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Letter from the Editor

This issue of the *International Journal of Not-for-Profit Law* features two major studies of civil society's principles and protections.

First is "Defending Civil Society," a detailed report on the threats—some heavy-handed, some subtle—facing civil society today. The **International Center for Not-for-Profit Law (ICNL)** and the **World Movement for Democracy Secretariat at the National Endowment for Democracy (NED)** develop a typology of threats to civil society organizations (CSOs); address the justifications on which these threats purportedly rest as well as the principles of international law that they contravene; and recommend specific steps through which democratic governments, international organizations, CSOs, and democracy assistance organizations can safeguard a healthy, vibrant civil society.

In addition, **Nick Gallus**, Counsel at the Canadian Department of Foreign Affairs and International Trade, analyzes a potential source of protection for American CSOs operating in Egypt: the bilateral investment treaty (BIT) between the United States and Egypt. Gallus summarizes the BIT; considers the hurdles that a CSO would face in establishing jurisdiction for a dispute under the treaty; assesses the potential applicability of the treaty's standards of protection to CSOs; evaluates Egypt's potential claim that treaty exceptions may apply; and reviews possible remedies for a breach of the treaty.

As always, we are grateful to our authors for their penetrating and timely articles. In addition, "Defending Civil Society" was generously supported by Canada's Department of Foreign Affairs and International Trade (DFAIT), the Swedish International Development Cooperation Agency (Sida), the United States Agency for International Development (USAID), the Hurford Foundation, and the Taiwan Foundation for Democracy. The views expressed in the report, however, do not necessarily reflect the views of the contributors or the governments they represent.

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Civil Society—Principles and Protections

Defending Civil Society

International Center for Not-for-Profit Law (ICNL)

**World Movement for Democracy Secretariat
at the National Endowment for Democracy (NED)¹**

Executive Summary

In his message endorsing this *Defending Civil Society* Report, Archbishop Desmond Tutu said, “[t]o me, civil society is at the core of human nature. We human beings want to get together with others ... and act collectively to make our lives better. And, when we face evils and injustice, we get together and fight for justice and peace. Civil society is the expression of those collective actions. Through strong civil societies, enjoying the freedoms of association and assembly, we encourage and empower one another to shape our societies and address issues of common concern.”

Today, civil society is facing serious threats across the globe. Civil society activists continue to face traditional forms of repression, such as imprisonment, harassment, disappearances, and execution. However, many governments have increasingly become more subtle in their efforts to limit the space in which civil society organizations (CSOs), especially democracy and human rights groups, operate.

In many states today – principally, but not exclusively authoritarian or hybrid regimes – traditional repression techniques are often complemented or preempted by more sophisticated measures, including legal or quasi-legal obstacles, such as barriers to the formation of organizations, barriers to operational activities, barriers to advocacy and public policy engagement, barriers to communication and cooperation with others, barriers to assembly, and barriers to resources.

¹ The **International Center for Not-for-Profit Law (ICNL)** is the leading source of information on the legal environment for civil society, including the freedoms of association and assembly. Since 1992, ICNL has served as a resource to civil society leaders, government officials, and the donor community in more than 100 countries. More information about ICNL can be found at www.icnl.org.

The **World Movement for Democracy**, initiated by the National Endowment for Democracy (NED) in 1999, is a global network of democrats, including activists, practitioners, academics, policy makers, and funders, who have come together to cooperate in the promotion of democracy. NED serves as the World Movement’s Secretariat. Information about the World Movement 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 the first and second editions of this Report.

The World Movement and ICNL encourage civil society groups around the world to reproduce and distribute this Report widely and to initiate and/or include discussions of it in their activities. For additional printed or electronic copies, contact the World Movement Secretariat at: world@ned.org.

This Report has been made possible through the generous support of several organizations, which are listed in Acknowledgments at the end of the Report.

Defending Civil Society was first published in 2008. This is a second edition.

Governments have tried to justify and legitimize such obstacles as necessary to enhance accountability and transparency of CSOs; to harmonize or coordinate CSO 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 treaties and conventions to which the states concerned are signatories.

Over the last several years, significant steps have been made to confront the worrying trend of increasingly restrictive environments for civil society around the world, and to advocate for enabling environments. Under auspices of the Community of Democracies, a group of concerned governments established a Working Group on “Enabling and Protecting Civil Society” to monitor and respond to developments concerning civil society legislation around the world. Also, 14 governments have jointly pledged financial support for the “Lifeline: Embattled NGO Assistance Fund” to help civil society activists confronting crackdowns. In September 2010, the United Nations Human Rights Council (UNHRC) passed a historic resolution on the “Rights to Freedom of Peaceful Assembly and of Association,” establishing a Special Rapporteur on the issue for the first time. The Organization of American States (OAS) also adopted a resolution in June 2011 on “Promotion of the Rights to Freedom of Assembly and of Association in the Americas.”

To elevate the international response, and to help civil society achieve its aspirations, which the Archbishop describes so well above, the Steering Committee of the World Movement for Democracy launched the Defending Civil Society project in 2007, undertaken in partnership with the International Center for Not-for-Profit Law (ICNL).

Like the original edition of the *Defending Civil Society* Report published in 2008, this second edition provides illustrative examples of the legal barriers used to constrain civic space. In addition to including more recent illustrative examples, this Report also expands discussion of major challenges, such as restrictions on the use of new technologies, measures against public movements and peaceful assemblies, and the unintended consequences of efforts to enhance the effectiveness of foreign aid.

The Report articulates the well-defined international principles protecting civil society and underscoring proper government-civil society relations, which are already embedded in international law. These principles include the right of CSOs to entry (that is, the right of individuals to form and join CSOs); the right to operate to fulfill their legal purposes without state interference; the right to free expression; the right to communication with domestic and international partners; the right to freedom of peaceful assembly; the right to seek and secure resources, including the cross-border transfer of funds; and the state’s positive obligation to protect CSO rights.

This Report calls on:

- Democratic governments and international organizations to recognize, protect, and promote fundamental rights, such as the rights to freedom of assembly and of association, using new technologies;
- Democratic governments and international organizations to raise the level of their engagement through mechanisms that already exist, yet have not been employed to their

maximum potential, such as the Community of Democracies' Working Group on Enabling and Protecting Civil Society, and the UN Special Rapporteur's mandate;

- Civil society organizations to deepen their understanding of legal frameworks governing them, and to build their capacity to engage in the reform of regressive frameworks; and
- Democracy assistance organizations to facilitate national, regional, and international discussions among their civil society partners and governments to develop ideas for reforming legal frameworks so that the space for civil society work in every country is protected.

International Principles Protecting Civil Society

To protect civil society organizations (CSOs) from the application of the legal barriers described in this Report, this section seeks to articulate principles that govern and protect CSOs from repressive intrusions by government.

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 the right of individuals to form trade unions, associations, and other types of CSOs.

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

(c) Broadly eligible founders. The architecture of international human rights is built on the premise that all persons, including non-citizens, enjoy certain rights, including the 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 a CSO 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, CSOs have the right to operate free from unwarranted state intrusion or interference in their affairs. International law creates a presumption against any regulation or restriction that would amount to interference in recognized rights.

(a) Interference can only be justified where it is prescribed by law and 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.

(b) Laws and regulations governing CSOs should be implemented and enforced in a fair, apolitical, objective, transparent, and consistent manner.

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

(2) CSOs 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

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

(2) 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 and the free flow of ideas are essential in a democratic society. CSOs are therefore protected in their ability to speak critically about government law or policy, and to speak favorably about human rights and fundamental freedoms.

(3) Interference with freedom of expression can only be justified where it is provided by law and necessary for respect of the rights or reputations of others; or for the protection of national security or of public order (*ordre public*), or of public health or morals.

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

(2) The right to receive and impart information, regardless of frontiers, through any media, embraces communication via the Internet and information and communication technologies (ICTs).

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

Principle 5: The Right to Freedom of Peaceful Assembly

(1) Civil society representatives, individually and through their organizations, enjoy the right to freedom of peaceful assembly.

(2) The law should affirm a presumption in favor of holding assemblies. Those seeking to assemble should not be required to obtain permission to do so.

(a) Where advance notification is required, notification rules should not be so onerous as to amount to a requirement of permission or to result in arbitrary denial.

(b) The law should allow for spontaneous assembly as an exception to the notification requirement, where the giving of notice is impracticable.

(3) The law should allow for simultaneous assemblies or counter-demonstrations, while recognizing the governmental responsibility to protect peaceful assemblies and participants in them.

(4) Interference with freedom of assembly can only be justified where it is in conformity with the law and necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals, or the protection of the rights and freedoms of others.

Principle 6: The Right to Seek and Secure Resources

Within broad parameters, CSOs have the right to seek and secure funding from legal sources, including individuals, businesses, civil society, international organizations, and inter-governmental organizations, as well as local, national, and foreign governments.

Principle 7: 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 fundamental freedoms and civil society is appropriately enabling, and that the necessary institutional mechanisms are in place to ensure the recognized rights of all individuals.

Introduction

Recent years have witnessed proliferating efforts by various governments to narrow 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), launched the Defending Civil Society project in 2007 to empower civil society actors in their efforts to defend and enhance civil society space.

As the first step in the project, the World Movement and ICNL published the first edition of *Defending Civil Society* in 2008 to identify and promulgate a set of international principles, already rooted in international law, which underscore proper government-civil society relations. Adherence to these principles—which include the rights of individuals to associate in civil society organizations (CSOs),² and the right of CSOs to advocate and to receive assistance from

²The “civil society” sector has been variously called the “third” sector, “voluntary” sector, “nonprofit” sector, and “independent” sector. Civil society is made up of various types organizations, which may include associations, foundations, non-profit corporations, public benefit companies, development organizations, community-based organizations, faith-based organizations, mutual benefit groups, sports clubs, advocacy groups, arts and culture organizations, charities, trade unions and professional associations, humanitarian assistance organizations, non-profit service providers, charitable trusts, and political parties. These organizations are often referred to as nongovernmental organizations (NGOs), not-for-profit organizations (NPOs), or civil society organizations (CSOs). To recognize and appreciate the diversity in organizational forms, this Report generally uses the term “civil society” or “CSOs” but refers to “NGOs” or “NPOs” when referenced as such by other sources. Also, while the fundamental freedoms of assembly and of association affect trade unions and political parties, the Report

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 relevant international treaties and conventions in which the principles are enshrined, are violating in the ongoing backlash against the advancement of democracy.

With the publication of the Report, the World Movement for Democracy and ICNL began 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 advancing democracy—also seeks to strengthen international solidarity among democracy-assistance organizations, human rights groups, and related CSOs at a precarious moment for the work they undertake.

To help advance the promotion and adoption of these internationally recognized principles to protect civil society, the World Movement assembled an Eminent Persons Group that included former Canadian Prime Minister and current chair of the World Movement Steering Committee the Rt. Hon. Kim Campbell, former Brazilian President Fernando Henrique Cardoso, His Holiness the Dalai Lama, former Czech President the late Vaclav Havel, former Malaysian Deputy Prime Minister Anwar Ibrahim, Egyptian scholar and activist Saad Eddin Ibrahim, and Archbishop Desmond Tutu. In 2009, this Eminent Persons Group endorsed the first edition of this Report and its findings.

In drafting the first edition of the Report, the World Movement Secretariat organized five regional consultations during May-August 2007. These consultations—held in Casablanca, Morocco; Lima, Peru; Kyiv, 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.

Preparing for this updated edition of the Report, the World Movement and ICNL once again conducted a series of consultations at various international fora, including ICNL’s Global Forum on Civil Society Law in August 2011. Feedback on the draft second edition was also collected from World Movement participants. Input directly from civil society activists who face challenges on the ground have helped verify the impact of barriers highlighted in this Report.

Rationale for the Defending Civil Society Project. Over the last several years, significant steps have been made to confront the worrying trend of increasingly restrictive environments for civil society around the world, and to advocate for enabling environments. In 2009, under Canadian leadership, the Community of Democracies launched a “Working Group on Enabling and Protecting Civil Society” to monitor and respond to developments concerning civil society legislation around the world. In September 2010, the United Nations Human Rights Council (UNHRC) passed a historic resolution on the “Rights to Freedom of Peaceful Assembly and of Association,” establishing a Special Rapporteur on the issue for the first time. Following this UNHRC resolution, the Organization of American States (OAS) adopted a resolution in June 2011 on “Promotion of the Rights to Freedom of Assembly and of Association in the Americas.”

generally focuses on issues concerning associations, foundations, community-based organizations, advocacy groups, and other types of organizations other than trade unions and political parties.

Furthermore, in 2011, 14 governments—including Australia, Benin, Canada, Chile, the Czech Republic, Denmark, Estonia, Lithuania, the Netherlands, Norway, Poland, Sweden, the United Kingdom, and the United States—pledged financial support for the “Lifeline: Embattled NGO Assistance Fund” to help civil society activists confronting crackdowns by providing emergency and advocacy assistance to enable them to continue their work in difficult circumstances.

Despite these international efforts, civil society is still losing space in many countries. Activists continue to face traditional forms of repression, such as imprisonment, harassment, disappearances, and execution. In September 2009, Yevgeniy Zhovtis, Kazakhstani human rights activist and member of the World Movement Steering Committee, received a four-year imprisonment sentence as a result of a politically manipulated trial related to an auto accident.³ In December 2009, Chinese dissident and principal author of “Charter ’08” and Nobel Laureate, Liu Xiaobo, was convicted of “inciting subversion of state power” and sentenced to 11 years in prison. In June 2010, in Kinshasa, Democratic Republic of the Congo, Floribert Chebeya Bahizire, a pioneer of human rights movements across Africa, was murdered, along with his driver Fidele Bazana, after being called to meet the Inspector General of Police. Baharaini human rights activist, Abdulhadi Al Khawaja, was arrested in December 2011 and sentenced to life imprisonment for participating in “OccupyBudaiya Street,” an initiative organized by protesters in Bahrain through Facebook and Twitter. Many civil society activists around the world fall victim to similar oppression every day.

As the first edition of the Report pointed out, traditional threats against civil society have increasingly been complemented by more sophisticated measures, including legal or quasi-legal obstacles to democracy and human rights work. 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. CSOs that advocate for human rights and democracy, including many that work in conflict zones, are particularly targeted. Regimes justify such actions by accusing independent CSOs of treason, espionage, subversion, foreign interference, or terrorism. These are but rationalizations, however; the real motivation is almost always political. Restrictive laws or practices are often introduced as a country prepares for presidential and/or parliamentary elections. These actions are not about defending citizens from harm, but about protecting those in power from scrutiny and accountability.

Since the publication of the first edition of the Report in 2008, three new major challenges have become evident. First, this updated Report addresses the challenges that civil society groups have increasingly faced in using new technologies, such as the Internet and mobile phones, to carry out their advocacy and mobilization efforts. Recent events in the Middle East and North Africa highlight the degree to which such new technologies can serve as powerful tools for civil society activists. Many authoritarian governments have responded by introducing newly restrictive laws and regulations and engaging in various activities to block access to the Internet and limit mobile phone communications without court approval.

Second, this edition extensively expands the discussion of freedom of assembly. The events of the Arab Spring vividly remind us of the power of protest. Many civil society groups use public meetings and demonstrations to express their political opinions, raise public awareness of salient issues, mobilize support for their advocacy efforts, and demand that

³ In February 2012, Yevgeniy Zhovtis was granted an amnesty and released.

governments respond. Similar to the trend that emerged after the “Color Revolutions” in some former Soviet countries, the Arab Spring that began in late 2010 triggered efforts in a variety of countries in different regions to take measures against popular uprisings and public movements.

Third, the Report now notes one unintended consequence of efforts to enhance the effectiveness of foreign aid. Some recipient governments have introduced laws or policies requiring civil society organizations to “harmonize” or “align” their activities with governmental priorities. In the process, governments have subtly converted “host country” ownership into “host government” ownership. The Fourth High Level Forum on Aid Effectiveness (HLF-4) Busan Partnership Document and the Istanbul Principles recognize that democratic ownership in national development plans is a crucial component in promoting development effectiveness. Inclusive partnerships among international organizations, governments, and civil society ensure that all stakeholders have sovereignty over decisions on how aid is used. In paragraph 22 of the Busan Partnership Document, states pledged to “implement fully [their] respective commitments to enable CSOs to exercise their roles as independent development actors, with a particular focus on an enabling environment, consistent with agreed international rights, that maximizes the contributions of CSOs to development.”⁴

Many of the examples in this Report, provided in the context of the recent backlash, reflect measures that some governments have imposed for decades. Ongoing crackdowns on activists in Sudan, Syria, Belarus, Tajikistan, Vietnam, and Cuba, for instance, show how severely restrictive those societies are and how 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 for potential political reforms.

As witnessed immediately after the “Color Revolutions” in former Soviet countries, so the events of the Arab Spring in 2010-2011 have posed both challenges and opportunities. The Arab Spring, which demonstrated the power of protest and the role of civil society activists, unfortunately triggered increasingly aggressive responses from governments in the region and in many other parts of the world, preventing civil society groups and individual citizens from exercising their rights to freedom of assembly and association. At the same time, the upheavals in those Arab countries, especially with the use of new technologies, have provided opportunities to reform the previously restrictive legal frameworks for CSOs and to facilitate open discussions about creating enabling environments for civil society groups in those countries.

A proper legal framework that respects fundamental freedoms can help create an enabling environment for civil society through which citizens actively participate in political and social development. As the Eminent Persons Group wrote in its letter endorsing the first edition of *Defending Civil Society*, “[d]emocracy will not flourish unless citizens can freely engage in politics and social change, and for many years civil society groups have been providing citizens with the means to do so peacefully.” To deepen a democratic culture and build a healthy democratic society, citizens must actively participate in policy making and social and economic development in their respective communities and countries. This Report seeks to articulate and

⁴ Busan Partnership for Effective Development Cooperation, <http://www.aideffectiveness.org/busanhlf4/component/content/article/698.html>.

promote the fundamental international principles for such a legal framework and enabling environment.

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 CSOs from engaging in the full range of free expression and public policy advocacy;
- ***barriers to communication and cooperation***, or the use of law to prevent or stifle the free exchange of contact and communication among CSOs and others;
- ***barriers to assembly***, or the use of law to ban or interfere with peaceful public gatherings; 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 in this Report 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 CSOs 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 second section of the Report briefly surveys government 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' true 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 describes in greater depth the international principles that protect civil society, and articulates the rights of civil society organizations that are being systematically violated. 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 freedom of peaceful assembly;
- the right to seek and secure resources; and

- the state's duty to protect and promote respect for human rights and fundamental freedoms and its obligation to protect the rights of CSOs.

To ensure a full understanding of these principles and rights, and to promote 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.⁵ 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 10 principles for informing government treatment of CSOs, including protection of their right to function in an environment free from harassment, intimidation, and discrimination; protection of their right to receive financial support from domestic, foreign, and international entities; and the apolitical and equitable application of laws regulating them.⁶

The final section of the Report considers how to use the Report to advance the principles it articulates, and 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.

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 six categories:

- barriers to entry,
- barriers to operational activity,
- barriers to speech and advocacy,
- barriers to contact and communication,
- barriers to assembly, 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.

⁵ ILO Declaration on Fundamental Principles and Rights at Work, <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

⁶ The U.S. Department of State Guiding Principles on Non-Governmental Organizations, <http://www.state.gov/j/drl/rls/shrd/2006/82643.htm>.

Legal barriers arise from a variety of sources, including constitutions, legislation, regulations, decrees, court decisions, and other legally binding measures. Moreover, legislation impacting CSOs extends beyond laws specifically designed to govern civil society organizations. Such measures include, for example, laws governing assembly and peaceful protests; anti-terrorism or anti-extremism legislation; laws on state security or state secrets; access to information laws; and measures affecting use of the Internet and freedom of expression.

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 in 2007 convened CSOs 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). More recently, in 2011, consultations on this updated edition were held at ICNL's Global Forum on Civil Society Law. Further feedback on the draft updated version was provided by scores of civil society activists around the world. Few citations are provided in order to protect the identity of sources, especially those working in politically hostile environments.

This Report considers the law not only as written but also as applied in practice. 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 completely limit the right to associate, whether in informal groups or as registered legal entities.

- In **North Korea**, while the constitution provides for freedom of association, the government fails to respect this provision in practice. There are no known organizations other than those created by the government.

(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 **Zambia**, the 2009 NGO Act prohibits the operation of unregistered organizations. An NGO must apply for registration to the Registrar within 30 days of its formation or the adoption of its constitution. Persons operating an unregistered organization commit a

criminal offense and are subject to criminal penalties, including fines and imprisonment of up to three years.

(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, including **Malaysia** and **Thailand**, 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 CSOs to undergo formal registration, incorporation, or other similar procedures (hereinafter “registration”), in order to attain legal entity status. Some states make the process so difficult that it effectively prevents CSOs 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.

- Applicants for registration as CSOs in **Panama** are subject to nearly unlimited government discretion. According to a 2011 report, an official charged with CSO registration asserted that he initially rejects 99% of applications for registration – which must be presented by lawyers – for purported legal deficiencies in the organizational bylaws. As a result, some CSOs have been forced to wait years, without explanation, to become officially registered. One CSO focusing on LGBT issues, for example, waited six years before being registered.
- In **Vietnam**, Decree 45 (2010) provides for a “dual management” system, whereby associations are responsible both to the Ministry of Home Affairs (or to local governments in the case of provincial associations) and to the ministry working in the professional arena of the association (or to the provincial level government agency for that sector). Thus, the government has at least two formal opportunities in which it can decline to approve the registration of an association (and two channels for continuing administration of associations).
- In **Eritrea**, Proclamation No. 145/2005 provides as follows: “Local NGOs may be authorized to engage in relief and/or rehabilitation work if ... they establish that they have at their disposal in Eritrea one million US dollars or its equivalent in convertible currency ...” (Article 8(1)).

(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 a 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.”⁷
- 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.”⁸ (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 constituted 70 to 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 **Zambia**, the 2009 NGO Act limits the validity of the registration certificate to just three years, and requires that an NGO apply to the NGO Board for the renewal of the certificate. The failure to renew the certificate of registration will result in the expiration of the certificate and presumably in the loss of legal entity status.

(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 **Azerbaijan**, according to regulations introduced in 2009, a foreign organization, in order to register, must negotiate and conclude an agreement with the Ministry of Justice (MoJ). The decision to conclude an agreement is, however, subject to the full discretion of the MoJ, as the regulations do not provide clear grounds for refusal to conclude an agreement nor any fixed time period within which a decision must be made.
- 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.

⁷ Schofield, Matthew, “Putin Cracks Down on NGOs,” McClatchy Washington Bureau, February 21, 2007 (<http://www.realcities.com/mld/krwashington/16742653.htm>).

⁸ The Advocacy Project, OTR Volume 3, Issue 1, December 7, 1998, p.2.

II. Barriers to Operational Activity

Even when CSOs have successfully negotiated the barriers to entry described above, the law may subject them to a wide range of constraints on 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 promoting, monitoring, or engaging in any human rights activities.
- In **Afghanistan**, the Law on NGOs (2005) prohibits NGO participation in construction projects and contracts (Article 8).
- Prohibitions are often 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 (NGO Act (2002), Article 31).
- Laws in several countries, including **Egypt** and **Russia**, prohibit participation in “political,” “extremist,” or “terrorist” activity without defining these terms clearly. Such vague language allows the state to block CSO activity in legitimate spheres of work (and to brand CSOs or CSO activists as “extremists” or “terrorists”).

(2) *Mandatory compliance with national development plans.* In other cases, laws and policies require CSOs to align or harmonize their activities with governmental priorities as defined in national development plans. Such requirements, commonly justified in the interest of aid effectiveness, limit the ability of CSOs to pursue activities not pre-defined by governments in development plans and may limit the ability of CSOs to play a critical watchdog role vis-à-vis the government.

- **Sierra Leone**’s 2009 Revised NGO Policy Regulations (“NGO Policy”) provide that “organizations wishing to operate as NGOs in Sierra Leone” must meet certain criteria, “including a clear mission statement outlining [their] purpose, objectives, target beneficiaries and constitution, which is in conformity with GoSL development policies” (NGO Policy at Paragraph 2.2.1.(i)). Otherwise, an NGO’s application to operate in Sierra Leone will be disqualified (NGO Policy at Paragraph 2.2.6). Moreover, the Policy states that “No project shall be implemented within Sierra Leone unless it has been discussed with the relevant line ministry and MoFED”⁹ (NGO Policy at Paragraph 2.5.2.1.).¹⁰
- According to the 2010 NGO Act in **Somaliland**, every NGO registered under the Act must “ensure their development programs are aligned with Somaliland’s national development plan” (Article 10(3)). The Consultative Committee (a governmental committee) is required to “formulate policy guidelines regulating the activities of NGOs

⁹ MoFED is the Ministry of Finance and Economic Development in Sierra Leone.

¹⁰ It is worth noting that the NGO Policy emphasizes the prohibition through block capitals, bold font, and underscoring, as follows: “**NO PROJECT SHALL BE IMPLEMENTED WITHIN SIERRA LEONE UNLESS IT HAS BEEN DISCUSSED WITH THE RELEVANT LINE MINISTRY AND MoFED.**”

and ensure alignment of their activities to overall national development goals/plans” (Article 7(1)(e)). Moreover, “[t]he programs of International NGOs shall be aligned with the National Development Plan of the Country” (Article 35(2)).

(3) *Invasive supervisory oversight.* The law can sometimes invite arbitrary interference in CSO activities by empowering governmental bodies to exercise stringent supervisory oversight of CSOs. Invasive oversight may take the form of burdensome reporting requirements, interference in internal management, and advance approval requirements.

- 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).
- In **Uganda**, section 2(2) of the NGO Act authorizes the NGO Board to issue a certificate of registration “subject to such conditions or directions generally as it may think fit to insert in the certificate, and particularly relating to – (a) the operation of the organisation; (b) where the organisation may carry out its activities; and (c) staffing of the organisation.” Furthermore, NGO regulations require an NGO to give “seven days notice in writing” of its intention “to make any direct contact with the people in any part of the rural area of Uganda.”

(4) *Government harassment.* Poorly drafted laws encourage government harassment through repeated inspections and requests for documentation, as well as the filing of warnings against CSOs. Indeed, governments also take “extra-legal” actions to harass independent groups.

- In **Azerbaijan**, in August 2011, the offices of the Institute for Peace and Democracy and the Women's Crisis Center were bulldozed as part of the government's alleged urban renewal project, which includes building a park in honor of former president Heydar Aliyev. The Institute for Peace and Democracy was given no prior notice of the demolition.
- Civil society leaders critical of official policies in **Panama** have routinely been subject to campaigns of harassment and intimidation. Accusations are made that the individual, or his or her CSO, is seeking to undermine the country’s stability. Victims of such harassment include environmental groups, minority rights organizations, women’s CSOs, and others.
- In **Belarus**, 78 civil society organizations 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 CSOs and 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.

(5) *Criminal sanctions against individuals.* The use of criminal penalties against individuals connected with CSOs can prove a powerful deterrent against CSO activities and freedom of association.

- **Tanzania**'s NGO Act (2002) contains penal provisions for even minor breaches of the Act. More disturbingly, the Act places the burden of proof in a criminal trial against office bearers of an NGO on the accused, not the prosecution.
- In **Yemen**, the Law on Associations and Foundations includes draconian individual punishments, providing up to six months in prison for individuals who are not members of an CSO but who participate in the management or discussions of an CSO's general assembly without express approval of the CSO'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.
- In February 2011, in **Zimbabwe**, the police raided an academic meeting in Harare at which a video on events in Tunisia and Egypt was shown. The police confiscated computers and other equipment and arrested everyone present, including civil society activists. Forty-five of the 46 activists were formally charged either with treason or with attempting to overthrow the government by unconstitutional means, crimes that carry penalties of life in prison or death, and up to 20 years in prison, respectively.¹¹

(6) *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.

- A leader of a human rights advocacy organization in the **Democratic Republic of the Congo** and his driver were murdered after being summoned by the General Inspectorate of Police in June 2010. Although the government investigation resulted in the suspension of the General Inspectorate of Police and the arrest of three police officers, threats to human rights activists still continue.
- In **Colombia**, in July 2007, 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.
- In the Philippines, since 2001, there has 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.

¹¹ The charges against most of the activists were dropped. Six activists, however, were charged and convicted in 2012 for conspiracy to commit public violence.

(7) *Organizational Termination and Dissolution.* While governments should only resort to the suspension and termination of CSOs as a measure of last resort, such measures are often based on vague or arbitrary legal grounds.

- In **Argentina**, the law permits the termination of a CSO 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.”

(8) *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.

- As but one example, on December 21, 2010, **Venezuela**’s National Assembly passed a raft of legislation, including the *Organic Law on People’s Power*, to consolidate the system of “people’s power,” a State-controlled system of citizen participation in public policy-making and oversight based in regional and community-level bodies. Also passed that day was the *Organic Law on Social Control*, which establishes that oversight of public and community functions is a shared responsibility between the people’s power organizations, citizens, and the Government. The aim of the Law is “prevention and correction of behaviors, attitudes and actions that may be contrary to social interests and ethics ...” and in particular, “that the activities of the private sector do not affect collective or social interests.” People’s power is not just symbolic—one prominent observer of Venezuelan governance stressed that according to the latest statistics, more public funds are being awarded to the people’s power institutions than to Venezuelan municipal governments.

III. Barriers to Speech and Advocacy

For many CSOs, 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 sometimes used to restrict the ability of CSOs 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 speech and publication.

- The Civil Associations Law of **Oman** (issued by the Sultani Decree No. 14 of 2000) states, in Article 5, that a CSO may not hold public lectures without prior permission from the Ministry of Social affairs.
- A new Law on Information came into effect in **Algeria** in January 2012. Among other restrictions, the Law requires all publications to be subject to prior approval by a media

regulatory authority. Moreover, the scope of the Law is apparently broad, embracing the “publication or dissemination of facts, news messages, opinions, or ideas...” (Article 3).

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

- In **Cambodia**, defamation and disinformation remain criminal offenses for which suspects can be arrested and subject to fines of up to 10 million riel (US\$2,500) – a sum that most Cambodians would have little chance of paying, thus facing the prospect of imprisonment for incurring debts. In July 2011, the Appeal Court of Cambodia upheld a two-year prison sentence for a staff person of the Cambodian League for the Promotion and Defense of Human Rights (LICADHO). The staffer had originally been convicted in August 2010 on a charge of disinformation for allegedly distributing leaflets that contained critical references to the government's relationship with Vietnam.
- In **Thailand**, defamation is a criminal offense under the Penal Code, and the maximum penalty is two years imprisonment and a fine of 200,000 baht (approximately US\$5,700). Moreover, section 112 of the Penal Code states: “Whoever defames, insults or threatens the king, the queen, the heir-apparent or the regent shall be punished with imprisonment of three to fifteen years.”

(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.

- 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 CSOs that advocate positions counter to the state as extremist.
- In **Ethiopia**, the Anti-Terrorism Proclamation of 2009 includes an overbroad and vague definition of terrorist acts and a definition of “encouragement of terrorism” that makes the publication of statements “likely to be understood as encouraging terrorist acts” punishable by 10 to 20 years in prison. The Proclamation has been used against activists and journalists. Since the Proclamation came into effect, more than 29 individuals have been imprisoned.

(4) *Criminalization of dissent.* In some countries, the law may be so phrased as to potentially criminalize the 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 that 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 that “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.”

IV. Barriers to Contact and Communication

Closely related to free expression is the ability of CSOs 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 may even be prohibited from doing so.

- The NGO Act 2002 in **Tanzania** established a National Council of NGOs as the collective forum for the purpose of coordination “of all NGOs operating in Mainland Tanzania,” and prohibits any persons or organizations from performing “anything which the Council is empowered or required to do” under the Act.
- In **Bosnia and Herzegovina**, the government has, in recent years, simply refused 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.

- In the **United Arab Emirates**, the Federal Law on Civil Associations and Foundations of Public Benefit (Federal Law 2 of 2008) restricts NGO members from participating in events outside the country without prior authorization from the Ministry of Social Affairs (Articles 16, 17).
- In **Algeria**, 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.
- **Egypt**’s Law on Associations and Foundations restricts the right of CSOs to join with non-Egyptian CSOs, and “to communicate with non-governmental or intergovernmental organizations” without prior governmental approval. Moreover, the law threatens with dissolution those CSOs that interact with foreign organizations without prior approval.
- In **Uzbekistan**, several international CSOs were ordered to terminate their activities due to engaging in “close cooperation and providing assistance to the activists of non-registered organizations.” In addition, CSOs seeking to conduct a conference and to invite international participants to the conference must secure advance approval from the Ministry of Justice.

- In **Kenya**, the NGO Coordination Act Regulations provide that no NGO can become a branch of, or affiliated to, or connected with any organization or group of a political nature established outside Kenya, except with the prior consent in writing of the NGO Coordination Board, obtained upon written application addressed to the Director and signed by three officers of the NGO.

(3) *Barriers to information and communication technology.* Barriers affecting the use of the Internet and web-based communication are becoming increasingly common. Restrictions on the right to communicate via the Internet assume many forms, including technical measures such as blocking and filtering; criminal laws applied to Internet expression; and laws that impose liability on intermediaries for the failure to filter or block content deemed illegal, among others.¹² The impact of these restrictions reaches far beyond civil society, of course, but civil society leaders and their organizations are prominent targets.

- In **Zimbabwe**, the Interception of Communications Act (ICA) signed into law in August 2007 authorizes the government “to intercept mail, phone calls and emails without having to get court approval.” The Act has been employed in the investigation of a case involving a man arrested for posting comments to Prime Minister Morgan Tsvangirai’s Facebook page that expressed admiration for the Egyptian protesters; the individual has been charged with “advocating or attempting to take-over government by unconstitutional means.” The ICA allows authorities to gather otherwise private information from Internet service providers to investigate anyone who is accused of being a threat to national security or public safety.
- 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 (US\$2000) for circulating “harmful” information by any means.
- The **Angolan** Parliament enacted the draft information technology crime law on March 31, 2011. Under the crime of “unlawful recordings, pictures and video” (Article 17), any person could be fined and imprisoned for electronically disseminating pictures, video, or recordings of a person’s public speech without the subject’s consent, even if the material is produced lawfully and without any intent to cause harm. This could deter journalists from posting videos of public demonstrations, or police brutality, even if recorded in a public place.

(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.¹³

¹² For more information on Internet restrictions, see the OpenNet Initiative at <http://opennet.net/>.

¹³ CIVICUS: Civil Society Watch, “Angola: Civil society campaigner arrested,” February 2007, referring to <http://www.globalwitness.org/library/angola-anti-corruption-campaigner-still-unable-leave-cabinda-angola>.

- In Novorossiysk, **Russia**, in February 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.¹⁴

V. Barriers to Assembly

The events of the Arab Spring have vividly reminded us of the power of protest. At the same time, they also remind us of how the law can be used to prevent and impede freedom of assembly. Legal barriers to free assembly assume many forms.

(1) *Bans on public gatherings.* The most extreme barrier to freedom of assembly is the prohibition of public gatherings.

- The government in **Saudi Arabia** warned in early March 2011 that it would enforce the law banning public demonstrations. According to the Interior Ministry, demonstrations are prohibited “because these contradict the principles of Islamic law and the values and norms of the Saudi society; they further lead to public disorder, harm to public and private interests, breach of the rights of others, and to wreaking havoc that result in bloodshed.”
- The law in **Burma** prohibits public gatherings through multiple layers of regulation. Article 144 of the Penal Code bans groups of five people gathering together. SLORC Order No. 2 (1988) bans “gathering, walking, marching in procession, chanting slogans, delivering speeches, agitating, or creating disturbances on the streets of five or more people ... regardless of whether the act is with the intention of creating a disturbance or of committing a crime or not.” And most recently, Directive 2/2010, issued on 23 June 2010, prohibits the act of marching to the gathering point “holding flags or marching and chanting slogans in procession.”
- Under the state of emergency decree issued in **Thailand** in April 2010, police were authorized to disperse peaceful assemblies; public gatherings of more than five people were banned; and suspects could be detained for 30 days without charge.

(2) *Advance notification requirement.* Advance notification of public gatherings is a common regulatory requirement, and has been upheld by the UN Human Rights Committee and regional human rights mechanisms. But an advance notification requirement may be problematic where it amounts to a request for permission and results in arbitrary or subjective denial.

- The Federal Law on Assemblies, Meetings, Demonstrations, Processions and Pickets (2004) in **Russia** requires notification to the government for any public event, except for a rally or picketing held by a single participant (Article 7). The promoter of the event must notify the government in writing not later than ten days prior to holding the public event (Article 7). Based on governmental rhetoric¹⁵ and crackdowns of unauthorized protests, the notification requirement often amounts to a requirement of advance permission.

¹⁴ Blomfield, Adrian, “Echoes of Stalin in tea party arrests,” Telegraph Media Group, February 7, 2007, <http://www.telegraph.co.uk/news/worldnews/1541881/Echoes-of-Stalin-in-tea-party-arrests.html>

¹⁵ Prime Minister Vladimir Putin commented as follows: “If you get (permission), you go and march. If you don’t—you have no right to. Go without permission, and you will be hit on the head with batons. That’s all there is to it.” See <http://www.weeklystandard.com/blogs/russian-democracy-needs-reset>.

- Article 3 of the Public Meetings and Events Law in **Cameroon** requires organizers of public meetings to notify officials at least three days in advance; and to obtain a permit from administrative authorities. In practice, however, the government often refuses to issue permits to organizers for assemblies organized by persons or groups critical of the government. On May 3, 2010, security forces prevented members of the Union of Cameroonian Journalists (UCJ) from demonstrating in Yaoundé because the authorities claimed the UCJ had not provided ample notice of the event to the appropriate authority.

(3) *Content-based restrictions.* Laws may specifically target (and restrict) public gatherings and meetings with “political” or other substantive content.

- In **Ecuador**, criminal laws have been applied to punish citizens who publicly protest against public works projects that affect the environment and indigenous communities. Articles 246-248 of the Penal Code subject those who “obstruct” the execution of public works projects to a fine and/or imprisonment up to three months.
- In **Singapore**, any gathering of five or more people for non-social purposes is considered an illegal assembly.
- The Peaceful Assembly Act 2011 of **Malaysia** bans any gathering in the form of street protest. Article 3 defines “street protest” as “an open air assembly which begins with a meeting at a specific place and consists of walking in a mass march or rally for the purpose of objecting to or advancing a particular cause or causes.”

(4) *Restrictions on categories of persons.* Laws may specifically restrict or prohibit certain individuals or categories of individuals from participating in public gatherings and demonstrations.

- In many countries, universities have served as hotbeds of political activism and student movements for change. In **Malaysia**, however, it is illegal for students to join political parties or take part in political campaigns or protests; students who do so risk expulsion and fines. Under the 1971 Universities Act, students are barred from expressing “support, sympathy or opposition” to any political party or trade union, domestic or foreign. More recently, the Peaceful Assembly Act 2011 of Malaysia prohibits anyone under the age of 21 from organizing an assembly and any children (under 15 years old) from participating in an assembly (Article 4(2)(d, e)).
- The 2009 Law on Demonstrations in **Cambodia** refers to freedom of assembly only with regard to Khmer citizens, and thereby seems to exclude foreigners from the embrace of freedom of assembly (Article 2). The Peaceful Assembly Act 2011 of **Malaysia** is more explicit, prohibiting non-citizens from organizing or participating in an assembly (Article 4(2)(a)).
- The lesbian, gay, bisexual, and transgendered (LGBT) community is often the target of restrictions on the freedom of assembly. For example, **Russia** routinely prohibited the Moscow LGBT pride parades in 2006, 2007 and 2008.

(5) *Responsibilities of organizers.* While it is not uncommon for laws to impose certain obligations on the organizers of public gatherings and demonstrations, the responsibilities should not be so burdensome as to deter the gathering itself.

- Article 5 of the Public Meetings and Events Law of **Cameroon** requires the organizers of any public meeting to appoint an “Executive” made up of three people who will be responsible for keeping the peace during the public meeting. The “Executive” must “prevent any violation of law and prevent speeches that conflict with public policy or are likely to incite people to commit felonies or misdemeanors.”
- Article 6 of the Peaceful Assembly Act 2011 of **Malaysia** obliges each organizer to “ensure that he or any other person at the assembly does not do any act or make any statement which has a tendency to promote feelings of ill-will or hostility amongst the public at large or do anything which will disturb the public tranquility,” and to “ensure the clean-up of the place of assembly or bear the clean-up cost of the place of assembly.”
- In **South Africa**, the Regulation of Gatherings Act of 1993 provides, in Section 11(1), that “if any riot damage occurs as a result of (a) a gathering ... [or] (b) a demonstration,” then the organizer or convener of the gathering, or “every person participating in such demonstration,” shall be “jointly and severally liable for that riot damage as a joint wrongdoer” In September 2011, the Supreme Court of South Africa, in interpreting section 11(1), held that “if one persists in organising an event where it is reasonably foreseeable that no measure or means could be employed to prevent it from degenerating into a riot, then when that eventuality occurs one could hardly be expected to escape liability for the harm caused to persons or property.”¹⁶

VI. 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 **Venezuela**, the Law for Protection of Political Liberty and National Self-Determination, enacted in December 2010, targets NGOs dedicated to the “defense of political rights” or other “political objectives” and precludes these organizations from possessing assets, or receiving any income, from foreign sources. Noncompliance could lead to a fine of double the amount received from the foreign source.
- In **Ecuador**, in July 2011, the President issued a decree prohibiting registered international CSOs from receiving funding from bilateral and multilateral sources for their activities in Ecuador.
- The Foreign Contributions (Regulation) Act, 2010, in **India** specifies persons who are ineligible to receive foreign contributions. Of particular concern is the inclusion of “Organization[s] of a political nature,” a term which has not been defined.

¹⁶ http://www.justice.gov.za/sca/judgments/sca_2011/sca2011-152.pdf.

(2) *Advance government approval.* In other countries, the law allows the receipt of foreign funding, but only with advance governmental approval.

- **Egyptian** law prohibits any association from receiving foreign funds – whether from foreign individuals or from foreign authorities (including their representatives inside Egypt) – without advance approval from the Minister of Social Solidarity and Justice. Securing ministerial approval may take months if not years; in many cases the Ministry simply fails to respond at all. Moreover, the failure to secure prior approval may lead to dissolution and criminal penalties, including imprisonment. In early 2012, for example, the Egyptian government brought charges against more than 40 Egyptian and foreign NGO employees for use of foreign funds in NGOs without prior approval.
- In **Jordan**, foreign funding to societies is subject to the approval of the Council of Ministers. The request for approval should include the source of funding, the amount of funding, the means of transfer, and the objectives for which the funding will be spent, in addition to any special conditions.
- In **Belarus**, in order to receive foreign funds, organizations must register the transfer agreement with a sub-department of the presidential administration, which grants such registrations only rarely (Presidential Decree No. 8 of March 12, 2001, para. 1(2)).
- In **Uzbekistan**, in order to receive a foreign grant, an NGO must secure a special opinion from the Commission under the Cabinet of Ministers that the project to be supported by the grant is indeed worthy of support.

(3) *Burdensome procedural requirements.* In other countries, the receipt of foreign funding is impeded by burdensome procedural requirements.

- In **China**, in 2010, the State Administration of Foreign Exchange issued *Notice 63 on Issues Concerning the Administration of Foreign Exchange Donated to or by Domestic Institutions* that, on paper, requires certain domestic nonprofit organizations to comply with new and more complex rules for receiving and using foreign donations. These requirements include an application attesting to the authority of the domestic organization and the foreign donor; the domestic group's business license; a notarized donation agreement between the domestic group and the foreign donor organization with the purpose of the donation prescribed; and a registration certificate for the foreign nonprofit group.
- In **Azerbaijan**, the Law on Grants of 1998, as reinforced by Presidential Decree of 2004, requires that non-commercial organizations ("NCOs") register grant agreements with the Ministry of Justice. The failure to register a grant makes NCOs vulnerable, as the fines for failure to register a grant agreement are so high (ranging from 1000 to 2500 AZN (US\$1,250-\$3,125)) that such penalties can result in severe hardship or even termination of the organization.
- **Indonesia** requires social organizations that seek to receive or provide donations to or from foreign entities to engage in a detailed approval and reporting process. Regulation No. 38 of 2008, issued by the Minister of Home Affairs, requires NGOs to register with the government and seek Ministry of Home Affairs' approval for foreign funding.

- In **India**, the Foreign Contribution (Regulation) Act, 2010, requires all nonprofit organizations wishing to accept foreign contributions to (a) register with the central government; (b) agree to accept contributions through designated banks; and (c) maintain separate books of accounts with regard to all receipts and disbursements of funds.

(4) *Routing funding through the government.*

- **Eritrea**'s Proclamation No. 145/2005 requires that international NGOs engage in activities only through "the Ministry or the concerned Government entity." Only if the Ministry of other concerned Government entity cannot "carry out the task" may international NGOs engage in activities directly.
- 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 percent of foreign grants to NGOs.
- In **Sierra Leone**, under the 2009 NGO Policy Regulations, assets transferred to build the capacity of local NGOs should be routed through the Sierra Leone Association of Non-Governmental Organizations and the Ministry of Finance and Economic Development.

(5) *Restricted purposes and activities.* Other countries erect barriers to funding certain spheres of activity.

- In **Ethiopia**, under the Proclamation to Provide for the Registration and Regulation of Charities and Societies, income from foreign sources may amount to no more than 10 percent of the total organizational income used by "Ethiopian" charities and societies. In addition, only "Ethiopian" charities and societies are legally allowed to advance human rights, the rights of children and the disabled, gender equality, nations and nationalities, good governance, and conflict resolution, as well as the efficiency of the justice system. "Income from foreign sources" is defined as "a donation or delivery or transfer made from foreign source of any article, currency or security. Foreign sources include the government agency or company of any foreign country; international agency or any person in a foreign country."¹⁷
- In **Zimbabwe**, the Electoral Commission Act (section 16) prohibits the use of foreign funds for voter-education projects conducted by independent NGOs; instead, such funds may be contributed directly to the Electoral Commission. The Electoral Amendment Bill 2011 maintains this constraint.
- Many other countries rely on vague statutory formulations to restrict purposes/activities that civil society can pursue with the support of foreign funding. For example, in **Indonesia**, the 2008 regulation on the Receipt and Giving of Social Organization Aids from and to Foreign Parties prohibits foreign assistance causing "social anxiety and disorder of national and regional economy."

¹⁷ Article 2(15) of the Proclamation to Provide for the Registration and Regulation of Charities and Societies, 2009.

- In **Bolivia**, Supreme Decree No. 29308 bans foreign assistance that carries “implied political or ideological conditions.” Without defining these terms, the law leaves enforcement of these restrictions to the full discretion of the state.

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 section 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.” 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 that expand government authority to monitor private phone calls and emails without warrants if there is “probable 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.¹⁸

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.”¹⁹

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.

¹⁸ Fact Sheet No. 29: *Human Rights Defenders: Protecting the Right to Defend Human Rights*, p. 12.

¹⁹ *Id.* at p. 13.

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 proposed in **Bangladesh** was premised, at least in part, on the government's declared intent to enhance NGO accountability and transparency.
- A related but distinct justification used to narrow civic space is the desire to "harmonize," "coordinate," or "align" NGO activities, often pursued under the guise of enhancing the effectiveness of foreign aid. For example, the 2007 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. Wrapped in such rhetorically appealing language, such legal restrictions may undermine the ability of NGOs to act independently of government development plans and to engage in watchdog and advocacy roles.
- 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."²⁰
- 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.²¹ In **Russia**, Vladimir Putin has accused the U.S. and Europe of trying to subvert Russia in part through foreign-funded NGOs.²² State-controlled media in **Uzbekistan** have accused the United States of trying to undermine Uzbek sovereignty through the Trojan horse of democratization.²³ **Zimbabwean** President Robert Mugabe has claimed that Western NGOs are fronts through which Western "colonial masters" subvert the government.²⁴

²⁰ Human Rights First, Memo on Venezuelan International Cooperation Bill.

²¹ 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>.

²² Schofield, Matthew, "Putin Cracks Down on NGOs," February 21, 2007.

²³ Carothers, Thomas, "The Backlash Against Democracy Promotion," *Foreign Affairs*, March/April 2006.

²⁴ *Id.*

- Some governments have carried the “sovereignty” rationale one step further, to suggest that fundamental rights and freedoms, such as the freedom of association and assembly, are limited in scope. During the parliamentary debate in 2008 preceding the enactment of the **Ethiopian** Proclamation on Charities and Societies, one parliamentarian stated: “... the right to assembly shall in no way be taken in absolute sense of term, nor is it granted to every person; that after all there is a matter of national sovereignty when it comes to implementation of these international instruments in conformity with objective realities in particular nations; and that the appropriateness of protecting these rights in a way that serves national sovereignty is recognized.”²⁵

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 ICCPR in Article 22²⁶:

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 pursuance 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.

²⁵ Minutes of Legal Administrative Affairs Standing Committee, Public Debate on Draft Proclamation for NGOs and Associations, December 24, 2008, p.16.

²⁶ 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 eight 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 (Sept. 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.²⁷ The degree of precision required is clear criteria to govern the exercise of discretionary authority.²⁸ 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.”²⁹

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) of the ICCPR.

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 or require their alignment with government priorities and plans are suspect. While “harmonization,” “coordination,” and “alignment” may sound innocuous, they may also conceal 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.

A generalized assertion of “national sovereignty” or “state sovereignty” is questionable as a basis for interference with fundamental freedoms, including freedom of association.³⁰ Claims

²⁷ OSCE/ODIHR, *Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations*, p. 4.

²⁸ *Id.*

²⁹ 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.

³⁰ 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.

of state sovereignty are belied by the very states using the justification for restrictions against NGOs when the same governments use their funding to influence domestic political affairs in other countries.³¹ 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.³²

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.³³ Claims of national security shall be construed restrictively “to justify 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.”³⁴

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 freedoms of association and of assembly, 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

³¹ 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.

³² 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.

³³ *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).

³⁴ See 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 (1984)], which were 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. They are available at <http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/siracusa.html>.

to the extent that is no more than absolutely necessary; there must be a pressing social need for the interference.³⁵

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. Even if prescribed by law and linked to a legitimate government interest, such invasive government actions could not 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 the following:

- arrest of individuals simply for participating in the activities of an unregistered organization;
- 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;
- restriction of NGO activities to the confines of governments' predefined development priorities and plans;
- 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;
- 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 here is beyond the scope of this Report. On the contrary, it is the state's obligation to demonstrate that the interference passes scrutiny under the foregoing analytical framework.³⁶ 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.

³⁵ OSCE/ODIHR, Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations, p. 4.

³⁶ 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."

International Principles Protecting Civil Society

To protect civil society from the regulatory barriers described earlier of this Report, this section seeks to articulate principles that govern and protect civil society from repressive intrusions of governments. Tracking the six clusters of legal barriers, the principles are designed to ensure that states honor the following:

- (1) the right of CSOs to entry (that is, the right of individuals to form and join CSOs);
- (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;
- (5) the right to freedom of peaceful assembly; and
- (6) the right to seek and secure resources.

Finally, these principles underscore

- (7) the state's positive obligation to protect the rights of CSOs.

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 Rights,³⁷ the International Covenant for Civil and Political Rights (ICCPR),³⁸ the International Covenant on Economic Social and Cultural Rights (ICESCR),³⁹ and a substantial list of other human rights conventions and declarations.⁴⁰ Freedom of association involves the right of individuals to interact and organize among themselves to collectively express, promote, pursue and defend common interests.⁴¹

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

³⁷ Adopted by General Assembly Resolution 217a (III) of 10 December 1948. Source: <http://www.ohchr.org/english/about/publications/docs/fs2.htm>.

³⁸ 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>.

³⁹ 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.

⁴⁰ 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 Convention on the Rights of Persons with Disabilities, 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.

⁴¹ 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.

- 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.⁴² Indeed, the European Court of Human Rights, in interpreting virtually identical language in the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁴³ 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.⁴⁴
- The U.N. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (hereinafter, “Defenders Declaration”),⁴⁵ 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.”⁴⁶ In recognizing that individuals can form CSOs in addition to “associations,” it implicitly recognizes that CSOs 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.⁴⁷

⁴² 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.

⁴³ 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>.

⁴⁴ 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).

⁴⁵ Adopted by the General Assembly in Resolution 53/144 of 9 December 1998. Source: <http://www.ohchr.org/english/law/freedom.htm>.

⁴⁶ 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 it was adopted by consensus—therefore representing a strong commitment by states to its implementation.

⁴⁷ Both the U.S. 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*

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

- The protective scope of Article 22 of the ICCPR is broad. “Religious societies, political parties, commercial undertakings and trade unions are as protected by article 22 as are cultural or human rights organizations, soccer clubs or associations of stamp collectors.”⁴⁸ The UN Human Rights Council, in Resolution 15/21 (October 2010), recognized that “the rights to freedom of peaceful assembly and of association are essential components of democracy, providing individuals with invaluable opportunities to, inter alia, express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable.”⁴⁹
- 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.”⁵⁰
- 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.”⁵¹
- Significantly, as recognized by the UN Defenders Declaration (Article 1, 5), NGOs must be free to promote and protect human rights and fundamental freedoms.

(issued by the U.S. 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 Ministers 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 individual persons (natural or legal) and by groups of such persons. They can be either membership or non-membership based.”

⁴⁸ Commentary to the Declaration on human rights defenders, UN Special Rapporteur on the situation of human rights defenders, July 2011, p. 35, <http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf>.

⁴⁹ For the full text of the Resolution, see <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/166/98/PDF/G1016698.pdf?OpenElement>.

⁵⁰ See Inter-American Commission on Human Rights, Advisory Opinion OC-5/85 of November 13, 1985, separate opinion of Judge Rafael Nieto-Navia.

⁵¹ 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 acknowledgment of the Macedonian minority in Bulgaria (*Stankov and the United Macedonian Organization Ilinden v. Bulgaria*, no. 29221/95 and 29225/95, ECHR 2001-IX).

(c) *Broadly eligible 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.”⁵²
- 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.”
- The Human Rights Council, in Resolution 15/21 (October 2010), reaffirmed that “everyone has the rights to freedom of peaceful assembly and of association and that no one may be compelled to belong to an association.”⁵³ The same Resolution further calls upon States “to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law.”
- It is important to emphasize that persons with disabilities enjoy the freedom of association on an equal basis with others. Adopted in December 2006, the Convention on the Rights of Persons with Disabilities places upon State Parties the obligation to promote “an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others.” Such an environment includes “[p]articipation in non-governmental organizations and associations concerned with the public and political life of the country” and “[f]orming and joining organizations of persons with disabilities” for representational purposes.⁵⁴

⁵² Reinforcing the broad scope of rights, Article 26 of the ICCPR enshrines the principle of non-discrimination, as follows: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” This principle applies to, *inter alia*, victims of discrimination because of their sexual orientation and gender identity (A/HRC/RES/17/19).

⁵³ For the full text of the Resolution, see: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/166/98/PDF/G1016698.pdf?OpenElement>.

⁵⁴ Convention on the Rights of Persons with Disabilities, Article 29(b), see: <http://www.un.org/disabilities/convention/conventionfull.shtml>.

(2) *Right to Associate Without Legal Entity Status*⁵⁵

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 CSOs 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. “[R]egistration should not be compulsory. CSOs should be allowed to exist and carry out activities without having to register if they so wish.”⁵⁶ 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.⁵⁷ National law can in no way result in banning informal associations on the sole ground of their not having legal personality.⁵⁸

(3) *Right to Seek and Obtain Legal Entity Status*

To meet their 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, CSOs are able to act not merely as an individual or group of individuals, but with the advantages that legal personality may afford (e.g., abilities to enter contracts, to conclude transactions for goods and services, to hire staff, to open bank accounts, etc.). It is well accepted under international law that the state should enable CSOs 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 UN Special Representative on human rights defenders has noted that “NGOs have a right to register as legal entities and to be entitled to the relevant benefits.”⁵⁹
- 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

⁵⁵ 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.

⁵⁶ Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178 (1 October 2004) page 21 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/533/18/PDF/N0453318.pdf?OpenElement>).

⁵⁷ These attributes distinguish gatherings protected by freedom of association from mere gatherings of people wishing to share one another’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.”

⁵⁸ OSCE/ODIHR Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations, pp. 6-7; *see also* UN 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.”).

⁵⁹ Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178, p. 21.

freedom and its practical application by the authorities reveal the state of democracy in the country concerned.”⁶⁰

- 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.”⁶¹

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 the relevant administration of its existence by providing basic information.⁶² 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.⁶³ The designated registration authority should be guided by objective standards and restricted from arbitrary decision making.

- The UN Special Rapporteur on human rights defenders has stated as follows: “Where a registration system is in place, the Special Representative emphasizes that it should allow for quick registration... Decisions to deny registration must be fully explained and cannot be politically motivated... NGO laws must provide for clear and accessible information on the registration procedure.”⁶⁴
- 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.”⁶⁵
- 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 be subject to the exercise of a free discretion

⁶⁰ *Sidiropoulos*, para. 40.

⁶¹ 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.

⁶² 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.

⁶³ “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).

⁶⁴ Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178, p. 21.

⁶⁵ 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. The I-ACHR issued a 2009 Report on Democracy and Human Rights in Venezuela, which contains virtually the same recommendation to the Venezuelan government: “Refrain from promoting laws and policies for the registration of human rights organizations that use vague, imprecise, or broad definitions regarding legitimate grounds for restricting the possibility of their establishment and operation.”

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.”⁶⁶

Moreover, the UN Special Representative on human rights defenders has noted that “Foreign NGOs ... must be allowed to register and function without discrimination, subject only to those requirements strictly necessary to establish bona fide objectives.”⁶⁷

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.

“The right to freedom of association has an individual and a collective dimension. Under the provisions of Article 22 of the International Covenant on Civil and Political Rights individuals have the right to found an association with like-minded persons or to join an already existing one. At the same time, it also covers the collective right of an existing association to perform activities in pursuit of the common interests of its members. State parties cannot therefore prohibit or otherwise interfere with the founding of associations or their activities.”⁶⁸

(1) Protection against Unwarranted State Interference

International law creates a presumption against any state regulation or restriction that would amount to an interference with 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.⁶⁹ 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.”⁷⁰

⁶⁶ Council of Europe Recommendation on legal status of NGOs, section IV (#28-29).

⁶⁷ Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178 (1 October 2004) p. 22 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/533/18/PDF/N0453318.pdf?OpenElement>). Additionally, UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, in her report to the UN General Assembly (4 August 2009, p. 24) (http://www.icj.org/IMG/report_of_sr_on_hrds_to_ga.pdf), emphasized that “Foreign NGOs ... should be subject to the same set of rules that apply to national NGOs; separate registration and operational requirements should be avoided.”

⁶⁸ Commentary to the Declaration on human rights defenders, UN Special Rapporteur on the situation of human rights defenders, July 2011, <http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf>.

⁶⁹ 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.”

⁷⁰ 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.”

The “prescribed by law” standard means both that the law be accessible (published) and that its provisions be formulated with sufficient precision to enable the persons concerned to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct.⁷¹ According to the UN Special Rapporteur on the situation of human rights defenders, the “prescribed by law” standard additionally “makes it clear that restrictions on the right to freedom of association are only valid if they had been introduced by law (through an act of Parliament or an equivalent unwritten norm of common law), and are not permissible if introduced through Government decrees or other similar administrative orders.”⁷²

The four legitimate government aims articulated in Article 22(2) – “national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others” – are an exhaustive, not illustrative list. Moreover, these state interests are to be strictly construed.⁷³

The “necessary in a democratic society” standard is applied as a test of proportionality. To illustrate, 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 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.”⁷⁴

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.”⁷⁵

⁷¹ See, for example, *N.F. v. Italy*, no. 37119/97, §§ 26-29, ECHR 2001-IX; and *Gorzelik and others v. Poland* [GC], no. 44158/98, §§ 64-65, ECHR 2004-I.

⁷² Commentary to the Declaration on human rights defenders, UN Special Rapporteur on the situation of human rights defenders, July 2011, p. 44, <http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf> (“It would seem reasonable to presume that an interference is only ‘prescribed by law’ if it derives from any duly promulgated law, regulation, order, or decision of an adjudicative body. By contrast, acts by governmental officials that are ultra vires would seem not to be ‘prescribed by law,’ at least if they are invalid as a result.”).

⁷³ In interpreting nearly identical language from Article 11 of the European Convention on Human Rights, the European Court of Human Rights has made clear that “only convincing and compelling reasons can justify restrictions on the freedom of association.” See also the “Siracusa Principles” [United Nations, Economic and Social Council, UN 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.4/1984/4 (1984)], which were 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. They are available at <http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/siracusa.html>.

⁷⁴ 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.

⁷⁵ See Center for Human Rights, University of Pretoria, African Human Rights System: The African Charter, available at http://www.chr.up.ac.za/centre_publications/ahrs/african_charter.html.

In the context of freedom of association, it follows that the state must refrain from unwarranted interference with the ability to form CSOs and with the ability of CSOs, once formed, to operate. CSOs 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.⁷⁶

State interference with civil society includes the forced closure or termination of CSOs. Like any other governmental intrusion, involuntary termination must meet the standards outlined in the ICCPR.⁷⁷ 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.⁷⁸ As independent, autonomous entities, NGOs should have broad discretion to regulate their internal structures and operating procedures.⁷⁹

The state has an obligation to respect the private, independent nature of NGOs, and refrain from interfering with their internal operations.⁸⁰ 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."⁸¹

- The African Commission on Human Rights, in reviewing a government decree establishing a new governing body for the Nigerian Bar Association, held that

⁷⁶ 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.").

⁷⁷ See *United Communist Party of Turkey and others v. Turkey*, Judgment of 30 January 1998, Reports 1998-I, para. 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.").

⁷⁸ 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.").

⁷⁹ Indeed, this principle applies to any organization predominantly governed by private law.

⁸⁰ 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.

⁸¹ See McBride, p. 46.

“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.”⁸²

- 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.”⁸³ The ICCPR Human Rights Committee has recognized that certain rights “may be enjoyed in community with others.”⁸⁴

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,⁸⁵ has specifically held that the right is not limited to individuals, but extends to corporate entities.⁸⁶

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. Significantly, freedom of association is closely linked with freedom of expression.⁸⁷ Restricting the right to speak out on issues of public

⁸² See Center for Human Rights, University of Pretoria, African Human Rights System: The African Charter, available at http://www.chr.up.ac.za/centre_publications/ahrs/african_charter.html.

⁸³ 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.”

⁸⁴ 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.

⁸⁵ “Everyone has the right to respect for his private and family life, his home and his correspondence.” European Convention on Human Rights, Article 8.

⁸⁶ 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.

⁸⁷ Indeed, the European Court of Human Rights has held that freedom of association derives from freedom of speech (see *Ezeline v. France*, Judgment of 26 April 1991, Series A, No. 202; (1992) 14 EHRR 362).

importance directly undermines freedom of association; individuals participate in NGOs in order to speak more loudly and forcefully.⁸⁸

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.⁸⁹ 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.”⁹⁰ The UN Human Rights Council has expressly stated that restrictions should never be applied to:

“[d]iscussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.”⁹¹

Thus, 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 UN 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”⁹² the following rights:

- 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;⁹³
- 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;

⁸⁸ See *Freedom and Democracy Party (OZDEP) v. Turkey*, (App. 23885/94), Judgment of 8 December 1999.

⁸⁹ See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, submitted 16 May 2011 to the Human Rights Council, Seventeenth session, http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf, para. 37. See also *Socialist Party and Others v. Turkey*, (App 21237/93), Judgment of 25 May 1998; (1999) 27 EHRR 51, p. 24.

⁹⁰ 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.

⁹¹ UN Human Rights Council, Resolution 12/16, Freedom of opinion and expression, 12 October 2009, para. 5(p).

⁹² UN Defenders Declaration, Articles 6-9.

⁹³ 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.”).

- 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; and
- To complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms.

States must not restrict freedom of expression directly or “by indirect methods or means.”⁹⁴ 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.”⁹⁵ There is a presumption against any state regulation that interferes with the freedom of expression. As with freedom of association, the analytic test has three components, though those components are distinct and specific to freedom of expression. Any limitation

- must be provided by law;
- must pursue one of two legitimate government purposes contained in Article 19(3) of the ICCPR, namely the respect of the rights and reputations of others, or the protection of national security or public order or public health or morals; and
- must be necessary (the least restrictive means required to achieve the aim).

“Moreover, any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.”⁹⁶

IV. The Right to Communication and Cooperation

Individuals and CSOs 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 and abroad, and

⁹⁴ See, e.g., Article 13, American Convention on Human Rights.

⁹⁵ 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).

⁹⁶ See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, submitted 16 May 2011 to the Human Rights Council, 17th sess., http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf, para. 24.

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.”⁹⁷

- 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*: (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” (emphasis added).
- 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.”⁹⁸
- International law also protects individuals from unwarranted interference with their freedom of movement. The ability to move freely is critical to effective 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.”⁹⁹

(2) Right to Communicate via Information and Communication Technologies

The right to receive and impart information, regardless of frontiers, through any media embraces communication via the Internet and information and communication technologies.¹⁰⁰ The language of the Universal Declaration and the ICCPR was drafted with foresight to include future technological developments through which individuals can exercise the freedom of

⁹⁷ 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.”

⁹⁸ 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)).

⁹⁹ 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.

¹⁰⁰ The right to communicate via Internet-based technologies is embraced by the right to communication. Given the importance of the Internet and Internet-based technologies, however, we spotlight this aspect of communication as a distinct principle. For a detailed analysis of the connection between new technology and fundamental freedoms, see Douglas Rutzen and Jacob Zenn, “Association and Assembly in the Digital Age,” *The International Journal of Not-for-Profit Law*, Vol. 13, Issue 4, December 2011 (http://www.icnl.org/research/journal/vol13iss4/art_1.htm).

expression. “Hence, the framework of international human rights law remains ... equally applicable to new communication technologies such as the Internet.”¹⁰¹ The UN Human Rights Council recently confirmed this view in calling upon States to refrain from imposing restrictions not consistent with Article 19(3) of the ICCPR on “[a]ccess to or use of information and communication technologies, including radio, television and the Internet.”¹⁰² In his 2011 report to the UN Human Rights Council, the UN Special Rapporteur emphasized that “there should be as little restriction as possible to the flow of information via the Internet, except in few, exceptional, and limited circumstances prescribed by international human rights law” and that “the full guarantee of the right to freedom of expression must be the norm, and any limitation considered as an exception, and that this principle should never be reversed.”¹⁰³

(3) Right to Cooperate Through Networks

Individuals and CSOs 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 crucial vehicles for exchanging information and experience, raising awareness, or engaging in advocacy. Notably, the Internet has opened up new possibilities for networking. The speed and global reach of the Internet enable individuals and CSOs to disseminate information in “real time” and to mobilize people quickly and effectively. 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 Freedom of Peaceful Assembly

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

Freedom of assembly is enshrined in the Universal Declaration of Human Rights (Article 20), the International Covenant on Civil and Political Rights (Article 21), and other UN and regional instruments.

Like the freedom of expression, the freedom of assembly is inextricably intertwined with the freedom of association. This is reflected through provisions within international legal instruments that embrace both the freedoms of association and assembly. For example, the Universal Declaration of Human Rights states, in Article 20, that “Everyone has the right to freedom of peaceful assembly and association.” Similarly, the European Convention protects both rights in Article 11: “Everyone has the right to freedom of peaceful assembly and to freedom of association with others...” Moreover, the mutually reinforcing nature of all three fundamental freedoms has been emphasized in case law. According to the European Court, the protection of opinions and the freedom to express them is one of the objectives of the freedoms

¹⁰¹ See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, submitted 16 May 2011 to the Human Rights Council, 17th sess., http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

¹⁰² UN Human Rights Council, Resolution 12/16, Freedom of opinion and expression, 12 October 2009, para. 5(p).

¹⁰³ See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, submitted 16 May 2011 to the Human Rights Council, 17th sess., http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf, para. 68.

of assembly and association.¹⁰⁴ Indeed, each of these three fundamental rights could be considered an “enabler” of the other rights.

As with the freedom of association, the freedom of assembly is applicable to all persons. The language of the ICCPR, in Article 2(1), affirms the state’s obligation to ensure rights to “all individuals within its territory and subject to its jurisdiction.” This includes minorities, women, children, human rights defenders, and members of vulnerable populations. This includes both nationals and non-nationals, whether stateless persons, refugees, foreign nationals, asylum seekers, migrants, or tourists.¹⁰⁵ This also includes both natural persons and legal entities. Regarding the latter, the UN Special Rapporteur on human rights defenders has emphasized that “assemblies can be organized by an NGO, a trade union, an ad hoc group, a social movement, or by individual defenders seeking to raise an issue for debate or protesting against human rights violations of different kinds.”¹⁰⁶

Just as the freedom of expression protects ideas that offend, shock, and disturb, so too does the freedom of assembly protect a demonstration that may annoy or give offense to persons opposed to the ideas or claims it is seeking to promote.¹⁰⁷ A demonstration in a public place “inevitably causes a certain level of disruption to ordinary life, including disruption of traffic.” Public authorities therefore have a duty to show a certain level of tolerance toward peaceful gatherings.

Political ideas are especially deserving of protection. “There is little scope ... for restrictions on political speech or on debate on questions of public interest.”¹⁰⁸ “In a democratic society based on the rule of law, political ideas which challenge the existing order and whose realization is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means.”¹⁰⁹

(1) Presumption in Favor of Holding Assemblies

The law should affirm a presumption in favor of holding assemblies. Those seeking to assemble should not be required to obtain permission to do so. Indeed, many forms of assembly require no form of governmental regulation and the law need not impose any obligation of advance notification for an assembly.¹¹⁰

¹⁰⁴ See *Freedom and Democracy Party (OZDEP) v. Turkey*, no. 23885/94, section 37, ECHR 1999-VIII.

¹⁰⁵ See Human Rights Committee General Comment No. 15 of 1994.

¹⁰⁶ Commentary to the Declaration on human rights defenders, UN Special Rapporteur on the situation of human rights defenders, July 2011, p. 26 (“As the right to participate in peaceful activities can be exercised individually and in association with others, it is important to emphasize that it is not necessary for an NGO to have legal personality to participate in assemblies, including a demonstration.”).

¹⁰⁷ See *Plattform “Arzte fur das Leben” v. Austria*, judgment of 21 June 1988, Series A no. 139, p. 12, sections 32.

¹⁰⁸ See *Wingrove v. the United Kingdom*, judgment of 25 November 1996, Reports 1996-V, pp. 1957-58, section 58.

¹⁰⁹ See *Stankov and the United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*.

¹¹⁰ See Guidelines on Freedom of Peaceful Assembly. Office for Democratic Institutions and Human Rights and the Venice Commission, OSCE/ODIHR 2010, <http://www.osce.org/odihr/73405?download=true>.

International law recognizes that, in certain circumstances, requirements of advance notification may be justified by a state's duty to protect public order, public safety, and the rights and freedoms of others. The ICCPR Human Rights Committee has upheld the requirement of advance notification, as have regional mechanisms.¹¹¹ But notification rules should not be so onerous as to amount to a requirement of permission or to result in arbitrary denial.

Where notification requirements are combined with arbitrary denial, or with the failure of the regulatory authorities to respond promptly, then the result is an excessive restriction on freedom of assembly. Where there is a failure to respond promptly, then the law should presume that the organizers of the assembly may proceed according to terms of notice. Where there is denial, the law should provide for the possibility of an expedited appeal.¹¹²

Moreover, the law should allow for spontaneous assembly. In other words, the law should provide for an exception to the notification requirement, where the giving of notice is impracticable. The ability to respond peacefully and immediately to a given incident or occurrence is essential to freedom of assembly.¹¹³

(2) Responsibility for Simultaneous Assemblies

The freedom of assembly may lead to simultaneous assemblies or counter-demonstrations. The law and the state have a special responsibility in such cases. First, the law should allow for counter-demonstrations, so that persons can express disagreement with views expressed at another public assembly. That said, "the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate."¹¹⁴ Second, the state has a positive duty to protect peaceful assemblies and participants of peaceful assemblies.¹¹⁵ This responsibility is particularly important where simultaneous opposition assemblies occur.

(3) Protection Against Unwarranted State Interference with Freedom of Assembly

As with freedom of association, international law creates a presumption against any state regulation that would amount to a restriction of recognized rights. Interference with freedom of assembly can only be justified where it is "in conformity with law,"¹¹⁶ intended to further

¹¹¹ See UN Human Rights Committee, *Auli Kivenmaa v. Finland* (1994).

¹¹² See Commentary to the Declaration on human rights defenders, UN Special Rapporteur on the situation of human rights defenders, July 2011, pp. 30, 32 ("States should ensure that there are satisfactory review procedures for complaints in the event of restrictions being imposed on assemblies. Additionally, States should ensure access to courts to appeal against any decision to restrict an assembly, although this should not be a replacement for satisfactory administrative review procedures ...").

¹¹³ *Id.* at p. 32 ("While recognizing that in order to be able to fulfil their responsibility to protect defenders participating in an assembly, the authorities need to be notified in advance, States are encouraged to consider in exceptional circumstances that defenders, with the aim of protesting human rights violations, should have the possibility of responding immediately to an event by holding public, peaceful assemblies.").

¹¹⁴ See *Plattform "Arzte fur das Leben" v. Austria*, judgment of 21 June 1988, Series A no. 139, p. 12, para. 32.

¹¹⁵ Commentary to the Declaration on human rights defenders, UN Special Rapporteur on the situation of human rights defenders, July 2011, p. 33.

¹¹⁶ It is worth noting that the "in conformity with law" standard applicable to freedom of assembly is distinct from the "prescribed by law" standard applicable to freedom of association. The "conformity with law" standard has been interpreted as a broader standard, implying that "restrictions to peaceful assembly can be imposed not only by law but also through a more general statutory authorization, such as an executive order or a decree." See

legitimate government objectives, and necessary in a democratic society. The legitimate government interests include only the following: “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.”¹¹⁷ Administrative measures restricting or preventing freedom of assembly are often applied with little consideration given for to these government interests.¹¹⁸

The proportionality test triggered by the “necessary in a democratic society” prong of the analytical test envisions that any interference be the least intrusive means available. It follows that a blanket application of a legal restriction, such as a total ban of all demonstrations, would likely fail the proportionality test.

There are a range of other regulatory issues beyond the scope of this Report. Among others, critical questions relate to the responsibilities of the organizer of a demonstration and the responsibilities of law enforcement. These questions, and others, are addressed in detail in other sources.¹¹⁹

VI. The Right to Seek and Secure Resources

Within broad parameters, CSOs have 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. Restrictions on resources are a direct threat to the ability of CSOs 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 often violate 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.”¹²⁰ Funding restrictions that stifle the ability of CSOs to pursue their goals may well constitute unjustifiable interference with freedom of association. The UN 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 (Law on Civil Associations and Institutions), which “gives the Government control over the right of NGOs to manage their own activities, including seeking external funding.”¹²¹

Commentary to the Declaration on human rights defenders, UN Special Rapporteur on the situation of human rights defenders, July 2011, p. 31.

¹¹⁷ ICCPR, Article 21.

¹¹⁸ Commentary to the Declaration on human rights defenders, UN Special Rapporteur on the situation of human rights defenders, July 2011, p. 31.

¹¹⁹ See, e.g., Guidelines on Freedom of Peaceful Assembly. Office for Democratic Institutions and Human Rights and the Venice Commission, OSCE/ODIHR 2010, <http://www.osce.org/odihr/73405?download=true>.

¹²⁰ ICCPR, Article 22.2.

¹²¹ Egypt, ICESCR, E/2001/22 (2000) 38 at paras. 161 and 176, http://www.bayefsky.com/themes/public_general_concluding-observations.php.

- The UN Defenders Declaration explicitly recognizes the right to access funding as a self-standing substantive right 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.”¹²² The Office of the UN 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*)” (emphasis added).¹²³
- 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.¹²⁴ And if human rights CSOs are protected in receiving foreign funds, then CSOs 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 *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (issued July 2011), the UN Special Rapporteur on the situation of human rights defenders affirms that “In order for human rights organizations to be able to carry out their activities, it is indispensable that they are able to discharge their functions without any impediments, including funding restrictions. When individuals are free to exercise their right to associate, but are denied the resources to carry out activities and operate an organization, the right to freedom of association becomes void.”¹²⁵
- 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.”¹²⁶ 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

¹²² 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.”

¹²³ See Office of the United Nations High Commissioner for Human Rights at <http://www.ohchr.org/english/issues/defenders/declaration.htm>

¹²⁴ Fact Sheet No. 29: *Human Rights Defenders: Protecting the Right to Defend Human Rights*, p. 13.

¹²⁵ Commentary to the Declaration on human rights defenders, UN Special Rapporteur on the situation of human rights defenders, July 2011, p. 95, <http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf>.

¹²⁶ 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.

Governments. The only legitimate requirements of such NGOs should be those in the interest of transparency.”¹²⁷

- The UN 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 Declaration is on “the right to freedom of thought, conscience and religion.”¹²⁸ 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.”¹²⁹ 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) stated: “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: States 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.”¹³⁰

¹²⁷ *Id.*, page 22.

¹²⁸ UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Article 1.

¹²⁹ *Id.*, Article 6(f).

¹³⁰ 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. The I-ACHR, in its 2009 Report on Democracy and Human Rights in Venezuela, reemphasized the same point in calling upon Venezuela to “[r]efrain from imposing illegitimate restrictions on financing, including foreign financing, of human rights organizations.”

In addition to direct statements on the right to solicit and receive funding, the international legal framework protects the right to property.¹³¹ The Universal Declaration, 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 CSOs.

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,”¹³² 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.¹³³ The right to dispose of one’s property would naturally embrace the right to make contributions to CSOs for lawful purposes.

VII. 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 CSOs. 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, ICCPR, etc.) are protected:

- United Nations Charter, Article 55: “... the United Nations shall promote: ... universal respect for, and observance of, human rights 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 emphasized the state obligation in General Comment

¹³¹ 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.”

¹³² 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.”

¹³³ Clare Ovey and Robin White, *The European Convention on Human Rights*, 3rd edition, Oxford University Press, 2002.

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.”
- UN 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 Action¹³⁴: “Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.”
- UN 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 2011 Vilnius Declaration: “Emphasizing that an enabling legal environment for civil society is an essential component of a sustainable democracy and underlining the importance of continuous support for civil society and non-governmental organizations in their efforts to exercise and promote freedom of expression, association, and assembly.... We condemn continued persecution of civil society activists in many countries around the world and strongly oppose repressive measures against civil society and non-governmental organizations. We actively support the promotion of the rights of every person, including members of civil society to the freedom of expression, assembly, and association. ...”

In light of this body of international law, a state not only is 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.¹³⁵ This duty includes an accompanying 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

¹³⁴ Adopted by the UN World Conference on Human Rights, June 25, 1993.

¹³⁵ 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. 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).

enabling legal framework will help create an appropriate environment for an NGO throughout its life-cycle.¹³⁶ 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.

Ways Forward: Protecting and Enhancing Civil Society Space

Since the launch of the Defending Civil Society project in 2007, civil society groups and the international community have taken significant steps to confront the worrying trend of increasingly restrictive environments outlined in this Report. These efforts have resulted in elevating the importance of freedom of assembly and of association in the international dialogue, preventing the passage of restrictive laws in several countries, and encouraging various governments to develop progressive legal frameworks.

Despite the increasing international response, civil society is still losing space in many countries. Just as restrictive legal environments around the world increased after the “Color Revolutions” in some former Soviet countries, the “Arab Spring” of 2011 triggered a new wave of restrictive measures against popular uprisings, public movements, and civic associations. This proliferation of legal restrictions imposed on civil society continues around the world while adding to the more traditional forms of repression, such as imprisonment, harassment, disappearances, and execution.

To further the global response to this challenge, the World Movement for Democracy and the International Center for Not-for-Profit Law (ICNL) recommend the following actions:

Actions Directed to the International Community at Large:

- Call on democratic governments and international organizations, including the United Nations, international financial institutions, and appropriate multilateral and regional organizations, to endorse the *Defending Civil Society* 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 Defending Civil Society principles.
- Urge established democracies and international organizations to reaffirm that proposed restrictions on freedom of association be subjected to the rigorous legal analytical test defined in Article 22 of the International Covenant for Civil and Political Rights (ICCPR, see Under Scrutiny section) and energetically publicize transgressions, particularly on the part of ICCPR signatories.
- 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.
- Urge democratic governments and international organizations to raise the level of their engagement through mechanisms that already exist, yet have not been employed to their

¹³⁶ 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*.

maximum potential, such as the Community of Democracies' Working Group on Enabling and Protecting Civil Society, the mandate of the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, and the implementation of the Organization of American States' Resolution on "Promotion of the Rights to Freedom of Assembly and of Association in the Americas."

- Organize discussions and hearings in parliaments, congresses, and national assemblies to raise lawmakers' awareness of the issues and principles.
- Monitor the degree to which Defending Civil Society principles outlined in this Report are being applied in bilateral and multilateral relations.
- Encourage UN special rapporteurs, in particular the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, to incorporate the Defending Civil Society principles into their reports and other UN documents.
- Recognize, promote, and protect fundamental rights, such as rights to freedom of assembly and of association, using new technologies.

Actions Directed to Civil Society Organizations:

- Learn about the *Defending Civil Society* principles and the extent to which they are promoted and protected in their respective countries, as well as around the world.
- Use the *Defending Civil Society* Toolkit (available at www.defendingcivilsociety.org) to deepen their understanding of legal frameworks governing their work, and to build their capacity to engage in the reform of regressive frameworks.
- Facilitate national and regional discussions to generate interest in, and mobilize support for, the findings in this Report and reform of legal frameworks governing civil society organizations.
- Encourage the integration of the *Defending Civil Society* principles in broader civil society 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 wide publicity and litigation in appropriate international courts.
- Translate this Report into various local languages to deepen understanding of the issues among grassroots civil society organizations and the broader public.
- 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.
- Share analyses of restrictive legal measures and reports on the impact of such measures with the UN Special Rapporteur on the Rights to Freedom of Assembly and of Association.
- Gather and study information about best practices on the promotion and protection of freedom of assembly and of association.

- Collaborate more closely with the international community and other stakeholders, such as international NGOs, trade unions, and legislators, to develop a strategic global response.
- Explore ways to engage lawyers in advocacy efforts, particularly in analyzing legal frameworks, drafting laws, and negotiating with government officials over technical provisions.

Actions Directed to Democracy Assistance Organizations:

- Call on democracy assistance foundations and organizations to endorse this Report and its Defending Civil Society principles.
- Facilitate national, regional, and international discussions with partners and governments to develop ideas for reforming legal frameworks to ensure that the space for civil society work in every country is protected.
- Insist that proposed restrictions on freedom of association be 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 wide publicity and litigation in appropriate international courts.
- Distribute copies of this Report to all of their partners and grantees around the world.
- Share with one another best practices for supporting civil society organizations facing restrictive environments in their countries.

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- Copenhagen Document of the Organization for Security and Cooperation in Europe (OSCE) (1990), http://www.osce.org/documents/odihr/1990/06/13992_en.pdf
- European Convention for the Protection of Human Rights and Fundamental Freedoms, <http://conventions.coe.int/Treaty/en/Summaries/Html/005.htm>

- First Optional Protocol to the International Covenant on Civil and Political Rights,
<http://www.ohchr.org/english/law/ccpr.htm>
- ILO Declaration on Fundamental Principles and Rights at Work,
http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT
- Inter-American Democratic Charter, http://www.oas.org/charter/docs/resolution1_en_p4.htm
- International Covenant for Civil and Political Rights, <http://www.ohchr.org/english/law/ccpr.htm>
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<http://www.oas.org/consejo/sp/AG/Documentos/AG05445E04.doc>
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- 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>
- UN Human Rights Council Resolution 15/21 on the Rights to Freedom of Peaceful Assembly and Association (September 2010), <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G10/164/82/PDF/G1016482.pdf?OpenElement>
- United States Department of State Guiding Principles on Non-Governmental Organizations,
<http://www.state.gov/g/drl/rls/77771.htm>
- Universal Declaration of Human Rights, <http://www.ohchr.org/english/about/publications/docs/fs2.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)

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Civil Society—Principles and Protections

Protection of Non-Governmental Organizations in Egypt Under the Egypt – U.S. Bilateral Investment Treaty

Nick Gallus¹

Executive Summary

In 2011, the Government of the Arab Republic of Egypt (“Egypt”) began investigations into whether non-governmental organizations (“NGOs”)² had breached the Egyptian law governing NGOs. As part of these investigations, armed personnel entered the offices of certain NGOs from the United States of America (“U.S.”), Egypt, and other countries, and temporarily detained employees while they seized documents and computers. The government subsequently charged particular staff with criminal offenses and prevented them from leaving the country. Shortly after, the Government released the draft of a new law to govern the activities of NGOs in Egypt, which would, among other things, preserve the right of the government to dissolve NGOs and limit their access to funding in certain circumstances.

This paper considers the actions of the Egyptian government in light of the Egypt – U.S. bilateral investment treaty (“BIT”).³ BITs provide protection to the investors of the parties to the treaty and their investments when they invest in the other party. Such treaties typically also provide the investor with the right to initiate arbitration to determine if a party has failed to provide the protections guaranteed in the treaty.

A U.S. organization that sought to initiate an arbitration under the Egypt – U.S. BIT would initially need to establish the jurisdiction of a tribunal to hear its claim. Thus, among other things, the organization would need to prove that it has an investment that is protected under the treaty.

The U.S. NGO would also need to establish that Egypt’s actions were inconsistent with obligations under the treaty. The organization could argue that Egypt failed to:

- provide an investment of the NGO with “national treatment” by treating an investment of a local organization in “like situation” more favorably;

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² This article refers to NGOs as not-for-profit organizations pursuing civil society goals.

³ Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, entered into force 27 June 1992, available at: http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002813.asp.

- provide an investment of the NGO with “most favored nation treatment” by failing to provide treatment which Egypt has promised to provide investments from other countries under other BITs, such as “fair and equitable treatment” and “full protection and security;”
- provide treatment no less “than that required by international law” by breaching its obligations in other treaties, such as the International Covenant on Civil and Political Rights;
- pay compensation when expropriating part of the NGO’s investment; and
- allow the free transfer of funds to the NGO.

In response to such claims, Egypt could seek to rely on exceptions in the treaty, including the exception for “measures necessary for the maintenance of public order and morals.”

If a U.S. NGO could successfully establish the jurisdiction of a tribunal to hear its claim and that Egypt acted inconsistent with its obligations under the treaty, and if Egypt was unable to rely on an exception under the treaty, the organization may be able to obtain remedies only if it can demonstrate that Egypt’s actions caused it monetary damage.

I. Introduction

In 2011, Egypt began an investigation into whether hundreds of organizations, including U.S. NGOs, had breached the *Law on Associations and Foundations* (Law 84 of 2002). Specifically, Egypt investigated whether the organizations had breached Law 84 of 2002 by receiving funding without obtaining approval from the government and operating without licenses.⁴

As part of the government’s investigation, on December 29, 2011, armed personnel entered the offices of several NGOs, including the U.S. organizations Freedom House, International Republican Institute, and National Democratic Institute, and temporarily detained employees while they seized documents and computers.⁵ The government subsequently criminally charged particular staff and prevented them from leaving the country.⁶ The trials are ongoing.

On January 17, 2012, Egypt announced the completion of a draft *Law on Associations and Foundations* (“Draft Law”) to replace Law 84 of 2002 as the law governing NGO activities in Egypt.⁷ The Draft Law applies to “associations” and “foundations.” An “association” is defined as “[a] group of continuous legal personality composed of natural or legal persons, or both, whose number in all cases is not less than 20, formed to pursue not-for-profit purposes.”⁸ A “foundation” is defined as “[a] legal person established by one or more natural or legal persons,

⁴ CNN Wire Staff, *Egypt Says It Will End NGO Raids, Return Seized Items*, 30 December 2011.

⁵ Peter Beaumont, *Egypt Police Raid Offices of Human Rights Groups in Cairo*, *Guardian*, 29 December 2011.

⁶ David Kirkpatrick and Mayy El Sheikh, *Politically Charged Trial of Pro-Democracy Groups Opens in Egypt*, *New York Times*, 27 February 2012.

⁷ Kareem Elbayar, *ICNL Comments on the Draft Egyptian Law on Associations and Foundations*, 23 January 2012.

⁸ Article 1.

or both, with an endowment of no less than one hundred thousand pounds, to pursue not-for profit purposes.”⁹ Among other things, the Draft Law:¹⁰

- allows the Ministry of Social Affairs (“Ministry”) to refuse to register, or dissolve, an association or foundation if the Ministry decides that its purposes do not relate to “social welfare, development, and the enlightenment of society” or pursues purposes that include “threatening national unity, violating public order or morals, or calling for discrimination between citizens”¹¹
- prohibits any government entity other than the Ministry from “licens[ing] the practice of any of the activities of associations or foundations” and voids existing licenses issued by other government entities to organizations practicing the activities of associations or foundations;¹²
- prevents associations and foundations from accepting foreign funds or sending funds abroad without Ministry approval;¹³
- gives the Ministry the right to suspend the activities or license of a foreign association or foundation;¹⁴
- gives the “Regional Federation” the right to send representatives to attend any general assembly meeting of an association (a “Regional Federation” is “a federation established by at least 10 associations or foundations or both located in one governorate, regardless of the activity, and having a legal personality”);¹⁵ and
- gives the Ministry the right to “prevent the implementation of” any decision “considered by the [Ministry] as violating [the draft] law or the [association’s] Articles of Incorporation.”¹⁶

Some of these provisions in the Draft Law are similar to provisions in Law 84 of 2002.¹⁷

This article examines the issues that would be faced by a U.S. NGO who claims that Egypt’s recent actions breach its obligations in the Egypt – U.S. bilateral investment treaty (“BIT”).¹⁸ The following section provides an overview of BITs and Egypt’s BIT with the U.S.

⁹ Article 1.

¹⁰ The description of the draft *Law on Associations and Foundations* is based on the translation provided by the International Center for Not-for-Profit Law.

¹¹ Articles 6, 9, and 35.

¹² Preamble Article 3.

¹³ Article 13.

¹⁴ Article 56.

¹⁵ Article 23.

¹⁶ Article 19.

¹⁷ Note also that on 8 May 2012, the Human Rights Committee and Religious and Social Affairs Committee of the Egyptian People’s Assembly published a draft *Law on Civil Work Organizations*.

¹⁸ Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, entered into force 27 June 1992, available at:

http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002813.asp

Section III examines the hurdles which an NGO would need to overcome to establish the jurisdiction of a tribunal to hear a claim against Egypt under the treaty. Sections IV and V describe the standards of protection under the Egypt – U.S. BIT and the issues which might arise from the application of those standards of protection to Egypt’s recent treatment of U.S. NGOs. Section VI addresses exceptions on which Egypt may rely. The final section reviews the remedies available to U.S. NGOs if Egypt has breached its obligations under the treaty and Egypt cannot rely on any exception.

II. The Egypt – U.S. Bilateral Investment Treaty

BITs provide protection to the investors of the parties to the treaty and their investments when they invest in the other party. Such treaties typically also provide the investor with the right to initiate arbitration to determine if a party has failed to provide the protections guaranteed in the treaty and what remedy is appropriate. The arbitrations are resolved by a tribunal, which generally has three members. One member is appointed by the claimant, another is appointed by the responding state, and a chairperson is agreed between the parties or appointed by the other two arbitrators or an appointing authority. Tribunal members are typically legal academics, partners in law firms, or barristers. The arbitration is conducted independently of any domestic legal system, according to a set of procedural rules identified in the treaty.

The first BITs were entered by Germany with Pakistan and with the Dominican Republic in 1959.¹⁹ There are now more than 2,500 BITs as well as several multilateral investment treaties, including the North American Free Trade Agreement and the Energy Charter Treaty.²⁰

Investors have started arbitration under an investment treaty at least 390 times.²¹ There may be more claims, as not all decisions are publicized. Several claimants have successfully convinced tribunals that states breached their obligations under the treaty. For example, tribunals have found a breach of a bilateral investment treaty through:

- Mexico failing to fulfill representations to the investor that an investment permit would be renewed;²²
- Chile issuing an investment permit for an urban renewal project that ultimately failed to satisfy local planning laws;²³
- Poland renegeing on a commitment to sell shares to an investor;²⁴

¹⁹ Kenneth Vandeveld, A Brief History of International Investment Agreements, 12 *UC Davis Journal of International Law and Policy* 157 (2005) at 170.

²⁰ C McLachlan, L Shore, M Weiniger, *International Investment Arbitration – Substantive Principles* (Oxford University Press, 2007) para. 1.07.

²¹ UNCTAD, Latest Developments in Investor-State Dispute Settlement, *IIA Issues Note*, No. 1, March 2011, page 1.

²² *Técnicas Medioambientales, TECMED SA v. Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, paras. 154 and 174.

²³ *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004 at para. 188.

²⁴ *Eureko BV v. Republic of Poland*, Partial Award, 19 August 2005 at para. 233.

- Spain permitting money to be transferred from an investor's bank account without consulting the investor on the terms of that transfer;²⁵
- Sri Lanka destroying the investor's shrimp farm as part of a military operation against separatist rebels;²⁶
- Zaire looting the investor's battery factory;²⁷
- Egypt passing legislation that proscribed cement imports three years before the investor's license to import was due to expire;²⁸
- Hungary passing legislation that extinguished the investor's right to manage an airport;²⁹ and
- Argentina failing to fulfill a specific legislative commitment to maintain gas distribution tariffs in U.S. dollars.³⁰

Not only have investors successfully claimed that States breached their obligations under investment treaties, but some of the compensation awarded by the tribunals has been substantial. For example, a Dutch investor received over U.S. \$300 million after convincing a tribunal that the Czech Republic breached the Czech Republic – Netherlands treaty by interfering with the investor's license to operate a local television station.³¹

The Egypt – U.S. BIT was signed in 1982, although it was subsequently amended before finally entering into force in 1992. It was the first BIT signed by the U.S.³² and contains some language that is different from language contained in the majority of U.S. BITs, which were signed later.³³ Thus, the language in the Egypt – U.S. BIT has not been reviewed as extensively as the language in later U.S. BITs.

²⁵ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No ARB/97/7, Award, 13 November 2000 at para. 83.

²⁶ *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award, 27 June 1990.

²⁷ *American Manufacturing & Trading v. Republic of Zaire*, ICSID Case No ARB/93/1, Award, 21 February 1997.

²⁸ *Middle East Cement Shipping and Handling Co SA v. The Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award, 12 April 2002 at para. 107.

²⁹ *ADC Affiliate Limited and ADC & ADC Management Limited v. Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006 at para. 476.

³⁰ *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006 at para. 175.

³¹ *CME Czech Republic BV (The Netherlands) v. The Czech Republic*, Partial Award, 13 September 2001; *CME Czech Republic BV (The Netherlands) v. The Czech Republic*, Final Award, 14 March 2003.

³² Letter from the Department of State to the President, 20 May 1986: "The Bilateral Investment Treaty (BIT) with Egypt was the first treaty signed under the BIT program which you initiated in 1981."

³³ See, generally, Kenneth Vandeveld, *U.S. International Investment Agreements* (Oxford University Press, 2009), pages 273-276.

There is only one dispute under the Egypt – U.S. BIT which is public (although there have been several decisions under Egypt’s BITs with other countries).³⁴ Members of the Wahba family and the U.S. companies which they owned, Champion Trading Company and Ameritrade International, complained that Egypt breached its obligations in the Egypt – U.S. treaty by not paying them compensation which was paid to local cotton companies following the privatization of the Egyptian cotton industry in 1994. The tribunal decided it did not have jurisdiction over the claims brought by the Wahba family, since they were nationals of Egypt as well as the U.S., and rejected the claims brought by the companies.³⁵

As the only decisions under the Egypt – U.S. BIT that are public, the decision on jurisdiction in *Champion Trading, Ameritrade International, James Wahba, John Wahba, and Timothy Wahba v. Egypt* and the award in *Champion Trading and Ameritrade International v. Egypt* are particularly important to the interpretation of that treaty. While there is no rule of precedent under investment treaty law—international tribunals established under investment treaties are not obliged to follow the interpretation of the treaty by previous tribunals—tribunals do tend to follow those previous interpretations.³⁶ Consequently, any tribunal which hears a claim brought by an NGO under the Egypt – U.S. BIT will pay careful attention to the *Champion Trading* decisions. However, as explained further below, the decisions are short and do not extensively clarify the scope of the treaty.

A tribunal which hears a claim brought by an NGO under the Egypt – U.S. BIT will also pay attention to decisions under other investment treaties. Tribunals have tended to follow the decisions of previous tribunals on the interpretation of similar obligations, even if they are not in the same treaty. However, decisions are certainly not always consistent and a decision on the interpretation of a provision is far from a guarantee that a similar provision, or even the same provision, will be interpreted the same way by another tribunal.³⁷

³⁴ *Wena Hotels Ltd v. Egypt*, ICSID Case No ARB/98/4 (Egypt-UK BIT); *Helnan International Hotels v. Egypt*, ICSID Case No ARB/05/19 (Egypt-Denmark BIT); *Siag and Vecchi v. Egypt*, ICSID Case No ARB/05/15 (Egypt-Italy BIT); *Jan de Nul and Dredging International v. Egypt*, ICSID Case No ARB/04/13 (Egypt-Belgium/Luxembourg BIT); *Middle East Cement Shipping and Handling v. Egypt*, ICSID Case No ARB/99/6 (Egypt-UK BIT); *Joy Mining Machinery v. Egypt*, ICSID Case No ARB/03/11 (Egypt-UK BIT)

³⁵ *Champion Trading, Ameritrade International, James Wahba, John Wahba, and Timothy Wahba v. Egypt*, ICSID Case No ARB/02/9, Decision on Jurisdiction, 21 October 2003 and *Champion Trading Company and Ameritrade International v. Egypt* Award, 27 October 2006.

³⁶ See, for example, C McLachlan, L Shore, M Weiniger, *International Investment Arbitration – Substantive Principles* (Oxford University Press, 2007) para. 1.48: “... while no *de jure* doctrine of precedent exists in investment arbitration, a *de facto* doctrine has in fact been building for some time”; Jeffery Commission, “Precedent in Investment Treaty Arbitration : A Citation Analysis of a Developing Jurisprudence,” 24(2) *J Intl Arbitration* 129 (2007); *Saipem SpA v. People’s Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction, 21 March 2007 at para. 67: “The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.”

³⁷ For example, see Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *Fordham Law Review* (2005) 1521.

The Egypt – U.S. BIT, like all other BITs, was not created expressly to protect not-for-profit organizations. Nonetheless, some commentators have stated that, in certain circumstances, their protections could be relied on by such organizations.³⁸ The next sections examine the issues which would arise for a U.S. NGO which sought to rely on the Egypt – U.S. BIT to challenge Egypt’s recent actions.

III. The Jurisdiction of a Tribunal to Hear a Claim Under the Egypt – U.S. BIT Concerning Egypt’s Recent Treatment of U.S. NGOs

An NGO challenging Egypt’s recent actions under the Egypt – U.S. BIT will first need to establish that the tribunal has jurisdiction to hear the claim. Specifically, the NGO will need to establish that the tribunal has personal, subject matter, and temporal jurisdiction.

A. Personal Jurisdiction

An NGO must establish that a tribunal convened to hear a claim for a breach of the Egypt – U.S. treaty has personal jurisdiction—that is, that the tribunal has jurisdiction over the parties before it.

A tribunal convened under the Egypt – U.S. BIT has personal jurisdiction over the Government of Egypt, since Egypt consented in the treaty to the jurisdiction of tribunals to hear claims against it.

With regard to the claimant, the treaty gives standing to claim to “nationals” and “companies.”³⁹ The treaty defines “national” as a “natural person who is a national of a Party under its applicable law.”⁴⁰ Thus, U.S. citizens have standing to claim under the treaty (as long as they are also not citizens of Egypt).⁴¹ So, too, do U.S. companies. The treaty states that “company”:

means any kind of juridical entity, including any corporation, company association, or other organization, that is duly incorporated, constituted, or otherwise duly organized, regardless of whether or not the entity is organized for pecuniary gain, privately or governmentally owned, or organized with limited or unlimited liability.⁴²

³⁸ Nick Gallus and Luke Eric Peterson, “International Investment Treaty Protection of NGOs” 22(4) *Arbitration International* 527 (2006); and Luke Eric Peterson and Nick Gallus, “International Investment Treaty Protection of Not-for-Profit Organizations,” *International Journal of Not-for-Profit Law* 10(1), December 2007.

³⁹ Article VII: “(2) In the event of a legal investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company—in the territory of such Party, the parties shall initially seek to resolve the dispute by consultation and negotiation.... If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute settlement procedures upon which a Party and national or company of the other Party have previously agreed.... (3)(a) In the event that the legal investment dispute is not resolved under procedures specified above, the national or company concerned may choose to submit the dispute to....”

⁴⁰ Article I(1)(e).

⁴¹ *Champion Trading, Ameritrade International, James Wahba, John Wahba, and Timothy Wahba v. Egypt*, ICSID Case No ARB/02/9, Decision on Jurisdiction, 21 October 2003.

⁴² Article 1(1)(a).

An NGO claiming under the Egypt – U.S. BIT would need to establish that it satisfied this definition. The organization may draw from comments of the Government of the U.S. that similar definitions in other U.S. treaties encompass “charitable and non-profit entities.”⁴³

In addition to giving standing to “nationals” and “companies,” the Egypt – U.S. BIT, like many investment treaties, gives standing to the parties to the treaty.⁴⁴ Thus, the U.S. government has standing to challenge Egypt’s recent actions. However, no state has publicly exercised its right under a BIT to challenge the actions of another state.

B. Subject Matter Jurisdiction

In addition to establishing the tribunal’s personal jurisdiction, an NGO challenging Egypt’s recent actions under the Egypt – U.S. BIT would also need to establish that the tribunal has subject matter jurisdiction over the claim. The subject matter jurisdiction of such a tribunal is confined in two important ways.

First, the treaty gives tribunals subject matter jurisdiction over a “legal investment dispute,” which is defined as including “an alleged breach of any right conferred or created by this Treaty with respect to an investment.”⁴⁵ Thus, an NGO would need to establish that it has in Egypt an investment, as defined by the treaty.

The investment of a U.S. NGO claiming against Egypt under the Egypt – U.S. BIT is particularly important because the treaty offers protections to those “investments,” rather than the investors,⁴⁶ as explained further in section IV, below. Thus, the NGO will need to identify an asset in Egypt which is a protected investment but which is also subject to the treatment of which the NGO is complaining.

The treaty states that:

“Investment” means every kind of asset owned or controlled and includes but is not limited to:

- (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
- (ii) a company or shares, stock, or other interests in a company or interests in the assets thereof;

⁴³ For example, see Treaty Between the United States of America and the Republic of Kyrgyzstan concerning the Encouragement and Reciprocal Protection of Investment, Article I(1)(b): “‘company’ of a Party means any kind of corporation, company, association, enterprise, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled,” and Letter of Transmittal available at the U.S. State Department website: <http://www.state.gov/documents/organization/43567.pdf>.

⁴⁴ Article VII: “(1) Any dispute between the Parties concerning the interpretation or application of this Treaty should, if possible, be resolved through diplomatic channels. (2) If the dispute cannot be resolved through diplomatic channels, it shall, upon the agreement of the Parties, be submitted to the International Court of Justice. (3)(a) In the absence of such agreement, the dispute shall, upon the written request of either Party, be submitted to an arbitral tribunal for binding decision in accordance with the applicable rules and principles of international law.”

⁴⁵ Article VII(1).

⁴⁶ For example, Article II(4) states that “[t]he treatment, protection and security of *investments* shall never be less than that required by international law and national legislation” (emphasis added).

- (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
- (iv) valid intellectual and industrial rights property, including, but not limited to, rights with respect to copyrights and related patents, trademarks and trade names, industrial designs, trade secrets and know-how, and goodwill;
- (v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;
- (vi) any right conferred by law or contract including, but not limited to, rights within the confines of law, to search for or utilize natural resources, and rights to manufacture, use and sell products;
- (vii) returns which are reinvested.

This definition is not exclusive. Thus, an “asset owned or controlled” by the NGO in Egypt falls within the definition, even if the asset does not fall within one of the listed examples.

Even if an NGO owns or controls an asset in Egypt, it may still not have an investment protected by the treaty. Some arbitrators have held that, regardless of the definition of investment in an investment treaty, investments will only be protected by the treaty if the asset displays certain inherent or objective characteristics of “investments.”⁴⁷ One tribunal listed these objective characteristics as “a contribution that extends over a certain period of time and that involves some risk.”⁴⁸ Commentators have suggested that, in certain circumstances, NGO investments may display these characteristics.⁴⁹

At least twice, arbitrators have held that an investment must be commercially oriented or intended to generate an economic return or profit.⁵⁰ Thus, depending on the tribunal convened to hear the dispute, an NGO seeking to establish the subject matter jurisdiction of a tribunal under the Egypt – U.S. BIT may need to demonstrate that it expected a profit or return from its investment in Egypt. This does not necessarily mean that the organization must establish that its overall goal was to profit; it may be sufficient to establish that was the goal of the particular investment which was affected.

The subject matter jurisdiction of a tribunal convened to hear a dispute under the Egypt – U.S. BIT is not confined only by that treaty. It is also confined by the Convention of the World Bank’s International Centre for the Settlement of Investment Disputes (“ICSID”). This is a treaty which was negotiated in the 1960s to create a center to resolve disputes between foreign investors and their host states. The Egypt – U.S. BIT requires claimants to submit their dispute to

⁴⁷ Nick Gallus and Luke Eric Peterson, “International Investment Treaty Protection of NGOs,” 22(4) *Arbitration International* 527 (2006) at pages 537-8.

⁴⁸ *Romak S.A. v. Republic of Uzbekistan*, 26 November 2009 at para. 180: “The term ‘investment’ has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT”; and para. 207: “The Arbitral Tribunal therefore considers that the term ‘investments’ under the BIT has an inherent meaning ... entailing a contribution that extends over a certain period of time and that involves some risk.”

⁴⁹ Luke Eric Peterson and Nick Gallus, “International Investment Treaty Protection of Not-for-Profit Organizations,” *International Journal of Not-for-Profit Law* 10(1), December 2007.

⁵⁰ *CME Czech Republic BV (The Netherlands) v. Czech Republic*, Ian Brownlie’s separate opinion, Final Award, 14 March 2003 at para. 34; *Franz Sedelmeyer v. Russian Federation*, Award, 7 July 1998 at page 65.

the ICSID.⁵¹ This means that the jurisdiction of a tribunal convened under the treaty is confined by the ICSID Convention.

Some arbitrators have held that there is an implicit or objective definition of investment under the ICSID Convention which must be satisfied before a tribunal at the ICSID has jurisdiction over the dispute.⁵² These characteristics are similar to the objective characteristics of investment discussed above, but also include contribution to the economic development of the host state.⁵³ A small number of tribunals have also required the expectation of profit or return.⁵⁴ Thus, even if a tribunal convened to hear a claim by a U.S. NGO under the Egypt – U.S. BIT does not interpret the BIT as requiring the NGO's investment to display characteristics inherent in an investment, the tribunal may require the investment to display those features to satisfy the requirements of the ICSID Convention.

C. Temporal Jurisdiction

The third limit on the jurisdiction of a BIT tribunal is on the tribunal's temporal jurisdiction. That jurisdiction is confined in three ways. First, it is confined to acts which occurred after the treaty entered into force.⁵⁵ The actions of Egypt against U.S. NGOs highlighted in section I, above, appear to satisfy this requirement; all occurred after the treaty entered into force in 1992.

A tribunal's temporal jurisdiction is also confined to acts which occurred after the beginning of the tribunal's personal and subject matter jurisdiction.⁵⁶ That is, the tribunal has no jurisdiction over acts which occurred before the claimant satisfied the definition of "national" or "company" under the Egypt – U.S. BIT and before the claimant owned or controlled an investment protected under the treaty and the ICSID Convention.

⁵¹ Article VII(3)(a): "In the event that the legal investment dispute is not resolved under procedures specified above, the national or company concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ('Centre') for settlement by conciliation or binding arbitration...."

⁵² Several tribunals have disagreed and held that parties to the ICSID Convention enjoy broad discretion to determine what constitutes a foreign investment—for example, through the definition in a given investment treaty—and that arbitration at the ICSID should be open to all such investments: *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, 29 April 2004 at para. 73; *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997 at para. 31; *M.E. Cement Shipping & Handling Co., SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 at para. 136; *MCI Power Group LC and New Turbine, Inc v. Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 at para. 165; *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 at paras. 249-255.

⁵³ See, for example, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 at para. 52; *AES v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005 at para. 88; *Jan de Nul and Dredging International v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 at para. 91.

⁵⁴ See, for example, *Fedax NV v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997 at para. 43; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction at para. 53.

⁵⁵ See, generally, Nick Gallus, *The Temporal Scope of Investment Protection Treaties* (British Institute of International and Comparative Law, 2008) from page 14.

⁵⁶ Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) para. 631.

A tribunal would also likely be limited in its ability to hear claims which challenge acts that occurred too long ago. While the Egypt – U.S. BIT does not contain an express time limit within which a claim must be brought, international tribunals that were not bound by express time limits have still held that they could not hear claims which challenged acts that occurred too long ago.⁵⁷ The precise time at which a claim expires is unclear; tribunals have tended to be guided by the claimant’s negligence in delaying the claim and the prejudice to the respondent state from the delay. Thus, an NGO which waited several years before claiming could face an argument that the claim is time barred.

IV. Protections Provided to U.S. NGOs Under the Egypt – U.S. BIT

If an NGO that claims under the Egypt – U.S. BIT can demonstrate that an arbitration tribunal convened has jurisdiction to hear the claim, it must then demonstrate that the treatment of that organization or its investment was inconsistent with a treaty obligation. There are likely five obligations under the Egypt – U.S. BIT which might be invoked by an NGO—namely, the obligations to provide:

- national treatment;
- most favored nation treatment;
- treatment required by international law and national legislation;
- compensation on expropriation; and
- free transfers.

These obligations are examined, in turn.

A. National Treatment

Articles II(1) and II(2)(a) of the Egypt – U.S. BIT require the parties to provide national treatment to foreign investments. Specifically, the parties must “permit such investments to be established and acquired on terms and conditions that accord treatment no less favorable than the treatment it accords to investments of its own nationals and companies....” The parties must also “accord investments in its territory, and associated activities in connection with these investments of nationals or companies of the other Party, treatment no less favorable than that accorded in like situations to investments and associated activities of its own nationals and companies....”⁵⁸

⁵⁷ Nick Gallus, *The Temporal Scope of Investment Protection Treaties* (British Institute of International and Comparative Law, 2008), pages 93-98.

⁵⁸ Article II(1) of the Egypt – U.S. BIT states: “Each Party undertakes to provide and maintain a favorable environment for investments in its territory by nationals and companies of the other Party and shall, in applying its laws, regulations, administrative practices and procedures, permit such investments to be established and acquired on terms and conditions that accord treatment no less favorable than the treaty it accords to investments of its own nationals and companies....” Article II(2)(a) of the Egypt – U.S. BIT states: “Each Party shall accord investments in its territory, and associated activities in connection with these investments of nationals or companies of the other Party, treatment no less favorable than that accorded in like situations to investments and associated activities of its own nationals and companies.... Associated activities in connection with an investment include, but are not limited to: (i) The establishment, control and maintenance of branches, agencies, offices, factories or other facilities for the conduct of business; (ii) The organization of companies under applicable laws and regulations; the acquisition of companies or interests in companies or in the property; and the management, control, maintenance, use, enjoyment

The national treatment obligation in the Egypt – U.S. BIT was addressed in *Champion Trading and Ameritrade International v. Egypt*. In that case, the claimants alleged that Egypt had failed to provide national treatment by not giving them compensation which was given to Egyptian owned cotton-trading companies. However, the tribunal dismissed the claim because the claimants were not in “like situations” with those companies that received compensation. Specifically, the companies were awarded compensation for trading in years when the claimants did not.⁵⁹

The national treatment obligation in the Egypt – U.S. BIT is worded similarly to articles in many BITs, which prevent states from treating foreign investments “less favorably” than local investments in “like situations” or “like circumstances.”⁶⁰ Nonetheless, the precise scope of the two key phrases, “less favorably” and “like situations (or circumstances),” is unclear

A state clearly treats a foreign investment “less favorably” than local investments when the state *intentionally* discriminates against a foreign investment because of the investment’s nationality.⁶¹ The circumstances in which other treatment is “less favorable” are unclear. The issue has not been extensively addressed by tribunals, which have tended to focus instead on whether the investments are in “like situations” or “like circumstances.”

Nevertheless, which local investments are in “like situations” or “like circumstances” with foreign investments is also unclear. One tribunal compared the treatment of the foreign investment with the treatment of the local investment producing the same product.⁶² Another tribunal supported a broader interpretation, examining the treatment of all local investments operating in the same economic sector.⁶³ Another tribunal went even further, comparing the treatment of the foreign investment with that of all local investments that exported other types of products. That tribunal found that Ecuador failed to provide national treatment by refunding

and expansion, and the sale, liquidation, dissolution or other disposition, of companies organized or acquired; (iii) The making, performance and enforcement of contracts related to investment; (iv) The acquisition (whether by purchase, lease or any other legal means), ownership and disposition (whether by sale, testament or any other legal means) of personal property of all kinds, both tangible and intangible; (v) The leasing of real property appropriate for the conduct of business; (vi) Acquisition, maintenance and protection of copyrights, patents, trademarks, trade secrets, trade names, licenses and other approvals of products and manufacturing processes, and other industrial property rights; and (vii) The borrowing of funds at market terms and conditions from local financial institutions, as well as the purchase and issuance of equity shares in the local financial markets, and, in accordance with national regulations and practices, the purchase of foreign exchange for the operation of the enterprise.”

⁵⁹ *Champion Trading Company and Ameritrade International v. Egypt* Award, 27 October 2006 paras. 134 – 156.

⁶⁰ Article II(1) of the Kazakhstan-U.S. BIT, for example, reads: “Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies...”

⁶¹ See, for example, Mexico’s submission to the *Methanex* Tribunal: *Methanex Corporation v. United States of America*, Final Award, 3 August 2005 at para. 32 of Chapter C of Part II.

⁶² *Methanex Corporation v. United States of America*, Final Award, 3 August 2005 at para. 19 of Chapter B of Part IV.

⁶³ *S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000 at para. 250.

value-added tax to a local flower exporting company and not to the foreign investor exporting oil.⁶⁴

Some tribunals have examined the policy goals of the challenged measure when examining if the local and foreign investments are in “like situations” or “like circumstances.” One tribunal said that a difference in treatment can “be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments.”⁶⁵ The tribunal applied this principle to find that Canada had not denied national treatment to a U.S. owned company that exported lumber from Canada by giving it a lower export quota than Canadian owned exporters. The tribunal found that, since the lower quota was reasonably related to rational policies, the U.S. owned company that received that quota was not in “like circumstances” with Canadian companies that received a higher quota.⁶⁶

Another tribunal also accepted the principle that the “assessment of ‘like circumstances’ must also take into account circumstances that would justify governmental regulations that treat [foreign investors] differently in order to protect the public interest.”⁶⁷ However, that tribunal held that the differential treatment of a U.S. investor in Canada was not justified because, while the goal behind the treatment was legitimate, the means chosen by the government to pursue that goal was not.⁶⁸

B. Most Favored Nation Treatment

In addition to requiring treatment of investments of the other Party no less favorable than treatment of local investments, the Egypt – U.S. BIT also requires treatment no less favorable than that provided to investments of any third country.⁶⁹ This obligation is commonly known as the obligation to provide most favored nation (“MFN”) treatment and is also common to investment treaties. Generally, it prevents a party to the treaty from discriminating against investments from the other party in favor of investments from a third country.

This provision imposes an obligation on the parties regarding their specific treatment of investments. For example, Egypt might breach the Article if it granted a permit to an English investment rather than a U.S. investment solely on the basis of the nationalities of the investment.

⁶⁴ *Occidental Exploration and Production Company v. The Republic of Ecuador*, Award, 1 July 2004 at para. 179.

⁶⁵ *Pope & Talbot*, Award on Merits Phase 2 at para. 79.

⁶⁶ *Pope & Talbot*, Award on Merits Phase 2 at paras. 87, 93, 102, 103.

⁶⁷ *S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000 at para. 250.

⁶⁸ *S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000 at para. 255.

⁶⁹ Article II(1) of the Egypt – U.S. BIT states: “Each Party ... shall, in applying its laws, regulations, administrative practices and procedures, permit such investments to be established and acquired on terms and conditions that accord treatment no less than that accorded in like situations to investments of nationals or companies of any third country, whichever is more favorable.” Article II(2)(a) states: “Each Party shall accord investments in its territory, and associated activities in connection with these investments of nationals or companies of the other Party, treatment no less favorable than that accorded in like situations to investments of its own nationals and companies or to investments of nationals and companies of any third country, whichever is most favorable....”

The MFN provision may also require Egypt to give U.S. investments treatment which it is obliged to provide in Egypt's investment treaties with other countries, such as its BIT with the United Kingdom. Some states and tribunals have accepted that the promise of MFN "treatment" includes a promise to provide treatment required by other investment treaties, which is more favorable.⁷⁰ However, some states have criticized this approach as inconsistent with the words of the provision.⁷¹

Thus, an NGO may seek to rely on the MFN provision to obtain treatment offered by Egypt in its other investment treaties, such as its BIT with the United Kingdom. There are four obligations, in particular, which are likely to be attractive:

1. the obligations observance obligation;
2. the obligation to provide fair and equitable treatment;
3. the obligation to provide full protection and security; and
4. the obligation not to impair by unreasonable measures.

1. The Obligations Observance Obligation

The "obligations observance" or "umbrella" obligation is contained in Egypt's BIT with the United Kingdom, which states:

Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.⁷²

Tribunals have disagreed over the scope of this provision. In particular, tribunals disagree over the precise obligations a state must observe. One tribunal found Argentina breached the provision when it failed to fulfill a specific legislative commitment to maintain gas distribution tariffs in U.S. dollars.⁷³ However, other tribunals expressed doubt whether the provisions elevate breaches of domestic legislation to a breach of the treaty.⁷⁴

Some tribunals have held that the obligations observance provision protects all contractual obligations.⁷⁵ Other tribunals view such provisions as protecting only those

⁷⁰ For example, *Rumeli Telekom and Telsim Mobil Telekomikasyon Hizmetleri v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 at para. 568; *White Industries Australia Limited v. India*, Final Award, 30 November 2011, paras. 11.2.1 – 11.2.9.

⁷¹ For example, *Chemtura Corporation v. Canada*, Canada Counter Memorial, 20 October 2008 at para. 882.

⁷² Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, Article 2(2).

⁷³ *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006 at para. 175.

⁷⁴ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 at paras. 71-88. See also *SGS Société Générale de Surveillance S.A. v. Pakistan*, Decision on Jurisdiction, at paras. 166-168.

⁷⁵ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 29 January 2004 at para. 128. See also *Fedax NV v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Award, 9 March 1998, at para. 29, holding that the provision protected the contractual obligation to pay the debt on a promissory note; and *Eureko BV v. Republic of Poland*, Partial Award, 19 August 2005 at para. 260, holding that the provision protected the contractual obligation to issue shares.

obligations that a state undertakes in its sovereign capacity.⁷⁶ For example, one tribunal said that this provision “will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State ... but will cover additional investment protections contractually agreed by the State as a sovereign inserted in an investment agreement.”⁷⁷ An agreement to refrain from changing certain regulations or laws affecting a particular foreign investor is an example of such a protection.

The *obligations* protected are not the only aspect of the provision that is unclear. Which *breaches* of contract breach the provision is also unclear. Some tribunals say the provision protects all breaches.⁷⁸ Other tribunals arguably say only breaches through sovereign act breach the provision.⁷⁹ A state implementing legislation extinguishing a contractual obligation is an example of a breach through such a sovereign act.

Further aspects of the application of the provision to contractual disputes are also unclear. It is still unclear whether investors can rely on the provision where the investor’s contract contains a clause choosing domestic courts to resolve the dispute.⁸⁰ The parties entitled to the protection of the provision also remain unsettled. Some tribunals have suggested that the provision protects only contracts to which the foreign investor and the state, themselves, are parties.⁸¹ Other tribunals have arguably extended the provision’s protection to contracts to which the foreign investor’s local subsidiary and sub-state entities are parties.⁸² On this approach, a foreign investor might claim that the state breached the BIT by failing to fulfill a contractual obligation – notwithstanding that the foreign investor is not personally a party to the contract in question.

2. The Obligation to Provide Fair and Equitable Treatment

An NGO may also argue that Egypt has breached the MFN provision in the Egypt – U.S. BIT by failing to provide the “fair and equitable treatment” which Egypt has promised to investments of other countries. For example, Egypt’s BIT with the UK also requires that:

⁷⁶ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 at para. 81.

⁷⁷ *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, at para. 109. See also the discussion in *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 at paras. 71-88.

⁷⁸ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 29 January 2004 at para. 128.

⁷⁹ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction at para. 72 and 81.

⁸⁰ Compare *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 29 January 2004 at para. 155, with, for example, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005 at para. 112.

⁸¹ *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 at para. 384; *Impregilio S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 at para. 223.

⁸² *SGS Société Générale de Surveillance S.A. v. Pakistan*, Decision on Jurisdiction at para. 166; *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award of 12 October 2005 at para. 86.

Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment....⁸³

Many BITs require the host state to provide “fair and equitable treatment.”⁸⁴ The precise scope of this standard of treatment is unclear. At least two tribunals have interpreted the standard literally, simply deciding whether the state’s conduct was “fair and equitable.”⁸⁵ Some countries have rejected this standard as too high.⁸⁶ Furthermore, it is unclear whether the standard is uniform across countries or depends on the country’s level of development.⁸⁷

While the precise scope of the standard is unclear, it is possible to identify elements of the standard on which many tribunals have agreed. All tribunals agree that the fair and equitable treatment standard protects against “denial of justice.” A state denying a foreign investor access to the justice system or administering that justice system unfairly can commit a denial of justice.⁸⁸

Some tribunals agree that the fair and equitable treatment obligation protects the investor’s legitimate expectations.⁸⁹ Tribunals have found that states failed to protect the investor’s legitimate expectations and, therefore, failed to provide fair and equitable treatment by:

- failing to fulfill representations to the investor that an investment permit would be renewed;⁹⁰
- issuing an investment permit for an urban renewal project that was inconsistent with local planning laws;⁹¹

⁸³ Article 2(2).

⁸⁴ Article II(2)(a) of the Kazakhstan – U.S. BIT, for example, provides: “Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.”

⁸⁵ *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 at para. 360; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 at para. 290.

⁸⁶ NAFTA Free Trade Commission Note of Interpretation, 31 July 2001.

⁸⁷ Nick Gallus, “The influence of the host state’s level of development on international investment treaty standards of protection,” 6(5) *Journal of World Investment and Trade* 711 (October 2005); Nick Gallus, “The fair and equitable treatment standard and the circumstances of the host state,” in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011).

⁸⁸ The leading text on the issue says “denial of justice occurs when the instrumentalities of a state purport to administer justice to aliens in a fundamentally unfair manner:” Jan Paulsson, *Denial of Justice* (Cambridge University Press, 2005) at page 62. Note that an investor must give local courts an opportunity to remedy their unfair treatment before the investor can successfully claim for a denial of justice (Jan Paulsson, *Denial of Justice* at pages 100-130). This is known as “exhausting local remedies.”

⁸⁹ *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 at para. 372, *Técnicas Medioambientales, TECMED S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 at para. 154; *Eastern Sugar BV v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 at para. 207.

⁹⁰ *Técnicas Medioambientales, TECMED S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 at para. 154 and 174.

⁹¹ *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 at para. 188.

- reneging on a commitment to sell shares to an investor;⁹² and
- drafting a law to minimize an investor's sugar production quota.⁹³

Among those tribunals that agree the fair and equitable treatment standard requires the state to protect the investor's legitimate expectations, there is little consensus on what, precisely, investors ought to legitimately expect. Some tribunals have said that foreign investors expect a stable legal and business environment.⁹⁴ These same tribunals have found that by failing to provide that environment, the state failed to provide fair and equitable treatment. For example, one tribunal found that Argentina breached the standard by reneging on a commitment to allow U.S. investors to charge local Argentine customers in U.S. dollars for the transport and distribution of gas.⁹⁵

3. The Obligation to Provide Full Protection and Security

A further obligation which a U.S. NGO might seek to import through the MFN article is the obligation to provide full protection and security. For example, the Egypt – UK BIT states:

Investments of nationals or companies of either Contracting Party ... shall enjoy full protection and security in the territory of the other Contracting Party.

At a minimum, the obligation to provide “full protection and security” requires the state to protect the investment's *physical* security. For example, a tribunal found Sri Lanka failed to provide full protection and security when its army destroyed the investor's shrimp farm as part of a military operation against Tamil Tiger rebels.⁹⁶ The tribunal held that the obligation required the state to take “reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.”⁹⁷

Some tribunals have endorsed an even broader interpretation of the full protection and security provision by applying the provision to protect the investment's *legal* security, as well as

⁹² *Eureka B.V. v. Republic of Poland*, Partial Award, 19 August 2005 at para. 233.

⁹³ *Eastern Sugar BV v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 at para. 335.

⁹⁴ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 25 April 2005 at para. 274; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, at para. 124; *Occidental Exploration and Production Company v. The Republic of Ecuador*, Award, 1 July 2004 at para. 183; *Metalclad Corporation v. Mexico*, Award, 30 August 2000 at para. 99.

⁹⁵ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 25 April 2005 at paras. 275-281.

⁹⁶ *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 27 1990.

⁹⁷ Para. 77. Another tribunal found Zaire failed to provide full protection and security when its army looted the investor's battery factory: *American Manufacturing & Trading v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997. A third tribunal found Egypt failed to provide full protection and security when it failed to prevent private parties taking over the investor's hotel and failed to subsequently prosecute those parties: *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 at paras. 84-95.

its physical security.⁹⁸ One tribunal, for example, found that Argentina failed to provide full protection and security by failing to provide a secure investment framework.⁹⁹

Not all investors have succeeded in their claims that states breached their obligation to provide full protection and security. The International Court of Justice, for example, found that failing to prevent local workers from occupying a factory was not sufficient to amount to a failure to provide full protection and security, where there was no evidence the workers damaged the plant and some level of production was maintained.¹⁰⁰ A BIT tribunal later partly relied on the International Court of Justice's decision in rejecting a claim that Romania's reaction to labor unrest breached the State's obligation to provide full protection and security.¹⁰¹

4. Unreasonable Impairment

A final obligation which a U.S. NGO might seek to import through the MFN article is the obligation not to unreasonably impair the management of its investment. For example, Article 2(2) of the Egypt – UK BIT states:

Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party is not in any way impaired by unreasonable ... measures.

This obligation has not been reviewed by tribunals as often as the obligations described above. However, two tribunals have interpreted this obligation as requiring that the State's conduct "bears a reasonable relationship to some rational policy..."¹⁰²

C. Treatment Required by International Law and National Legislation

Article II(4) of the Egypt – U.S. BIT provides that "[t]he treatment, protection and security of investments shall never be less than that required by international law and national legislation." The U.S. State Department explained that "[t]his clause is intended to place a floor under and reinforce the national/MFN treatment standard."¹⁰³ Thus, Article II(4) requires a minimum standard of treatment of investments from the other Party, regardless of how the government treats its own investments or those of third parties. In this sense, Article II(4) is similar to the obligations in the Egypt – UK BIT to provide fair and equitable treatment, full protection and security, and not unreasonably impair the operation of investments, which were discussed above, in section IV(B).

⁹⁸ See, for example, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Partial Award, 13 September 2001 at para. 613: "The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued."

⁹⁹ *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 at para. 408.

¹⁰⁰ *Case concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 20 July 1989, ICJ Reports [1989] 15 at para. 108.

¹⁰¹ *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award of 12 October 2005, at paras. 164-166.

¹⁰² *Saluka v. Czech Republic*, Partial Award, 17 March 2006 at para. 460, approved in *Rumeli Telekom and Telsim Mobil Telekomikasyon Hizmetleri v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 at para. 679.

¹⁰³ Letter from the Department of State to the President, 20 May 1986.

Article II(4) contains two sub-obligations. The first is that “[t]he treatment, protection and security of investments shall never be less than that required by ... national legislation.” This seems to oblige the parties to the treaty to treat foreign investments consistent with national legislation. Thus, an investor could claim under the treaty that the treatment of its investment was inconsistent with national legislation.

The second obligation in Article II(4) is that “[t]he treatment, protection and security of investments shall never be less than that required by international law.” This obligation was invoked by the claimants in *Champion Trading and Ameritrade v. Egypt*. They alleged that Egypt breached the obligation by failing to act transparently. The tribunal held that, on the facts before it, there was no evidence that the government failed to act transparently.¹⁰⁴ Consequently, there was no need for the tribunal to decide if Article II(4) required Egypt to act transparently.

Aside from *Champion Trading and Ameritrade v. Egypt*, no award that is public has addressed the meaning of Article II(4) of the Egypt – U.S. BIT or the obligation to provide treatment no “less than that required by international law.” Thus, the scope of the obligation is not clear. Nevertheless, it may require Egypt to provide the customary international law minimum standard of treatment.

Generally, “international law” is determined by four sources listed in Article 38(1) of the Statute of the International Court of Justice.¹⁰⁵ One of those sources is customary international law, which is the “the general and consistent practice of States that they follow from a sense of legal obligation.”¹⁰⁶ The customary international law minimum standard of treatment is, therefore, the general and consistent treatment of aliens performed from a sense of legal obligation. The 1910 description of the standard given by the former U.S. Secretary of State, Elihu Root, is often repeated:

There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the world.... If any country’s system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment of aliens.¹⁰⁷

The customary international law minimum standard of treatment is unclear. However, one tribunal recently described it as follows:

... to violate the customary international law minimum standard of treatment ... an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards....¹⁰⁸

¹⁰⁴ *Champion Trading Company and Ameritrade International v. Egypt* Award, 27 October 2006 at para. 164.

¹⁰⁵ C Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007) 36–7.

¹⁰⁶ Annex A, 2004 U.S. Model BIT.

¹⁰⁷ Elihu Root, “The Basis of Protection to Citizens Residing Abroad,” 4(3) *American Journal of International Law* (1910) 517 at pages 521-522.

¹⁰⁸ *Glamis Gold v. U.S.*, Award, 8 June 2009 at para. 22. See also *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, 18 September 2009 at para. 296: “To determine whether an action fails to meet the requirement ..., a

According to this description, the customary international law minimum standard of treatment is not as high as the standards described above, such as that required by the obligation not to unreasonably impair the management of an investment or the obligation to provide fair and equitable treatment. Thus, an NGO claiming against Egypt under the Egypt – U.S. BIT will likely focus on claiming that Egypt has failed to provide MFN treatment, in breach of Article II(1), by unreasonably impairing the management of its investment or failing to provide fair and equitable treatment, rather than focusing on claiming that Egypt has breached Article II(4) through a failure to provide the customary international law standard of treatment.

Customary international law is not the only source of international law under Article 38 of the Statute of the International Court of Justice. Another source is treaties. Thus, a U.S. NGO could argue that the obligation in Article II(4) that “[t]he treatment, protection and security of investments shall never be less than that required by international law” also requires Egypt to treat the organization consistent with Egypt’s obligations in treaties other than its BIT with the U.S.

D. Expropriation

Article III(1) of the Egypt – U.S. BIT provides protection against certain kinds of expropriation. It states:

No investment or any part of an investment of a national or company of either Party shall be expropriated or nationalized by the other Party or by a subdivision thereof—or subjected to any other measure, direct or indirect, if the effect of such other measure, or a series of such other measures, would be tantamount to expropriation or nationalization (all expropriations, all nationalizations and all such other measures hereinafter referred to as “expropriation”)—unless the expropriation

- (a) is done for a public purpose;
- (b) is accomplished under due process of law;
- (c) is not discriminatory;
- (d) is accompanied by prompt and adequate compensation, freely realizable; and
- (e) does not violate any specific contractual engagement.

The obligations in sub-Articles (a) to (e) are cumulative. Thus, a party breaches its obligation in the Article if an expropriation is not “accompanied by prompt and adequate compensation” that is “freely realizable,” even if the expropriation satisfies the other listed obligations.

Article III(1) protect against both direct and indirect expropriation. A direct expropriation is where the state directly takes the investment, often by transferring the investment to itself. For example, one tribunal found that Russia expropriated a German investor’s property through a Presidential Decree confiscating the property.¹⁰⁹ Similarly, in a 2006 case, another tribunal found

tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy’s very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.”

¹⁰⁹ *Franz Sedelmeyer v. Russian Federation*, Award, 7 July 1998 at page 73.

Hungary had directly taken the investor's contractual right to manage an airport by passing legislation extinguishing the right.¹¹⁰

Article III(1) also protects against certain "indirect" expropriations or measures "tantamount to expropriation."¹¹¹ These are measures which do not overtly expropriate property but have the same effect. There is no test for what amounts to an indirect expropriation. There is not even consensus as to whether tribunals hearing a claim for an indirect expropriation should focus only on the *effect* of the measures on the investment or whether they should also look at the *legitimacy* of the purpose behind the measures (for example, a legitimate public health purpose). While some tribunals focus on the effect of the measures on the investment,¹¹² one tribunal found that a Californian law proscribing the use of an ingredient in gasoline was not an indirect expropriation because the law pursued a legitimate purpose.¹¹³

While there is no agreement on a test, some tribunals have identified what types of measures might be an indirect expropriation. A tribunal said that a measure is more likely to be an indirect expropriation if the measure is inconsistent with specific commitments given to the foreign investor.¹¹⁴ Another tribunal found a measure is more likely to be an indirect expropriation if the measure is disproportionate to the purpose the state hopes to achieve.¹¹⁵

Thus, the line between legitimate non-compensable exercises of government regulation and those actions which amount to an expropriation for which compensation must be paid is unclear.¹¹⁶ Some governments have provided more detailed written guidance. For example, the U.S. now provides that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriation."¹¹⁷

E. Free Transfers

Article V of the Egypt – U.S. BIT provides:

¹¹⁰ *ADC Affiliate Limited and ADC & ADC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 at para. 476.

¹¹¹ On indirect expropriation generally, see Andrew Newcombe, "The Boundaries of Regulatory Expropriation," 20 *ICSID Review-Foreign Investment Law Journal* 1 (2005).

¹¹² See, for example, *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 at para. 310.

¹¹³ *Methanex Corporation v. United States of America*, Final Award, 3 August 2005, Part IV, Chapter D, Page 4 at para. 15. See also *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006 at paras. 254-5; and *Fireman's Fund Insurance Company v. Mexico*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006 at para. 176(j).

¹¹⁴ *Methanex Corporation v. United States of America*, Final Award, 3 August 2005, Part IV, Chapter D, Page 4 at para. 7. See also *Fireman's Fund Insurance Company v. Mexico*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006 at para. 176(k).

¹¹⁵ *Técnicas Medioambientales, TECMED SA v. Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003 at para. 122.

¹¹⁶ See, for example, the discussion in Andrew Newcombe, "The Boundaries of Regulatory Expropriation," 20 *ICSID Review-Foreign Investment Law Journal* 1 (2005).

¹¹⁷ U.S.-Chile FTA, Chapter 10, Annex 10-D, Article 4 (b).

1. Either Party shall in respect of investments by nationals or companies of the other Party grant to those nationals or companies the free transfer of:
 - a. returns;
 - b. royalties and other payments deriving from licenses, franchises and other similar grants or rights;
 - c. installments in repayments of loans;
 - d. amounts spent for the management of the investment in the territory of the other Party or a third country;
 - e. additional funds necessary for the maintenance of the investment;
 - f. the proceeds of partial or total sale or liquidation of the investment, including a liquidation effected as a result of any event mentioned in Article IV; and
 - g. compensation payments pursuant to Article III.
2. ...
3. Notwithstanding the preceding paragraphs, either Party may maintain laws and regulations: (a) requiring reports of currency transfer....

The precise scope of this provision is unclear. It has not been interpreted by an award that is public. While similarly worded provisions are included in many BITs, they have not been extensively reviewed by tribunals, and tribunals which have addressed the provisions have not clarified their scope. Commentary on the provision does not clarify its application to measures similar to those envisaged in the Draft Law.¹¹⁸

V. The Application of the Egypt – U.S. BIT to the Actions of Egypt Against U.S. NGOs

Having reviewed the scope of the obligations under the Egypt – U.S. BIT, this article now applies those obligations to specific aspects of the recent Egyptian conduct, identified in section I, above.

A. Armed Personnel Entering NGO Offices and Temporarily Detaining Employees

An NGO could claim that Egypt failed to provide full protection and security to its investment in Egypt by entering its offices and temporarily detaining employees while documents and computers were seized. As explained above, such an NGO may need to demonstrate that Egypt failed to take such “reasonable measures ... which a well-administered government could be expected to exercise under similar circumstances.”¹¹⁹ Thus, such a claim might need to address whether it was unreasonable for the Egyptian military to enter the offices and temporarily detain employees to gather evidence to support the claim for breach of Law 84 of 2002.

¹¹⁸ For commentary on BIT provisions that require the free transfer of funds, see United Nations Conference on Trade and Development, *Transfer of Funds*, 2000. For commentary on the provision in the Egypt – U.S. BIT, see Kenneth Vandeveld, *United States Investment Treaties – Policy and Practice* (Kluwer, 1992) at pages 144-146.

¹¹⁹ See section IV(B)(3), above.

An NGO could also argue that Egypt's actions impaired the management of its investment. Such a claim would initially need to establish that Egypt owed the NGO the obligation not to impair the management of its investment, through the treaty MFN provision. The NGO would also likely need to establish that entering the offices and detaining employees did not "bear a reasonable relationship to some rational policy."¹²⁰

An NGO might also claim that entering its offices and temporarily detaining employees was a breach of Egypt's obligation to provide fair and equitable treatment. Again, the NGO would need to first establish that Egypt owed the organization that treatment, through the treaty MFN provision, before demonstrating that Egypt's conduct fell below the fair and equitable treatment standard. Thus, the organization may need to establish that it did not legitimately expect that the military would enter its offices and detain its personnel to gather evidence to support a charge that the organization breached Law 84 of 2002.¹²¹

Finally, an NGO could claim that Egypt's actions fell below the customary international law minimum standard of treatment. An organization bringing such a claim would likely need to establish that Egypt's actions were "manifestly arbitrary," "blatantly unfair," involved "a complete lack of due process," involved "evident discrimination" or "a manifest lack of reasons."¹²²

B. Armed Personnel Seizing Assets

An NGO could challenge that the seizure of its documents and computers was an expropriation, in breach of Article III(1) of the treaty. Such a claim would face the obstacle of establishing that the documents and computers, themselves, are investments or parts of an investment protected under the treaty and possibly also the ICSID Convention. The claim would also need to establish that the documents and computers have not been returned since, generally, *temporary* taking of property is not regarded as an expropriation.¹²³

Seizing the assets also may raise issues of full protection and security, unreasonable impairment of the management of the investment, fair and equitable treatment, and the customary international law minimum standard of treatment.

C. Charging NGO Employees and Preventing Them from Leaving the Country

Charging someone with a crime, of itself, is unlikely to engage any obligations under the treaty. Nor is preventing the employees from leaving the country. One tribunal recently held that "interdiction orders ... are commonplace in many countries and promote the rational public policy of preventing the accused from fleeing the country in avoidance of criminal prosecution."¹²⁴

Nevertheless, the subsequent trial of those charged with operating without a license and receiving foreign funds in violation of Egyptian law may provide a basis for a claim that Egypt

¹²⁰ See section IV(B)(iv), above.

¹²¹ See section IV(B)(ii), above.

¹²² See section IV(C), above.

¹²³ Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration, Substantive Principles* (Oxford University Press, 2007) para. 8.95.

¹²⁴ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011 at para. 606.

has failed to provide fair and equitable treatment, or the customary international law standard of treatment by committing a denial of justice. Such a claim would need to establish that the administration of justice to the employees was “fundamentally unfair.”¹²⁵

D. Draft Law

The application of the Draft Law, if enacted, could be challenged by an NGO as inconsistent with Egypt’s obligations in its BIT with the U.S. However, many of the provisions of the Draft Law, highlighted in section I, above, are similar to provisions in Law 84 of 2002.¹²⁶ A claim which challenges the application of provisions of the Draft Law which are similar to provisions in Law 84 of 2002 will face several obstacles. First, Egypt could challenge whether a tribunal has temporal jurisdiction to hear a challenge to the application of a law which has existed since 2002. Egypt could argue that the claim effectively challenges a measure that was enacted before the claimant acquired its investment in Egypt. The government could also argue that the claim has expired because it is effectively challenging a measure which occurred too long ago.¹²⁷ Egypt has previously challenged the validity of a claim on similar grounds, albeit unsuccessfully.¹²⁸ Second, it would be difficult for an NGO to successfully argue that the application of a law which existed when the claimant began working in Egypt is inconsistent with the claimant’s legitimate expectations, and, therefore, inconsistent with any obligation to provide fair and equitable treatment. Moreover, it would be difficult to successfully argue that the application of a law which existed when the claimant began working in Egypt is not “fair” or “reasonable.”¹²⁹

Nevertheless, an NGO might challenge the application of provisions of the Draft Law, if enacted, as inconsistent with Egypt’s BIT obligations. Specifically, an NGO might challenge the application of the provision which voids existing licenses issued by other government entities to organizations practicing the activities of associations or foundations.¹³⁰ An NGO whose license was voided under this law, and was not reissued, could argue that this was inconsistent with its legitimate expectations and, therefore, a failure to provide fair and equitable treatment.

¹²⁵ See section IV(B)(ii), above.

¹²⁶ For example, see Law 84 of 2002, Preamble Article 4: “All group whose purpose includes or that carries out any of the activities of the aforementioned associations and institutions, even if it assumes a legal form other than that of the associations and institutions, shall adopt the form of an association or non-governmental institution, and amend its articles of incorporation accordingly and submit the application for its registration according to the provisions of the attached law, within the period prescribed in the first clause of this article, otherwise it shall be considered dissolved by the rule of law”; Article 17: “In all cases no association shall collect funds from abroad...”; Article 42: “The Association shall be dissolved with a substantiated decision of the Minister of Social Affairs ... in the following cases...”; Article 63: “The non-governmental institution may be dissolved by virtue of a substantiated decree of the Minister of Social Affairs...”

¹²⁷ See section III(C), above.

¹²⁸ *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000 at para. 104.

¹²⁹ See also *GAMI Investments, Inc v. Mexico*, Final Award, 15 November 2004 at para. 93: “NAFTA arbitrators have no mandate to evaluate laws and regulations that predate the decision of a foreigner to invest.”

¹³⁰ Preamble Article 3.

The Draft Law gives the Ministry of Social Affairs the power to suspend the license of an NGO.¹³¹ If the NGO could convince a tribunal that its license was an investment or part of an investment protected under the treaty and the suspension was sufficiently long, then the organization could argue that the suspension was an indirect expropriation of that license. The suspension of a license also might give rise to claim for unreasonable impairment of the management of the investment, failure to provide full protection and security, or failure to provide the customary international law minimum standard of treatment. Depending on the circumstances of the suspension, the NGO might rely on the comments of one tribunal that a “deliberate campaign” to “punish” an investor for supporting an opposition party or to “expose [the investor] as an example to others who might be tempted to do the same ... must surely be the clearest infringement one could find of the provisions ... of the Treaty.”¹³²

An NGO might challenge the application of the provision of the Draft Law which gives the Ministry of Social Affairs the ability to dissolve NGOs in Egypt.¹³³ Dissolving an NGO without reason could breach the obligation to provide fair and equitable treatment or the obligation not to arbitrarily impair the management of investments. Even if Egypt dissolved an NGO with reason, Egypt could, arguably, breach BIT obligations if the organization has a license allowing it to operate for a certain period of time. A tribunal could view the dissolution as inconsistent with the organization’s legitimate expectations and, therefore, a breach of the obligation to provide fair and equitable treatment or even as an expropriation of the intangible rights inherent within the license.¹³⁴ However, a tribunal might consider the legitimacy of the policy objectives being pursued by Egypt in weighing a potential treaty breach.

The Draft Law empowers the “Regional Federation” to send representatives to attend NGO meetings.¹³⁵ An NGO could argue that such interference goes beyond its legitimate expectations and, therefore, breaches an obligation to provide fair and equitable treatment. Such a claim would need to confront the authority of an International Court of Justice decision finding that the state did not breach its obligation to provide full protection and security by failing to prevent workers from occupying the investor’s factory.¹³⁶ However, if representatives caused some physical damage or impeded the meeting, then an NGO would have a stronger argument that the conduct rises to the level of a BIT breach.

The Draft Law also prevents NGOs from accepting foreign funds without the approval of the Ministry of Social Affairs.¹³⁷ This may implicate Article V(1)(e), which requires Egypt to grant to U.S. companies “the free transfer of ... additional funds necessary for the maintenance of the investment.”

The Draft Law also prevents NGOs from sending funds abroad without the approval of the Ministry of Social Affairs. This may implicate Article V(1)(d) or (e), which require Egypt to

¹³¹ Article 56.

¹³² *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 at para. 123. Note that at para. 137 the tribunal ultimately found that there was insufficient evidence of such a deliberate campaign.

¹³³ Articles 6, 9, and 35.

¹³⁴ See section IV(D), above.

¹³⁵ Article 23.

¹³⁶ *Case concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 20 July 1989, ICJ Reports [1989] 15.

¹³⁷ Article 13.

grant to U.S. companies with investments in Egypt “the free transfer of ... amounts spent for the management of the investment in the territory of the other Party or a third country.”

These restrictions may also implicate an obligation to not arbitrarily impair management of an investment. If the NGO is dependent upon foreign funding to survive, an NGO might argue that the denial amounts to an indirect expropriation.

An NGO could also argue that a denial of foreign funding breaches the obligation to provide national treatment if other local organizations remain able to draw upon foreign funding or if the denial of foreign funding effectively disadvantaged foreign owned NGOs compared to their local counterparts.¹³⁸

Finally, a U.S. NGO might argue that the application of the provisions identified above is inconsistent with Egypt’s obligations as a party to the International Covenant on Civil and Political Rights and, therefore, breaches Egypt’s obligation in Article II(4) of the BIT to ensure that “[t]he treatment, protection and security of investments shall never be less than that required by international law.” Article 22 of that Covenant guarantees the “the right to freedom of association.”¹³⁹

E. Composite Acts

Even if one of the isolated acts, examined above, does not breach the Egypt – U.S. BIT, a U.S. NGO could claim that the combined effect of several of the acts does. Several tribunals have held that a state breached its obligations in a BIT through a composite act.¹⁴⁰

VI. Exceptions Under the Egypt – U.S. BIT

Even if an action of Egypt is inconsistent with an obligation of the Egypt – U.S. BIT, Egypt will not breach the treaty if the action falls under an exception. There are three exceptions on which Egypt may seek to rely.

A. Measures Necessary for Public Order and Morals

Article X(1) of the Egypt – U.S. BIT provides:

¹³⁸ See section IV(A), above.

¹³⁹ Article 22 of the International Covenant on Civil and Political Rights states: “(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. (3) Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.”

¹⁴⁰ For example, see *El Paso Energy International Company v. Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011 at para. 519: “The Tribunal, taking an all-encompassing view of consequences of the measures complained of by El Paso ... concludes that, by their cumulative effect, they amount to a breach of the fair and equitable treatment standard.”

This Treaty shall not preclude the application by either Party or any subdivision thereof of any and all measures necessary for the maintenance of public order and morals ... [and] the protection of its own security interests.

Thus, Article X(1) effectively contains two exceptions. The first is that the “Treaty shall not preclude the application by either Party ... of any and all measures necessary for the maintenance of public order and morals....”

When interpreting a similar exception, a tribunal held that measures necessary for the maintenance of “public order” included “actions properly necessary by the central government to preserve or to restore civil peace and the normal life of society ... to prevent and repress illegal actions and disturbances that may infringe such civil peace and potentially threaten the legal order....”¹⁴¹ The tribunal held that a measure will not be “necessary” if another “treaty consistent, or less inconsistent alternative measure, which the member State concerned could reasonably be expected to employ is available.”¹⁴²

A panel addressing a similarly worded provision in the World Trade Organization’s General Agreement on Trade in Services¹⁴³ held that “the term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation”¹⁴⁴ and “‘public order’ refers to the preservation of the fundamental interests of a society, as reflected in public policy and law.”¹⁴⁵ The Appellate Body of the World Trade Organization confirmed that a measure will not be “necessary” if there is an alternative measure “that would preserve for the responding Member its right to achieve its desired level of protection,”¹⁴⁶ which is consistent with the state’s obligations, and which is “reasonably available.”¹⁴⁷ The Appellate Body applied this definition to hold that the U.S.’s prohibition on the remote supply of gambling and betting services, including internet gambling, is necessary for the maintenance of public order and protection of public morals.¹⁴⁸

Thus, Egypt could attempt to defend its actions as necessary for the maintenance of public order and morals by arguing that they preserve the standards and the fundamental interests of Egyptian society. To succeed in such an argument, Egypt may need to establish that the actions of U.S. NGOs threatened the standards and fundamental interests of Egyptian society and there were no alternative measures available to the government which would have preserved those standards and interests.

¹⁴¹ *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 at para. 174.

¹⁴² *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 at para. 195.

¹⁴³ Article XIV of the GATS states: “... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Members of measures: (a) necessary to protect public morals or to maintain public order....”

¹⁴⁴ *U.S. – Gambling*, Panel Report at para. 6.487.

¹⁴⁵ *U.S. – Gambling*, Panel Report at para. 6.467.

¹⁴⁶ *U.S. – Gambling*, Appellate Body Report at para. 308.

¹⁴⁷ *U.S. – Gambling*, Appellate Body Report at para. 307.

¹⁴⁸ *U.S. – Gambling*, Appellate Body Report at para. 326.

B. Measures Necessary for the Protection of Security Interests

The second exception within Article X(1) is that the “Treaty shall not preclude the application by either Party ... of any and all measures necessary for the ... protection of its own security interests.” Similar provisions have been interpreted by several BIT tribunals¹⁴⁹ as well as the International Court of Justice.¹⁵⁰

These tribunals have uniformly held that the application of this exception is not “self-judging”; it is for the tribunal to ultimately decide whether the measure was necessary for the protection of the state’s security interests.¹⁵¹

One tribunal held that a state can rely on this exception only in response to “serious public disorders.”¹⁵² Another held that a measure will not be “necessary” if another “treaty consistent, or less inconsistent alternative measure, which the member State concerned could reasonably be expected to employ is available.”¹⁵³

Egypt could attempt to defend its actions as necessary for the protection of its security interests by arguing that they address the serious public disorder caused by the U.S. NGOs’ actions. Egypt may need to establish that the actions of U.S. NGOs threatened serious public disorder. Egypt may also need to establish that there were no alternative measures available to the government which would have prevented the serious public disorder.

C. Exception to the Obligation of National Treatment

The national treatment obligation in the Egypt – U.S. BIT contains a limited exception in Article II(3)(a).¹⁵⁴ This Article gives Egypt the right to adopt a measure that is inconsistent with its obligation to provide national treatment if the measure satisfies three criteria. First, the measure must have existed at the time the treaty entered into force in 1992 or existed before the time of the investment. Second, Egypt must have notified the U.S. of the measure. The required

¹⁴⁹ Most recently, see *El Paso Energy International Company v. Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011 at paras. 561-670.

¹⁵⁰ In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986 at para. 282, the International Court of Justice rejected the U.S.’s argument that its support of paramilitaries against the government of Nicaragua in the 1980s was “necessary” for the protection of the U.S.’s “essential security interests” because “the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be ‘necessary’ for that purpose.” In *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, p 161 at para. 78, the court also rejected the U.S.’s reliance on the provision to justify its attack on Iranian oil platforms in 1987 and 1988 because the attacks were not in self-defense.

¹⁵¹ For example, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986 at para. 222; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 at para. 187.

¹⁵² *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006 at para. 228.

¹⁵³ *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 at para. 195.

¹⁵⁴ Article II(3)(a) provides: “Notwithstanding the preceding provisions of this Article, each Party reserves the right to maintain limited exceptions to the standard of national treatment otherwise required concerning investments or associated activities if exceptions fall within one of the sectors listed in the Annex to this Treaty.”

time of this notification is unclear. Finally, the measure must fall within one of the following sectors:

Air and sea transportation; maritime agencies; land transportation other than that of tourism; mail, telecommunication, telegraph services and other public services which are state monopolies; banking and insurance; commercial activity such as distribution, wholesaling, retailing, import and export activities; commercial agency and broker activities; ownership of real estate; use of land; natural resources; national loans; radio, television, and the issuance of newspapers and magazines.

The actions of the Egyptian government described in section I do not appear to fall within one of these sectors.

VII. Remedies for NGOs Under the Egypt – U.S. BIT

The Egypt – U.S. BIT does not identify the remedies which are available to a successful claimant. Moreover, there is no jurisprudence under the treaty to help identify these remedies, since the one decision that is public held that there was no breach.

Nevertheless, decisions under other BITs shed some light on the remedies which may be available to a U.S. NGO which successfully established that Egypt breached its obligations in the Egypt – U.S. BIT. A tribunal finding that a state breached its BIT obligations can order the state to compensate the foreign investor for any monetary damages suffered by the investor as a result of the breach. It is unclear whether a tribunal can order a state to perform a certain act in order to fulfill its BIT obligations.¹⁵⁵

Claimants overwhelmingly claim only monetary damages. Damages awards vary. One tribunal, for example, awarded the claimant U.S.\$450,000, a small fraction of its original claim.¹⁵⁶ Conversely, another tribunal awarded the claimant almost U.S.\$300 million in a case where the state interfered with the control of a large broadcasting enterprise.¹⁵⁷

NGOs claiming monetary compensation through the Egypt – U.S. BIT will need to demonstrate they have suffered quantifiable damages. In some instances, this will be straightforward. For example, if Egypt breaches the treaty through the seizure of assets which have not been returned, then the NGO has suffered damages amounting at least to the value of the assets. Similarly, if Egypt physically harmed the assets then it has caused damages to the extent of the harm.

¹⁵⁵ Compare *Enron Corp. and Ponderosa Assets, LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 at para. 79: “An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available”; *Antoine Goetz v. Burundi*, Award, 10 February 1999, (2000) 15 ICSID Rev-FILJ 457 at page 516; and *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 at para. 387, with *LG&E Energy Corp and others v. Argentina*, ICSID Case No. ARB/02/1, Damages Award, 25 July 2007 at para. 87: “The judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty.”

¹⁵⁶ *Pope & Talbot v. Canada*, Damages Award, 31 May 2002 at para. 91.

¹⁵⁷ *CME Czech Republic BV (The Netherlands) v. The Czech Republic*, Final Award, 14 March 2003.

Identifying the damages of an NGO arising simply from the inability to continue to operate is not so straightforward. The organization could claim for the amount it has invested in Egypt minus the proceeds from the sale of any assets. While BIT tribunals sometimes award future profits to foreign investors crippled by state interference, most NGOs will, by definition, not earn any future profits. However, an organization could claim the loss of future profits of an arm earning profits to fund the organization's other activities. Such a claim would need to demonstrate that future profits are not speculative.¹⁵⁸

Some decisions indicate that not-for-profits may be able to claim for damage that is not financial. For example, the tribunal in the *Desert Line Projects v. Yemen* case awarded "moral damages" of U.S.\$1 million to a company because its executives "suffered the stress and anxiety of being harassed, threatened and detained by [Yemen security forces] as well as by armed tribes."¹⁵⁹

Any claimant under the Egypt – U.S. BIT will need to be well funded. Simply registering a claim at the ICSID will cost a claimant U.S.\$25,000,¹⁶⁰ and each of the three arbitration tribunal members will charge hundreds of dollars an hour for their time.¹⁶¹ BIT disputes often last several years, in which time lawyer, arbitrator, and institution fees can amount to several million dollars¹⁶² (although one recent award illustrates how BIT arbitration can be cheaper and cost only several hundred thousand dollars).¹⁶³ Losing claimants are sometimes ordered to pay the entire fees of the winning respondent state.¹⁶⁴ For example, one losing claimant was recently ordered to pay over \$15 million to Turkey,¹⁶⁵ although this was extraordinary. Even "victorious"

¹⁵⁸ See, for example, *PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Serketi v. Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007, at paras. 310-315.

¹⁵⁹ *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 at para. 286. See also *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, at para. 333, holding that moral damages can be awarded "provided that the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act; the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and both cause and effect are grave or substantial."

¹⁶⁰ ICSID Schedule of Fees, 1 January 2012, paragraph 1.

¹⁶¹ See, for example, paragraph 3 of the ICSID Schedule of Fees, 1 January 2012, which provides that arbitrators can charge U.S.\$3,000 per day.

¹⁶² For example, the lawyer, arbitrator, and ICSID fees in the *PSEG v. Turkey* dispute were U.S.\$20,851,636.62 (*PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Serketi v. Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007 at para. 352), although this amount is extraordinary.

¹⁶³ *Pantehnik SA Contractors and Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 at para. 103: "This case shows that competent lawyers on both sides of an investor-state dispute are able to represent their clients ably and efficiently without incurring vast expense. The Claimant seeks reimbursement of EUR 154,523; Albania's corresponding claim is EUR 269,657. These amounts are but fractions of cost claims submitted in other ICSID cases."

¹⁶⁴ See, for example, *Methanex Corporation v. United States of America*, Final Award, 3 August 2005, Part VI.

¹⁶⁵ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011 at para. 570.

claimants are not always awarded their legal costs,¹⁶⁶ which may diminish the attraction of arbitration over smaller claims.¹⁶⁷

Even if a U.S. NGO successfully established that Egypt breached its obligations in the treaty, Egypt may refuse to provide the remedies ordered by the tribunal. Egypt may refuse to cease its act breaching the treaty or may refuse to undertake the actions necessary to comply with its BIT obligations. It is difficult to identify the recourse of a NGO in those circumstances. However, there is a debate as to whether the ICSID's status as a World Bank agency might give added weight to political and diplomatic pressure on a recalcitrant state.¹⁶⁸

Egypt could refuse to pay the compensation ordered by the tribunal. Other states have refused to pay compensation ordered in a BIT award. For example, Russia refused to pay the compensation to the German investor Franz Sedelmeyer for breaches of the Germany-Russia BIT.¹⁶⁹

If the state does refuse to pay, then the claimant can seek to enforce the award. The ICSID Convention requires states party to the Convention to enforce ICSID awards as if they were "a final judgment of a court in that State."¹⁷⁰ By contrast, NGOs seeking to enforce ICSID awards in states not party to the ICSID Convention must rely on the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*,¹⁷¹ which allows courts in that state to refuse to enforce arbitral awards on a number of grounds.¹⁷²

¹⁶⁶ See, for example, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 25 April 2005 at para. 472; *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 at para. 252.

¹⁶⁷ On costs generally, see Stephan Schill, "Arbitration Risk and Effective Compliance: Cost-Shifting in Investment Treaty Arbitration," 7 *Journal of World Investment and Trade* 653 (2006).

¹⁶⁸ Edward Baldwin, Michael Nolan, and Mark Kantor, "Limits to Enforcement of ICSID Awards," 23(1) *Journal of International Arbitration* 22 (2006).

¹⁶⁹ See *Franz Sedelmeyer v. Russian Federation*, Award, 7 July 1998; Luke Eric Peterson, *Contrary to Initial Reports, Russian Federation Deposits at Stockholm Arbitration Institute have not been Frozen, But Decision Expected Soon*, *Investment Treaty Arbitration*, 12 October 2011.

¹⁷⁰ ICSID Convention, Article 54(1).

¹⁷¹ Article III provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon...." A leading text explains that "[e]nforcement is normally a judicial process which ... gives effect to the mandate of the award. Enforcement may function as a sword in that the successful party requests the legal assistance of the court to enforce the award by exercising its power and applying legal sanctions should the other party fail or refuse to comply voluntarily. The type of sanctions available will vary from country to country and may include seizure of the award debtor's property, freezing of bank accounts or even custodial sentences in extreme cases." Julian Lew, Loukas Mistelis, and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003) at para. 26-12.

¹⁷² *New York Convention*, Article V. The grounds for refusal to enforce include where a party was "unable to present his case," the tribunal exceeded its powers conferred by the treaty, and "enforcement of the award would be contrary to the public policy of that country." NGOs may face the additional obstacle of the "commercial" reservation in Article I(3), under which states can declare they will apply the Convention only to disputes arising from relationships which are "commercial." It is unclear whether a dispute under a BIT between an NGO and the host state satisfies this requirement.