principle 6: State Duty to Protect

(1) The State has a duty to promote respect for human rights and fundamental freedoms, and the obligation to protect the rights of civil society. The State's duty is both negative (i.e., to refrain from interference with human rights and fundamental freedoms), and positive (i.e., to ensure respect for human rights and fundamental freedoms).

(2) The State duty includes an accompanying obligation to ensure that the legislative framework relating to freedom of association and civil society is appropriately enabling, and that the necessary institutional mechanisms are in place to ensure the recognized rights to all individuals.

Introduction

Recent years have witnessed proliferating efforts by various governments to restrict the space in which civil society organizations in general and democracy assistance groups in particular operate. In response, the World Movement for Democracy, under the leadership of its International Steering Committee and in partnership with the International Center for Not-for-Profit Law (ICNL), is undertaking a project to identify and promulgate a set of international principles, already rooted in international law, that should inform government-civil society relations.

Adherence to these principles—which include the rights of citizens to associate in nongovernmental organizations (NGOs), to advocate, and to receive assistance from within and beyond national borders—is indispensable for advancing, consolidating, and strengthening democracy. However, these are precisely the principles that an increasing number of governments, including signatories to the appropriate international laws and conventions in which the principles are enshrined, are violating in the ongoing backlash against democracy.

With this report, the first phase of the Defending Civil Society project and drafted in partnership with the ICNL, the World Movement for Democracy begins an international campaign to promote the adoption of the principles the report articulates. Through this campaign, the World Movement - a global network of democracy and human rights activists, practitioners, scholars, donors, and others engaged in democracy promotion - also seeks to strengthen international solidarity among democracy-assistance, human rights and related NGOs at a precarious moment for the work they undertake.

To help advance the promotion and adoption of these internationally-recognized principles that protect civil society (hereafter ‘international principles’), the World Movement has assembled an Eminent Persons Group that includes former Canadian Prime Minister Kim Campbell, former Brazilian President Fernando Henrique Cardoso, His Holiness the Dalai Lama, former Czech President Vaclav Havel, former Malaysian Deputy Prime Minister Anwar Ibrahim, and Egyptian scholar and activist Saad Eddin Ibrahim, and Archbishop Desmond Tutu.

Following the initial drafting of this report, the World Movement secretariat organized five regional consultations during May-August 2007. These consultations—held in Casablanca, Morocco; Lima, Peru; Kiev, Ukraine; Bangkok, Thailand; and Johannesburg, South Africa—enabled grassroots activists, independent journalists, democracy assistance practitioners, scholars, and others to review interim drafts of the report, offer their comments and recommendations for the final version, and suggest strategies for advancing the international principles. Many of the recommended changes and suggested strategies have been incorporated into the report. In addition, as a result of the regional consultation in Casablanca, a specific Middle East/North Africa report on the regional environment for civil society work will be issued, featuring ten country reports prepared by local civil society leaders. This regional report will be available in Arabic and English for distribution and posting on Web sites throughout the region.

Rationale for the Defending Civil Society Project. We have recently witnessed a backlash against democracy on the part of regimes that seek to frustrate, undermine, or prohibit the activities of democratic and civil society groups and individual activists. In some post-Soviet states, for instance, authoritarian tendencies have revived, fueled by nationalism, a cold war legacy of fear of and hostility to “foreign enemies,” populist exploitation of social inequalities, and the imposition of non-democratic measures by democratically elected leaders.

Outside the post-Communist sphere, “semi-authoritarian” or “hybrid” regimes have stepped up measures to curb democratic activities they consider threatening. As examples in the following pages reveal, democratic space has been eroded by curtailing fundamental freedoms, disregarding the rule of law, suppressing civil society organizations and stifling independence of the media. Such regimes tend to adopt relatively sophisticated measures to constrain independent NGOs, using ostensibly technical or administrative regulations to restrict civil society groups. Of course, in regimes like Cuba, Turkmenistan or North Korea, more crudely familiar repressive techniques are also deployed.

Many regimes are imposing controls on civil society under the pretexts of ensuring security, political stability, and non-interference in the country's internal affairs. Governments place restrictions on NGO activities, constrain their work, and harass and intimidate civil society activists in violation of internationally accepted principles of freedom. NGOs that advocate for human rights and democracy, including many that work in conflict zones, are particularly targeted. Regimes justify such actions by accusing independent NGOs of treason, espionage, subversion, foreign interference, or terrorism. These are but rationalizations, however; the real motivation is almost always political. These actions are not about defending citizens from harm but rather protecting those in power from scrutiny and accountability.

Semi-authoritarian governments are developing tools to suppress and silence independent groups, from manifestly restrictive laws and regulations to quietly burdensome registration and tax requirements. Charges leveled against NGOs are usually vague, such as "disturbing social order" or "undermining security," and, to make matters worse, implementation and enforcement of such charges are arbitrary, fostering a climate of self-censorship and fear.

While authoritarian, hybrid or semi-authoritarian regimes pose growing challenges to democracy advocates and their international supporters, the international community cannot ignore those authoritarian regimes that were largely unaffected by the Third Wave of democracy and continue to repress all forms of independent political activity. Many of the examples in this report, provided in the context of the recent backlash, reflect measures that some governments have imposed for decades. Recent events in Burma, for instance, remind us of the closed societies in East Asia and elsewhere where people are denied the most basic human rights. Other governments, at least temporarily, have married economic progress with strict political control, serving as models for rulers who want both the benefits of economic openness and a monopoly of political power. Whether that combination is sustainable is an open question, but in an age of global communications and transparency, such situations offer both challenges and opportunities.

Outline of the report. This report is divided into four sections: Legal Barriers to Civil Society Organizations; Government Justifications for Legal Barriers; International Principles Protecting Civil Society; and Next Steps: Building Solidarity and Promoting the Principles. In the first section, the legal barriers are discussed within several categories:

- *barriers to entry*, particularly the use of law to discourage, burden, or prevent the formation of organizations;
- *barriers to operational activity*, or the use of law to prevent organizations from carrying out their legitimate activities;
- *barriers to speech and advocacy*, or the use of law to restrict NGOs from engaging in the full range of free expression and public policy engagement; and

- **barriers to resources** or the use of law to restrict the ability of organizations to secure the financial resources necessary to carry out their work.

Examples are provided to elucidate each category in a nuanced way. We have not sought to provide a comprehensive account of regimes taking measures to implement such restrictions. The examples provided are intended to be illustrative of the challenges NGOs face in a wide—and widening—range of countries. In addition, the authors of the report fully recognize that there are significant variations in the challenges civil society confronts within regions and from one region to another. The Middle East/North Africa regional report mentioned above, for example, aims to describe the differences among the countries in that region regarding the legal environments for civil society activity. We encourage efforts in other regions to conduct similar surveys.

The second section of the report briefly surveys governments' justifications for establishing legal barriers. Again, the examples are not meant to be comprehensive but to illustrate the ways in which such justifications serve to deflect criticism by obscuring governments' intentions. This section of the report is instructive in the ways in which such proffered justifications can be analyzed and, for the most part, rejected.

The third and fundamental section of the report, on the international principles protecting civil society, articulates the rights of civil society organizations that are being systematically violated. Not surprisingly, these principles and rights correspond to the legal barriers discussed in the first section of the report. They include:

- the right to entry (or freedom of association);
- the right to operate free from government interference;
- the right to free expression;
- the right to communication and cooperation;
- the right to seek and secure resources; and,
- the state's duty to protect or promote respect for human rights and fundamental freedoms and its obligation to protect the rights of NGOs.

To ensure a full understanding of these principles and rights in order to have the best chance for promoting adherence to them, this section provides specific citations of documents and other references reflecting their roots in international law and longstanding international acceptance. The articulation of these principles and rights is meant to augment other efforts to delineate such principles.

For instance, the International Labor Organization (ILO) long ago issued its Declaration on Fundamental Principles and Rights at Work. More recently, the European Parliament's Foreign Affairs Committee expressed its concern about attacks on human rights defenders, insisting that the European Council and European Commission raise the situation of human rights defenders systematically in all political dialogues, while the U.S. State Department formulated ten principles for informing government treatment of NGOs, including the right to function in an environment free from harassment, intimidation and discrimination; to receive financial support from domestic, foreign, and

international entities; and suggesting that laws regulating NGOs be applied apolitically and equitably.

The final section, on ways to use the report to advance the principles it articulates provides a short list of recommended actions that civil society organizations and others can take, including actions to enlist the help of the international community, actions that civil society organizations can implement cooperatively, and actions specifically aimed at democracy assistance organizations. The World Movement will be facilitating a number of opportunities for discussing these and other suggested actions in greater detail.

About the authors. The International Center for Not-for-Profit Law (ICNL) is the leading source of information on the legal environment for civil society and public participation. Since 1992, ICNL has served as a resource to civil society leaders, government officials, and the donor community in over 90 countries. More information about ICNL can be found at: www.icnl.org. The National Endowment for Democracy (NED) initiated the World Movement for Democracy in 1999 and currently serves as its secretariat. More information about NED can be found at: www.ned.org. Information about the World Movement for Democracy can be found at www.wmd.org. The World Movement for Democracy expresses its deep appreciation to ICNL for its gracious and expert cooperation in the production of this report.

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Legal Barriers to Civil Society Organizations

A disturbingly large number of governments – principally, but not exclusively authoritarian or hybrid regimes - are using legal and regulatory measures to undermine and constrain civil society. Legal constraints fall broadly into five categories:

- barriers to entry;
- barriers to operational activity;
- barriers to speech and advocacy;
- barriers to contact and communication; and
- barriers to resources.

Legal impediments affect a broad range of civil society organizations, regardless of their mission, but in many countries organizations pursuing human rights and democracy are disproportionately affected, if not deliberately targeted.

Legal barriers arise from a variety of sources, including constitutions, legislation, regulations, decrees, court decisions, and other legally binding measures. Moreover, legislation impacting NGOs extends beyond laws specifically designed to govern civil society organizations. Such legislation includes, for example, anti-terrorism or anti-extremism legislation, state security or state secrets legislation, and even regulations affecting Internet use, and access to information and assembly.

Country-specific examples are drawn from testimony given by civil society activists during a series of consultations and discussions, as well as publicly available media sources. The consultations convened NGOs and activists from various regions, identifying barriers to civil society organizations in the Middle East and North Africa (consultation held in Casablanca), Latin America (Lima), Asia (Bangkok), the former Soviet Union (Kiev) and sub-Saharan Africa (Johannesburg). Few citations are provided in order to protect the identity of sources, especially those working in politically hostile environments.

This paper considers not only the law as written but also as applied in practice. Moreover, rather than provide an exhaustive list of offending countries, our aim is to root the legal barriers in real circumstances. We recognize, of course, that summary statements of legal barriers lack the background and context necessary for a fully nuanced understanding of a specific situation. However, the country examples are intended not to provide a detailed understanding of any single barrier or specific country, but rather to illustrate the wide range of barriers being used in countries around the world and to demonstrate, succinctly, how legal barriers constrain civil society.

I. Barriers to Entry

Restrictive legal provisions are increasingly used to discourage, burden and, at times, prevent the formation of civil society organizations. Barriers to entry include:

(1) Limited right to associate. Most directly, the law may limit the right to associate at all, whether in informal groups or as registered legal entities.

- In **Libya**, there is no legally-recognized right to associate.
- In **Saudi Arabia**, only organizations established by royal decree are allowed.
- In **North Korea**, any unauthorized assembly or association is regarded as a collective disturbance, and liable to punishment.

(2) Prohibitions against unregistered groups. In a clear infringement of freedom of association, some governments require groups of individuals to register, and prohibit

informal, unregistered organizations from conducting activities. They often impose penalties on persons engaging with unregistered organizations.

- In **Uzbekistan**, the Administrative Liability Code makes it illegal to participate in the activity of an unregistered organization.
- In **Cuba**, persons involved in unauthorized associations risk imprisonment and/or substantial fines.
- In **Belarus**, state authorities have warned twenty organizations that they have breached the Law on Public Organizations by participating in the unregistered group, the *Assembly of Non-Governmental Organisations* (which has reportedly been denied registration several times)

(3) Restrictions on founders. In some countries, the law limits freedom of association by restricting eligible founders or by requiring difficult-to-reach minimum thresholds for founders.

- In **Turkmenistan**, national-level associations can only be established with a minimum of 500 members.
- In many countries, from **Macedonia** to **Malaysia**, from **Thailand** to **Taiwan**, the law permits only citizens to serve as founders of associations, thereby denying freedom of association to refugees, migrant workers, and stateless persons.
- In addition, in **Qatar**, founders of an association are required not only to be Qatari nationals but also to be of “good conduct and reputation.”

(4) Burdensome registration/incorporation procedures. Many states require NGOs to undergo formal registration, - incorporation, or other similar – procedures (hereinafter “registration”) in order to attain legal entity status, and some make the process so difficult that it effectively prevents NGOs from being registered. Such barriers include a lack of clarity regarding the registration procedures; detailed, complex documentation requirements; prohibitively high registration fees; and excessive delays in the registration process.

- In **Ethiopia and Algeria**, regulations governing the registration process are vague and leave considerable discretion to the registration officials. Consequently, NGOs have had difficulty registering, experiencing long delays, repeated requests for information, and in some cases denial.
- In the **United Arab Emirates**, the government has actively discouraged the creation of human rights organizations by simply not responding to registration applications from such groups, some of whom have been waiting years.
- In **Malaysia**, excessive delays in registering as an NGO (a “society”) compel organizations to opt to register as for-profit companies or partnerships, which thereby prevent these organizations from recruiting members or receiving tax exemptions.
- In **Syria**, only a handful of NGOs closely associated with the regime (in effect, government-organized NGOs, or GONGOs) have successfully navigated the registration process.

(5) Vague grounds for denial. A common legal tool is the use of overbroad, vague grounds for denying registration applications. Compounding the problem, the law may provide no mechanism to appeal the decision.

- In **Bahrain**, according to the law on associations, the government can refuse registration to an organization if “society does not need its services or if there are other associations that fulfill society’s needs in the [same] field of activity.”
- In **Russia**, a gay rights organization was denied registration on the grounds that its work “undermines the sovereignty and territorial integrity of the Russian Federation in view of the reduction of the population.”
- In **Malaysia**, the Societies Act provides that the registrar may not register any local society “which *in the opinion of the Minister* is likely to affect the interests of the security of the Federation or any part thereof, public order or morality,” and “where *it appears to him* that such local society is unlawful under provisions of this Act or any other written law or is likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, good order, or morality in the federation.” (italics added)

(6) Re-registration requirements. In practice, re-registration requirements burden civil society and give the state repeated chances to deny entry to politically disfavored organizations.

- In **Uzbekistan**, in 2004, President Islam Karimov issued a decree requiring local NGOs working on “women’s issues”, which make up 70-80 percent of all NGOs in the country, to re-register with the Ministry of Justice. Organizations that chose not to do so were forced to cease their activities. In addition, the Karimov government imposed a re-registration requirement on previously accredited international organizations.
- In **Rwanda**, civil society work is hampered by the requirement of annual renewal of registration.
- Similarly, in **Zambia**, a newly proposed NGO bill would require NGOs to register annually.

(7) Barriers for international organizations. Some countries use legal barriers specifically to target international organizations, seeking to prevent or impede their operation inside the country.

- In **Jordan**, international organizations may set up branch offices, subject to “any conditions and restrictions which [the Minister of Social Development] imposes.”
- Even more starkly, in some countries, like **Turkmenistan**, registration of foreign organizations is practically impossible.
- In **Uganda**, registration of a foreign organization requires a recommendation from the diplomatic mission in Uganda or a duly authorized government office of the organization’s home country. Prior to registration, the NGO Board (a government

agency within the Ministry of Internal Affairs) must approve its structure, foreign employees, and a plan to replace its foreign employees.

II. Barriers to Operational Activity

Even when NGOs have successfully negotiated the above barriers to entry, the law may subject them to a wide range of constraints to legitimate activities. Such impediments assume many forms.

(1) Direct prohibitions against spheres of activity. In some cases, the law may directly prohibit NGOs from participating in certain spheres of activity.

- The law in **Equatorial Guinea** restricts NGOs from engaging in promoting, monitoring or engaging in any human rights activities and requires government approval for political gatherings involving more than ten individuals.
- Prohibitions are formulated in broad, imprecise, and vague terms, giving considerable discretion to government officials. For example, in **Tanzania**, an International NGO must “refrain from doing any act which is likely to cause misunderstanding” among indigenous or domestic NGOs.
- Laws in several countries prohibit participation in “political,” “extremist” or “terrorist” activity without defining these terms clearly; such vague language allows the state to block NGO activity in legitimate spheres of work (and to brand NGOs or NGO activists as “extremists” or “terrorists”).

(2) Invasive supervisory oversight. The law invites arbitrary interference in NGO activities by empowering governmental bodies to exercise stringent supervisory oversight of NGOs. Invasive oversight may take the form of burdensome reporting requirements, interference in internal management, and mandatory coordination with government policy.

- In **Syria**, the law authorizes state interference in associational activities, by allowing government representatives to attend association meetings and requiring associations to obtain permission to undertake most activities.
- Similarly, in **Russia**, NGO legislation authorizes the government to request any financial, operational, or internal document at any time without any limitation, and to send government representatives to an organization’s events and meetings (including internal business or strategy meetings).
- **Vietnam**’s Decree 88, governing associations, provides for strict control over associations at all levels. Associations registered under Decree 88 are directly linked to government programs, and effectively serve as agencies of government ministries. The government has the right to intervene in all stages of NGO operations, including membership, and it may veto members or introduce members of its own choice.

(3) Government harassment. Poorly drafted laws encourage government harassment through repeated inspections and requests for documentation, as well as the filing of

warnings against NGOs. Indeed, governments also take “extra-legal” actions to harass independent groups.

- In **Egypt**, NGOs are impeded by the extra-legal actions of the security services, who scrutinize and harass civil society activists even though the law does not accord them any such powers.
- In **Belarus**, 78 civil society organizations (CSOs) were forced to cease operations in 2003 due to harassment from government officials. In 2004, the government inspected and issued warnings to 800 others. These inspections have proved successful in disrupting NGOs, preventing them from concentrating on their mission activities.
- In **Cuba**, officials have used the provisions of the Law for the Protection of National Independence and the Economy of Cuba, which outlaws “counterrevolutionary” or “subversive” activities, to harass dissidents and human rights activists.
- Most recently, in **Burma**, after images of the beatings of Buddhist monks and the killing of a Japanese photographer leaked out via the Internet, Burma’s military rulers physically disconnected primary telecommunications cables in two major cities, thereby blocking 85 percent of e-mail service providers and nearly all political-opposition and pro-democracy websites.

(4) Criminal sanctions against individuals. The use of criminal penalties against individuals connected with NGOs can prove a powerful deterrent against NGO activities and freedom of association.

- **Tanzania’s** NGO Act (2002) contains penal provisions for even minor breaches of the Act (e.g., use of an inappropriate registration form is punishable by imprisonment). More disturbingly, the Act places the burden of proof in a criminal trial against office bearers of an NGO not on the prosecution, but on the accused.
- In **Yemen**, the Law Concerning Associations and Foundations includes draconian individual punishments, providing up to six months in prison for individuals who are not members of an NGO but participate in the management or discussions of an NGO’s General Assembly without express approval of the NGO’s Board of Directors, and up to three months in prison for any violation of the Law, no matter how small.
- The **Iranian** government has used “suspended” sentences against civil society activists as a way to avoid international condemnation for imprisoning activists while simultaneously discouraging them from future activism.

(5) Failure to protect individuals and organizations from violence. The conspicuous failure of states to protect individual activists and civil society representatives in the face of threats, intimidation, violent assault and even murder creates a climate of fear that can effectively undermine the strength of civil society.

- In the **Philippines**, since 2001, there have been a rising number of cases of unsolved extra-judicial killings and abductions of human rights and political activists. The government's own Commission on Human Rights estimates the number of victims between 2001 and May 2007 at 403 people – more than one per week.
- In **Colombia**, in a July 2007 incident similar to many others this year, members of a paramilitary group operating openly and in conspicuous communication with the police publicly threatened members of the Peace Community of San José de Apartadó. With no police response to this reported threat, the next day the same paramilitary members murdered one of the group's leaders, constituting the fourth murder of a leader of the Peace Community over a 20 month period.

(6) Termination and Dissolution. The ultimate supervisory tool against NGOs is suspension and/or termination, which is often based on vague or arbitrary legal grounds.

- In **Argentina**, the law permits the termination of an NGO when it is “necessary” or “in the best interests of the public.”
- In **Burma**, the Ministry of Home Affairs issued an order that terminated 24 civic organizations, including the *Free Funeral Services Society* and the *Chinese Traders Association*, founded in 1909; the termination order did not indicate a clear basis for closure, stating only that “the registration of the following 24 associations in Rangoon division has been objected to and that officials need to take necessary action as per the registration law of forming associations.”

(7) Establishment of GONGOs. By legislation or decree, governments have established organizations known as “government-organized NGOs” or GONGOs. GONGOs represent a threat to civil society, when they are used to monopolize the space of civil society-government dialogue, attack legitimate NGOs, defend government policy under the cover of being “independent,” – or otherwise inappropriately reduce the space for truly independent civic activity – all of which make GONGOs difficult to categorize.

III. Barriers to Speech and Advocacy

For many NGOs, particularly those engaged in human rights and democracy promotion, the ability to speak freely, raise awareness and engage in advocacy is fundamental to fulfilling their mission. Legal provisions are used to restrict the ability of NGOs to engage in a full range of free expression, including advocacy and public policy engagement.

(1) Prior restraints and censorship. In some countries, restrictions may come through direct burdens on publication.

- In the **United Arab Emirates**, the Law on Associations (1999) requires associations to follow government censorship guidelines and to receive prior government approval before publishing any material.

- In **Uganda**, NGOs wishing to publish human rights materials must submit them to the Government Media Center for scrutiny before publication.

(2) Defamation laws. Laws of defamation are used to hinder free speech and protect powerful people from scrutiny.

- In 2005-2006, in **Cambodia**, several human rights activists were arrested and detained on defamation charges. Defamation remains a criminal offence for which suspects can be arrested, and subject to fines of up to 10 million riel (US\$2,500) – a sum which most Cambodians would have little chance of paying, thus facing the prospect of imprisonment for incurring debts.

(3) Broad, vague restrictions against advocacy. Broad, ambiguous terms are often used to restrict “political” activities or “extremist” activities, giving the government substantial discretion to punish those whose statements are deemed improper, which in turn serves to chill free expression.

- In **Nepal**, a proposed Code of Conduct would have outlawed “attempts of political influence” on others.
- The **Russian** Law on Extremist Activity (2003) prohibits advocacy of extreme political positions and relies on a vague definition of “extremist activity,” inviting the government to label NGOs that advocate positions counter to the state as extremist.

(4) Criminalization of dissent. In some countries, the law may be so phrased as to potentially criminalize the actual expression of criticism against the ruling regime.

- In **Belarus** in 2005, the Criminal Code was amended to prohibit the dissemination of “dishonest” information about the political, economic, or social situation of the country, with a corresponding penalty of up to six months in prison.
- Similarly, in **Malaysia**, the Anti-Sedition Act prohibits public discussion of certain issues altogether, and provides that the dissemination of false information can lead to imprisonment.
- In **Vietnam**, thousands of individuals are currently detained under catch-all “national security” provisions in the Vietnamese Criminal Code, such as “spying” (article 80, which includes sending abroad documents which are not state secrets “for use by foreign governments against the Socialist Republic of Vietnam”) and article 88, which forbids “conducting propaganda”). In addition, the Law on Publication strictly prohibits the dissemination of books or articles which “disseminate reactionary ideas and culture ...; destroy fine customs and habits; divulge secrets of the Party, State, and security ...; distort history, deny revolutionary achievements, hurt our great men and national heroes, slander or hurt the prestige of organizations, honor and dignity of citizens.”

(5) Restrictions on freedom of assembly. By making it difficult or even illegal for individuals and groups to gather or meet (i.e., to exercise freedom of assembly), the law

directly hinders the ability of NGO representatives, and individuals generally, to plan and/or engage in advocacy activities.

- In **Singapore**, any gathering of five or more people for non-social purposes is considered an illegal assembly.
- The Law on Demonstrations in **Russia** requires notification to the government for any assembly, mass meeting, demonstration, procession or vigil, occurring at any place and time, which involve more than ten people for non-private purposes.
- The government of **Paraguay** has introduced proposals for the modification of the penal code and an Anti-Terrorist Law which could result in the criminalization of social protest.

IV. Barriers to Contact and Communication

Closely related to free expression is the ability of NGOs to receive and provide information, to meet and exchange ideas with civil society counterparts inside and outside their home countries. Here again, the law is being used to prevent or stifle such free exchanges of contact and communication.

(1) Barriers to the creation of networks. Existing legal entities – whether associations, foundations, trade unions or other legal forms – may be limited in their freedom to form groups or establish networks, coalitions or federations, or even prohibited from doing so.

- The NGO Act 2002 in **Tanzania** established a National Council of NGOs as the sole umbrella group for NGOs, compelling all NGOs to belong to the Council, and prohibiting any person or organizations from performing “anything which the Council is empowered or required to do” under the Act. Thus, no other NGO umbrella group can operate lawfully.
- In **Bosnia and Herzegovina**, the government has simply refused for years to register associations of legal entities – i.e., umbrella groups – whether established by trade unions, foundations or other associations.

(2) Barriers to international contact. Governments prevent and inhibit international contact by denying internationals entry into the country, or by hindering nationals from leaving the country. In addition, meetings and events convening nationals and internationals are restricted.

- The 1999 Law on Associations in the **United Arab Emirates**, for example, restricts NGO members from participating in events outside the country without government permission.
- **Egypt**'s Law 84/2002 restricts the right of NGOs to join with non-Egyptian NGOs, and “to communicate with non-governmental or intergovernmental organizations.” Moreover, the law threatens NGOs that interact with foreign organizations with dissolution.

- In **Uzbekistan**, several international NGOs were ordered to terminate their activities due to engaging in “close cooperation and providing assistance to the activists of non-registered organizations.”
- The ability to conduct conferences with domestic and international participants is severely constrained in many countries. In **Algeria**, for example, the Algerian human rights league organized a conference on the “disappeared and invited lawyers and activists from Latin America and other countries.” International participants were denied visas to enter the country, and nationals were blocked from entering the conference. Similarly, in **Tunisia**, a court ordered the Tunisian Human Rights League to desist from holding a human rights conference.
- In **China**, the government closed the China Development Brief (CDB), a publication which helped to connect Chinese nonprofit organizations with potential foreign funders. Termination was based on allegations that the publication conducted unauthorized surveys.

(3) Barriers to communication. Legal barriers affecting the free use of the Internet and web-based communication are becoming increasingly common. The impact of these restrictions reaches far beyond civil society, of course, but civil society leaders and their organizations are prominent targets.

- In **Syria**, seven human rights defenders, who allegedly participated in a pro-democracy discussion group and published articles on the Internet which criticized the lack of democracy and freedom in Syria, were sentenced to between five and seven years' imprisonment on 17 June 2007 on charges of “carrying out activities or making written statements or speeches that expose Syria to the risk of hostile operations.”
- In **Vietnam**, Decision 71 (2004) strictly prohibits “taking advantage of the web to disrupt social order and safety” and obliges users of Internet cafes to provide a photo ID which is kept on file for 30 days. Decree 56/2006 imposes exorbitant fines of up to 30 million VND (2000 USD) for circulating “harmful” information by any means.
- In **Zimbabwe**, the Interception of Communications Act signed into law on 3 August 2007 authorizes the government “to intercept mail, phone calls and emails without having to get court approval.”

(4) Criminal sanctions against individuals. As noted above, criminal laws can be enforced to undermine NGO activity, while states have used criminal sanctions to prevent and discourage free contact and communication.

- In **Angola**, in February 2007, a human rights and anti-corruption campaigner was arrested by armed Angolan police while visiting an oil-rich enclave to meet with local civil society representatives. She has reportedly been charged with espionage.
- In Novorossiysk, **Russia**, in January 2007, nine members of Froda, an NGO that campaigns for ethnic minority rights, were found guilty of holding an unsanctioned “tea” meeting with two German students.

V. Barriers to Resources

The law can be used to restrict the ability of NGOs to secure resources necessary to carry out their activities. Barriers to funding have become increasingly common in recent years, targeting foreign funding in particular.

(1) Prohibitions against funding. Most directly, the law may prohibit the receipt of certain categories of funding altogether.

- In **Eritrea**, the government issued Administration Proclamation No. 145/2005 that broadly restricts the U.N. and bilateral agencies from funding NGOs.
- In the Transnistria region of **Moldova**, the president of the separatist government signed a decree in 2006 prohibiting foreign funding of NGOs registered in Transnistria. Specifically, NGOs were prohibited from receiving funding directly or indirectly from any international or foreign organization, foreign government, Transnistrian organization with a foreign capital share in excess of 20 percent, foreign citizen or stateless person, or any anonymous source.
- An NGO Bill was enacted in **Zimbabwe** in 2004 (though never signed into law) that would have prohibited local NGOs engaged in “issues of governance” from accessing foreign funds.

(2) Advance government approval. More commonly, the law allows the receipt of foreign funding, but requires advance governmental approval.

- Foreign donations to associations in **Algeria** must be pre-approved by the Ministry of Interior.
- **Egyptian** NGOs can be severely punished for collecting or sending funds abroad without official permission, or for affiliating with a foreign NGO network or association without ministry permission. A government decree, citing the foreign funding restriction, recently dissolved the Association for Human Rights Legal Aid.

(3) Routing Funding through the Government.

- **Eritrea**'s Proclamation No. 145/2005 (mentioned above) requires all donor funds to flow through government ministries, allowing NGOs to receive funding only if there is insufficient capacity at the ministry level.
- A draft International Cooperation Bill in **Venezuela** proposes a Fund for Cooperation and International Assistance, which would receive various forms of financial resources, such as financial assistance from foreign governments, international organizations, and public or private institutions. It is not clear how the Fund would be managed or financial resources distributed.
- In **Uzbekistan**, in 2004, the government began requiring that foreign funding for NGOs be channeled through one of two government-controlled banks, thereby allowing the monitoring of all money transfers, and affording the opportunity to

extract part of the money transfer, whether through administrative fees, taxation or corruption. Reportedly, the Uzbek government has used this system to obstruct the transfer of at least 80% of foreign grants to NGOs.

To emphasize, the foregoing list of legal barriers is illustrative, not exhaustive. It should also be noted that the impact of restrictive legal measures goes beyond those organizations or individuals that may be immediately subject to them, and can lead to a chilling of civil society activity more broadly. This, of course, is more difficult to measure.

The aim of this report is to highlight the trend, largely prevalent within authoritarian and semi-authoritarian regimes, towards more intrusive and punitive regulation of civil society organizations. There are some grounds for concern in developed or consolidated democracies even if they do not reflect a manifestly repressive intent. In **Argentina**, for example, the law permits the termination of an NGO when it is “necessary” or “in the best interests of the public”, while in **India**, NGOs have protested that the proposed Foreign Contribution Management Control Bill (FCMC) would further burden foreign funding. Similarly, in the **United States**, civil liberties groups have challenged the recent use of secret, unchallenged evidence to close down charities purportedly associated with terrorists and criticized amendments to the Foreign Intelligence Surveillance Act which expand government authority to monitor private phone calls and emails without warrants if there is “reasonable belief” that one of the parties is overseas. The fact that such issues have been and remain subject to criticism and future revision is a critical factor that sets them apart from countries where political debate is stifled.

Government Justifications for Legal Barriers

The justifications presented by governments for the regulatory backlash against civil society are as diverse as the restrictions themselves. Governments argue that they are necessary to promote NGO accountability, protect state sovereignty, or preserve national security. A key problem is that these concepts are malleable and prone to misuse, providing convenient excuses to stifle dissent, whether voiced by individuals or civil society organizations. As the United Nations has noted:

Under the pretext of security reasons, human rights defenders have been banned from leaving their towns, and police and other members of security forces have summoned defenders to their offices, intimidated them and ordered the suspension of all their human rights activities. Defenders have been prosecuted and convicted under vague security legislation and condemned to harsh sentences of imprisonment.¹

¹ Fact Sheet No. 29: Human Rights Defenders: Protecting the Right to Defend Human Rights, p. 12.

As a result, “[o]rganizations are closed down under the slightest of pretexts; sources of funding are cut off or inappropriately limited; and efforts to register an organization with a human rights mandate are delayed by intentional bureaucracy.”²

This section seeks to identify the government justifications for the regulatory backlash and examine to what extent those proffered justifications are indeed justifiable under international law.

I. Government Justifications ...

In recent years, governments have defended the enactment and/or implementation of legal impediments constraining civil society as seeking to accomplish a range of governmental purposes.

To illustrate:

- Legislation recently enacted or proposed in **Afghanistan, Russia, and Uzbekistan** was premised, at least in part, on the government’s declared intent to enhance NGO accountability and transparency.
- A related but distinct justification is the desire to “harmonize” or “coordinate” NGO activities. The draft NGO Bill in **Nigeria** provided for the “harmonization” of the activities of NGOs, without defining what “harmonization” means. Similarly, the 2006 draft International Cooperation Bill in **Venezuela** sought to subject NGOs to “coordination” and “harmonic integration,” apparently intending to require NGO activities to conform to guidelines established by the President.
- Governments have sought to justify restrictions under the banner of national security, counter-terrorism or anti-extremism. Counter-terrorism was used to justify the need for **Venezuela’s** proposed International Cooperation Bill; according to Deputy Montiel, the Bill would be a “certain blow ... to those disguised NGOs, because in truth they are terrorist organizations, prepared to claw.”³
- Among the most common justifications for the current regulatory backlash against NGOs is preventing interference with state sovereignty, or guarding against foreign influence in domestic political affairs.⁴ **Russian** President Putin has

² *Id.* at p. 13.

³ Human Rights First, Memo on Venezuelan International Cooperation Bill.

⁴ In the 1990s, several prominent Asian leaders articulated a new challenge to the concept of universal human rights based on culture difference. Countries including Singapore, Malaysia and Indonesia began to argue that international human rights law should not necessarily be applied to them because it was Western and did not conform to Asian culture or, as was sometimes argued, Confucianism. This assertion of culture is somewhat similar to articulations of sovereignty. Much has been written about the “Asian values” debate, but we note the ongoing relevance of the issue for several Asian countries. For more information, see Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, available at <http://www.law.nyu.edu/journals/jilp/issues/32/pdf/32e.pdf>.

accused the U.S. and Europe of trying to subvert Russia in part through foreign-funded NGOs.⁵ State-controlled media in **Uzbekistan** have accused the United States of trying to undermine Uzbek sovereignty through the Trojan horse of democratization.⁶ **Zimbabwean** President Robert Mugabe has claimed that Western NGOs are fronts through which Western “colonial masters” subvert the government.”⁷

II. ... Under Scrutiny

The proffered government justifications may be rhetorically appealing, but rhetoric alone is not sufficient to justify interference with freedom of association and the rights of NGOs. Such interference must, instead, find legal justification. Indeed, each restriction on freedom of association, where challenged, is subject to a rigorous legal analytical test, as defined by the International Covenant for Civil and Political Rights (ICCPR) in Article 22⁸:

No restrictions may be placed on the exercise of this right [freedom of association with others] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. 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.

Thus, restrictions on the exercise of freedom of association are justifiable only where they are:

- (a) Prescribed by law;
- (b) In the interests of one of the four legitimate state interests:
 - National security or public safety;
 - Public order;
 - The protection of public health or morals;
 - The protection of the rights and freedoms of others; and
- (c) Necessary in a democratic society.

⁵ Schofield, Matthew, *Putin Cracks Down on NGOs*, February 21, 2007.

⁶ Carothers, Thomas, *The Backlash Against Democracy Promotion*, Foreign Affairs, March/April 2006.

⁷ Id.

⁸ While only binding on signatories to the ICCPR, there are sound arguments for broader applicability. As members of the United Nations, every government has accepted obligations to protect the rights enshrined in international law, including the Universal Declaration and the ICCPR, among others. No state has ever sought to join the UN and reserve against Articles 55 and 56 of the Charter, according to which member states pledge themselves to take joint and separate action to promote “universal respect for and observance of human rights and fundamental freedoms without distinction as to race, sex, language, or religion.” Of the 8 States that abstained from the General Assembly vote in 1948, only Saudi Arabia has not renounced its abstention. (Forsythe, David, *Human Rights Fifty Years After the Universal Declaration*, PS: Political Science and Politics, Vol. 31, No.3 (Sep. 1998).

(1) Prescribed by Law?

In subjecting restrictions on freedom of association to closer scrutiny, the first question is whether or not the interference is *prescribed by law*. This requirement means that restrictions should have a formal basis in law and be sufficiently precise for an individual or NGO to assess whether or not their intended conduct would constitute a breach and what consequences this conduct may entail.⁹ The degree of precision required is that which sets forth clear criteria to govern the exercise of discretionary authority.¹⁰ The Johannesburg Principles assert that “[t]he law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.”¹¹

Some of the legal barriers described above are clearly not prescribed by law. For example, the extra-legal actions of security services, which scrutinize and harass civil society activists, are certainly not prescribed by law. The failure of the state to protect groups and activists from threats of harm or violent acts is a dereliction of duty, not prescribed by law. Furthermore, vague and ambiguous regulatory language authorizing government officials to exercise subjective or even arbitrary decision-making (e.g., laws failing to define “extremism,” which is a ground for dissolution) may also not be prescribed in law, if the application of law is not reasonably foreseeable.

In failing to satisfy even the first prong of the ICCPR test, restrictions on freedom of association can only be deemed to violate international law.

(2) Legitimate Government Concerns?

A second issue is whether or not the restrictions are used *in pursuance of legitimate grounds*. The grounds available are limited to the four government aims listed above. The interpretation of these grounds cannot be expanded to embrace grounds other than those explicitly defined in Article 22(2).

Many of the restrictions identified in the “Legal Barriers” section of this report may not be supported by legitimate government concerns. For example, regulatory measures based on the government intent to “harmonize” or “coordinate” NGO activities are suspect. While “harmonization” and “coordination” may sound innocuous, they may also conceal the government intent to control or direct the activities of NGOs. In such cases, harmonization contradicts the basic premise of freedom of association, namely that people can organize for any legal purpose. It is difficult to see how such a justification

⁹ OSCE/ODIHR, Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations, p. 4.

¹⁰ Id.

¹¹ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Principle 1.1(a). The Johannesburg Principles were developed by a meeting of international experts at a consultation in South Africa in October 1995 and are available at www.article19.org.

can be compatible with the exhaustive list of ICCPR purposes and therefore be deemed legitimate.

A generalized assertion of “national sovereignty” or “state sovereignty” is questionable as a basis for interference with fundamental freedoms, including freedom of association.¹² Claims of state sovereignty are belied by the very states using the justification for restrictions against NGOs when the very same governments use their funding to influence domestic political affairs in other countries.¹³ Hypocrisy abounds when governments accept millions (or in some cases, billions) of dollars of U.S., foreign assistance but then prohibit a local NGO from receiving a grant from a U.S.-based NGO, on the grounds that it might give the U.S. unwarranted influence over domestic political affairs. All duplicity aside, however, the critical point is that international law does not automatically recognize generalized assertions of “state sovereignty” as a justification to infringe fundamental rights and freedoms.¹⁴

Assertions of national security or public safety may, in certain circumstances, constitute a legitimate state aim. But states may not enact whichever measures they deem appropriate in the name of national security, public safety, or counter-terrorism.¹⁵ Claims of national security shall be construed restrictively as justifying measures limiting certain rights *only when* they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.¹⁶

¹² See Neier, Aryeh, Open Society Institute, “Asian Values vs. Human Rights”, available at <http://www.nancho.net/fdlap/fdessay2.html>, where the conflict between Asian values and fundamental human rights is questioned.

¹³ See *The Backlash against Democracy Assistance*, Report prepared by the National Endowment for Democracy, June 8, 2006, p. 12 (The Russian Duma, in November 2005, allocated 500 million rubles (\$17.4 million) to “promote civil society” and defend the rights of Russians in Baltic States. Venezuela has reportedly invested considerable sums in supporting Cuba, subsidizing the election campaign of Bolivia’s president Evo Morales, and funding other radical or populist groups in Latin America.)

¹⁴ Please note the following discussion regarding the limitations on the use of the national security exception. These same arguments are presumably applicable to the state sovereignty claim.

¹⁵ *Izmir Savas Karsitlari Dernegi & Others v. Turkey*, European Court of Human Rights, Application no. 46257/99, 2 March 2006, at pp. 36, 49-50 (the case is available only in French).

¹⁶ OSCE/ODIHR, *Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations*, p. 5, drawing on criteria from the “Siracusa Principles” [United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1985/4 (1985)] adopted in May 1984 by a group of international human rights experts convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Sciences. Though not legally binding, these principles provide an authoritative source of interpretation of the ICCPR with regard to limitations clauses and issue of derogation in a public emergency.

In sum, many legal barriers amount to restrictions not linked to legitimate state aims and are therefore insupportable. Where restrictions on freedom of association are both prescribed by law and in the interest of legitimate state purposes, we must then turn to the final prong of the analysis.

(3) Necessary in a Democratic Society?

Legitimate government concerns, in and of themselves, do not justify interference with freedom of association, unless that interference is “necessary in a democratic society.” Stated differently, restrictions prescribed by law and amounting to interference with freedom of association cannot be justified merely because they are linked with legitimate government interests; they must also be necessary in a democratic society. The “necessary” test implies that any measures must be proportionate to the legitimate aim pursued, and only imposed to the extent which is no more than absolutely necessary; there must be a pressing social need for the interference.¹⁷

To determine whether government interference is necessary, it is important to consider whether or not there are less intrusive means available to accomplish the desired end. For example, the use of government supervision to disrupt the activity of NGOs (through government attendance at the internal meetings of NGOs or the requirement of advance government approval to engage in human rights activities) certainly amounts to interference with freedom of association. Although prescribed by law, and at least arguably linked to a legitimate government interest (public order or the protection of the rights and freedoms of others), such invasive government actions cannot be considered necessary in a democratic society. Indeed, a number of countries have developed less intrusive means to accomplish the same ends.

Thus, even if restrictions are implemented in pursuance of legitimate government aims, they will be deemed violations of international law if not necessary in a democratic society. Most of the legal barriers listed in this paper are insupportable on this basis. Put simply, legitimate state interests can never justify the use of disproportionate constraints, such as:

- arrest of individuals simply for participating in the activities of an unregistered organization;
- the restriction of the right to register an NGO to citizens only;
- denial of registration to an NGO dedicated to cultural preservation of a minority group or to human rights;
- granting of unlimited authority to the state to inspect NGO premises or attend any NGO meeting or event;
- harassment, arrest and imprisonment of peaceful critics of the government;
- closure of international NGOs for engaging in peaceful, lawful activities;
- arrest of local NGO representatives for meeting with foreign students;

¹⁷ OSCE/ODIHR, *Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations*, p. 4.

- requirement that NGOs receive advance permission from the state before meeting or participating in foreign NGO networks; and/or
- placement of stifling restraints on the ability to access resources.

To consider the legality of each legal barrier cited in this paper is beyond the scope of this inquiry. On the contrary, it is the state's obligation to demonstrate that the interference passes scrutiny under the foregoing analytical framework.¹⁸ Unless the state is able to show that the restriction at issue is prescribed by law, in the interest of legitimate government aim(s) and necessary in a democratic society, then that restriction is not justified.

International Principles Protecting Civil Society

To protect civil society from the regulatory barriers described in this paper, this section seeks to articulate principles that govern and protect civil society – and in particular, NGOs – from repressive intrusions of governments. Tracking the five clusters of legal barriers, the principles are designed to ensure that states honor:

- (1) the right of NGOs to entry (that is, the right of individuals to form and join NGOs);
- (2) the right to operate to fulfill their legal purposes without state interference;
- (3) the right to free expression;
- (4) the right to communication with domestic and international partners; and
- (5) the right to seek and secure resources.

Finally, these principles underscore

- (6) the state's positive obligation to protect the rights of NGOs.

I. The Right to Entry (Freedom of Association)

International law protects the right of individuals to form, join and participate in civil society organizations.

(1) Right to Form, Join and Participate in a CSO

The rights of civil society are rooted, in part, in the concept of freedom of association as guaranteed by the Universal Declaration of Human Rights¹⁹, the International Covenant for Civil and Political Rights (ICCPR)²⁰, the International Covenant on Economic Social and Cultural Rights (ICESCR)²¹, and a substantial list of other human rights conventions

¹⁸ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Principle 1(d): "The burden of demonstrating the validity of the restriction rests with the government."

¹⁹ Adopted by General Assembly Resolution 217a (III) of 10 December 1948. Source: <http://www.ohchr.org/english/about/publications/docs/fs2.htm>.

²⁰ Entry into force 23 March 1976; adopted by the General Assembly in Resolution 2200A (XXI) of 16 December 1966. Source: <http://www.ohchr.org/english/law/ccpr.htm>.

²¹ Entry into force 3 January 1976; adopted by the General Assembly in Resolution 2200A (XXI) of 16 December 1966. Source: http://www.unhcr.ch/html/menu3/b/a_ceschr.htm

and declarations²². Freedom of association involves the right of individuals to interact and organize among themselves to collectively express, promote, pursue and defend common interests.²³

(a) *Broad scope of right.* Freedom of association broadly protects the formation of a wide range of civil society forms.

- The Universal Declaration of Human Rights, Article 23(4), states that "Everyone has the right to form and to join trade unions for the protection of his interests." Article 22 of the ICCPR, in defining the right to freedom of association, specifically mentions trade unions, as does Article 8 of the ICESCR. The International Labor Organization's 1998 *Declaration on Fundamental Principles and Rights at Work* is particularly significant because it grounds trade union rights in the basic, democratic, political right of freedom of association.
- The Universal Declaration of Human Rights, Article 20(1), states that "Everyone has the right to freedom of peaceful assembly and association." Article 22 of the ICCPR, while making specific reference only to trade unions, protects the right to form and join any associative group or membership organization.²⁴ Indeed, the European Court of Human Rights, in interpreting virtually identical language in the European Convention for the Protection of Human Rights and Fundamental Freedoms²⁵, has held specifically that freedom of association broadly embraces the right of individuals to form or join associations, political parties, religious organizations, trade unions, employer associations, companies, and various other forms of association.²⁶
- The U.N. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights

²² These include, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the African Charter on Human and People's Rights, the American Convention on Human Rights, the Arab Charter on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

²³ Report submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178, p. 12.

²⁴ The ICCPR Human Rights Committee (established under Article 28 of the ICCPR), in expressing concern over Belarus, reiterated that "the free functioning of non-governmental organizations is essential for protection of human rights." ICCPR, A/53/40, vol. I (1998) 26 at para. 155.

²⁵ Entry into force 3 September 1953; adopted 4 November 1950 by the members of the Council of Europe, Rome. Source: <http://conventions.coe.int/Treaty/en/Summaries/Html/005.htm>.

²⁶ See *Sidiropoulos and others v. Greece*, European Court of Human Rights, 10 July 1998, Reports of Judgments and Decisions, 1998-IV, par. 40 ("The Court points out that the right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions.") See also *Liebscher and Hubl v. Austria*, no. 25710/94, European Commission on Human Rights, 12 April 1996 (Article 11 is also applicable to companies, regardless of whether they were founded for economic purposes or not.)

and Fundamental Freedoms (hereinafter, “Defenders Declaration”)²⁷, adopted by the General Assembly in 1998, states that “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.”²⁸ In recognizing that individuals can form NGOs in addition to “associations,” it implicitly recognizes that NGOs can be membership based or non-membership based. This is significant in that many of the organizations engaged in civil society support work are foundations, not-for-profit companies, or other non-membership forms.²⁹

(b) *Broadly permissible purposes.* International law recognizes the right of individuals, through NGOs, to pursue a broad range of objectives. Permissible purposes generally embrace all ‘legal’ or ‘lawful’ purposes and emphatically includes the promotion and protection of human rights and fundamental freedoms.

- The Inter-American Commission on Human Rights (IACHR) has stated that freedom of association is the right to join with others “for the common achievement of a legal goal.”³⁰
- The Council of Europe is even more explicit on this point: “NGOs should be free to pursue their objectives, provided that both the objectives and the means employed are consistent with the requirements of a democratic society. NGOs should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law.”³¹

²⁷ Adopted by the General Assembly in Resolution 53/144 of 9 December 1998. Source: <http://www.ohchr.org/english/law/freedom.htm>.

²⁸ Like the 1948 Universal Declaration, the Defenders Declaration, as a General Assembly Resolution, is not legally binding. Significantly, however, it contains a series of principles and rights that are based on human rights standards enshrined in other international instruments and was adopted by consensus—therefore representing a strong commitment by states to its implementation.

²⁹ Both the US State Department and the Council of Europe have recognized the importance of NGOs in all their forms, and not only associative groups. The *Guiding Principles on Non-Governmental Organizations* (issued by the US State Department on December 14, 2006) state, for example, “Individuals should be permitted to form, join and participate in NGOs of their choosing in the exercise of the rights to freedom of expression, peaceful assembly and association.” The Committee of Minister of the Council of Europe issued a Recommendation relating to the legal status of NGOs in Europe in October 2007, which states in section I (#2) that “NGOs encompass bodies or organisations established both by individuals persons (natural or legal) and by groups of such persons. They can be either membership or non-membership based.”

³⁰ See Inter-American Commission on Human Rights, Advisory Opinion OC-5/85 of November 13, 1985, separate opinion of Judge Rafael Neito-Navia.

³¹ See Council of Europe, *Fundamental Principles*, Strasbourg, 13 November 2002, p. 3 (#10). In addition, the European Court of Human Rights has held states in violation of Article 11 (freedom of association) for denying its protection to associations with stated goals of the promotion of regional traditions (*Sidiropoulos v. Greece*, 10 July 1998, Reports of Judgments and Decisions, 1998-IV), of achieving the acknowledgement of the Macedonian minority in Bulgaria (*Stankov and the United Macedonian Organization Ilinden v. Bulgaria*, no. 29221/95 and 29225/95, ECHR 2001-IX).

- Significantly, as recognized by the U.N. Defenders Declaration (Article 1, 5), NGOs must be free to promote and protect human rights and fundamental freedoms.

(c) *Potential founders.* The architecture of international human rights is built on the premise that all persons, including non-citizens, enjoy certain rights, including freedom of association.

- The Universal Declaration of Human Rights recognizes this principle in Article 2(1): “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind...”
- The ICCPR, in Article 2(1), similarly embraces non-citizens by requiring states to ensure rights to “all individuals within its territory and subject to its jurisdiction.”
- The Human Rights Committee adopted General Comment No. 15 in 1994, which explained, in relevant part, that “the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness; and that “Aliens receive the benefit of the right of peaceful assembly and of freedom of association.”

(2) Right to Associate Informally³²

It is widely recognized that freedom of association includes the right to associate informally, that is, as a group lacking legal personality. Freedom of association cannot be made dependent on registration or legal person status. That NGOs may be formed as legal entities does not mean that individuals are *required* to form legal entities in order to exercise their freedom of association. On the contrary, freedom of association guarantees are implicated when a gathering has been formed with the object of pursuing certain aims and has a degree of stability and thus some kind of institutional (though not formal) structure.³³ National law can in no way result in banning informal associations on the sole ground of their not having legal personality.³⁴

³² By “informally,” we are referring to the lack of legal personality or legal entity status. We recognize that some informal groups may actually adopt highly formalized structures for their activities.

³³ These attributes separate gatherings protected by freedom of association from mere gatherings of people wishing to share each other’s company, or transient demonstrations, which are separately protected by the freedom of assembly. See McBride, Jeremy, *International Law and Jurisprudence in Support of Civil Society*, Enabling Civil Society, Public Interest Law Initiative, © 2003, pp. 25-26. See also Appl. No. 8317/78, *McFeely v. United Kingdom*, 20 DR 44 (1980), n. 28, at 98, in which the European Commission on Human Rights described freedom of association as being “concerned with the right to form or be affiliated with a group or organization pursuing particular aims.”

³⁴ OSCE/ODIHR Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations, pp. 6-7; see also U.N. Special Representative Report, p. 21 (“... the Special Representative also believes that registration should not be compulsory. NGOs should be allowed to exist and carry out collective activities without having to register if they so wish.”)

(3) Right to Seek and Obtain Legal Entity Status

In order to meet its mission goals most effectively, individuals may seek legal personality (or legal entity status) for organizations they form. It is through legal personality that, in many countries, NGOs are able to act not merely as an individual or group of individuals, but with the advantages that legal personality may afford (e.g., ability to enter contracts, to conclude transactions for goods and services, to hire staff, to open a bank account, etc.). It is well accepted under international law that the state should enable NGOs to obtain legal entity status. Article 22 of the ICCPR would have little meaning if individuals were unable to form NGOs and also obtain legal entity status. The U.N. Special Representative on human rights defender noted that “NGOs have a right to register as legal entities and to be entitled to the relevant benefits.”³⁵

- The European Court of Human Rights has held as follows: “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 way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned.”³⁶
- Sounding a similar note in its March 2006 report, the Inter-American Commission on Human Rights affirmed the responsibility of member states to “ensure that the procedure for entering human rights organizations in the public registries will not impede their work and that it will have a declaratory and not constitutive effect.”³⁷

In terms of the available procedures for legal recognition, some countries have adopted systems of “declaration” or “notification” whereby an organization is considered a legal entity as soon as it has notified its existence to the relevant administration by providing basic information.³⁸ Where states employ a registration system, it is their responsibility to ensure that the registration process is truly accessible, with clear, speedy, apolitical, and inexpensive procedures in place.³⁹ The designated registration authority should be guided by objective standards and restricted from arbitrary decision-making.

³⁵ Report submitted by the U.N. Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178, p. 21.

³⁶ Sidiropoulos, par. 40.

³⁷ Inter-American Commission on Human Rights, *Report of the Situation of Human Rights Defenders in the Americas*, Doc: OEA/Ser.L/V/II.124Doc.5rev.1 (March 7, 2006), Recommendation 16.

³⁸ In the Report submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178, p. 21, the Special Representative favors regimes of declaration instead of registration.

³⁹ “Excessively restrictive provisions of Uzbek law with respect to the registration of political parties as public associations, by the Ministry of Justice, are of deep concern.” ICCPR Human Rights Commission, A/56/40 vol. I (2001) 59 at paras. 79(23-24).

- The Inter-American Commission on Human Rights has stated that states should “[r]efrain from promoting laws and policies regarding the registration of human rights organizations that use vague, imprecise, and broad definitions of the legitimate motives for restricting their establishment and operation.”⁴⁰
- The Council of Europe maintains that “The rules governing the acquisition of legal personality should, where this is not an automatic consequence of the establishment of an NGO, be objectively framed and should not subject to the exercise of a free discretion by the relevant authority. The rules for acquiring legal personality should be widely published and the process involved should be easy to understand and satisfy.”⁴¹

II. The Right to Operate Free from Unwarranted State Interference

Once formed, NGOs have the right to operate in an enabling environment, free from unwarranted state intrusion or interference in their affairs.

(1) Protection against Unwarranted State Interference

International law creates a presumption against any state regulation that would amount to a restriction of recognized rights. The ICCPR lists four permissible grounds for state interference with freedom of association: the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.⁴² It is the state’s obligation to demonstrate that the 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.” This litmus test applies broadly to the use of regulatory restrictions on the fundamental rights of NGOs.⁴³

To emphasize, the Human Rights Committee General Comment 31(6) has stated: “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

⁴⁰ Inter-American Commission on Human Rights, *Report of the Situation of Human Rights Defenders in the Americas*, Doc: OEA/Ser.L/V/II.124Doc.5rev.1 (March 7, 2006), Recommendation 17.

⁴¹ Council of Europe Recommendation on legal status of NGOs, section IV (#28-29).

⁴² Article 22(2), ICCPR: “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.”

⁴³ See also U.S. State Department, *Guiding Principles*, no. 2 (“Any restrictions which may be placed on the exercise by members of NGOs of the rights to freedom of expression, peaceful assembly and association must be consistent with international legal obligations.”). In addition, the *Principles* note (no. 5) that “Criminal and civil penalties brought by governments against NGOs, like those brought against all individuals and organizations, should be based on tenets of due process and equality before the law.”

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.”⁴⁴

Regional human rights commissions have repeatedly made the same point; for example, the African Commission on Human and People’s Rights adopted a resolution on the right to freedom of association, providing that “in regulating the right to association, competent authorities should not enact provisions which will limit the exercise of the freedom.”⁴⁵

In the context of freedom of association, it follows that the state must refrain from unwarranted interference with the ability to form NGOs and with the ability of NGOs, once formed, to operate. NGOs should only be subject to regulation if they implicate a legitimate government interest. Moreover, it is incumbent upon the state to ensure that applicable laws and regulations are implemented and enforced in a fair, apolitical, objective, transparent and consistent manner.⁴⁶

State interference with civil society assumes its most egregious form in the forced closure or termination of NGOs. Like any other governmental intrusion, involuntary termination must meet the standards outlined in the ICCPR.⁴⁷ The relevant government authority should be guided by objective standards and restricted from arbitrary decision-making.

(2) Protection against Unwarranted Intrusion in an Organization’s Internal Governance

Freedom of association embraces the freedom of the founders and/or members to regulate the organization’s internal governance. Indeed, one of the principal elements of freedom of association is the ability to run one’s own affairs.⁴⁸ As independent, autonomous

⁴⁴ ICCPR Human Rights Committee, General Comment No. 31(6), Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 26 May 2004.

⁴⁵ See Center for Human Rights, University of Pretoria, African Human Rights System: The African Charter, available online (http://www.chr.up.ac.za/centre_publications/ahrs/african_charter.html).

⁴⁶ See U.S. State Department, *Guiding Principles*, no. 4 (“Acknowledging governments’ authority to regulate entities within their territory to promote welfare, such laws and administrative measures should protect – not impede – the peaceful operation of NGOs and be enforced in an apolitical, fair, transparent and consistent manner.”)

⁴⁷ See United Communist Party of Turkey and others v. Turkey, Judgment of 30 January 1998, Reports 1998-I, par. 33, in which the European Court observed that the right of freedom of association would be largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association without having to comply with the Convention. See also Council of Europe Recommendation on legal status of NGOs, section IV (#44) (“The legal personality of NGOs can only be terminated pursuant to the voluntary act of their members - or in the case of non-membership NGOs, its governing body – or in the event of bankruptcy, prolonged inactivity or serious misconduct.”)

⁴⁸ See McBride, Jeremy, *International Law and Jurisprudence in Support of Civil Society*, Enabling Civil Society, Public Interest Law Initiative, © 2003, p. 46 (“... it would be very difficult to justify attempts (whether at the registration stage or subsequently) to prescribe in detail how an association should organize its affairs – whether it ought to have this or that management structure – and there should certainly not be attempts to interfere with the choice of its representatives.”)

entities, NGOs should have broad discretion to regulate their internal structure and operating procedures.⁴⁹

The state has an obligation to respect the private, independent nature of NGOs, and refrain from interfering with their internal operations.⁵⁰ Put differently, state interference in internal affairs (e.g., attending meetings, appointing board members) may amount to a violation of freedom of association. "... [I]t would be very difficult to justify attempts (whether at the registration stage or subsequently) to prescribe in detail how an association should organize its affairs – whether it ought to have this or that management structure – and there should certainly not be attempts to interfere with the choice of its representatives."⁵¹

- The African Commission on Human Rights, in reviewing a government decree establishing a new governing body for the Nigerian Bar Association, held that "interference with the self-governance of the Nigerian Bar Association by a Body dominated by representatives of the government with wide discretionary powers violated the right to association."⁵²
- The Council of Europe Recommendation on the legal status of NGOs in section VII (#70) states 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."

(3) Right to Privacy

Civil society representatives, individually or through their organizations, enjoy the right to privacy. Article 17 of the ICCPR enshrines the right to privacy: "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.... (2) Everyone has the right to the protection of the law against such interference or attacks."⁵³ The ICCPR Human Rights Committee has recognized that certain rights "may be enjoyed in community with others."⁵⁴

⁴⁹ Indeed, this principle applies to any organization predominantly governed by private law.

⁵⁰ The legal framework in some countries may set certain, appropriate minimum governance standards, relating to issues such as the non-distribution constraint, the highest governing body, conflicts of interest, etc.

⁵¹ See McBride, p. 46.

⁵² See Center for Human Rights, University of Pretoria, African Human Rights System: The African Charter, available online (http://www.chr.up.ac.za/centre_publications/ahrs/african_charter.html).

⁵³ The Universal Declaration of Human Rights uses nearly identical language in Article 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

⁵⁴ ICCPR Human Rights Committee, General Comment No. 31(9), Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 26 May 2004.

Recognizing the potential for government intrusion into the premises of private legal entities, including NGOs, it is natural that the right to privacy is enjoyed in community with others. Indeed, the European Court, in analyzing similar language in the European Convention on Human Rights,⁵⁵ has specifically held that the right is not limited to individuals, but extends to corporate entities.⁵⁶

III. The Right to Free Expression

Civil society representatives, individually and through their organizations, enjoy the right to freedom of expression.

As with freedom of association, freedom of expression is enshrined in the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and a lengthy list of other UN and regional instruments.⁵⁷ Significantly, freedom of association is closely linked with freedom of expression.⁵⁸ Restricting the right to speak out on issues of public importance directly undermines freedom of association; individuals participate in NGOs in order to speak more loudly and forcefully.⁵⁹

Freedom of expression protects not only ideas regarded as inoffensive or a matter of indifference but also those that “offend, shock or disturb,” since pluralism is essential for democratic society.⁶⁰ This point is fundamental in light of governmental restrictions against “political” or “extremist” activities, which can be interpreted to restrict speech that is critical of government. Similarly, states may not restrict rights based on “political or other opinion.”⁶¹ Under international law, civil society representatives – individually or collectively – have the right to speak out critically against government on issues relating to human rights and fundamental freedoms.

The U.N. Defenders Declaration, Articles 6-9, addresses in particular detail freedom of expression concerning human rights and fundamental freedoms and extends to “everyone ... individually, and in association with others”⁶² the following rights:

⁵⁵ “Everyone has the right to respect for his private and family life, his home and his correspondence.” European Convention on Human Rights, Article 8.

⁵⁶ See Niemietz v. Germany, 13710/88, ECHR 80 (16 December 1992), in which the Court found no reason why the notion of “private life” should exclude activities of a professional or business nature.

⁵⁷ See footnote 2 for an illustrative list of relevant international documents.

⁵⁸ Indeed, the European Court of Human Rights has held that freedom of association derives from freedom of speech (see Ezelin v. France, Judgment of 26 April 1991, Series A, No. 202; (1992) 14 EHRR 362.)

⁵⁹ See Freedom and Democracy Party (OZDEP) v. Turkey, (App. 23885/94), Judgment of 8 December 1999.

⁶⁰ See Socialist Party and Others v. Turkey, (App 21237/93), Judgment of 25 May 1998; (1999) 27 EHRR 51, p. 24.

⁶¹ Article 1, ICCPR: “Each State Party to the present Covenant undertakes to protect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” See also Article 2, Universal Declaration of Human Rights.

⁶² U.N. Defenders Declaration, Articles 6-9.

- To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms;
- Freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;⁶³
- To study, discuss, form and hold opinions on the observance, both in law and practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters;
- To develop and discuss new human rights ideas and principles and to advocate for their acceptance;
- To submit to governmental bodies and agencies ... 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;
- To complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms.

Moreover, states must not restrict freedom of expression directly or “by indirect methods or means.”⁶⁴ States must refrain from enacting laws and supporting policies restricting the potential activities (and therefore speech) of civil society through vague, imprecise, and broad definitions of concepts, such as “political” or “extremism”.⁶⁵ The presumption against any state regulation described above applies fully here, in the context of freedom of expression.

As highlighted above in the “Legal Barriers” section, restrictions on the freedom of assembly have a direct impact on the ability of NGO representatives to plan and/or engage in advocacy activities. It is therefore important to stress that such restrictions, as with restrictions on the freedoms of association and expression, must comply with international law. Freedom of assembly is enshrined in the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and a lengthy list of other UN and regional instruments. States carry the burden, therefore of proving that interference with the freedom of assembly is prescribed by law, in pursuit of a legitimate government interest, and necessary in a democratic society.

⁶³ A corollary of this principle is that NGOs should have access to both domestic and foreign-based media. See U.S. State Department, *Guiding Principles*, no. 8 (“Governments should not interfere with NGOs’ access to domestic and foreign-based media.”)

⁶⁴ See, e.g., Article 13, American Convention on Human Rights.

⁶⁵ The ICCPR Human Rights Committee reviewed the Russian Law “On Combating Extremist Activities” and expressed concern that “the definition of ‘extremist activity’ ... is too vague to protect individuals and associations against arbitrariness in its application.” ICCPR, A/59/40 vol. I (2003) 20 at para. 64 (20).

IV. The Right to Communication and Cooperation

Individuals and NGOs have the right to communicate and seek cooperation with other elements of civil society, the business community, international organizations and governments, both within and outside their home countries.

(1) Right to Communication

Civil society representatives, individually and through their organizations, have the rights to receive and impart information, regardless of frontiers, and through any media.

- Article 19(2) of the ICCPR protects the right to freedom of expression in language that embraces the right to communication with a range of actors both at home, abroad, and in a variety of media: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁶⁶
- The Defenders Declaration provides substantially more detail. Article 5 grants everyone the right, individually and in association with others, *at the national and international levels* (emphasis added): “(a) To meet or assemble peacefully; (b) To form, join and participate in non-governmental organizations, associations or groups; (c) To communicate with non-governmental or inter-governmental organizations.”
- Other international human rights instruments define the right to freedom of expression in such a way as to include the right to receive information from others. The African Charter on Human and People’s Rights states specifically in Article 9(1): “Every individual shall have the right to receive information.” In language mirroring the ICCPR, the American Convention on Human Rights states in Article 13(1): “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”⁶⁷
- International law also protects individuals from unwarranted interference with their freedom of movement. The ability to move freely is critical to effective

⁶⁶ The Universal Declaration of Human Rights uses nearly identical language in Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

⁶⁷ Article 13 of the American Convention goes on to provide that the exercise of this right “shall not be subject to prior censorship” (Art. 13(2)) and “may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.” (Art. 13(3)).

communication and cooperation among civil society representatives. Article 12 of the ICCPR states, “Everyone lawfully within the territory of a state, shall, within that territory, have the right to liberty of movement”; moreover, “everyone shall be free to leave any country, including his own.”⁶⁸

(2) Right to Cooperate through Networks

Individuals and NGOs have the right to form and participate in networks and coalitions, in order to enhance communication and cooperation, and to pursue legitimate aims. Networks and coalitions can be a crucial vehicle for exchanging information and experience, raising awareness, or engaging in advocacy. Notably, the Internet has opened up new possibilities for networking; the right to receive and impart information of all kinds, regardless of frontiers, and through any media (highlighted above) certainly includes the Internet and web-based technologies. The right to cooperate through such networks, whether as informal bodies or registered entities, is based on the freedoms of association and expression, as detailed above.

V. The Right to Seek and Secure Resources

Within broad parameters, NGOs have the right to seek and secure funding from legal sources.

Closely linked with free contact and communication is the right to seek and secure funding from legal sources. Legal sources should include individuals and businesses, other civil society actors and international organizations, as well as local, national, and foreign governments. As cutting off contact and communication for NGOs is to strike at their existence, so restrictions on resources are a direct threat to their ability to operate. Restrictions on the receipt of funding, and especially on the receipt of foreign funding have grown increasingly common, but as this section will demonstrate, such impediments violate the spirit and the developing trends within international law.

- Article 22 of the ICCPR, in protecting the right to freedom of association, places limits on the state’s ability to restrict this right; justifiable restrictions are “those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”⁶⁹ Funding restrictions that stifle the ability of NGOs to pursue their goals may well constitute unjustifiable interference with freedom of association. The U.N. Committee on Economic, Social, and Cultural Rights (CESCR) recognized the problem with such restrictions when it expressed “deep concern” with Egypt’s Law No. 153 of 1999, which “gives the Government control over the right of NGOs to manage their own activities, including seeking external funding.”

⁶⁸ The freedom of movement is an important human rights concept about which much has been written. We note its relevance to the right to communication and cooperation.

⁶⁹ ICCPR, Article 22.2.

- The U.N. Defenders Declaration addresses the issue directly in Article 13: “Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration.”⁷⁰ The Office of the U.N. High Commissioner for Human Rights explains that the Declaration provides specific protections to human rights defenders, including the right to “solicit, receive and utilize resources for the purpose of protecting human rights (*including the receipt of funds from abroad*).”⁷¹ (Emphasis added).
- In its report entitled, “Human Rights Defenders: Protecting the Right to Defend Human Rights,” the United Nations explicitly identified “legislation banning or hindering the receipt of foreign funds for human rights activities” as a key issue of concern.⁷² And if human rights NGOs are protected in receiving foreign funds, then NGOs engaged in other activities (e.g., social services) should also be protected in their right to receive foreign funds, absent some justification for discriminatory treatment.
- In the October 2004 Report of the Special Representative of the Secretary-General on human rights defenders, Hina Jilani included “Restrictions on funding” as a category of legal impediment which “seriously affected the ability of human rights defenders to carry out their activities.”⁷³ The Special Representative’s recommendations included the following: “Governments must allow access by NGOs to foreign funding as a part of international cooperation, to which civil society is entitled to the same extent as Governments. The only legitimate requirements of such NGOs should be those in the interest of transparency.”⁷⁴
- The U.N. Defenders Declaration is not alone in protecting the right to receive funding. It follows in the wake of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which was proclaimed by the U.N. General Assembly in 1981. Of course, the focus of this

⁷⁰ UN Defenders Declaration, Article 3: “Domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed and within which all activities referred to in the present Declaration for the promotion, protection and effective realization of those rights should be conducted.”

⁷¹ See Office of the United Nations High Commissioner for Human Rights at <http://www.ohchr.org/english/issues/defenders/declaration.htm>

⁷² Fact Sheet No. 29: Human Rights Defenders: Protecting the Right to Defend Human Rights, p. 13.

⁷³ Report submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178, p. 20.

⁷⁴ Id., p. 22.

Declaration is on “the right to freedom of thought, conscience and religion.”⁷⁵ The Declaration recognizes, in Article 6, that the right to freedom of thought, conscience and religion shall include, *inter alia*, the freedom to “solicit and receive voluntary financial and other contributions from individuals and institutions.”⁷⁶ Again, no distinction is made between domestic and foreign sources.

- The Council of Europe Recommendation on the legal status of NGOs in section VI (#57) states: “NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemption from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies, income from investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax deductions and credits.”
- The 1990 Copenhagen Document of the Organization for Security and Cooperation in Europe (OSCE) establishes commitments among the 55 participating states of the OSCE. Paragraph 10.3 of the Copenhagen Document addresses forming NGOs for human rights promotion, and Paragraph 10.4 states that individuals and groups must be allowed to “have unhindered access to and communication with similar bodies within and outside their countries and with international organizations... and to solicit, receive and utilize for the purpose of promoting and protecting human rights and fundamental freedoms voluntary contributions from national and international sources as provided for by law.”
- The Inter-American Commission on Human Rights issued a report (March 2006), which focused on the responsibility of states in this area: State should “refrain from restricting the means of financing of human rights organizations. The states should allow and facilitate human rights organizations’ access to foreign funds in the context of international cooperation, in transparent conditions.”⁷⁷

In addition to direct statements on the right to solicit and receive funding, the international legal framework protects the right to property.⁷⁸ The Universal Declaration of Human Rights, in Article 17, extends the right to own property and protection against arbitrary state deprivation of property to everyone, which could be interpreted to include legal entities and therefore NGOs.

⁷⁵ U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Article 1.

⁷⁶ *Id.*, Article 6(f).

⁷⁷ Inter-American Commission on Human Rights, *Report of the Situation of Human Rights Defenders in the Americas*, Doc: OEA/Ser.L/V/II.124Doc.5rev.1 (March 7, 2006), Recommendation 19.

⁷⁸ Article 17 of the Universal Declaration of Human Rights states: “(1) Everyone has the right to own property alone as well as in association with others; (2) No one shall be arbitrarily deprived of his property.”

Indeed, the European Court has held that Article 1 of the First Protocol of the European Convention on Human Rights, which protects the right to the “peaceful enjoyment of his possessions,”⁷⁹ is applicable to both natural and legal persons. While the European Court has found that the right gives no guarantee of a right to acquire possessions, it has stated, significantly, that the right to property includes the right to dispose of one’s property.⁸⁰ The right to dispose of one’s property would naturally embrace the right to make contributions to NGOs for lawful purposes.

VI. State Duty to Protect

The state has a duty to promote respect for human rights and fundamental freedoms, and the obligation to protect the rights of NGOs. The state’s duty is both negative (i.e., to refrain from interference with human rights and fundamental freedoms), and positive (i.e., to ensure respect for human rights and fundamental freedoms). The state duty to protect also applies to certain inter-governmental organizations, including, of course, the United Nations.

International law has placed on states the obligation to ensure that the rights enshrined in international law (the Universal Declaration of Human Rights, ICCPR, etc.) are protected:

- United Nations Charter, Article 55: ... the United Nations shall promote: universal respect for, and observance of, human right and fundamental freedoms for all without distinction as to race, sex, language, or religion. Article 56: All Members pledge themselves to take joint and separate action in co-operation with the Organizations for the achievement of the purposes set forth in Article 55.
- Universal Declaration of Human Rights, 6th preamble: “Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms ...”
- ICCPR, Article 2: (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind ... (2) ... each State Party ... undertakes to take the necessary steps ... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. The ICCPR Human Rights Committee

⁷⁹ Article 1 of the First Protocol of the European Convention reads: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

⁸⁰ Clare Ovey and Robin White, The European Convention on Human Rights, 3rd edition, Oxford University Press, © 2002.

emphasized the state obligation in General Comment 31(7) (2004): “Article 2 requires that States Parties adopt legislative, judicial, administrative, educative, and other appropriate measures in order to fulfill their legal obligations.”

- International Covenant on Economic, Social and Cultural Rights, Article 2: (1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
- U.N. Declaration on the Right to Development, Article 6: All states should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all...
- Vienna Declaration and Programme of Action⁸¹: Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of government.
- U.N. Defenders Declaration, Article 2: Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.
- The Community of Democracies 2007 Bamako Ministerial Consensus, Article 44: Support and encourage non-governmental organizations by urging countries to adopt legislation aimed at strengthening civil society and to ensure that registration, formation, funding and operation of non-governmental organizations and their peaceful activities be carried out. At the same time we remind countries that any regulation placed on, or action taken, regarding non-governmental organizations must be consistent with domestic and international legal obligations and be enforced in an apolitical, fair and transparent manner.

In light of this body of international law, a state is not only bound to refrain from interference with human rights and fundamental freedoms, but also has a positive duty to ensure respect for human rights and fundamental freedoms, including the freedoms of association and expression, among others.⁸² This duty includes an accompanying

⁸¹ Adopted by the U.N. World Conference on Human Rights, June 25, 1993.

⁸² The State ‘Duty to Protect’ cannot be trumped by claims of sovereignty. “The State that claims sovereignty deserves respect only as long as it protects the basic rights of its subjects. It is from their rights that it derives its own. When it violates them, what Walzer called ‘the presumption of fit’ between the Government and the governed vanishes, and the State’s claim to full sovereignty falls with it.” (See S.

obligation to ensure that the legislative framework for civil society is appropriately enabling and that the necessary institutional mechanisms are in place to “ensure to all individuals” the recognized rights. An enabling legal framework will help create an appropriate environment for an NGO throughout its life-cycle.⁸³ Necessary institutional mechanisms could include, among others, a police force to protect people against violations of their rights by state or non-state actors and an independent judiciary able to provide remedies.

Next Steps: Building Solidarity and Promoting Adoption of the Principles

The *Defending Civil Society* report seeks to help mount a global response to the issue of increasingly restrictive environments for civil society organizations, particularly activities focusing on democracy and human rights. The report discusses ways in which governments have erected barriers, presents and analyzes a number of justifications for those barriers, and outlines the principles that governments are violating. To advance the adoption of these principles and help protect the political space for civil society, the World Movement for Democracy encourages civil society organizations to take action and build solidarity around the international principles outlined above.

Several actions and strategies have been suggested through the various consultations undertaken in producing this report.

Actions Directed to the International Community at Large:

- Call on democratic governments and international organizations, including the United Nations, international financial institutions, and appropriate regional organizations, to endorse the report and the principles it articulates, and to encourage national governments to adhere to them.
- Urge established democracies and international organizations to reaffirm their commitments to democratic governance, rule of law, and respect for human rights, and develop consistent policies based on the principles.
- Urge established democracies and international organizations to reaffirm that proposed restrictions on freedom of association are subjected to the rigorous legal analytical test defined in Article 22 of the ICCPR (see Under Scrutiny section) and energetically publicize transgressions, particularly on the part of ICCPR signatories.

Hoffmann, *The politics and ethics of military intervention*, *Survival*, 37:4, 1995-96, p.35. See also V. Popovski, Sovereignty as Duty to Protect Human Rights, www.un.org/Pubs/chronicle/2004/Issue4/0404p16.html).

⁸³ For more information on the elements of an enabling legal environment, please make reference to ICNL’s *Checklist for NPO Laws* (www.icnl.org) or to OSI’s *Guidelines for Law Affecting Civic Organizations*.

- Urge democratic governments and international organizations to ensure and increase assistance for civil society organizations as part of their efforts to protect and enhance public space for citizens to initiate and engage in activities to advance and consolidate democratic transitions.
- Organize discussions and hearings in parliaments, congresses, and national assemblies to raise lawmakers' awareness of the issues and principles.
- Monitor the degree to which the principles in the report are being applied in bilateral and multilateral relations.
- Call on the Community of Democracies to endorse the report and its principles, and urge it to establish a committee to monitor violations of the principles around the world.
- Encourage UN special rapporteurs to incorporate the principles into their reports and other UN documents.

Actions for Civil Society Organizations:

- Facilitate national and regional discussions to generate interest in, and mobilize support for, the findings of this report and legal reform of legal frameworks governing civil society organizations.
- Integrate the report's principles in broader democracy-assistance strategies, including efforts at the local and national levels to enhance women's and youth participation in political, social, and economic affairs; to establish independent judiciaries to enforce the rule of law; and to strengthen free and independent media.
- Insist that proposed restrictions on freedom of association are subjected to the rigorous legal analytical test defined in Article 22 of the ICCPR (see Under Scrutiny section) and energetically pursue transgressions, particularly on the part of ICCPR signatories, through energetic publicity and litigation in appropriate international courts.
- Translate the report into various local languages to deepen understanding of the issues among grassroots civil society organizations.
- Explore more effective ways to use new technologies and "virtual" space to conduct democracy and human rights work and to mobilize support for such work.

Actions Directed to Democracy Assistance Organizations:

- Call on democracy assistance foundations and organizations to endorse this report and its principles.
- Encourage democracy assistance foundations to facilitate national, regional, and international discussions among civil society groups to develop ideas for reforming legal frameworks for civil society work.
- Insist that proposed restrictions on freedom of association are subjected to the rigorous legal analytical test defined in Article 22 of the ICCPR (see Under Scrutiny section) and energetically pursue transgressions, particularly on the part

of ICCPR signatories, through energetic publicity and litigation in appropriate international courts.

- Ensure that democracy assistance foundations and organizations distribute copies of this report to all of their partners and grantees around the world.

APPENDIX: Bibliography of Key International Instruments

- Universal Declaration of Human Rights
<http://www.ohchr.org/english/about/publications/docs/fs2.htm>
- International Covenant for Civil and Political Rights
<http://www.ohchr.org/english/law/ccpr.htm>
- First Optional Protocol to the International Covenant on Civil and Political Rights
<http://www.ohchr.org/english/law/ccpr.htm>
- International Covenant on Economic, Social and Cultural Rights
<http://www2.ohchr.org/english/law/cescr.htm>
- International Convention on the Elimination of All Forms of Racial Discrimination
<http://www.ohchr.org/english/law/cerd.htm>
- Convention on the Elimination of All Forms of Discrimination against Women
<http://www.ohchr.org/english/law/cedaw.htm>
- Convention on the Rights of the Child
<http://www.ohchr.org/english/law/crc.htm>
- Convention on the Rights of Persons with Disabilities
http://untreaty.un.org/English/notpubl/IV_15_english.pdf
- UN General Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms
<http://www2.ohchr.org/english/issues/defenders/declaration.htm>
- U.N. Declaration on the Right to Development
<http://www.unhchr.ch/html/menu3/b/74.htm>
- Vienna Declaration and Programme of Action
[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)
- African Charter on Human and Peoples' Rights

http://www.achpr.org/english/info/charter_en.html

- American Convention on Human Rights
<http://www.iachr.org/Basicos/basic3.htm>.
- American Declaration of the Rights and Duties of Man
<http://www.oas.org/juridico/English/ga-Res98/Eres1591.htm>
- Arab Charter on Human Rights
<http://www1.umn.edu/humanrts/instree/arabcharter.html>.
- European Convention for the Protection of Human Rights and Fundamental Freedoms
<http://conventions.coe.int/Treaty/en/Summaries/Html/005.htm>
- Recommendation CM/Rec (2007)14 of the Committee of Ministers of the Council of Europe to member states on the legal status of non-governmental organisations in Europe
<https://wcd.coe.int/ViewDoc.jsp?id=1194609&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>
- Copenhagen Document of the Organization for Security and Cooperation in Europe (OSCE) (1990)
http://www.osce.org/documents/odihr/1990/06/13992_en.pdf
- OSCE/ODIHR Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations
<http://www.legislationline.org/upload/lawreviews/46/a8/24ea8fac61f2ba6514e5d38af6b2.pdf>
- The Community of Democracies 2007 Bamako Ministerial Consensus: “Democracy, Development and Poverty Reduction”
<http://www.bamako2007.gov.ml/PRODUCTION%20DE%20LA%204%E8me%20CONFERENCE%20MINISTERIELLE%20CD/CONSENSUS%20DE%20BAMAKO/MasterBamakoDocument.pdf>

ARTICLE

Violence, Spin, and "Otherness" in Arab Civil Society

Ibrahim Saleh¹

Introduction

Civil society is supposed to be composed of self-organizing groups, movements, and individuals, relatively autonomous from the state, operating as an integral part of political liberalization. Such civil society is vibrant in articulating values and enhancing civic engagement. However, Arab governments control and manipulate these groups, by allowing them only marginal autonomy while retaining surveillance of their operations.

The attempts to stifle civil society can have unintended consequences. Many desperate people are ignorant, afraid, and vengeful. Sometimes they just want attention and will do anything to get it. Denied the opportunity to deliberate in the civic sphere, some actors resort to violence.

In addition, Middle Eastern governments have accused many independent organizations receiving foreign financial aid of espionage. This situation has deprived the players in civil society in most Arab states from contributing to political liberalization, which in turn has created a vacuum that has been filled by violence.

In that context, three events are closely linked: the cartoon controversy, the bombing of the United Nations building in Algeria, and the attacks during the Muslim Pilgrimage (Hajj). The first took place on February 5, 2006, when the Danish newspaper *Jyllands-Posten* published cartoons depicting the Prophet Muhammad, which led to Muslim anger and protest, including the torching of Denmark's embassies in Beirut and Damascus. The second event occurred on December 11, 2007, when car bombs in Algeria killed staff of the United Nations High Commissioner for Refugees and the UN Development Program, as well as university students in a passing bus. The third occurred on December 21, 2007. Saudi security forces arrested suspected *Al-Qaeda* militants planning attacks during the pilgrimage (Hajj), as Muslim pilgrims performed the last rituals in Mecca. The suspects purportedly aimed to cause "security confusion" during the annual pilgrimage in which more than two million Muslims were taking part.

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Those who resort to violence may unwittingly serve the interests of their rulers. So-called spin doctors in the Arab world use the violent acts to perpetuate stereotypes and heighten polarization. Moreover, the Arab governments use the violent events as an excuse to further limit the public space by restricting freedom of expression and association. Suppression is justified on the ground of national security, which limits the role of peaceful Islamist activism even further. Western scholars, politicians, and journalists reinforce the process of stereotyping by characterizing the violence as religious in nature, when in truth it is political.

Political violence is a weapon of the weak. When they feel overwhelmed by hegemonic powers, they realize that there is no way to get their voices heard in politics except through violence. This makes violence a kind of struggle for meaning (Luow, 2001) to grab the attention and build up counter-hegemony.

Political violence is therefore a tool for communicating with governments and for triggering responses that attempt to mobilize constituencies. Such violence stems from competitions for "will," "popularity," and sometimes "authority."

In this regard, Islamic terrorism against western targets makes sense to its perpetrators, and the violence in Iraq has its own grisly logic. Muslim clerics do not hesitate to supply the media with headline-making statements, while some western politicians and commentators embrace an extreme tone.

The real controversy here is the motivation behind the escalation of violence. It is not religious, as it may appear, but rather political, acts of manipulation designed to serve the causes of the radical imams for scope enlargement, validation, and mobilization. In an enigma of human agency, the imams have used political spin to leapfrog from being insignificant in importance and influence to being the de facto leaders of many Muslims, who advocate a strong stance of defending Islam.

The three events signify a tragic turning back to a time of "propaganda of the deed." (Selnow, 1994, 178).

Spin Doctors

Global politics has become a media activity, with politicians increasingly transformed into media performers. This has given rise to a new industry of communication professionals known as spin doctors (Nicholas, 1998), who stage-manage events in media discourse to affect public opinion. Mass-mediated politics involves five sets of players: politicians as performers, the spin industry, media workers (journalists and researchers), media audiences, and policy makers.

The manipulation of media and public creates a conflict with basic notions of democracy. The "pernicious influence" reduces transparency and creates a distorted news frame. (Louw, 2005, 311).

One symptom is the new language that aims to obscure events in what is described as "terminological fog" (Taylor, 1992, 45). For example, civilian deaths become "collateral damage." Acronyms as well as such euphemisms attempt to sterilize the horrors of war.

Political violence is the weapon of the weak. Dominated groups facing overwhelming hegemonic powers realize that the only way to get their voices heard in politics is violence. The oppressed groups take part in the struggle for meaning (Louw, 2001) to grab the attention and build up counter-hegemony. Political violence is therefore a communicative tool that attempts to mobilize a constituency.

The motivation behind these acts is not religion but politics. The acts are undertaken to serve the needs of radical imams for scope enlargement, validation, and mobilization. The imams thereby leap from insignificance to de facto leadership of stagnant civil society in the Muslim world. They represent a strong stance of defending Islam. This dramaturgy creates news frames that cater to Muslims who are already angry over the disdain that they subjectively experience from the West.

Importantly, this anger predates the Danish cartoons. It divides the societies inside and outside the Arab and Muslim worlds into good and bad. As William Green (1993) emphasizes, a society does not simply discover its others but fabricates them, by selecting, isolating, and emphasizing particular aspects and making them symbolize their difference. Green points out that "otherness" concentrates on the life of the collective and stigmatizes the group according to one major characteristic.

With the Danish cartoons, western media condemned the protests based on the notion of freedom of expression, whereas most Muslim and Arab media compared the fight to that of Prophet Mohammad in Medina, who, with limited power, formed alliances with tribes of polytheists and Jews for the greater good of Muslims. This troubled environment was described by Wallerstein (1999) as "utopistics," which takes the terminal crisis of the current world system and extrapolates even more extensive, politically motivated religious wars and cultural violence over the next fifty years.

Media Coverage and Spin

In Pakistan, news coverage of the cartoon controversy focused on Muslim rage and "street power." The overall news frame, by contrast to the western interpretation, referred to the cartoons as "blasphemous," "provocative," and "sacrilegious." Though this struggle was orchestrated by relatively small elite, it consisted of intellectuals and people in powerful positions, which gave weight to the news coverage. (Eide, 2007, 142).

Egyptian news coverage relied more heavily on exaggeration and disproportion. Symbols, labels, and intentionally created images of "folk devils" were used to characterize the western role and heighten public anxiety. A dichotomy was further punctuated by the state's insistence on the need for control and on the legitimacy of the actions taken. Such escalation reflected religious fundamentalism, a new twist in the intersection between politics and religion. (Saleh, 2007).

Here, political spin worked to alter the perceptions of Arabs/Muslim and westerners. All sought to impose their favored meanings on the events. The Arab governments used the controversy to fuel the campaign against the West, with theories about conspiracies to disintegrate society and marginalize religion. The governments' main motive was to preserve the oppressive political status quo, though they claim to derive their legitimacy not from divine commands but from the will of the citizens whom they purportedly represent.

Westerners, meanwhile, construed the violence as an outgrowth of religion. The wrongheadedness of this position was underscored by a research project on which I collaborated. Between January and March 2007, 300 university students in Egypt, Dubai, and Kuwait were questioned. Asked about the factors underlying the Danish cartoon controversy, 44 percent cited a clash of civilization, 37 percent said politics, and 18 percent named religion.

The media disseminate stories serving the spin doctors, creating a relationship that is virtually cannibalistic. The journalistic coverage of the cartoon controversy exemplifies the superficiality of media stereotypes and conventions. (Snow & Alheide, 1991). The "hype-making" process divided the societies inside and outside the Arab and the Muslim world into good and bad. Western media condemned the protests against limiting the publishing of the cartoons based on the notion of freedom of expression, while most of the Muslim and Arab media compared the fight to that of Prophet Mohammad in Medina, when the Prophet, with limited power, formed alliances with tribes of polytheists and Jews for the greater good of Muslims.

Muslims/Arabs are torn. At home, they face subjugation by dictatorial governments. Elsewhere, they face stereotypes characterizing them as barbarous savages. This exemplifies what Wallerstein (1998) refers to as the "black period" of intense political and cultural struggle. The political contenders fight for supremacy, and the stronger players attempt to protect their interests through repression while the weaker ones resort to violence.

Conclusion

In conclusion, the surge in violence mirrors the hostile effects of the media, which continue to increase. While physical and information distances between cultures have been radically reduced through globalization, the global social distance remains a serious threat. Even as physical distances decline in importance, socio-cultural distances produce cultural misperceptions. Political conflict gets PR-ized through violence, as in the case of the cartoon controversy.

The Algerian bombings and the attacks on Muslim Hajj, like the Danish cartoon controversy, were geared toward radicalizing sections of Muslim public opinion, creating polarization, and thereby strengthening Muslim fundamentalism in its struggle against western hegemony and secularism. This process succeeds to a degree, because it makes the hegemonistic order more visibly militaristic and coercive.

In all three events, local circumstances are symptoms of a larger systemic conflict. The attacks, disinformation, dissembling, and "othering" reflect a fundamental insularity that precludes mutual understanding.

Local circumstances are symptoms of a larger systemic malaise. Admittedly, reactions of all parties involved to events surrounding the religious debate are rather extreme. The vehemence of the personal attacks, disinformation, and dissembling rhetoric used by "strangers"/"othering" seems an instance of a wider social phenomenon: a fundamental insularity that threatens the ability to make consensual decisions.

As extreme groups in civil society use "last resort" tactics as standard operating procedure, discourse gets strangled. Acting as spin doctors, these groups, in collaboration

with government and media, bombard citizens with messages of bigotry and intolerance. Ideologues establish the frame through which events are interpreted. The public loses its capacity to act as an informed and critical citizenry.

The Arab world currently stands at a media crossroads. At stake is the type of communication and media environment we seek to have, from local to global levels, for ourselves and future generations. Today, spin doctors use religion to serve political causes. Religion is the means, contrary to many scholars, and not the end. The media equate religion in many cases with political institutions, and establish "otherness" through that template. Spin doctors use news frames to fight the struggle for meaning. The result is that media ignore or denounce the possibility of coexistence with the West, and accept unquestioningly their own coercive society.

The Danish cartoons represent a particular grievous blasphemy for the adherents of Islam. Nonetheless, one must emphasize that the Islamic demonstrations against the cartoons broke out some four months after their initial publication. When conservative and anti-immigrant papers elsewhere in Europe reprinted the images, *mullahs* inside and outside Europe decided to turn them into a *cause celebre*. Reactionaries and enemies of tolerance and respect on both sides use political spin. Each downplays ideological and political distinctions and fans the flames of a symbolic politics that permits no compromise.

Pointedly, the most important question revolves around how media in the Middle East legitimize self-defense vs. collective punishment to spin violence in the face of the "other."

This researcher believes that only by breaking the stereotypes can we work through the deadlock. That is a stiff challenge. It is, however, one that each generation must face in order to foster the cause of freedom.

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ARTICLE

Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue

Reginald Akujobi Onuoha¹

1.0 INTRODUCTION

The patterns of inheritance and succession,² particularly under intestate estate under customary law in Nigeria, have almost as many variations as there are ethnic groups in the country, and many of the variations are discriminatory in practice. The law of succession and inheritance reflects Nigeria's plural legal system. Indigenous customary law developed rules of inheritance for intestacy through the traditional canon of descent, as adapted over the years to changes in the society³ and the rule of natural justice as applied by the courts.⁴ Fortunately, nongovernmental organizations have been active in attempting to rectify the problems of discrimination.

Rather than trying to cover all the patterns of succession, I examine a few of the succession patterns,⁵ with particular reference to the discriminatory aspects under customary law. I also propose reforms. Finally, I recognize the important work done by nongovernmental organizations in Nigeria.

2.0 STATEMENT OF THE PROBLEM

While the law of inheritance and succession under English law is reasonably settled, the aspect dealing with customary law is not, which breeds conflict and acrimony among heirs. What's more, the law discriminates among beneficiaries. Some are accorded rights of inheritance and others are not. Consequently, this customary law falls under the

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² See T.O. Elias: **Nigerian Land Law** (1971) 4th edn., Sweet & Maxwell London, chapter 8, p. 120. S.N. Obi: **Family Law in Southern Nigeria** (1966) p. 880. C.O. Olawoye: **Title to Land in Nigeria** (1974), University of Lagos/Evans Brothers London, chapter 6. B.O. Nwabueze: **Nigerian Land Law** (1982), Nwamife Publishers, Enugu, p. 86. Smith, I.O.: **Practical Approach to Law of Real Property** (1999), Ecowatch Publications Lagos. Finine Fekumo: **Principles of Nigerian Customary Land Law** (2002), F & F Publishers, Port Harcourt.

³ A striking example of charges is the evolution of Nuncupative Wills in Customary Law and the use of will in English form to affirm or vary customary rules of inheritance.

⁴ All the state High Court Laws in Nigeria provide for the enforcement of only customary laws that are not repugnant to Natural Justice, equity and good conscience. See example of S.3 Cap 60 Laws of Western Nigeria 1959; Cap 49 Laws of Northern Nigeria 1963.

⁵ For further illustrative patterns see: Derret, J.O. (ed.), **Studies in the Laws of Succession in Nigeria**, Oxford University Press London, 1965.

repugnancy doctrine test and, more important, international conventions against discrimination.

One example is the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), an international document that establishes standards of equality between women and men. The convention was adopted by the United General Assembly on 18 December 1979, and was made binding on ratifying states on 3 September 1981. CEDAW provides a framework for developing and applying equality norms to specific conditions in different countries and legal systems. This international bill of rights for women also stands as an agenda for action to guarantee these rights. In its preamble, the convention states that extensive discrimination against women continues to exist, and it emphasizes that such discrimination violates the principles of equality of rights and respect for human dignity. Article I of the convention defines discrimination against women as “any distinction, exclusion, or restriction made on the basis of sex in the political, economic, social, cultural, civil or any other field.”

Article I further defines discrimination against women as anything that can bring about unequal treatment between men and women while carrying out their livelihood. This article groups married and unmarried women together. Article 13 stipulates in part that women have the right to obtain family benefits, while Article 15 states, *inter alia*, that women have equal rights with men in matters of law related to business contracts. Under Article 16, women are empowered to own and give away their property. State parties to the convention are obliged to refrain from acts that would defeat the object and purpose of the convention—namely, the elimination of *all forms* of discrimination against women. Each party must report on its progress to the committee. The implementation of the convention is monitored by the Committee on the Elimination of Discrimination Against Women (CEDAW), which is composed of 23 experts elected by state parties. The Committee meets annually in New York.

Gender discrimination is currently receiving the attention of the world community. The position of women in law and society has attracted public sympathy and interest.

Apart from CEDAW, other documents apply, such as the African charter—a regional bill—and national Constitutions that prohibit discrimination on the ground of sex in all categories of rights. Having ratified the CEDAW treaty, Nigeria is generally bound by its provisions, so any laws or procedures to the contrary must be declared null and void. Unfortunately, Nigerian courts have long sustained some of the customary practices that subjugate women, as demonstrated in the case of *Nwanya v. Nwanya*.⁶ The case of *Mojekwu v. Mojekwu*,⁷ however, has marked a turning point. The Court of Appeal in that case struck down, as repugnant to natural justice, equity, and good conscience, the Oli-ekpe custom in Ibo land, which bars women from inheriting land.

The law of succession basically deals with testate methods of inheritance, and the rules governing them differ. When a man dies, the devolution of his self-acquired

⁶ (1987) 3 NWLR (pt. 62) 697.

⁷ (1997) 7 NWLR (pt. 512) 283.

property depends upon whether he has made a will.⁸ If he has made a will, the property devolves according to the will.⁹ If no will exists—that is, under the condition of intestacy—his property devolves in accordance with the applicable customary law. Discriminations exist in both cases, but especially under intestacy. Discrimination thus exists in the method of distribution under various customary laws. Unfair practices allow some to inherit while others cannot.

The discriminatory aspects of property inheritance under customary law in Nigeria manifests in different forms and scope ranging from primogeniture rules, right of spouses, rights of adopted children and rights of illegitimate child; although it is generally agreed rule under customary law of intestate succession and inheritance that succession goes by blood.

3.0 PRIMOGENITURE RULE

The general rule of customary law where a land owner dies intestate is that his self-acquired property devolves on his children as family property.¹⁰ The head of the family is the eldest male child of the deceased who occupies the family house and holds same as a trustee of the other children, male or female. However, the rule is different in certain localities.

In Bini and Onitsha communities, for instance, the deceased's property devolves to the eldest son exclusively, in accordance with the rule of *primogeniture*, under which the eldest son is expected to look after younger children¹¹ and may sell the house over the wishes of other children or treat it as his own property.¹² Among the Markis group of the Verbe of Northern Nigeria, the rule of *ultimogeniture* applies, whereby inheritance is by the youngest son, which applies to bar other heirs of the deceased landowner.

The rule of primogeniture is plainly unfair to the younger children of the family, hence it is repugnant to natural justice, equity, and good conscience.¹³ Nonetheless, it has been argued that the system accords with native ideas, particularly the role of the eldest son as the “father of the family”¹⁴ who has a legally binding obligation towards the children.¹⁵ Primogeniture or ultimogeniture has also been identified as “a probable solution to the problem of fragmentation in land tenure,”¹⁶ which has hindered large-scale agriculture and economic development.

⁸ *Idehen v. Idehen* (1991) 6 NWLR at 198.

⁹ *Lawal Osula v. Lawal Osula* (1995) 9 NWLR (pt. 419) p. 259.

¹⁰ See *Suberu v. Sumonu* (1957) 2 FSC p. 33, *Abeje v. Ogundairo* (1967) LLR p. 9.

¹¹ See Oloyede: **Modern Nigerian Land Law** (Evans Brothers) 1989 p. 153.

¹² See Elias: **Nigerian Land Law**, *ibid.*

¹³ That was the view of the court of first instance in *Ogiamen v. Ogiamen* (1967) NMLR p. 245 at p. 247.

¹⁴ See *Ehigie v. Ehigie* (1961) 1 NMLR p. 307 at p. 309.

¹⁵ See Obi: **Modern Family Law in Southern Nigeria** (1966) p. 337.

¹⁶ Oloyede, *op. cit* at p. 157.

The right of the eldest surviving son to succeed his father in the headship of the family is automatic and arises from the fact of seniority. Only the father, as the owner and creator of the family property, can deprive the eldest son of this right, by a valid direction made with the aim of ensuring that the affairs of the family are properly managed by a person qualified on the grounds of intelligence and education to do so. In the absence of any such direction by the father, the right of the eldest son cannot be taken away without his consent. But a right that arises by the operation of the law is liable to be abrogated or modified by a change in customs. An example of such right is the right to Igiogbe house, which exists in Benin kingdom.

4.0 THE RIGHT OF SPOUSES

In customary law generally, a husband cannot inherit his deceased wife's share of her family property, for the husband is treated as a stranger who is not entitled to share in property of the family of which he is not a member. In *Caulcrick v. Harding*,¹⁷ the deceased landowner left property for his three daughters, one of whom was the plaintiff's deceased wife. The plaintiff's husband claimed a third share of the property by virtue of his deceased wife's right. It was held that he plaintiff had no such right. *Stricto sensu*, a widow is not entitled to share in the property of the deceased husband at customary law.¹⁸ An exception is where she had occupied an apartment during her lifetime, except where she has taken another husband (other than the brother of the deceased husband), in which case, she loses her right of occupation and may be asked to leave.¹⁹

This seemingly unfair practice exists by virtue of intestacy, for under native law and custom, the devolution of property follows the blood. Consequently, a wife or widow, not being of the blood, has no claim to any share.²⁰ An exception to this practice does exist: when a widow chooses to remain in her husband's house and in his name, she can do so even if she has no children. This is to ensure her maintenance. Although she cannot transfer any of the husband's property outright, if the husband's family fails to maintain her, then she has a qualified right to let part of the house to tenants and use the rent to maintain herself.²¹

Her interest in the house or farmland is merely possessory and not proprietary, so she cannot dispose of it. In one instance, a widow remained with her only daughter in occupation of the late husband's house at Onitsha, improved it, let part it to tenants from whom she collected rent, and in all other respects treated the house as her own for 44 years. Upon her death, she devised it by will. The bequest was ruled void against the husband's relations, on the principle of *nemo dat quod non habet*.

This custom offends the principles of natural justice, equity, and good conscience. Why? The widow, during their marriage and during the deceased husband's life, might have toiled to bring about the acquisition of such property. It is therefore not only

¹⁷ (1929) 7 NLR p. 48.

¹⁸ See *Nezianya v. Okagbue & Ors.* (1963) 1 All NLR p. 352.

¹⁹ *Ibid.*

²⁰ *Shogunro Davis v. Shogunro* (1929) 9 NLR at 79/80; (*Okonkwo v. Okonkwo*)

²¹ *Nezianya v. Okagbue* (1963) 1 All NLR p. 52.

repugnant to natural justice, but also morally repulsive to deprive her of ownership of such property. Even the Holy Bible states that “a man shall leave his parents and cleave unto a woman and shall become one flesh.”²² How can a mortal alter the creation of God? Husband and wife are truly one body and one blood, hence they should share what belongs to them equally, and should be free to exercise their rights via devise.

On the other hand, a husband’s deprivation of inheritance in his deceased wife’s share of her family property is justified. The principle of *nemo dat quod non habet* aptly applies here. The same condition exists as regards deceased wife’s ante-nuptial property. Nonetheless, his right of inheritance in his deceased wife’s real property depends (conditional), first, on whether the wife left any surviving issues; and, second, whether the property was acquired before or during overture; but certainly, wife’s ante-nuptial property goes to her children jointly and in default of her children goes to her relatives and never to the husband, though he has a right over personal property. This customary principle was affirmed in the case of *Nwugege v. Adigwe*.²³

This is an administrative suit from Onitsha in which the claim by the head of the family of a deceased widow for a letter of administration of her estate was opposed by her husband’s son by another wife. The latter was held to be the proper person to administer the estate. The court rejected another proposition of the customary law of Onitsha laid down by six redcap chiefs who gave evidence in the case: that where a man marries a woman who has a house and lives with her as a husband and wife there, the house goes to the wife’s family on her death. The court gave as a reason for rejecting this proposition that in laying it down, the chiefs explained that under their custom, it was unheard of that a man marries a woman and lives with her in her house, which is equivalent to accepting the custom that a woman should marry a man and not otherwise.

But since there is no express rule of customary law covering the specific point, the court was free to arrive at a decision in accordance with the principle of natural justice, equity, and good conscience; consistent with the general tenor and spirit of customary law. The general principle of customary law is that a wife’s property acquired before marriage which is not taken to her husband’s house cannot be inherited by the husband or the husband’s family. The exception, property taken to the husband’s house, contemplates only movable property; since realty cannot be taken, it implies that it cannot be inherited.

As regards ante-nuptial property, the general rule is that such property remains property of the wife unless it is mixed with the property acquired during overture. Property acquired during overture, in a situation where the wife is predeceased by her husband and all her children, will go to the husband’s relatives. The inheritance of wife’s property by her husband in default of issues contradicts the general principle that devolution follows the blood but is explained by the fact that marriage has the effect of transferring the wife to the husband’s patrilineal and subjecting her to the control of her husband and his patrilineal. This principle accords with the customs of Netembe and

²² Genesis chap. 2 verse 24; see also Mark 10: 6-9: “What God has joined together let no man put asunder”.

²³ (1934) 11 NLR 134.

Kalabari people, where under Iya marriage, the wife and the children have the right of inheritance.

Among the Yorubas, the Idomas, and perhaps a few other communities, a husband cannot inherit (realty) from the wife just as the wife cannot inherit from him. If she dies without issue, her property passes to her siblings. It is also the law that a husband cannot inherit property acquired by the wife during separation.²⁴ A point which requires clarification and justice is the position of customary law that inheritance follows the blood (general rule) and the issue of property (realty) acquired through concerted efforts of both husband and wife. Should the wife not be accorded a right of inheritance here? It is submitted that this should be an exception to the rule; for to do otherwise amounts to injustice and contravenes the Biblical injunction that “husband and wife are but one flesh.”

It also violates section 42(1), which bars discrimination and deprivation on grounds of sex, and section 43, which stipulates that subject to the provisions of this constitution, every citizen of Nigeria shall have the right to acquire and own *immovable property* anywhere in Nigeria.

It also contravenes Article 16 of CEDAW, which empowers women all over the world not only to own immovable property but also to give away such property at will. A similar right is guaranteed in Article 2 of the African Charter:

Every individual shall be entitled to the enjoyment of the right and freedom recognized and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.

Besides, the Charter of the United Nations begins by affirming “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.” In fact, the achievement of international organizations in promoting and encouraging respect for human rights and fundamental freedoms for all, without discrimination on the grounds of, inter alia, sex, constitutes one of the purposes of the United Nations, according to Article 1, paragraph 3. A similar provision is made under Article 13 para. 1(b) while Article 76(c) encourages respect for human rights and fundamental freedom for all without discrimination on the grounds of race, sex, etc. The Universal Declaration, though not a treaty, has with time become a basic component of Customary International Law, binding on all states, and not only members of the United Nations.²⁵ The Universal Declaration is an authoritative definition of human rights, setting out the principles and norms of securing respect for the right of man everywhere in the world. It has been described as the great charter of liberties and common standard of achievement for all people.

²⁴ *Administrator General v. Egbuna supra.*

²⁵ Sohn cited by Thomas Buergenthal in **International Human Rights in a Nutshell** pp. 29-32, quoted in Eze, O.: “Democracy, Human Rights and the Nigerian Judiciary” (1993) **JHR LP**. Vol. 3,2,3, pp. 69-70. It also asserts that the Universal Declaration has formed part of the Jus Cogens – Peremptory norms of customary international law considered as binding on all nations.

5.0 THE RIGHTS OF THE ADOPTED CHILD

Adoption of children is rare and known mostly in English Law. The position of an adopted child as regards succession is not very clear. It has, however, been established that the right of an adopted child is inferior to that of the legitimate child of the blood.

5.1 Procedure for Adoption

Among the Efiks of Nigeria, the procedure for adoption requires the presence of members of the adopter's family, to whom the adopter formerly nominates his/her adoptee. An adoption which fails to conform to this procedure confers no right upon the adopted child. Therefore an adopted child's right to succeed to any property depends on the validity of the procedure.²⁶ For the Yorubas, it has been stated that an adopted child *cannot* inherit from his/her adoptive parent. However, in the case of *Administrator General v. Tuwase*,²⁷ the estate of a Yoruba woman from Ijebu who had died without issues, was claimed by her husband, from whom she had been separated for 44 years before her death; by her adopted child, who had predeceased her, through the child's descendants; and by a number of collaterals descended from her maternal grandfather, including an adopted daughter of an aunt. The claim of the husband was rejected. It was ordered that the descendants, including the adopted children of the deceased grandfather, should take one share each, while her direct descendants--i.e., the surviving adopted child--should share per stirpes. This suggests that the right of an adopted child is inferior to that of a legitimate child of the blood, for the direct descendants, were they of that blood, would have inherited the estate to the exclusion of all these other collaterals. Why this discrimination? Adoption arises either where a couple could not have children of their blood or where they have such children but the condition of the adopted child arouses their sympathy, as when a child is predeceased by his or her parents.

In either of the above cases, that inherent sympathy exists. It is only reasonable that an adopted child be treated as being of the blood of the adopters, otherwise the essence and spirit of the adoption is defeated. Furthermore, since such inferior position or status is accorded the adopted child, he or she is discriminated against, which violates the constitutional provision of S. 42(2) of the 1999 constitution: "No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth."

To be sure, discrimination, when it consists of an ability to differentiate right from wrong and good from bad, is an essential part of everyday life. But discrimination becomes morally unacceptable when it treats a person less favorably than others on account of a consideration which is morally irrelevant.²⁸

S. 42(1) of the 1999 Constitution was expounded by the Court of Appeals in the case of *Uzoukwu v. Ezeonu II*.²⁹ Appellants in the case argued that the respondent referred to, treated, and regarded them as slaves, descendants of slaves, or persons of

²⁶ See *Martin v. Johnson* (1945) 12 NLR p. 46.

²⁷ (1946) 18 NLR at 88.

²⁸ Feldman, D. et al.: *Civil Liberties and Human Rights in England and Wales* (New York: Oxford University Press Inc. 1993) pp. 854-855.

²⁹ (1991) 6 NWLR (Part 290) p. 708 C.A.

inferior stock, and for that reason prevented them from enjoying certain rights, such as owning property, taking titles, or taking part in developmental activities of the town. The respondents, it was alleged, required the appellants to observe a practice of "redemption," in order to be recognized as persons of equal status. Under redemption, the appellants would, among other things, slaughter a cow or goat, or make other offerings or sacrifices to the respondents. The appellants at the lower court argued that as citizens of the Federal Republic of Nigeria, they have fundamental rights as guaranteed by section 31 and 39 of the Constitution of the Federal Republic of Nigeria 1979, not to be discriminated against on the basis of whatever circumstances attended their birth, or to be subjected to any human indignity, or to be called or regarded as "second class citizens," "strangers," or any other inferior/lower social class than other citizens of Nigeria. They contended that their constitutional rights guaranteed in sections 31 and 39 of the 1979 Constitution of Nigeria are violated by the practice of "redemption" to appease members of the respondents' family in order to "cleanse" the applicants of their "slave blood" or "inferiority" or "stranger-element" or any other usage, norms, ethos, or other customary practice.

Though the appeal was dismissed, the Court of Appeals held *inter alia* that the discrimination envisaged against a person by S. 39(1) 1979 Constitution must be based on law, stating further that the protection provided by S. 39(1) can be invoked only if the condition therein stated is the *sole* reason for discriminating against the person; it cannot be invoked if other reasons are adduced. Consequently, it is reasonable to invoke this provision to protect the right of a person tagged "adopted child," for it is unconscionable, immoral, and inhumane to pretend that a child is fathered whereas in practice, parental rights are deprived. To this extent, this customary practice is inconsistent and incompatible with the basic norm and should therefore be outlawed. It is hereby submitted that S. 39(1), which deals with discrimination of various types, should not be enforceable solely against the state; it should be made enforceable against individuals as well. This is so because that state may be less likely to discriminate than a vindictive individual.

6.0 THE RIGHTS OF AN ILLEGITIMATE CHILD

An illegitimate child has been referred to as a child born out of wedlock, while a legitimate child is an issue of wedlock. Plainly, a child born out of wedlock whose paternity has been acknowledged by his natural father is as much legitimate as one born in wedlock. That is not the case, however. A child born out of wedlock during a marriage is illegitimate under the Act, whether or not the child is acknowledged by the natural father; unless by custom, someone else has a prior claim to paternity of such a child.

Where a child is born out of wedlock, the first question is who is entitled to the paternity of the child? The question is essential, particularly in a polygamous setting. The controversy as regards paternity has always been between the natural father and the mother's father or the person who has paid the bride price on the mother. Customs vary. A majority of communities favor the claim of the man who had paid the bride price of the mother. This is the position so far as customary practices and principle are concerned.

As for the judicial position, the Supreme Court holds that paternity should go with blood, and that any custom which prefers the provider of the bride price or the mother's father to the natural father is repugnant to natural justice, equity, and good conscience.

It was so adumbrated in *Edet v. Essien*.³⁰ But in *Amakiri v. Good-Head*³¹ the custody of an illegitimate child was awarded to the family of the mother's husband. This is a classic situation where the rule of natural justice altered a repugnant customary practice, or a sharp divergence between judges made law based upon advanced ethical values reflecting the facts of social life, for in almost all communities in Nigeria, it is considered an outrage that a man should be deprived of the paternity of a child from a woman on whom he had paid the bride price.

6.1 Succession Rights of an Illegitimate Child

The practice varies among various communities. Among the Yorubas, illegitimate children are accorded equal rights as their legitimate counterparts; the same is true of the Annang, Ibibio, Oron, Aba-Ngwa, and Nsukka, among others. In some other communities, illegitimate children are deprived of succession rights. The courts appear to support this reprehensible practice, as demonstrated in *Onwudinjo v. Onwudinjo*,³² where the court rejected the claim of an illegitimate child to share in the intestate estate of his father on the ground that no evidence had been laid in support of such claim, but supported a claim by a child where paternity had been acknowledged. With due respect, this is a miscarriage of justice by **Justice Ainley, C.J.** (as he then was). His decision is contrary to S. 39(2) of the 1979 Constitution, which assimilates into society citizens born out of wedlock who would ordinarily have been disinherited under English Law or their customary law. Similarly, S. 42(2) states, "No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth." The Constitution is the foundation of all legalities in Nigeria. It is the duty of the court not only to protect it but also to promote its operation to achieve its objective of social engineering through articulate and purposeful interpretation of the law. Furthermore, provisions in America and Europe provide for equal rights for children born in or out of wedlock. Though the European Convention does not contain any explicit provision to this effect, the *European Court of Human Rights* held in *Marckx v. Belgium*³³ that no objective and reasonable justification existed for denying the illegitimate any entitlement on intestacy in the estate of members of her mother's family.³⁴

In *Mojekwu v. Mojekwu* the Nnewi customary law of Oli-ekpe was struck down under the repugnancy principle by the unanimous judgment of the Enugu Division of the Court of Appeals. The basis of the decision was that the customary law in question which "permits the son of the brother of the deceased person to inherit the property of the deceased to the exclusion of the deceased's female child" was a clear case of discrimination and hence inapplicable.

³⁰ (1982) 2 NLR.

³¹ (1923) 4 NLR at 101.

³² (1957) 2 ENLR.

³³ Page 212 Human Rights Laws and Practices in Nigeria.

³⁴ Series A No. 31, Judgment of 13 June 1979.

By contrast, *Onwudinjoh v. Onwudinjoh*³⁵ in effect holds that any custom according a right of legitimacy to an illegitimate child may be repugnant to natural justice or contrary to public policy. The morality behind this reasoning is questionable, to say the least. Although sexual promiscuity may be frowned upon, there is no justification in punishing an innocent offspring.

Consider this viewpoint:

There is nothing morally reprehensible in allowing the illegitimate children of a man to share with the legitimate children in his estate thereby alleviating the many social stigmas from which they already suffer. And as nature would have it, sometimes they become the breadwinners of the family...³⁶

As for the obligations of the lawyer, consider this:

Lawyers ... shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.³⁷

Necessarily, the duties and responsibilities of lawyers in Third World countries, most of which are under autocratic regimes, should be greater. In the context of a developing country, the lawyer must, in the words of Zambian ex-President Kenneth Kaunda,

be something more than a practicing professional man; he must be more even than the champion of the fundamental rights and freedoms of the individual. He must be, in the fullest sense, a part of the society in which he lives and he must understand that society if he is to be able to participate in its development and the advancement of the economic and social well being of its members.³⁸

Similarly, Gower, a renowned jurist, acknowledged that the public responsibilities of the legal profession in a developing country are greater than those in highly developed states. According to him, developing countries need courageous lawyers with the highest ethical standards if the rule of law and personal freedom are to be preserved against corruption, nepotism and elitism, as well as military and police power.³⁹

The legal profession therefore ought to be concerned with more than merely its bread and butter. Lawyers should use the law as an instrument of social change. The lawyer should engineer desirable social and economic changes under the law. For the lawyer to perform effectively, however, the bar must be independent. The International Commission of Jurists in the Declaration of Delhi 1959 recognizes that an organized

³⁵ (1957) 1 ENLR 1.

³⁶ Nwabueze B.: *Nigerian Land Law*, *ibid.*, p. 101.

³⁷ Para. 14 of the Basic Principles on the Role of Lawyers adopted at the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

³⁸ Address to the Law Society of Zambia on April 24, 1970 (quoted in Orojo, O.L.: **Conduct and Etiquette for Legal Practitioners** (London: Sweet and Maxwell, 1979) p. 45.

³⁹ Gower: "Independent Africa: The Challenge of the Legal Profession" (1966) p. 102 quoted in Orojo, *ibid.*, p. 46.

legal profession free to manage its own affairs is essential to the Rule of Law. The independent bar, too, should support and sustain an independent and fearless bench.

RECOMMENDATIONS FOR REFORM

Since the law of inheritance touches every individual in the society and indeed the community at large, it merits close attention. The law must be reformed to redress the loopholes, the inadequacies, and the harsh consequences of some customary law applications. A society can be socially engineered in an effective way only if the law is fair, just, and humane. Indeed, operation of the rule of law respects the aspirations of all and consequently maximizes the happiness of all. In the spirit of utilitarianism, the greatest happiness for the greatest number, any law that pursues this end is an instrument of social engineering.

In Nigeria, customary law lacks the above-mentioned ingredients of a virile legal system. Moreover, many uncertainties exist in succession and inheritance law, which create conflict and acrimony among contending interests.

The following recommendations are submitted.

1. Codification of Customary Law

Codification is essential for a reliable legal system, especially in a developing such as Nigeria, where less regard is paid to the rule of law, even where the law is adequately enshrined (the constitution). Consider the human rights abuses by both the state and group(s), particularly during the military dictatorial regimes.

Codification of the customary law will bring about certainty. A society's law commands respect and obedience where the individual knows the governing law, his rights and obligations, and the punishment for violating it. Our customary law, especially in the area of inheritance, is uncertain as demonstrated by *Dawodu v. Danmole*;⁴⁰ where the unsuccessful application of one method of distribution, per stirpes (*Idigi*), will lead to another method (*Ori Ojori*). This law leaves room for abuse, oppression, and exploitation of the weak, because in most cases, the head of the family as a last resort will be asked to choose a more convenient system of distribution. He will often decide the option that will be more beneficial to his own interest. In this process, he would have breached one of the demands of natural justice: "a man must not judge in his own case."⁴¹ In such a situation, fair judgment cannot be obtained (*nemo iudex in causa sua*).

⁴⁰ (1958) 3 FSC 46 (1962) 1 All NLR 702.

⁴¹ See *State Council Service Commission and Another v. Burugbe* (1984) 7 SC 19; *Metropolitan Properties Ltd. v. Lannon* (1969) 1 QB 577, 599. *Okoduwa v. State* (1988) 2 NWLR pt. 76, 333. Attesting to the universality of natural justice, **Karibi-Whyte JSC** in *Adeniyi v. Governing Council of Yaba College of Technology* (1993) 6 NWLR (pt. 300) 526, 449 stated that the rule is of ancient origin and common to mankind, recognized by the ancient Greeks and Romans, enshrined in the Holy Bible, and recognized as part of African culture and philosophy of justice.

Codification will weed out all irrelevant areas and uncertainties in the law, leaving certainty behind. Codification respects moral and legal considerations, unlike most aspects of our country's law.⁴²

Codification will clarify the multiple systems of customary law, but that is not enough.

2. Unification of Customary Laws

The unification of customary laws will apply a single set of laws to all major tribes in Nigeria, eliminating the problems of uncertainty and inconsistency that multiple sets of law impose.

3. Harmonization

Harmonization of the laws is desirable, as with the Land Use Act Section 5, which recognizes statutory right and customary right of occupancy. This system has successfully been implemented in Ghana.

4. Harmonization of the Principles of Natural Justice with Customary Law

Harmonization of the principles of natural justice with the customary laws is also recommended. This is analogous to the role of equitable principles in the common law, so that natural justice applies where there is a lacuna in the customary law application. Equitable principles and common law can flow in the same channel though their waters do not mix, contrary to the predictions that they would invariably create rancor. Like common law and equity, customary law and principles of natural justice can be harmonized into a single legal system and be applied side by side where necessary, the objective being to supplement the customary law and not to supplant it. According to a judge in a decided case, it is difficult to define "natural justice" and "good conscience,"⁴³ but since the court was familiar with the doctrines of equity, the rule of native law before him was declared repugnant to English system of equity and hence inapplicable. Happily enough, the decision was overruled on appeal. The court should always engage in philosophical discussion and attempt to give a lengthy exposition of their reasons for their conclusions. The conflicting position in the above case does not end here. In a similar circumstance and specifically in the application of the equitable doctrine, **Uwais C.J.** (as he then was) in *Osinjugbebi v. Saibu & Ors*⁴⁴ stated the following:

Equity is a rule of English law and has not become part of Yoruba native law and custom or indeed any native law and custom in the context of Nigeria, there is nothing in our laws as equity according to Yoruba Law and Custom.

This view of Justice Uwais has received some criticisms as contrary to Yoruba law and custom and indeed Nigerian customary law generally. It was surprising that a judge of the Supreme Court should say that he does not know the meaning of "equity," which simply

⁴² E.g. the Osu Caste, Disinheritance of female child of property right – *Mojekwu v. Mojekwu* and the disinheritance of illegitimate child, to mention but a few.

⁴³ *Lewis v. Bankole* (1908) 1 NLR 81.

⁴⁴ 1982 9 SC 904.

means fairness, conscience, good faith, and the like—all of which of course are embedded in our laws and customs. It is equally surprising that the trial judge in *Lewis v. Bankole*⁴⁵ could say that it is difficult to define “Natural Justice” and “good conscience” and therefore the concepts need not apply. “Natural Justice” simply means justice based on innate human principles, or justice determined by an innate human sense of justice, or in a broad sense an inherent right to have fair and just treatment at the hands of the rulers or their agents.

It serves as “modern” natural law limitation on the powers of the state. Hence, decisions affecting the rights of the citizens require a fair hearing (*audi alteram partem*), and the decision maker must not be a party to the dispute or interested in the subject matter of the decision or otherwise biased (*nemo iudex in causa sua*). Natural justice cuts across all human endeavors and confronts any judge in any legal system. The principles should be applied without hesitation and reservation. No judge should claim ignorance of this noble weapon, since such a claim is tantamount to recklessness and negligence.

5. Application of the Principles of Natural Justice

To cushion the harsh effect of some of the customary laws and to fill the lacuna created by them, the agencies that implement the law should apply the principles of natural justice where injustice otherwise would result.

Codification, unification, and harmonization will produce certainty in formulating, applying, and implementing the law, leavened as necessary by the natural justice principle. This will shape the customary law in a more civilized manner that respects the interests of all, no matter the status, race, sex or circumstance of birth. This in turn will enthrone law as tool of social engineering for achieving the object of utilitarianism – the greatest happiness of the greatest number, the objective of laws of every civilized state.

Improving the customary law with regard to property inheritance should be a continuous process until the law seeks to produce the greatest happiness of the greatest number. At that point, our law can be compared with its English counterpart and no longer tagged as “barbarous,” whether rightly or wrongly.

6. Promoting the Role of NGOs

Nigeria and indeed other African countries should encourage and promote the role of non-governmental organizations. Among many other activities, NGOs have been educating, enlightening, and informing women and the society on the need to recognize and eliminate discriminatory gender practices in our customary law. Especially valuable work has been done by such NGOs as Women in Nigeria (WIN), Women’s Aid Collective (WACOL), and Women Organisation on Gender Issues. The current changes in the law and practice in some of the Eastern States resulted from the efforts of NGOs such as WACOL.

⁴⁵ *Supra.*

NGOs wrote to the State House of Assembly concerning the Widows Bill.⁴⁶ A letter from WACOL in 2000 stated as follows:

Women's Aid Collective (WACOL) is a non-governmental, non-profit organization registered with Corporate Affairs Commission (CAC) (**No. RC. 388132**) and the Federal Ministry of Justice. WACOL is committed to helping women and adolescents in need. Our vision of a democratic society free from violence and all forms of abuses, where human rights of all, in particular women, children and adolescents are recognized in law and practice.

With regards to our Women's Rights Project, WACOL's programmes are targeted at total empowerment of women. WACOL gives legal assistance and counseling to women, girls and victims of human rights abuses. Under our Legal Aid Project, WACOL has many cases relating to Inheritance and Property Rights, all affecting widows. One of such pathetic cases, evidencing the hardships of widows was brought to your attention during our advocacy visit in commemoration of the "African Women's Day" and "Day of Action for Women's Equal Rights to Equal Inheritance in Africa" which took place on July 31, 2000.

You would recall sir, that the case was that of Mrs. Lucy Ndu, a 79 year old widow whose right to shelter, housing and inheritance was violated by her step-son who removed the entire roofing of a house where she is living just to drive her away from her deceased husband's estate. This is just an example of a heartbreaking story that we as an organization receive on a daily basis.

We hereby, wish to recommend the Honourable House for considering the above bill currently before it.

In solidarity with Women in Enugu State and our sister NGOs in South East Zone, we wish to register our unalloyed support in the passing of the above bill.

We sincerely believe and have the firm conviction that the passing of the bill will to a large extent not only redress the problems of widows, which are very rampant in all the Igbo speaking states of Nigeria but also drastically reduce the cumulative breaches of human rights of women.

We therefore look forward to the support and co-operation of the House in the passing of the bill on THE PROHIBITION OF INFRINGEMENT OF A WIDOW'S FUNDAMENTAL RIGHTS LAW.

In 2001, WACOL wrote proposed specific amendments to the bill.

Niki Tobi JCA (as he then was) in *Mojekwu v. Mojekwu*⁴⁷ gave a wise decision when he said "we need not travel all the way to Beijing to know that the Nnewi Oli-ekpe Custom is repugnant to natural justice, equity and good conscience." This pronouncement

⁴⁶ Joy Ngozi Ezeilo, *Legislative Advocacy for Women's Human Rights*, *Women's Aid Collective* (2001) pp. 35-36.

⁴⁷ *Supra*.

has been rejected by the Supreme Court, however, in **Uwaifo JSC** in **Mojekwu v. Iwuchukwu**,⁴⁸ on the principle of fair hearing.

I cannot see any justification for the court below to pronounce that the Nnewi native custom of Oli-ekpe was repugnant to natural justice, equity and good conscience ... it would appear, for these reasons, that the underlying crusade in that pronouncement went too far to stir up a real hornet's nest even if it had been made upon an issue joined by the parties. I find myself unable to allow that pronouncement to stand and in the circumstances, and accordingly I disapprove of it as unwarranted.

The above pronouncement would appear to cut short the gender celebration in **Mojekwu v. Mojekwu**. Apart from reasons of fair hearing, I would not subscribe to **Uwaifo JSC**'s pronouncement. Aside from the fact that Nigeria is part of the international community, it is very difficult to rationalize the views of **Uwaifo JSC** with the African charter, protocols, and conventions for the elimination of all kinds of discrimination against women.⁴⁹ Still, one can understand his stance in defense of Oli-ekpe. The background of a judge more or less affects his verdict on customary issues. The better approach was that of **Niki Tobi JCA** (as he then was) in forbidding discriminatory inheritance practices in Igbo land against females and burying the Nrachi marriage inherent in that custom.⁵⁰

⁴⁸ (2004) 7 MJSC p. 165.

⁴⁹ See S. 42(1)(2) of the 1999 Constitution, Articles 2 and 5 of the CEDAW, S. 18(1) of the High Court Laws of Anambra State 1987.

⁵⁰ See **Mojekwu v. Ejikeme** (2000) 5 NWLR pt. 657 402 where it was testified thus: "The Nrachi Ceremony is done to enable a daughter bear children in her father's compound in order that the children if males will represent the father of the mother. Such children if males, will inherit the mother's father's property." Thus Nrachi may be seen as the customary equitable intervention to cure the mischief in Oli-ekpe, yet it is still repugnant to natural justice, equity and good conscience.