



International Service for Human Rights
(ISHR)

RIGHT TO FREEDOM OF ASSOCIATION
HUMAN RIGHTS DEFENDERS BRIEFING PAPERS SERIES

April 2009

TABLE OF CONTENTS

Preface	1
Introduction	2
I. Right to freedom of association in international law	3
1. Scope of the right to freedom of association	4
2. Purpose of the association	5
3. Form of the association	6
4. Nature of the right.....	6
5. Restrictions.....	7
II. From norm to reality: standards and challenges	9
1. Human rights as a legitimate purpose	9
2. Registration procedure	10
3. Compulsory registration.....	12
4. Restrictions and control over activities	14
5. Dissolution of the organisation	14
6. Access to funding	15
7. Security legislation	16
8. Intimidation and attacks.....	17
III. The role of civil society in the implementation of human rights standards	19
IV. Conclusion	21
ANNEX I: Summary of concluding observations of the treaty bodies	22
ANNEX II: Best practices and recommendations	26

PREFACE

This briefing paper examines the scope of the right to freedom of association, with particular emphasis on human rights defenders and their work. This paper draws together the various international standards for the protection of this right, in addition to examining the different standards and challenges to this right for human rights defenders.

The primary audience of this paper are *human rights defenders* working at the international, regional and national levels. This paper seeks to present relevant information in a simple and accessible manner to defenders, and act as a practical tool to support them in their work. It can be used as a resource or background reading for specific trainings for defenders on this topic, in addition to assisting in national advocacy or awareness-raising efforts on the right to freedom of association, at the regional and national levels.

This paper may also be of use to *national human rights institutions* (NHRIs) when dealing specifically with defenders' issues. In addition, it can be used as resource material for NHRIs when providing advice to States in formulating or reviewing legislation relating to the right to freedom of association at the national level.

This briefing paper also collates and references the work of the UN treaty bodies and the UN Special Rapporteur on human rights defenders on the right to freedom of association in relation to defenders. *Academics, students and a wider audience* may therefore also find this paper of use as a guide to the international standards for the protection of the right to freedom of association for defenders.

INTRODUCTION

The right to freedom of association is recognised and protected under all major human rights instruments, both at the international and regional levels, and at the national level under the Constitutions of many countries. However, despite the wide recognition and protection afforded to the right to freedom of association, violations of this right continue to threaten the work of human rights defenders around the world.

This paper analyses the right to freedom of association in relation to the exercise of human rights activities focussing on the specific situations and issues affecting human rights defenders and their organisations. To identify specific international human rights standards against which domestic laws governing non-governmental organisation (NGOs) may be assessed, this paper reviews the observations made by the Human Rights Committee (HRC)¹ and the positions expressed by the UN Special Rapporteur on human rights defenders (Special Rapporteur on human rights defenders) in reports and cases.² Accordingly, in defining the framework of the right to freedom of association, the analysis focuses primarily on the *International Covenant on Civil and Political Rights* (ICCPR) and the UN *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (Declaration on human rights defenders).³

Section I provides a brief analysis of the right to freedom of association as enshrined in the two mentioned instruments. The analysis is expanded in **Section II**, which outlines specific issues and challenges faced by human rights defenders in relation to the enjoyment of the right to freedom of association and attempts to identify applicable standards. **Section III** focuses on the protection of human rights defenders and civil society organisations as an additional obligation deriving from the international human rights treaties more generally, rather than from specific provisions on the right to freedom of association. A table summarising the information contained in section II and providing references to relevant UN documents is included in **Annex I**. **Annex II** provides best practices and recommendations of the Special Rapporteur on human rights defenders as included in reports focussing specifically on the right to freedom of association.

¹ The Human Rights Committee is the body established by the *International Covenant on Civil and Political Rights* to monitor its implementation by States party.

² Formerly known as the Special Representative of the Secretary-General on human rights defenders prior to the review, rationalisation and improvement of mandates of the Human Rights Council by *Resolution 7/8* in March 2008. The Special Rapporteur on human rights defenders is one of the special procedures created by the late Commission on Human Rights. It was established in 2000 and is mandated to monitor the situation of human rights defenders throughout the world and to assist States in the implementation of the Declaration on human rights defenders.

³ 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* (commonly known as the Declaration on human rights defenders) was adopted by the UN General Assembly by consensus in 1998.

I. RIGHT TO FREEDOM OF ASSOCIATION IN INTERNATIONAL LAW

The ICCPR was the first international human rights treaty to codify the right to freedom of association, building upon the provision contained in the *Universal Declaration of Human Rights* (UDHR). In the context of labour rights, however, there had been some earlier developments. In 1919, the Constitution of the International Labour Organisation (ILO) included a reference to freedom of association as a *principle* of special and urgent importance⁴ and, in a later amendment, defined it as ‘essential for sustained progress.’⁵ In 1948, freedom of association was elevated to the status of *right* with the adoption of the UDHR and the *ILO Convention on Freedom of Association and Protection of the Right to Organise* (No. 87). The ICCPR codified freedom of association as a human right thus extending its protection beyond the labour context.

Article 22 of the ICCPR relating to freedom of association 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.⁶

In 1998, the UN General Assembly adopted the Declaration on human rights defenders. The Declaration on human rights defenders is the only international instrument specifically devoted to the protection of human rights defenders. While it is not a binding instrument, it refers to rights contained under several legally binding international and regional treaties, in particular the ICCPR, and specifies how those rights apply to human rights defenders. Therefore, rather than creating new rights, the Declaration on human rights defenders provides guidance on the interpretation of rights contained in binding human rights treaties with respect to human rights defenders. The Declaration on human rights defenders constitutes the framework for the protection of human rights defenders and is therefore relevant to define the full scope of the right to freedom of association.

Article 5 of the Declaration on human rights defenders states:

- ‘For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: [...]
- b) to form, join and participate in non-governmental organizations, associations or groups.’

⁴ L. Swepston, ‘Human rights law and freedom of association: Development through ILO supervision’, *International Labour Review*, Vol. 137 (1998) No.2, 170.

⁵ Article 1, *Declaration concerning the aims and purposes of the International Labour Organisation* (1944) (Declaration of Philadelphia), Annex to ILO Constitution.

⁶ Paragraph 3 of Article 22 (omitted) regulates the relationship between the ICCPR and ILO Convention No 87, for those States which have ratified both treaties.

RIGHT TO FREEDOM OF ASSOCIATION IN INTERNATIONAL AND REGIONAL INSTRUMENTS

International instruments:

- Article 22, *International Covenant on Civil and Political Rights*
- Article 8, *International Covenant on Economic, Social and Cultural Rights*

Regional instruments:

- Article 11, *European Convention on Human Rights*
- Article 10, *African Charter on Human and People's Rights*
- Article 8, *African Charter on the Rights and Welfare of the Child*
- Article 16, *American Convention on Human Rights*
- Article 28, *Arab Charter on Human Rights*

Declarations:

- Article 20, *Universal Declaration of Human Rights*
- Article 5, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms* (Declaration on human rights defenders)
- Article 1, *Declaration concerning the aims and purposes of the International Labour Organisation*
- Article 22, *American Declaration on the Rights and Duties of Man*
- Article 2(4), *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*

1. Scope of the right to freedom of association

Freedom of association is generally defined as the right to associate with others to pursue a common interest.⁷ The right to freedom of association has both a positive and a negative dimension: the right to associate, and the right not to associate with others. With regards to the latter, any system of *compulsory* membership, be it to a trade union, a political party, or a religious group, is therefore, in principle, not permissible.⁸ The choice to join an organisation must be a free and voluntary decision. The UDHR makes this negative dimension explicit by providing that 'no one may be compelled to belong to an association'.⁹ Similar language is used in regional human rights instruments.¹⁰

Another related aspect is the right to choose *which* organisation to join.¹¹ The possibility to choose implies that there must exist more than one organisation to choose from. A situation where the authorities do not allow the establishment of a new organisation on the basis that one already exists in the same area is not fully compliant with this right and should be justified upon one of the grounds provided in Article 22(2) of the ICCPR.¹²

⁷ S. Joseph, J. Schultz, M. Castan, *The International Covenant on Civil and Political Rights. Cases, Materials and Commentary* (OUP, 2000), Paras 19.11 and 432.

⁸ *Ibid.*, Paras 19.25-27, 439. Compulsory membership to professional organisations, however, could be justified under ICCPR Article 22(2) on grounds of public order.

⁹ Article 20(2), *Universal Declaration on Human Rights*.

¹⁰ See, for example, Article 10(2), *African Charter on Human and Peoples' Rights*.

¹¹ M. Nowak, *CCPR Commentary* (N.P. Engel, 2005), p.499, Para.11.

¹² See *infra* section I.5.

The Declaration on human rights defenders clarifies that the right covers not only the creation of a new organisation and the possibility for an individual to join an existing one (form or join) but also its effective functioning and operation (participate). Any individual must be permitted to effectively and meaningfully contribute to the activities of the organisation. The Declaration on human rights defenders makes explicit what is only implied in the ICCPR.¹³ It would make little sense to allow individuals to create associations yet not to allow their members to contribute to their activities.

The Declaration on human rights defenders makes explicit reference to the exercise of freedom of association ‘at the national and international level’. Any individual should enjoy this right regardless of whether the organisation works locally or internationally, or whether it has branches or the main office abroad, or is affiliated to an international network. While it is not uncommon for laws governing NGOs to differentiate in the treatment between national and international NGOs, particularly as regards their establishment, this cannot go as far as to discriminate against the latter as this would hinder the exercise of freedom of association at the international level.

WHAT DOES THE RIGHT TO FREEDOM OF ASSOCIATION COVER?

- The right *to join* or to choose *not* to join an association
- The right to choose *which* organisation to join¹⁴
- The right to *set up* an organisation in an area of activity, even if other organisations doing similar work already exist
- The organisation must be able to *operate effectively*
- Individuals must be allowed to *contribute effectively* to the activities of the association
- The right to freedom of association applies to *national, regional and international* organisations

2. Purpose of the association

The purpose of an association is the pursuit of an interest common to all its members. It is generally accepted that associations should be able to pursue ‘any activity which individuals alone are able to pursue since a grouping of individuals with the same objective does not thereby make that objective inherently objectionable’. Accordingly, any purpose is in principle allowed, be it political, cultural, social, religious, or of any other kind.¹⁵ This is confirmed by the *American Convention on Human Rights* (ACHR), which provides a very broad and non-exhaustive list of possible purposes for which an association may be formed.¹⁶ Any limitation in this regard must meet the conditions required by Article 22(2) of the ICCPR.¹⁷ An obvious example of a permissible restriction is that an association cannot be set up for the pursuit of criminal activities.

By stating that freedom of association can be exercised for the purpose of promoting and protecting human rights, the Declaration on human rights defenders reiterates the

¹³ The principle of effectiveness requires that a provision not be interpreted in such a way as to deprive it of its substance.

¹⁴ This also means there should be more than one organisation to join, otherwise the right to association is not exercised fully. See: M. Nowak, *CCPR Commentary* (N.P.Engel, 2005), p.499, Para.11.

¹⁵ M. Nowak, *CCPR Commentary* (N.P.Engel, 2005), p.497, Para.6.

¹⁶ Article 16(1), *American Convention on Human Rights*.

¹⁷ See *infra* section I.5.

legitimacy of the work carried out by human rights defenders and their organisations. This is particularly relevant in situations where the authorities restrict the creation of human rights organisations on the basis that the protection of human rights is a role that should be carried out by the State. In other cases, States may view human rights organisations as ‘subversive’ when they play a role in holding States accountable and limit them under security legislation¹⁸.

KEY POINTS

- An association can be set up to pursue any common purpose, except criminal activities
- The protection and promotion of human rights is a legitimate purpose for an association to pursue!

3. Form of the association

The ICCPR does not specifically prescribe the form that an association may take. The absence of any indication in this regard and the broad language of the provision can be interpreted as imposing no restrictions on the form that an association can take. Accordingly, an association can be organised in a formal and relatively more complex structure including a number of governing and executive bodies, or operate with an informal and more basic structure.¹⁹ This is confirmed by the language used in the Declaration on human rights defenders, which refers to NGOs, associations and groups.

Article 22 of the ICCPR can also be interpreted as allowing for associations to freely choose the legal form that best suits its members.²⁰ An organisation may therefore seek a legal personality or operate as a mere *de facto* group.²¹

KEY POINTS

- An association is not required to take any specific form in order to enjoy the right to freedom of association.
- An association may:
 - have a formal structure
 - be an informal group
 - may have a legal personality
 - may be an unregistered entity

4. Nature of the right

The right to freedom of association, like freedom of assembly and expression, lies at the crossroad between civil and political rights. On the one hand, it is a classic example of a civil right; on the other, it constitutes a precondition for the functioning and

¹⁸ See *infra* section II.1 and II.7.

¹⁹ For the minimum structural requirements for an association to be defined as such, see J. McBride, *NGO Rights and Their Protection Under International Human Rights Law*, 9.

²⁰ M. Nowak, *CCPR Commentary* (N.P. Engel, 2005) p.498, Para.6.

²¹ M. Nowak, *CCPR Commentary* (N.P. Engel, 2005) p.498, Para.6.

development of democratic societies, for ‘political interests can be effectively championed only in community with others’.²²

This right has at the same time an individual and a collective dimension. First, it covers the subjective right of the individual to associate with others, i.e. to form, join and participate in associations. Second, it covers the right of the association itself – in addition to the rights of its individual members – to function freely and without hindrance in pursuit of its objectives.²³ The Declaration on human rights defenders, by stating that everyone has the right to freedom of association ‘individually and in association with others’, reinforces this interpretation. Once an association is established, not only its single members but also the association itself are entitled to the full respect and free exercise of the right. The Declaration on human rights defenders refers to this collective dimension with regard to all the rights that it protects, including freedom of assembly and expression.

KEY POINTS

- The right to freedom of association is protected for *individuals* and *organisations*. Individuals have the right to found or join any association, and associations have a right to ‘perform activities in pursuit of the common interest of its members.’²⁴

5. Restrictions

Freedom of association is not an absolute right.²⁵ The ICCPR allows States to restrict it for a variety of purposes. However, it remains important to carefully consider the criteria and types of restrictions that are permissible in order to assess whether specific laws and regulations governing NGOs and the activities of groups of human rights defenders are compliant with international standards.

According to Article 22(2) of the ICCPR, the restrictions have to be:

- ‘Prescribed by law’: This means that any limitations on this right have to be made through the law, and that governments cannot restrict the right using, for instance, administrative regulations. Restrictions must be provided for in the legislation²⁶ and so-called ‘executive’ legislation, such as government decrees, would not suffice.²⁷
- ‘Necessary in a democratic society’: The reference to a democratic society means that proportionality and necessity must be considered in light of the basic values of democratic societies, including ‘pluralism, tolerance, broadmindedness and people’s sovereignty’.²⁸ There must be proportionality between the severity of the restriction to freedom of association and the reason for it.²⁹

²² M. Nowak, *CCPR Commentary* (N.P.Engel, 2005), p.496, Para.2.

²³ M. Nowak, *CCPR Commentary* (N.P.Engel, 2005), p.498, Para.7. See also: Human Rights First, *The Neglected Right: Freedom of Association in International Human Rights Law* (1997).

²⁴ M. Nowak, *CCPR Commentary* (N.P.Engel, 2005), p.498, Para.7.

²⁵ A right is defined as absolute when no restrictions are permissible. An example is provided by the prohibition of torture, which can suffer no exceptions.

²⁶ The term ‘law’ is to be intended as a general-abstract parliamentary act or an equivalent unwritten norm of common law, M. Nowak, *CCPR Commentary* (N.P.Engel, 2005), p.271-272, Paras 28-29; p.505, Para.21.

²⁷ M. Nowak, *CCPR Commentary* (N.P.Engel, 2005), p.273.

²⁸ M. Nowak, *CCPR Commentary* (N.P.Engel, 2005), p.505, Para.22; European Court of Human Rights (ECHR), *Handyside case*, 7 Dec 1976, Series A No.24. For a brief overview of the ECHR jurisprudence on freedom of

- c) In the interest of national security, public safety, public order, public health or morals, or the protection of the rights and freedoms of others.

A restriction of the right to freedom of association is only permissible when all these conditions are met. For example, a law prohibiting the creation of organisations working on sexual orientation and gender identity issues would not comply with these requirements. First, because a democratic society must uphold pluralism and tolerance, accept diversity and allow anybody to advocate for the protection of their rights. Second, the prohibition would need to justify how the operation of such an organisation could pose a threat to national security, public safety, or any other public interest listed under c) above.

Thus, the fact that a restriction is included in a particular law does not make it permissible in accordance with Article 22. It should *also* be demonstrated that the measure is proportionate to the interest protected by the restriction, and that interest must be one of the listed purposes above, such as public safety, etc.

Under certain circumstances, States may be allowed to derogate or be temporarily exempt from upholding some of their international human rights obligations during a time of public emergency under Article 4 of the ICCPR.³⁰ Certain other rights are deemed non-derogable, and thus States are not permitted to suspend these rights even during periods of emergency. The right to freedom of association is a derogable right under the ICCPR. States often use a state of emergency as an excuse to limit freedom of association, in addition to a number of other rights such as the right to freedom of expression and the right to freedom of assembly. As the regime of derogation is not specifically related to freedom of association, it will not be examined here.

KEY POINTS

The right to freedom of association can only be limited on the following basis:

- By law (administrative regulations cannot be used to limit this right)
- The limitation must be proportional and necessary in order to achieve the stated purpose, in addition to being compatible with 'democratic ideals'
- In the interest of national security, public safety, public order, public health or morals, or the protection of the rights and freedoms of others

association, see L. E. Irish, K.W. Simon, 'Freedom of association, recent developments regarding the 'neglected right'', *International Journal of Not-for-Profit Law*, Vol. 3 Issue 2, 2000. Jurisprudence of the European Court can appropriately be referred to as the *European Convention on Human Rights* contains a clause identical to the ICCPR, while the HRC has never dealt with this issue.

²⁹ ECHR, *ibid*.

³⁰ ICCPR, Article 4. This provision only allows derogations in time of public emergency that threaten the life of the nation. The emergency must be officially proclaimed and the derogation notified to all State parties. Derogations are allowed to the extent strictly required by the situation, provided that they are not discriminatory. The article includes a list of non-derogable rights.

II. FROM NORM TO REALITY: STANDARDS AND CHALLENGES

The Human Rights Committee and the Special Rapporteur on human rights defenders have both addressed freedom of association in the context of specific country situations and have made significant contributions to the clarification of applicable norms. Their work therefore provides a useful resource when attempting to identify specific standards against which specific cases of violations of freedom of association of human rights defenders can be assessed.

Increasingly, human rights defenders are facing challenges and problems in their work that are no longer limited to instances of intimidation and attacks but stem from restrictive legislation, particularly laws governing NGOs and security legislation. Often, the very legitimacy of their human rights work is challenged. Common obstacles include the criminalisation of non-registered groups or organisations, procedures and criteria for registration, attempts to restrict and control NGO activities, administrative harassment and threats of or actual dissolution. These and other issues will be addressed in the following paragraphs.

1. Human rights as a legitimate purpose

As described earlier, a group of persons can decide to form an association for any type of common purpose. The ACHR provides a broad and non-exhaustive list that includes ‘ideological, religious, political, economic, labour, social, cultural, sports, or other purposes’.³¹ Human rights organisations, or associations or bodies set up for the purpose of protection of human rights, often face restrictions on their work because of the purpose for which they have been set up is deemed to threaten the government. However, it must be recalled that any restriction on the purpose of the association has to meet a high threshold: it must be prescribed by law; be necessary in a democratic society, and, be in the interest of national security, public safety, public order, public health or morals or the protection of the rights and freedoms of others.³²

In practice, it is not uncommon that domestic legislation imposes restrictions on the purpose of an association, that do not meet the required conditions. In some countries, for example, human rights activities are considered ‘subversive’ and are therefore prohibited under national security legislation.³³ While national security is an admissible ground for restrictions under Article 22(2) of the ICCPR, the argument that human rights activities in general, such as monitoring and reporting on violations, could pose a threat to national security in a democratic society, is not acceptable.

In other cases, laws governing NGOs simply do not allow for the possibility to establish organisations working on human rights issues.³⁴ In this regard, the Declaration on human rights defenders legitimises human rights work by affirming the right of everyone ‘to promote and strive for the protection of human rights’.³⁵ As obvious as this recognition may appear, the Declaration on human rights defenders is the first international instrument to explicitly affirm a right to engage in human rights

³¹ Article 16(1).

³² See *supra* section I.5.

³³ Report of the Special Representative of the Secretary-General on human rights defenders, Commission on Human Rights, E/CN.4/2003/104 (2003) Para.35.

³⁴ See HRC, Concluding observations on Equatorial Guinea, CCPR/CO/79/GNQ (30 July 2004), Para.11.

³⁵ Article 1, Declaration on human rights defenders.

activities.³⁶ The Declaration on human rights defenders makes explicit that the protection and promotion of human rights constitute a legitimate purpose for any organisation to pursue.

In most cases, the authorities do not expressly outlaw organisations on the basis that their objective is the promotion and protection of human rights. They tend to use other grounds to deny registration to human rights organisations. For instance numerous laws require NGOs to pursue a vaguely defined ‘public interest’ or to be ‘needed’ in a specific field in order to obtain registration.³⁷ Such clauses very easily lend themselves to arbitrary application and abuses. Besides national security and public order, ‘public morals’ are one of the grounds often used to deny registration, particularly in relation to organisations working on culturally sensitive issues such as gender issues, reproductive health, or sexual orientation.

What does it mean in practice that the ‘protection and promotion of human rights’ is a legitimate purpose for an association to pursue, and how is human rights activity defined in this context? For this purpose, it is important to clarify *what* human rights issues, *which type* of activities, and *who* can carry out the activities. Concerning the first point, human rights refer to the full range of civil, political, economic, social and cultural rights. This is important in light of the difficulty that many human rights defenders are not recognised as such for the human rights work that they carry out. This is often the case for human rights defenders working on economic, social and cultural rights, in particular labour and union rights and HIV/AIDS, or human rights defenders working on sexual orientation and gender identity.³⁸ The failure to recognise persons active in these different areas as human rights defenders legitimately working for the promotion and protection of human rights can have a serious impact on their right to freedom of association, and vice versa.

As to the type of activities undertaken, they might involve monitoring violations, publishing reports, scrutinising and criticising human rights policies and records of the government, observing trials, offering legal assistance to victims of violations, organising demonstrations, seminars and conferences, training, using the media, and so on. The range of activities is extremely wide and can in practice be of any kind as long as it is a peaceful activity.³⁹

As to who can carry out human rights activities, the Declaration on human rights defenders establishes that anyone can do so, regardless of whether they work in a human rights organisation or engage only occasionally in human rights work, of whether they work professionally or in a non professional or voluntary capacity, regardless of any qualification or personal quality that they may or may not have.⁴⁰

2. Registration procedure

The role of the authorities in the process leading to the acquisition of legal personality of an organisation may vary considerably. Two main models can be identified:

³⁶ *Id.*

³⁷ Report of the Special Representative of the Secretary-General on human rights defenders, General Assembly, A/59/401 (2004), Para.57.

³⁸ See, for example, Report of the Special Representative on human rights defenders, Human Rights Council, A/HRC/4/37 (2007) Paras 52, 73, 96.

³⁹ Articles 3, 12 and 13, Declaration on human rights defenders.

⁴⁰ *Ibid.*, Article 1.

notification and registration. Under the first model, an organisation willing to seek legal personality merely needs to notify the authorities of its establishment. This suffices for the organisation to acquire legal personality. In many cases, however, the law provides for a stricter process of registration, whereby the organisation needs to apply for legal personality and the authorities decide – on the basis of applicable law - whether to grant it. In this case, a key issue is how the registration process is designed and implemented in practice as it could be used to restrict freedom of association.

It is possible to identify specific elements of the registration process that might be incompatible with freedom of association. An example is a system of sponsorship, whereby an organisation needs to be sponsored by a government agency in order to obtain registration.⁴¹ This requirement makes it virtually impossible for an independent organisation to register, and introduces a direct form of control by the government on the activities of registered groups. In most cases, each element of the registration process is in principle compatible with freedom of association yet they have the *potential* of being used to restrict it. It is by examining the process as a whole rather than its single elements that an assessment can be made about its compliance with the right to exercise freedom of association. Examples of this are when requirements of registration fees or a minimum number of founding members are imposed. Both these measures can be used as ways of restricting freedom of association, particularly when an exorbitant fee or a large number of founding members are requested to establish the association.⁴²

A common feature of restrictive laws governing NGOs is the differing treatment of national and international organisations. The latter are often subject to a separate and more restrictive regime requiring, for instance, a larger number of members or a minimum number of branches abroad. For example, in Turkmenistan, the law requires foreign and international NGOs to have a minimum of 500 members, while national NGOs are required to have 50 and local organisations only five.⁴³ While the rationale behind such a difference is not clear, this requirement makes establishing a foreign or international organisation in that country far more difficult. This type of regulation represents undue discrimination and contradicts international standards that protect the exercise of freedom of association at the national and international levels.⁴⁴ With regards to the establishment of organisations, the HRC has clarified that international, including foreign, organisations should not be treated differently compared to national organisations and should be allowed to function freely.⁴⁵

In other cases, violations of international standards may occur due to the ambiguity of the law or a lack of clarity and transparency as to its application. Information concerning the requirements needed for registration must be transparent and accessible. There have been cases where different authorities have provided different or even

⁴¹ This is the case of the Chinese 1998 Regulations on Registration and Management of Social Organisations, which requires all NGOs to be approved by the government's Civil Affairs Department and to find a sponsor within the system of government agencies before they can be recognised as legitimate. See Chinese Human Rights Defenders (CHRD), *The Perils of Defending Rights. A report on the situation of human rights defenders in China* (2006), 10.

⁴² McBride reports that there is no indication in case law or practice as to the acceptability of imposing a minimum number of founders and questions whether a requirement of more than two is compatible with freedom of association. J. McBride, *supra* note 19. See also *Report of the Special Representative of the Secretary-General on human rights defenders*, General Assembly, A/59/401 (2004), Paras 54-55.

⁴³ Turkmenistan, Law on Public Associations (2003). See *Report of the Special Rapporteur on human rights defenders*, Commission on Human Rights, E/CN.4/2005/101/Add.1 (2005), Para.579.

⁴⁴ See *supra* section I.1.

⁴⁵ *Id.*. See also Committee Against Torture (CAT), Concluding Observations on Nepal, CAT/C/NPL/CO/2 (2005), Para.23.

contradictory information about the requirements and the procedure.⁴⁶ Lack of clarity often leads to the submission of incomplete files. In this case the authorities should request the missing information rather than rejecting the application.

The law must define precisely the grounds upon which registration may be denied. Ill-defined grounds open the door to the possibility of arbitrary application of the law. To ensure transparency, the decision of the authorities to reject the application must be motivated and the applicant organisation informed of the reasons. Besides ensuring transparency, this is also necessary for the decision to be appealed. Communicating the reason for denying registration also allows the applicant to file a new application and rectify the application so as not to face the same negative result. As an example of good practice, it has been suggested that if the authorities fail to communicate the reasons for denying registration, the organisation should be considered as legally operative.⁴⁷ The same rule should be applied when the authorities fail to provide any response to the application. Finally, in case of refusal to register, the possibility of appealing the decision must be ensured.⁴⁸

The HRC addressed a case where the legislation introduced a distinction between associations and NGOs and noted:

‘The Committee is disturbed by the distinction that the State party makes between associations and non-governmental organisations, and reports that non-governmental human rights organisations have been unable to obtain permission to register. The State party should provide information on the consequences of the distinction made between associations and non-governmental organisations. The State party should ensure that this distinction does not violate, in law or in practice, the provisions of article 22 of the Covenant’.⁴⁹

The introduction of a formal distinction into the legislation has no evident rationale and could easily lend itself to abuse, as in the above case where human rights NGOs were reported to be unable to register.

3. Compulsory registration

The Declaration on human rights defenders, by referring to NGOs, associations and groups, requires that human rights organisations be free to seek legal personality or to remain operative as informal groups. The Special Rapporteur on human rights defenders has therefore recommended that States comply with the Declaration on human rights defenders by allowing human rights defenders to freely choose the preferred legal form of their organisations.⁵⁰ While recognising that States do have the right to regulate freedom of association, the Special Rapporteur on human rights defenders has recommended that registration not be compulsory, and is of the view that NGOs should be allowed to carry out their activities without having to register.⁵¹

⁴⁶ Report of the Special Representative of the Secretary-General on human rights defenders, General Assembly, A/59/401 (2004) Para.52.

⁴⁷ *Ibid.*, Para.82(d).

⁴⁸ *Ibid.*, Para.82(j).

⁴⁹ HRC, Concluding Observations on Togo, CCPR/CO/76/TGO (28 November 2002), Para.19.

⁵⁰ Report of the Special Representative of the Secretary-General on human rights defenders, General Assembly, A/59/401 (2004), Para.82(a).

⁵¹ Report of the Special Representative of the Secretary-General on human rights defenders, General Assembly, A/59/401 (2004), Para.82(a).

However, some scholars consider that requiring organisations to register and acquire legal personality is a permissible restriction under Article 22(2) of the ICCPR.⁵² The premise that the authorities need to maintain public order would allow them to impose registration to control the lawfulness of the organisation.⁵³ In practice, compulsory registration may not necessarily affect human rights organisations very negatively as most of them do tend to seek legal personality. This allows them to rent offices, open a bank account, obtain tax benefits and receive grants from donors, whom often do not fund unregistered groups.

However, if compulsory registration is permissible under international law, what are the consequences of non-registration? What happens if a human rights group carries out activities before the registration process is completed, or despite registration being denied? In the first case, the HRC recommended that States clarify the status of NGOs before the final decision on registration is made. This recommendation was prompted by the observation that a long time often elapses between the request for registration and the final decision by the authorities. Moreover, in some cases this time has intentionally been unduly prolonged to prevent the requesting organisation from carrying out its work. The Committee has urged:

[...]the State party to take all necessary measures to ensure that registration is not used to silence political movements opposed to the Government and to limit the rights of association guaranteed by the Covenant. In particular, legislation should clarify the status of associations [...] in the period between the request for registration and the final decision; such status should be consistent with articles 19, 22 and 25 of the Covenant.⁵⁴

Accordingly, pending the decision, the organisation should be free to start its work. The Special Rapporteur on human rights defenders also reached the same conclusion and recommended that ‘NGOs should be presumed to be operating legally until it is proven otherwise, in particular during the entire registration process’.⁵⁵

Under a regime of compulsory registration, if an organisation carries out human rights activities despite denial of registration, consequences can be more problematic. On the one hand, the organisation is in an illegal situation since registration is compulsory and has been denied; on the other hand, denial of registration is increasingly used by States to prevent the establishment of unwanted organisations. Often, this is treated as a criminal offence and the persons responsible are prosecuted and sentenced to jail.⁵⁶ The criminalisation of non-registered groups is another example of how the legal system may be used to hinder human rights work by threatening human rights defenders with imprisonment.⁵⁷

⁵² M. Nowak, *CCPR Commentary* (N.P.Engel, 2005), p.506, Para.24.

⁵³ *Id.*

⁵⁴ HRC, Concluding Observations on Azerbaijan, CCPR/CO/73/AZE (12 November 2001), Para.23.

⁵⁵ *Report of the Special Representative of the Secretary-General on human rights defenders*, General Assembly, A/59/401 (2004), Para.82(g).

⁵⁶ *Report of the Special Representative of the Secretary-General on human rights defenders*, General Assembly, A/59/401 (2004), Para.51.

⁵⁷ *Report of the Special Representative of the Secretary-General on human rights defenders*, General Assembly, A/57/182 (2002) Para.19.

4. Restrictions and control over activities

Once an organisation has gone through the registration process and has been granted legal personality, it should be free to pursue its objectives and carry out its activities in complete independence and without undue influence. Any attempt to limit or control its activities runs contrary to the right to freedom of association. This right does not only cover the possibility of joining or establishing an organisation, but also the possibility for its members to contribute effectively to the achievement of its objectives and thus – on a collective dimension- the possibility for the organisation itself to undertake its activities free from undue pressure and control.

An increasingly common feature of restrictive NGO laws is the introduction of a list of permitted activities or, on the contrary, of prohibited activities.⁵⁸ This is extremely problematic, particularly when these categories of activities are vaguely defined. An example of this kind is the prohibition on engaging in political activities. Without further definition, this clause potentially includes a broad range of activities, from monitoring of elections and advocacy for law reform, to the provision of legal aid to political prisoners.⁵⁹

Similarly, undue control over the activities of an organisation may also be exercised in many different ways, including by requiring the submission of periodic reports or notification of management decisions. Other examples include subjecting any kind of public event to authorisation and granting regulatory bodies the authority to issue policy guidelines for NGOs.⁶⁰

Treaty bodies have addressed the issue of restrictions and control over NGO activities and concluded that certain types of control over their activities violate the right to freedom of association⁶¹. The HRC expressed concern:

... at reported obstacles imposed on the registration and free operation of non-governmental organisations and political parties (Articles 19, 22 and 25). [The Committee] is especially concerned about obstacles placed in the path of national and international non-governmental organisations and special rapporteurs whose task is to investigate allegations of human rights violations in the territory of the State party. The State party should take all the necessary steps to enable national and international organisations and political parties to function without hindrance.⁶²

5. Dissolution of the organisation

Another feature of recent restrictive laws governing NGOs is the introduction of a system of warnings that the authorities may send to an organisation in case of contravention of administrative regulations. Again, even though the system itself is not necessarily incompatible with freedom of association, it lends itself to abuses and may become an additional tool to threaten the operation of NGOs. In this case, warnings are

⁵⁸ *Report of the Special Representative of the Secretary-General on human rights defenders*, General Assembly, A/59/401 (2004), Para.67.

⁵⁹ *Id.*

⁶⁰ *Ibid.*, Para.68.

⁶¹ HRC, Concluding Observations on: Vietnam, CCPR/CO/75/VNM (26 July 2002), Para.20; Central African Republic, CCPR/C/CAF/CO/2 (2006), Para.18; Democratic Republic of the Congo, CCPR/C/COD/CO/3 (2006), Para.23; *et al.* CAT, Concluding observations on Nepal, CAT/C/NPL/CO/2 (2005), Para.23.

⁶² HRC, Concluding Observations on Vietnam, CCPR/CO/75/VNM (26 July 2002), Para.20.

often sent for minor administrative irregularities such as changes in the address of the organisation, in its letterhead or its logo. After issuing a number of warnings, sometime as few as two, the authorities can suspend and eventually close down the organisation.⁶³

Similar to cases of denial of registration, the grounds upon which the authorities can decide the dissolution of an organisation must also be clearly defined in law and the decision must be subject to judicial review. There must be proportionality between the decision to dissolve and the reasons for it and since dissolution is perhaps the most severe restriction to freedom of association, the reasons must be very serious. Closing down an organisation on grounds such as disturbance of public order, for example in connection to a street protest, appears to be disproportionate and therefore in violation of the right to freedom of association.⁶⁴

6. Access to funding

An important issue for any organisation is how it is able to access funding for its daily functioning and for its various activities. Restrictions and barriers to funding may result in the impairment of the right to freedom of association, for without funding, the organisation would not be able to operate and pursue its objectives. In this sense, access to funding is an inherent element of the right to freedom of association. If freedom of association is recognised and protected, but individuals and organisations are denied the means and resources to pursue their legitimate objectives, the right becomes devoid of any substance. Several international instruments⁶⁵ as well as the concluding observations of the UN treaty bodies⁶⁶ have emphasised this link.

In many countries, however, the authorities place restrictions on the ability of human rights organisations to receive and use funds, particularly when these funds come from abroad.⁶⁷ In countries with scarce domestic resources, where human rights organisations are often only able to operate using foreign grants, legal or administrative obstacles such as an absolute prohibition or a regime of prior governmental authorisation to receive funding from abroad result in the organisations being unable to operate. In the case of Egypt, for instance, the HRC has stated:

‘The Committee is concerned at the restrictions placed by Egyptian legislation and practice on the foundation of non-governmental organisations and the activities of such organisations such as efforts to secure foreign funding, which require prior approval from the authorities on pain of criminal penalties (article 22 of the Covenant). The State party should review its legislation and practice in order to enable non-governmental organizations to discharge their functions without impediments which are inconsistent with the provisions of Article 22 of

⁶³ *Report of the Special Representative of the Secretary-General on human rights defenders*, General Assembly, A/59/401 (2004).

⁶⁴ *Ibid.*, Para.72.

⁶⁵ See, for example, Article 6, UN *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981), which interprets the possibility to solicit and receive financial contributions as part of the right to freedom of thought, conscience, religion or belief.

⁶⁶ HRC, Concluding Observations on Egypt, CCPR/CO/76/EGY (28 November 2002), Para.21; Committee on Economic, Social and Cultural Rights, Concluding Observations on Egypt, E/2001/22 (2000) 38, Paras 161 and 176. The ILO Committee on Freedom of Association has taken the same position, see Human Rights First, *The Neglected Right: Freedom of Association in International Human Rights Law* (1997).

⁶⁷ *Report of the Special Representative of the Secretary-General on human rights defenders*, General Assembly, A/59/401 (2004), Para.75.

the Covenant, such as prior authorization, funding controls and administrative dissolution.⁶⁸

In some cases, national legislation goes so far as to require governmental authorisation for an organisation to merely *apply* for funds from foreign donors.⁶⁹

In addition to the sources of funding, restrictions may concern the ways in which funds are used. There are numerous examples of NGOs not being permitted to use funds for certain activities, for example, to organise meetings or demonstrations or to produce documents and reports.⁷⁰ While restrictions can be considered to be legitimate if the funds are granted by the government itself, in other cases they can infringe upon the right of the organisation to operate freely and independently. This is because donors, regardless of whether they are public or private entities, can – and in most cases do – attach conditions to their grants regarding how the funds are to be used. When an organisation accepts funding from a particular donor, it voluntarily agrees to be bound by the terms and conditions imposed by the donor. However, it is less reasonable for a third actor, such as the government, to impose restrictions on the relationship between donor and the NGO, especially if this impedes the right to freedom of association.

Restrictions may also affect the amount of the resources through taxation. For example, the Special Rapporteur on human rights defenders stated that it was a clear case of discrimination for one State to introduce a tax of up to 25% on receipt of resources by human rights organisations in that country.⁷¹ Freedom of association does not require States to grant tax benefits to not-for-profit organisations. However, if a distinction is made between not-for-profit organisations working on human rights and other non-profit organisations, this amounts to discriminatory treatment and constitutes a violation.

Regarding access to funding, the Declaration on human rights defenders is very innovative. Article 13 of the Declaration on human rights defenders protects the right ‘to solicit, receive and utilise resources for the express purpose of promoting and protecting human rights’. This covers the entire cycle of funding, from seeking resources and applying for grants (solicit) to receiving and using them. The Declaration offers strengthened protection by codifying access to funding as a self-standing right.

7. Security legislation

Increasingly, security and emergency legislation are used to curtail freedom of association.⁷² Security legislation may negatively impact the activities of human rights defenders in relation to a number of other rights, from freedom of assembly and expression, to access to information and the right to liberty and security of person.

⁶⁸ HRC, Concluding Observations on Egypt, CCPR/CO/76/EGY (28 November 2002), Para.21.

⁶⁹ This is the case of Sudan, under the Humanitarian Aid Commission Act 1988. See Human Rights Council, SRSG HRD Report (2007), A/HRC/4/37/Add.1, Para.613.

⁷⁰ *Report of the Special Representative of the Secretary-General on human rights defenders*, General Assembly, A/59/401 (2004), Para.76.

⁷¹ *Report of the Special Representative of the Secretary-General on human rights defenders*, General Assembly, A/59/401 (2004), Para.78.

⁷² For a comprehensive analysis of the impact of security legislation on the work of human rights defenders, see *Report of the Special Representative of the Secretary-General on human rights defenders*, General Assembly, A/58/380 (2003).

According to Article 22 of the ICCPR, national security is one of the grounds permitting restrictions to freedom of association. This ground may justify restrictions in case of a grave threat to the life of the entire nation.⁷³ In practice, this clause is often used to hinder the activities of human rights organisations, for example, to justify denying their registration.⁷⁴ Often, national security considerations are invoked by authorities in their decisions without further explaining the specific reasons why and how the applicant organisation poses such a threat. The failure to provide an explanation for such decisions often aggravates the situation for the applicant organisation as appealing the decision becomes more difficult.⁷⁵

The HRC has repeatedly addressed the issue of the impact of security legislation upon human rights activities as well as of its possible misuse. The Committee criticised the use of vague and broad language in security legislation, which may allow for arbitrary application of the law. Such is the case of ‘extremist activity’ with no further specification, as used in the Russian *Law on Combating Extremist Activities* (2002).⁷⁶ The Committee also acknowledged how emergency legislation may be used to restrict human rights activities. It recommended that:

[T]he State party should take urgent steps to amend all legislation that restricts the activities of [human rights] organisations, in particular, state of emergency legislation which must not be used as an excuse to suppress activities aimed at the promotion and protection of human rights.⁷⁷

While anti-terrorism legislation must fully respect all the rights protected under the Covenant, emergency legislation may derogate from its provisions provided that it respects the conditions required by Article 4 of the ICCPR.⁷⁸ Often, however, States fail to comply with those conditions. Illustrative in this regard are the findings of the Committee in relation to the Syrian Arab Republic:

‘The Committee notes with concern that the state of emergency declared some 40 years ago is still in force and provides for many derogations in law or practice from the rights guaranteed under articles 9, 14, 19 and 22, among others, of the Covenant, without any convincing explanations being given as to the relevance of these derogations [...] and the[ir] necessity [...]. The Committee has further noted that the State party has not fulfilled its obligation to notify other States parties of the derogations it has made and of the reasons for these derogations, as required by article 4 (3) of the Covenant.’⁷⁹

8. Intimidation and attacks

Intimidation and attacks against individual human rights defenders constitute first and foremost violations of their right to life and security of the person. However, if perpetrated against members of an NGO and motivated by their human rights work,

⁷³ M. Nowak, *supra* note 11, p.276.

⁷⁴ *Report of the Special Representative of the Secretary-General on human rights defenders*, Commission on Human Rights, E/CN.4/2004/94 (2004), Para.70.

⁷⁵ *Report of the Special Representative of the Secretary-General on human rights defenders*, General Assembly, A/58/380 (2003), Para.22.

⁷⁶ HRC, Concluding Observations on Russian Federation, CCPR/CO/79/RUS (6 November 2003), Para.20. Similarly, HRC, Concluding Observations on Chile, CCPR/C/CHL/CO/5 (18 May 2007), Para.7.

⁷⁷ HRC, Concluding Observations on Syrian Arab Republic, CCPR/CO/84/SYR (9 August 2005), Para.12.

⁷⁸ See *supra* note 29.

⁷⁹ HRC, Concluding Observations on Syrian Arab Republic, CCPR/CO/84/SYR (9 August 2005), Para.6.

they will also constitute violations of the right to freedom of association, since the perpetrator aims at hindering the work of the organisation.⁸⁰ Both the Special Rapporteur on human rights defenders and the HRC have supported this approach and condemned such attacks as violations of freedom of association:

‘The Committee deplores information received regarding actions taken against human rights defenders, including intimidation and verbal and physical attacks [...] as well as interception of communications. Such acts constitute restrictions of their rights to freedom of expression and association’.⁸¹

Similarly, all cases of raids in offices, seizure of documents and equipment, surveillance and interception of communications, can also constitute violations of freedom of association (in addition to the right to privacy). The Special Rapporteur on human rights defenders has taken up a number of cases where raids in offices, destruction of documents and materials, etc. were aimed at preventing organisations from carrying out their human rights work.⁸²

In all these examples, as the attacks are motivated by the human rights work carried out by the victims, they also violate Articles 1 and 12 of the Declaration on human rights defenders protecting the right to engage in human rights activities.

⁸⁰ L. Swepston, *supra* note 4, 178.

⁸¹ HRC, Concluding Observations on Colombia, CCPR/CO/80/COL (26 May 2004), Para.18. See also HRC, Concluding Observations on Thailand, CCPR/CO/84/THA (8 July 2005), Para.19.

⁸² See, for example, *Report of the Special Representative of the Secretary-General on human rights defenders*, E/CN.4/2006/95/Add.1 (2006), Para.467.

III. THE ROLE OF CIVIL SOCIETY IN THE IMPLEMENTATION OF HUMAN RIGHTS STANDARDS

Although the HRC is the treaty monitoring body that has dealt most extensively with freedom of association, all the treaty bodies have consistently underscored the importance of an active and functioning civil society for the full implementation of the treaties. In the absence of specific provisions on freedom of association, they have interpreted the treaties as implying a general duty of States to encourage and foster the establishment of an active and free civil society.⁸³ The HRC and the Committee on Economic, Social and Cultural Rights (CESCR) have based their recommendations on the provisions protecting the right to freedom of expression, association and participation in public life and the right to form and join trade unions. Other committees have viewed this obligation as descending from the treaty as a whole. Recognising the importance of NGOs for the implementation of the treaties through domestic and international activities, States must create a favourable environment for civil society regardless of the existence of specific provisions protecting the right to freedom of association.

This duty has both a positive and a negative dimension: State parties must support civil society and refrain from any illegitimate restrictions. The Committee on the Rights of the Child (CRC), for example, recommended the review of laws, regulations and practices affecting the activities of NGOs:

[T]he Committee expresses its concern that insufficient efforts have been made to involve civil society in the full implementation of the Convention, particularly in the area of civil rights and freedoms. It further notes with deep concern that non-governmental organisations are subjected to difficult procedures for registration and that foreign funding in particular is restricted, which may limit their effectiveness and independence. The Committee emphasises the important role civil society plays as a partner in implementing the provisions of the Convention, including with respect to civil rights and freedoms. The Committee reiterates its recommendation that the State party [...] review without delay laws, regulations and administrative practices in order to facilitate the registration and activities of non-governmental organisations.⁸⁴

Similar recommendations have been issued by the Committee on the Elimination of Racial Discrimination (CERD)⁸⁵ and the Committee on the Elimination of Discrimination Against Women (CEDAW).⁸⁶ Specific conducts have also been identified as violations. Reference has been made to burdensome registration procedures, re-registration, restrictions on foreign funding, travel bans for defenders, and censorship:

The Committee expresses concern over the wide-ranging restrictions placed by the authorities on civil society organizations such as re-registration requirements,

⁸³ See, for example CERD, Concluding Observations on Kazakhstan, CERD/C/65/CO/3 (2004), Para.21; CERD, Concluding Observations on Ireland, CERD/C/IRL/CO/2 (2005), Para.12; HRC, Concluding Observations on Belarus, CCPR/C/79/Add.86 (1997), Para.19; Committee on the Rights of the Child (CRC), Concluding Observations on Nepal, CRC/C/15/Add.261 (21 September 2005), Para.34; *Report of the Committee on the Elimination of Discrimination Against Women*, A/55/38 (SUPP), Paras 80 and 81.

⁸⁴ CRC, Concluding Observations on Belarus, CRC/C/118 (2002), Paras 222 and 223.

⁸⁵ See, for example, CERD, Concluding Observations on Ireland, CERD/C/IRL/CO/2 (2005), Para.12.

⁸⁶ See, for example, *Report of the Committee on the Elimination of Discrimination Against Women*, A/55/38 (SUPP), Para.165.

censorship, travel ban, and requirement to obtain prior governmental authorisation for receiving grants from donors. The Committee underlines the importance of the role of civil society in the full implementation of the Convention and recommends that the State party remove all legal, practical and administrative obstacles to the free functioning of civil society organizations in the State party.⁸⁷

The identification of a general duty of States to encourage and foster the establishment and activities of NGOs under all UN human rights instruments represents an important contribution of the treaty bodies to the protection of human rights defenders and their organisations. It allows the various committees to examine these issues despite the absence of specific provisions on freedom of association in the respective treaties.

⁸⁷ CRC, Concluding Observations on Nepal, CRC/C/15/Add.261 (3 June 2005), Paras 33 and 34.

IV. CONCLUSION

In outlining her vision and priorities for the term of her mandate, the Special Rapporteur on human rights defenders has highlighted that the right to freedom of association continues to be threatened for many human rights defenders. In particular, she has highlighted:

Restrictive legislation regarding non-governmental organizations (NGOs), excessive State scrutiny of the management and administration of NGOs and administrative and judicial harassment prompted by minor procedural irregularities or fabricated evidence, together with other forms of retaliation against human rights organizations, continue to be reported to the Special Rapporteur.⁸⁸

The continued focus of the mandate of the Special Rapporteur on obstacles to freedom of association for human rights defenders is testament to the continuing challenges to this right, and the importance of freedom of association for human rights organisations and defenders to be able to carry out their activities. As the thematic and country reports of the treaty bodies form an important frame of reference for the missions, recommendations and country reports of the Special Rapporteur, this briefing paper summarises both the main challenges identified by the treaty bodies to freedom of association and also their recommendations to States.

Some of the challenges to freedom of association identified by the treaty bodies include restrictive registration procedures, including arbitrary denial of registration as well as compulsory registration; restrictions on access to funding, particularly foreign funding for human rights organisations; the use of security legislation to restrict freedom of association; and most importantly, attacks against human rights defenders motivated by the work that they carry out.

The concluding observations and recommendations of the treaty bodies have addressed the above challenges to freedom of association in addition to several others, in every geographical region of the world and in varied political and socio-economic contexts. The clarity that the views of the treaty bodies offer by way of international standards for the protection of this right therefore provide a useful and authoritative guide for defenders at the national level to better advocate for the free and full exercise of the right to freedom of association.

⁸⁸ *Report of the Special Rapporteur on the situation of human rights defenders*, in accordance with General Assembly Resolution 62/152, A/63/288 (14 August 2008), Para.43.

ANNEX I: SUMMARY OF CONCLUDING OBSERVATIONS OF THE TREATY BODIES

CHALLENGES TO FREEDOM OF ASSOCIATION			
I. Restrictions under national security or emergency regulation			
COUNTRY	ISSUES IDENTIFIED BY THE COMMITTEES	RECOMMENDATIONS MADE BY THE COMMITTEES	SOURCES
Chile	Broad definition of terrorism has allowed charges to be brought against persons participating in protests in relation to land rights	Definition of terrorism should be narrower so as to avoid arbitrary application and should be limited to those crimes which can be justifiably equated with terrorism	HRC, Concluding Observations on Chile, CCPR/C/CHL/CO/5, 18 May 2007, Para.7.
Syrian Arab Republic	State imposed obstacles to registration and operation of human rights organisation, including intimidation, harassment and arrest of human rights defenders and refusal to register human rights NGOs	State should release all persons detained because of human rights activities and end all harassment of human rights defenders; all emergency legislation restricting human rights activities of organisations should be amended	HRC, Concluding Observations on Syrian Arab Republic, CCPR/CO/84/SYR, 9 August 2005, Para.12.
Russian Federation	Vague definition of extremist activity may allow for arbitrary application against individuals and associations	State party is encouraged to make definition of extremist activity more precise to exclude possibility of arbitrary application and give persons notice regarding actions for which they may be criminally liable	HRC, Concluding Observations on Russian Federation, CCPR/CO/79/RUS, 1 December 2003, Para.20.
II. Registration			
COUNTRY	ISSUES IDENTIFIED BY THE COMMITTEES	RECOMMENDATIONS MADE BY THE COMMITTEES	SOURCES
Tunisia	Human rights organisations who are independent and whose objectives and activities are not in violation of the ICCPR have faced obstacles when applying for registration	State should ensure that such organisations are registered and that they are provided with effective and prompt recourse against any rejection of their applications	HRC, Concluding Observations on Tunisia, CCPR/C/TUN/CO/5, 23 April 2008, Para.21.

Algeria	Human rights organisations and human rights defenders subject to harassment and intimidation by State officials and not able to operate freely	State must protect activities of human rights defenders and ensure that restrictions on registration of organisations is compatible with Article 22; also, State party should guarantee right of any association to appeal against any refusal of registration	HRC, Concluding Observations on Algeria, CCPR/C/DZA/CO/3, 12 December 2007, Para.25.
Libyan Arab Jamahiriya	Current application of laws governing registration of groups and authorisation of appeals prevent exercise of freedom of association	State should take all necessary measures to guarantee right to peaceful association and assembly	HRC, Concluding Observations on Libyan Arab Jamahiriya, CCPR/C/LBY/CO/4, 15 November 2007, Para.25.
Togo	Human rights NGOs unable to obtain permission to register	Distinction between NGOs and associations should not violate freedom of association in law or in practice	HRC, Concluding Observations on Togo, CCPR/CO/76/TGO, 28 November 2002, Para.19.
Azerbaijan	Prohibition for NGOs to operate pending registration	Legislation should clarify the status of organisations and political parties during the period between the request for registration and the final decision, and should be compatible with Article 22	HRC, Concluding Observations on Azerbaijan, CCPR/CO/73/AZE, 12 November 2001, Para.23.

III. Activities of the organisation

COUNTRY	ISSUES IDENTIFIED BY THE COMMITTEES	RECOMMENDATIONS MADE BY THE COMMITTEES	SOURCES
Libyan Arab Jamahiriya	Death penalty can be imposed for the establishment of groups, organisations or associations based on a political ideology contrary to the principles of the 1969 Revolution	Such legal provisions should be abolished	HRC, Concluding Observations on Libyan Arab Jamahiriya, CCPR/C/LBY/CO/4, 15 November 2007, Para.24.
Sudan	Frequent harassment, intimidation and arbitrary detention of human rights defenders, and inability to operate freely; concern over 2006 Act regulating Humanitarian and Voluntary Action	State should protect activities of human rights organisations and human rights defenders and ensure any legislation is compatible with Article 22	HRC, Concluding Observations on the Sudan, CCPR/C/SDN/CO/3, 29 August 2007, Para.29.

Central African Republic	Harassment and intimidation of human rights defenders by security forces that prevent them from carrying out their work	State party should protect the activities of human rights defenders and ensure that restrictions are compatible with Article 22	HRC, Concluding Observations on Central African Republic, CCPR/C/CAF/CO/2, 27 July 2006, Para.18.
Democratic Republic of Congo	Harassment, intimidation arbitrary arrest and detention, and prohibition of demonstrations of human rights defenders by security forces that prevent them from carrying out their work	State party should protect the activities of human rights defenders and ensure that restrictions are compatible with Article 22	HRC, Concluding Observations on Democratic Republic of Congo, CCPR/C/COD/CO/3, 26 April 2006, Para.23.
Nepal	Code of Conduct for NGOs severely limits their monitoring capacity; international and national monitors not granted access to places of detention in relation to fact-finding missions	State should amend Code of Conduct for NGOs to enable protection of human rights defenders and be compatible with international standards; State party should ensure that national and international monitors are granted permission to conduct visits	CAT, Concluding Observations on Nepal, CAT/C/NPL/CO/2, 15 December, 2005, Para.23.
Vietnam	Obstacles for international and national human rights organisations in relation to registration and operation; also obstacles to special rapporteurs hindering investigations of allegations of human rights	State should take all necessary steps to enable national and international NGOs to operate without hindrance	HRC, Concluding Observations on Vietnam, CCPR/CO/75/VNM, 5 August, 2002, Para.20.
IV. Access to funding			
COUNTRY	ISSUES IDENTIFIED BY THE COMMITTEES	RECOMMENDATIONS	SOURCES
Egypt	Requirement for prior governmental authorisation to receive funding from abroad	State party should review its legislation and practice in order to enable NGOs to function without impediments inconsistent with Article 22, such as prior authorisation, funding controls and administrative dissolution.	HRC, Concluding Observations on Egypt, CCPR/CO/76/EGY, 28 November 2002, Para.21

(General)	Restrictions on receiving foreign funding	Difficult procedures for registration and restrictions on foreign funding may limit the effectiveness and independence of NGOs; State parties should immediately review laws to facilitate registration and activities of NGOs	CRC, Report on the 30th session, CRC/C/118, 3 September 2002, Para. 222.
-----------	---	--	--

ANNEX II: BEST PRACTICES AND RECOMMENDATIONS

From: Report of the Special Representative of the Secretary-General on human rights defenders to the General Assembly, A/59/401, (1 October 2004), §§ 81-82.

‘81. NGO laws should be written and implemented to allow for the quick, easy and inexpensive creation of organizations and the acquisition of legal personality. Individuals and legal entities, national or foreign, and even organs of the State should be allowed to establish and independently operate associations for the defence of human rights, in accordance with clearly stated rights, privileges and immunities.

82. The Special Representative makes the following recommendations:

With regard to registration:

(a) **The right to register and the duty to register.** NGOs have a right to register as legal entities and to be entitled to the relevant benefits. Nevertheless, 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;

(b) **Favouring regimes of declaration instead of registration.** Whereas the Special Representative recognizes that States can regulate freedom of association, she encourages them to adopt regimes of ‘declaration’ or ‘notification’ whereby an organization is considered a legal entity as soon as it has notified its existence to the relevant administration by providing basic information, including the names and addresses of the founder(s) and the name, address, statutes and purpose of the organization;

(c) **Expeditious process.** Where a registration system is in place, the Special Representative emphasizes that it should allow for quick registration. The law must set short maximum time limits for State authorities to respond to registration applications; failure to provide a response should result in the NGO being considered as legally operative;

(d) **Explained decision.** Decisions to deny registration must be fully explained and cannot be politically motivated. Failure to provide detailed grounds for the decision should result in the NGO being considered to be operating legally;

(e) **Clear and publicly accessible criteria and procedures for registration.** NGO laws must provide for clear and accessible information on the registration procedure. Official documents describing in detail the necessary steps and documentation for registration, including sample applications, must be accessible to NGOs and disseminated to all State organs. Training must be conducted or instruction given to ensure homogenous implementation of the law and to prevent arbitrary interpretations of registration criteria;

(f) **Documents required.** NGO laws should preclude overly burdensome requests for unnecessary documents. Documentation required for registration should serve the sole objective of registration and must not be used for intelligence or other purposes;

(g) **Presumption of legality.** NGOs should be presumed to be operating legally until it is proven otherwise, in particular, during the entire registration process;

(h) **Independence of registering bodies.** Registering bodies should be independent from the Government and include representatives of civil society. In particular, members of such bodies should not be directly appointed by Government, nor at its discretion;

(i) **Re-registration.** In the event of the adoption of a new law all previously registered NGOs should be considered as continuing to operate legally and provided with accelerated procedures to update their registration;

(j) **Appeals process.** All NGOs whose applications have been denied by the registering body should have an opportunity to challenge this decision in an independent court;

(k) **Foreign NGOs.** Foreign NGOs carrying out activities for the promotion of human rights must be allowed to register and function without discrimination, subject only to those requirements strictly necessary to establish bona fide objectives;

(l) **Funding.** Governments must allow access by NGOs to foreign funding as a part of international cooperation, to which civil society is entitled to the same extent as Governments. The only legitimate requirements of such NGOs should be those in the interest of transparency;

With regard to the objectives and activities of human rights NGOs:

(m) Governmental authorities should refrain from exerting a priori scrutiny into the objectives of NGOs. The legality of an organization's purposes and its conformity with the law should be reviewed only when a complaint has been lodged against the organization. Only an independent judicial body should be given the authority to review an organization's purposes and determine whether they are in breach of existing laws;

(n) No restrictions should be imposed on the types of activities that human rights defenders carry out in the defence of human rights, provided they respect the principle of transparency and non-violence. Legitimate aims must include the right to engage in the defence of human rights standards, including but not restricted to furthering democratic rights, advocating for constitutional reforms, publicizing opinions and facts critical of government policies and actions and advocating for State accountability;

(o) Any restriction on the ground of 'public order/morals/ethics' and any criteria meant to limit the right to freely associate must be clearly defined. Any human rights-related activities must be clearly excluded from these restrictions;

(p) States should be legally barred from interfering with the management structure and activities of NGOs. In particular, the Special Representative encourages States to repeal legal provisions allowing for any control by the State of activities carried out in defence of human rights. Where concern arises with the activities of an organization, such concern must be brought before a fair, impartial and independent judicial authority through proceedings that are transparent, conducted in accordance with the principles of due process and open to public and international scrutiny;

(q) States should commit themselves to training their authorities, in particular the police and security forces, on how to implement the law at the local level in order to ensure that the freedom of association of human rights defenders is understood, respected and protected;

With regard to the suspension and closure of NGOs:

(r) **Suspension.** Government authorities should not be granted the power to arbitrarily suspend the activities of human rights groups. The courts alone should be entitled to order a suspension, and only in situations of clear and imminent danger that could result directly from such activities, and that is objectively ascertained;

(s) **Dissolution.** Actions by the Government against NGOs must be proportionate and subject to appeal and judicial review. Administrative irregularities or non-essential changes in the specifics of an organization should never be considered as sufficient grounds for closing down an organization;

With regard to funding:

(t) Access to funds, including from foreign sources, for the purpose of defending human rights should be ensured and facilitated by the law.'

PROJECT COORDINATOR

Inmaculada Barcia, Manager, Regional & National Human Rights Defenders Programme

AUTHORS

Kaavya Asoka, Human Rights Officer
Andrea Rocca, Human Rights Officer

EDITORIAL TEAM

Inmaculada Barcia, Manager, Regional & National Human Rights Defenders Programme
Eléonore Dziurzynski, Communication Manager
Isabelle Scherer, Director

ABOUT THIS PUBLICATION

The *Human Rights Defenders Briefing Papers* are a series of six briefing papers providing simple and practical information on rights relevant to the work of human rights defenders. Other papers cover right to freedom of assembly, freedom of expression, access to funding, access to information and access to international bodies.

COPYRIGHT, DISTRIBUTION AND USE

Copyright © 2009 International Service for Human Rights. Material from this publication may be reproduced for training, teaching or other non-commercial purposes as long as ISHR is fully acknowledged. You can also distribute this publication and link to it from your website as long as ISHR is fully acknowledged as the source. No part of this publication may be reproduced for any commercial purpose without the prior express permission of the copyright holders. ISHR accepts no responsibility for any inaccuracies arising from or connected to unapproved or unofficial translations of its publications or parts thereof.

DISCLAIMER

While every effort has been made to ensure the accuracy and reliability of the information contained in this publication, ISHR does not guarantee, and accepts no legal liability whatsoever arising from any possible mistakes in the information reported on, or any use of this publication. We are however happy to correct any errors you may come across so please notify k.asoka@ishr.ch.