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

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

These comments address the second draft of the Cambodian Law on Associations and Non-Governmental Organizations, which was released by the Royal Government of Cambodia on March 24, 2011. ICNL has reviewed the draft law solely based on a translation[1] of the second draft itself and a comparison with the first draft law, and not based on a review of the broader legal framework within Cambodia, such as the Cambodian Civil Code, labor law or existing memoranda of understanding that may exist between the Cambodian Government and NGO sector.

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

[1] ICNL has relied on the unofficial translation provided by the Office of the High Commission for Human Rights (OHCHR) on March 24. We extend our appreciation to OHCHR for the translation.

Executive Summary

Key issues raised by revisions introduced by the second draft law include:

- **The draft law outlines a registration process, which would allow for the exercise of unbounded government discretion.** The current draft eliminates the few safeguards that protected applicants in the registration process. Article 18 of the first draft was deleted in its entirety, and the law now contains no criteria for the denial of registration. Consequently, the registration determination seems to be left wholly to the discretion of the Ministry of Interior. The problem is compounded by the removal of any requirement to provide a written explanation to the applicant in cases of denial. Moreover, the draft law makes no reference to an opportunity to appeal the denial of registration to an independent adjudicator. The absence of safeguards could have a disproportionate impact on groups that engage in advocacy, support unpopular causes, or are critical of the government.

- **The draft law requires a reduced, but still high, minimum membership for associations.** In order to form an association, 11 Cambodian nationals must be named as members, and at least 5 governing members must handle the registration process. While the required minimum number of founding and governing members for associations has been reduced from the first draft, the required minimum threshold will likely impede the formation of small mutual interest groups. A group of 8-10 individuals who wish to associate to pursue a legitimate collective purpose would not be permitted under the draft law to form an association as a legal entity. The interference is exacerbated where the law, as is the case here, prohibits unregistered groups to carry out activities.

The second draft law leaves materially unchanged several problematic issues posed by the first draft law, including the following:

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

- **The draft law prohibits any activity conducted by unregistered associations and NGOs.** Registration is thus mandatory and unregistered groups are banned. This means that every group of individuals who gather together with a differing level of frequency and perform the broadest variety of imaginable activities, from trekking and football fans, to chess and silk weaving groups, will be acting in violation of law.

- **The draft law provides inadequate standards to guide the government's determination of suspension or termination of an association or NGO.** There is no requirement for the governmental authorities to provide notice and an opportunity to rectify problems prior to the

suspension or termination, and there is no mention of a right to appeal after suspension or termination.

- **The draft law erects barriers to the registration and activity of foreign NGOs.** Among other issues, the draft law outlines a heavily bureaucratic, multi-staged registration process, which lacks procedural safeguards, and is therefore subject to delays and subjective, arbitrary and politicized decision-making. In addition, the draft law requires mandatory collaboration with the Government of Cambodia, by stating that a foreign NGO "shall collaborate with relevant partner ministries / institutions of the Royal Government of Cambodia when developing projects, monitoring, and evaluating the implemented activities or results." Thus, there appears to be no room for foreign NGOs to act independently of the Government in addressing public benefit goals or community needs.

- **The draft law places constraints on associations and NGOs through notification and reporting requirements.** For example, associations and NGOs are required to "inform in writing the relevant municipal hall or provincial halls …" when implementing activities in a given locale. This requirement, which is separate from and additional to the registration process, could amount to a substantial burden on program implementation. In addition, all associations and NGOs, large and small, domestic and foreign, are subject to the same reporting requirements; for small mutual interest associations in particular, compliance could be problematic.

Analysis

I. Restrictions on Founding Members

Issue: Chapter 2 of the draft law restricts eligible founding members of associations to "Cambodian founding members" (Article 8) and eligible founding members of domestic NGOs to "Cambodian founders" (Article 9). In reference to associations, Article 8 requires a minimum of 11 Cambodian founding members (reduced from 21 in the prior draft), and at least 5 governing members to handle the registration process (reduced from 7 in the prior draft).

Discussion: The revisions to Articles 8 and 9 are positive, in that the required minimum number of founding members and leaders for associations has been reduced. But the required minimum threshold, even as reduced by the drafters, will likely impede the formation of small mutual interest groups, and in fact remains higher than international good practices would suggest. Moreover, concerns remain with the nationality requirements for the founding members of both associations and NGOs.

The Universal Declaration of Human Rights recognizes, in Article 2(1), that "*everyone* is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind …" (emphasis added) The ICCPR, in Article 2(1), illuminates this point, explicitly stating that the rights of the ICCPR extend "to all individuals within its [the state's] territory and subject to its jurisdiction." The ICCPR Human Rights

Committee, in its General Comment No. 15, explained that "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness;" and that "Aliens receive the benefit of the right of … freedom of association."[2]

First, with respect to both associations and domestic NGOs, the draft limits eligible founding members to Cambodian nationals, and thereby excludes refugees, stateless persons and others in Cambodia from forming associations or domestic NGOs. (Articles 8, 9) This nationality requirement constitutes a clear infringement of the principles highlighted above, and therefore a clear violation of the freedom of association, as protected by the ICCPR and other international instruments.

Second, while the second draft has reduced minimum membership requirements for associations (11 Cambodian founding members and at least 5 governing members to meet registration requirements),[3] the minimum threshold nonetheless remains higher than can likely be justified by a legitimate government interest. For example, a group of 8-10 individuals who wish to associate to pursue a legitimate collective purpose would not be permitted under the draft law to form an association as a legal entity; this amounts to interference with the right these individuals have to freedom of association. The interference is exacerbated where the law, as is the case with the draft law in Cambodia, prohibits unregistered groups to carry out activities. Recognizing this issue, other countries require a minimum number of only three, or even just two, founding members for associations.[4]

Recommendation: Revise Chapter 2 of the draft law to conform establishment criteria to international norms relating to freedom of association. More specifically:

- Amend Articles 8 and 9 to eliminate the nationality requirement for founding members and to ensure that everyone (i.e., all individuals within the state's territory and subject to its jurisdiction) is eligible to form associations or domestic NGOs.

- Amend Article 8 by reducing the minimum number of founders for an association from 11 to 3 or 2, which would be consistent with the minimum requirement of members to form a domestic NGO in the draft law, and consistent with international practice.

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

[3] The requirement of 11 members contrasts with the minimum requirement of 3 members to form a domestic NGO. It is worth noting that associations can pursue either members' interests or public interests, while domestic NGOs can pursue only public interests. The dramatic difference in the minimum number of founding members is likely to mean that groups pursuing public interests will choose to form NGOs, while groups pursuing members' interests will have no other option that the association form, which requires 11 founding members. The issue is further complicated due to the practical challenges in distinguishing between purposes that serve members versus the public interest. A judicial association, for example, may fundamentally be focused on member interests, but also serve the public interest in a more professional judiciary; should such an organization register as an association or a domestic NGO?

[4] While some countries do have higher minimum membership requirements, such requirements would also seem to interfere with the freedom of smaller groups to associate, as protected by the ICCPR. This is particularly true where the law provides for mandatory registration.

II. Registration Requirements

Issue: Chapter 2 of the draft law generally outlines the registration requirements and procedures for a domestic association and NGO. Article 12 requires associations and domestic NGOs to "have a central office in the Kingdom of Cambodia." Article 13 addresses the registration fee, which "shall be determined by an Inter-Ministerial Proclamation." Articles 14 and 15 contain the documentation requirements for associations and NGOs. And Articles 16-18 address the registration procedures, including the receipt of the registration application; the examination of the application and decision to accept or reject the registration; and the date of the creation of the legal entity. Article 18 from the first draft law, which dealt with "rectification" of the application, has been removed, in its entirety, from the second draft.

Discussion: The right to obtain legal entity status is well protected in international law. Article 22 of the ICCPR would have little meaning if individuals were unable to form NGOs and attain legal entity status.[5] The UN Special Representative on Human Rights Defenders has noted that "NGOs have a right to register as legal entities and to be entitled to the relevant benefits."[6]

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

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

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

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

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

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

[10] Article 2(3) of the ICCPR reads as follows: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that

Rather than strengthening the registration procedures, the second draft law has eliminated the few safeguards that protected applicants. Concretely, the second draft law fails to include a clear and limited list of objective grounds for denial of registration, or even the requirement of a written explanation to the applicant in case of denial. Article 17 authorizes the Ministry of Interior to "examine the documents and the legality of the statute" and to decide "whether to accept or reject the registration" of the organization. Article 18 of the first draft law – which included some safeguards protecting applicants, including the requirement of written notification upon denial and grounds for denial (albeit through broad, open-ended terms) – has been removed in its entirety from the second draft. Thus, the second draft includes no grounds for denial at all, thereby leaving the decision to register or not to register wholly to the discretion of the Ministry.

The new draft law fails to meets the ICCPR standard which requires that restrictions (in this case, denial of registration) be "prescribed by 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*.[11] Moreover, the lack of <u>any</u> grounds for denial opens the door to unrestrained government discretion. There is nothing in the draft law which would confine government decision-making to the ICCPR, Article 22 standards (that restrictions on freedom of association be "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"). Taken together, the lack of safeguards could have a disproportionate impact on groups that engage in advocacy or expressive activity that supports unpopular causes or is openly critical of government policy or action.

In addition, the draft law makes no reference to an opportunity for appeal of the denial of registration to an independent adjudicator. While we are not familiar with Cambodian administrative law and recognize that the issue of appeal from administrative decisions may be addressed there, the lack of reference to appeal in the draft law is worrying. The right to appeal is a fundamental safeguard for any government decision-making process, including registration of associations and NGOs. If the broader Cambodian legal framework offers no recourse to a competent, independent, and impartial tribunal, then the failure of the draft law to do so would violate Articles 2(3) and 14 of the ICCPR.

Another important legal safeguard for applicants is the inclusion of a fixed time period for government decision-making. The first draft included a requirement that the Ministry decide on applications within 45 working days. The second draft has increased the time period to 90 working days. Because the time

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any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted." Article 8 of the Universal Declaration of Human Rights reinforces this principle: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

[11]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.

period is defined by working days, the time period amounts to approximately 18 weeks (or nearly five months, excluding any consideration of holidays). The doubling of the time period for registration review is regrettable and will lead to longer waits for registration decisions. This is particularly concerning where unregistered groups are not allowed to operate.

Additional concerns from the first draft law remain:

- Extensive documentation requirements. The draft law, in Articles 14-15, requires extensive amounts of information, including "Profiles of the governing members" of the association and domestic NGO (as well as detailed biographical information (age, sex) relating to the list of the 11 founders of an association, and "a recent 4x6 size photograph" for leaders of both associations and domestic NGOs). The term "Profiles" is undefined and could lead to open-ended inquiries by the government into the biographies of the leaders. Moreover, it is unclear how this information would be used. As stated above, *everyone* has the right to associate. The submission of "Profiles of the governing members" could invite government vetting of those individuals seeking to form organizations as legal entities. The problem is compounded by the lack of objective standards in reviewing registration applications; consequently, the leader profiles could fuel the exercise of unbridled discretion.

- Proof of assets. Article 15, which addresses documentation requirements for domestic NGOs, maintains the requirement of a "registration excise fee" but introduces a new procedure. The new procedure provides that the president of the domestic NGO must provide a copy of its bank statement for deposits at any bank recognized by National Bank of Cambodia "within 30 working days at the latest after receiving registration letter." The failure to comply with this requirement shall result in the removal of the domestic NGO from the registration list. In other words, the requirement has been changed to a post-registration, rather than advance, requirement. The regulatory intent of this provision remains unclear. Is it to require that all NGO applicants have funds deposited in the bank? Is it to require those NGOs that do have funds to inform the Ministry authority? Both are potentially problematic, but it is the former – an asset requirement – that could weigh heavily on the freedom of association. Both associations and NGOs are defined are membership organizations in the draft law; in most countries, membership organizations are not required to hold assets at the time of application for registration (or any other time during their life-cycle, for that matter).[12] Indeed, because freedom of association applies to everyone, and not merely to those with assets or funds deposited in banks, requirements to demonstrate the possession of assets or funds almost certainly violate the freedom of association.[13]

- Requirement of office. Article 12 requires associations and domestic NGOs to "have a central office in the Kingdom of Cambodia." While it is common in many countries to require that

[12] Foundations or other non-membership form may, by contrast, be required to provide proof of assets, since such organizations are based on property rather than members.

[13] Recognizing that Article 13 provides that the registration excise fee "shall be determined by an Inter-Ministerial Proclamation", it is crucial that the registration fee not be so expensive as to impede the freedom of association.

organizations provide an address, requirements to secure actual office space are potentially more burdensome. A central office may be appropriate for well-funded NGOs, but smaller community-based associations and NGOs may lack sufficient resources to support an office. Indeed, such small organizations may simply operate in the community, hold meetings in members' homes, and have no need for a central office.

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

- Amend Chapter 2 to include appropriate safeguards for registration applicants, including a clear and limited list of objective grounds for denial; the requirement of a written explanation in case of denial; and the opportunity for appeal to a competent, independent and impartial tribunal.

- Amend Article 17 to include a shorter time period for government decision-making. The original period of 45 days, as included in the first draft, was a more progressive rule than the 90-day time period currently envisioned.

- Amend Articles 14 and 15 to reduce documentation requirements; in the case of organizational leaders, eliminate the vague requirement of "profiles" and simply require their names and addresses.

- Amend Article 15 to eliminate the requirement to demonstrate the possession of assets or funds and to deposit a registration excise fee in a bank after registration. Amend Article 13 through the inclusion of language to help ensure that any registration fee that may be determined by Inter-Ministerial Proclamation not be so expensive as to impede the freedom of association.

- Amend Article 12 to require that applicants have an address, but not necessarily a central office.

III. Mandatory Registration

Issue: Article 6 of the second draft remains, effectively, unchanged. It continues to prohibit any activity conducted by unregistered associations and NGOs. Registration is thus mandatory and unregistered groups are banned.

Discussion: The draft law's mandatory registration requirements constitute restrictions on the freedom of association under Article 22 of the ICCPR. Under Article 22, as well as other major international conventions, "freedom of association is a right, and not something that must first be granted by the government to citizens."[14] That associations and NGOs may be formed as legal entities does not mean that individuals can be *required* to form legal entities in order to exercise the freedom of association. As the UN Special Representative on human rights defenders stated in her report to the UN General

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

Assembly: "[R]egistration should not be compulsory. NGOs should be allowed to exist and carry out activities without having to register if they so wish."[15]

Mandatory registration is particularly problematic when registration is difficult to achieve, as is true under this draft law, especially for would-be smaller organizations seeking to address needs at the community level or the interests of members. In such circumstances, individuals are forced to choose between operating as an unregistered group – and therefore illegally – or seeking to comply with burdensome registration requirements. See Section II for an overview of registration requirements.

It is, of course, understood that legal entities will reasonably enjoy different legal rights from those groups which do not have legal personality. The rights of a legal entity, such as limited liability for its members/founders, tax or other specified incentives, authority to possess a property title, and the ability to sue and be sued in courts, among other rights, have traditionally made registration of a legal entity an attractive option for associations. The decision about whether or not to register and become a legal entity, however, should be a purely voluntary one. And individuals have the right under international law to associate without registering a legal entity.

Moreover, as a policy matter, enforcement of mandatory registration requirements, and the corresponding prohibition of activities carried out by unregistered groups or organizations, may be difficult to implement and unworkable in practice. No regulatory body responsible for gathering such information has the means to pursue every group (two and more) of individuals who gather together with a differing level of frequency and may be performing the broadest variety of imaginable activities, from trekking and football fans, to chess and silk weaving groups. Furthermore, there is no need for the government to waste its resources in seeking to limit the activities of such groups.

Recommendation: Amend Article 6 to eliminate the mandatory registration requirement and, instead, explicitly allow for unregistered groups to operate.

IV. Suspension, Termination and Dissolution

Issue: Articles 49 and 50 address involuntary suspension and termination of both domestic associations/NGOs or alliances and foreign NGOs, but only superficially, by referring to suspension or termination "by a definitive court judgment." In the wake of voluntary termination, according to Article 51, remaining assets shall be distributed in accordance "with its organization statute, memorandum or decisions" of the association/NGO. In the wake of involuntary termination, according to Article 52, remaining assets shall be distributed "according to the definitive judicial ruling."

Discussion: Involuntary termination is a clear example of interference with freedom of association, and like any other government intrusion, must meet the standards outlined in the ICCPR. "The relevant government authority should be guided by objective standards and restricted from arbitrary decision-

[15] 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).

making."[16] The draft law provides inadequate standards to guide the government's determination of suspension or termination. The draft law does not expressly limit the use of termination as a sanction of last resort. There is no requirement for the governmental authorities to provide notice and an opportunity to rectify problems prior to the suspension or termination, and there is no mention of a right to appeal after suspension or termination. Taken together, the process of suspension and/or termination is open to government manipulation and overreach.

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

Recommendation: Revise Articles 49 and 50 to include an exhaustive list of objective grounds for suspension and termination, along with accompanying procedural safeguards as outline above. Revise Articles 51 and 52 to help ensure that assets are transferred to organizations with the same or similar purpose.

V. Foreign Non-Governmental Organizations

Issue: The draft law erects barriers to the registration and activity of foreign NGOs. First, Articles 30-34 outline a heavily bureaucratic, multi-staged registration process. Second, Article 36 requires mandatory collaboration by stating that a foreign NGO "shall collaborate with relevant partner ministries/ institutions of the Royal Government of Cambodia when developing projects, monitoring, and evaluating the implemented activities or results." Third, Article 37 limits the validity of the memorandum of understanding to 1-3 years, thereby requiring foreign NGOs to undergo the equivalent of a re-registration process. Fourth, Article 39 addresses the resources and budget of foreign NGOs, stating that a foreign NGO "shall have a sufficient budget to implement its aid projects" and placing a 25% cap on administrative expenses of a foreign NGO.

Discussion: As a threshold issue, Article 4 defines a foreign NGO as "a group of foreign natural persons in foreign countries established under foreign laws to serve public interests in the Kingdom of Cambodia without conducting any activity to generate profits for sharing among their members." The definition is limited in that it refers exclusively to membership organizations; it therefore excludes the wide array of non-membership not-for-profit organizations that exist around the world. For example, in many countries, foundations, think tanks, and other organizations (including groups such as the East West Management Institute and ICNL) are non-membership organizations.

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

Registration Procedures. The registration of a foreign NGO is based on the approval and signing of a Memorandum Agreement with the Ministry of Foreign Affairs and International Cooperation.[17] Moreover, there is a multi-tiered approval process:

- First, according to Article 33, a foreign NGO "shall discuss and agree with partner ministries/ institutions of the Royal Government on aid projects/programs before submitting an application for a memorandum of understanding with Ministry of Foreign Affairs and International Cooperation …" The supporting documents relating to the foreign NGO's aid projects/programs issued by the partner ministry/institution must be included as part of the application process. [This requirement is newly introduced by the second draft law and reinforces the multi-tiered nature of the governmental approval process.]

- Second, according to Article 30, a foreign NGO "shall submit an application for memorandum to the Ministry of Foreign Affairs and International Cooperation" supported by specified documentation.[18] The Ministry review then follows within 45 days in order to decide "whether or not to sign a memorandum." (Article 32)

- Third, according to Article 34, upon approval of the memorandum agreement, the Ministry sets "a date and venue for signing the memorandum" with the foreign NGO.

- Fourth, also according to Article 34, after the memorandum agreement has been signed, the foreign NGO "shall declare its agreement on aid projects/programs to the Council for the Development of Cambodia."

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

Mandatory Collaboration with Government. Once a foreign NGO has received approval to operate, Article 36 states that a foreign NGO "shall collaborate with relevant partner ministries/institutions of the Royal Government of Cambodia when developing projects, monitoring, and evaluating the implemented activities or results." Collaboration is thus not merely envisioned as an option to be encouraged (as Article 2 seems to suggest, in stating that the purpose of the law is to provide "opportunities" to collaborate), but rather a mandatory requirement. Moreover, the range of areas for collaboration is wide, extending throughout the program life-cycle, from project preparation through evaluation of results. Thus, there appears to be no room for foreign NGOs to act independently of the Government in

[17] Since the process of securing government approval through the signing of a memorandum agreement is tantamount to registration, we use the term registration in these comments.

[18] Certain documentation requirements raise concerns. (Article 30) For example, a foreign NGO must submit a "list of national and foreign staffs who are working in the Kingdom of Cambodia." While it is common for foreign NGOs to designate a representative to serve as the contact point with the regulatory authorities, the state interest in staff identities is unclear.

addressing public benefit goals or community needs. 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."[19] The draft law, in subjecting foreign NGOs to the additional requirement of collaboration with government, places undue burdens on the activities of foreign NGOs.

Furthermore, it is not clear how collaboration is envisioned at the various stages of project implementation, but any mechanism seems destined to invite government interference. Imagine, for example, a foreign NGO engaged in human rights defense and required to work with the government in planning and implementing its program activities, as well as monitoring and evaluating the result of the program activities; collaboration with the government through every phase of the program cycle would, inevitably, undermine the NGO's ability to represent objectively the concerns of persons who sought help and advice from it. Finally, the constraints on the freedom of action for foreign NGOs are also a burden of responsibility for government ministries and institutions.

Re-registration. Article 37 limits the validity of the memorandum of understanding to 1-3 years, and requires those foreign NGOs wishing to continue activities in Cambodia to request an extension of the memorandum. In essence, therefore, foreign NGOs are subject to a re-registration process. The UN Special Rapporteur on the situation of human rights defenders has noted re-registration requirements with concern: "In certain countries NGOs are required to re-register in certain periods, be it every year or more often, which provides additional opportunities for Governments to prohibit the operation of groups whose activities are not approved by the Government. Requirements for periodic re-registration may also induce a level of insecurity … resulting in self-censorship and intimidation."[20]

Budget of Foreign Non-Governmental Organizations. Article 39 addresses the resources and budget of foreign NGOs. Two concerns arise. First, a foreign NGO "shall have a sufficient budget to implement its aid projects" but there is no objective basis provided to determine what constitutes a "sufficient" budget. The vagueness of the term "sufficient" opens the door to subjective and arbitrary governmental decision-making. Second, Article 39 places a 25% cap on administrative expenses of a foreign NGO. The second draft law has amended Article 39 to define an "administrative expenses" to include "staff's salaries, office equipments, and other expenditures for office functioning." Limits on administrative expenses, even where the regulatory intent is benign, are generally misguided for a number of reasons. First, administrative spending caps are inevitably arbitrary; in light of the diversity in the sizes and types of organization (even if focused solely on foreign NGOs), it is impossible to determine an appropriate

[19] 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."

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

percentage for administrative expenses that would be fairly applicable to all organizations. Second, staff salaries in particular are, in many if not most cases, not merely "administrative" in nature, but are rather directly related to the implementation of programs. For example, if ICNL were to provide technical assistance to a ministry seeking, for example, to draft legislation affecting civil society in Cambodia, virtually the entire cost of providing such assistance would be attributable to staff salaries. Surely this could not and should not be artificially limited by some arbitrary 25% standard, unrelated to the nature of the actual costs of providing the service. Third, administrative spending caps limit the integrity and efficiency of the sector, in that certain administrative expenses are essential to ensure sound organizational management, compliance with applicable rules and regulations, and cost-effective delivery of service and programs. Fourth, limits on administrative spending can be exceedingly difficult to enforce, as any definition of what constitutes an administrative expense is likely to pose problems of interpretation. This is certainly true for the new language introduced in Article 39; the meaning of "other expenditures for office functioning" will inevitably lead to different interpretations.

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

- Streamline the registration process and include safeguards to ensure a more objective, consistent, apolitical, and professional registration decision-making process.
- Revise Article 36 to allow for and/or encourage, but not mandate, collaboration with the Government of Cambodia.
- Amend Article 37 to remove re-registration requirement for foreign NGOs.
- Delete Article 39 in its entirety; alternatively, amend Article 39 to remove the ambiguity relating to what constitutes a sufficient budget and to narrow the scope of what is included in administrative expenses.

VI. Supervision

Issue: The draft law places requirements on associations and NGOs relating to staff recruitment (Article 41); notification of governmental authorities in connection with opening field offices or conducting activities (Article 43); reporting to governmental authorities (Article 46); and inspection by governmental authorities (Article 48). In addition, Articles 53 and 54 address violations and penalties.

Discussion: Article 22 of the ICCPR limits government supervisory action in clear terms: "No restrictions may be placed on the exercise of this right [freedom of association] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others." The recognition of freedom of association as a right "that must be respected necessarily entails some limits on the degree of regulation … The very essence of the freedom of association is the ability of those belonging to a body to decide how it should be run; this necessitates both a minimalist approach to regulation and very close scrutiny of attempts to interfere with the

choices that associations and their members make about the organization of their affairs."[21] Articles 41, 43, 46, 48 of the draft law contain ambiguity that could lead to overbroad interpretations and discretion. Articles 53 and 54 lack procedural safeguards and invite the exercise of excessive governmental discretion. This section will consider each issue in turn.

Notification Requirements. Article 43 commendably allows associations/NGOs to "open branch offices or conduct activities" both in Phnom Penh and in the provinces of Cambodia. In such cases, however, the association/NGO "shall provide a written notification to municipal hall or concerned provincial halls …" Notably, the requirement is to notify and not to seek approval. Nonetheless, the notification requirement relates explicitly not only to opening a branch office, but also the implementation of activities. This requirement, which would therefore seem to apply to any domestic association/NGO that engages in occasional or episodic activities in a given locale, could amount to an impediment on program activity. For example, an NGO engaged in a one-time assessment of progress toward the UN Millennium Development Goals in the various provinces of Cambodia would be required to notify the relevant government authorities in each province and municipality where the assessment is taking place. While the government may have legitimate interests in NGO activities, requiring notification may be unworkable in practice.

Reporting Requirements. Article 46 requires associations/NGOs to prepare an annual report on "activities and budget status of preceding year and action plan of following year to be deposited [in] their office and submit to the Ministry of Interior or Ministry of Foreign Affairs and International Cooperation and the Ministry of Economic and Finance and other relevant ministries."[22] Thus, the draft Law takes a "one size fits all" approach to reporting, with all domestic and foreign organizations being subject to the same annual reporting requirement.[23] As an alternative, one could envision a system where organizations with no tax benefits or public funding would be accountable to their members but would have no public reporting requirements. Organizations below a certain threshold would be subjected to simplified reporting, even if they receive tax benefits or public funding. More fulsome reports would only be required of large organizations receiving substantial tax benefits or public funding. Details and distinctions would be worked out after meaningful consultation with civil society.

Staff Recruitment. Article 41 requires associations and NGOs to employ Cambodians "to the maximum extent possible."[24] It is not clear how compliance with such a vague standard will be determined, and

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

[22] The provision could benefit from greater specificity, in that it is not clear to which ministry (or ministries) the domestic association/NGO should direct its report. The ambiguity in this provision is likely to lead to confusion within the NGO sector regarding where to submit the reports, and to confusion within the Government regarding who is responsible for reviewing reports.

[23] Revisions to Article 46 in the second draft law do provide for some foreign NGOs to file reports on a date other than the end of February. This distinction relates only, however, to the timing of the filing.

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

whether the Cambodian Government will have any role in determining compliance. The same concerns arise with the requirement of proportionality of staff to programs. How will compliance be determined and who decides? As general principles to guide organizations in their hiring, these provisions are likely to be innocuous. If these provisions, however, provide the basis for governmental intervention in the hiring practices of organizations, then such intrusion in the internal affairs could amount to undue interference in an organization's operations.

Inspection Authority. Article 48 authorizes the Ministry of Economy and Finance or the National Audit Authority "to examine reports on financial status and assets" of any association or NGO, "as provided for in Article 10, Chapter 2 of the Law on Audit of the Kingdom of Cambodia."[25] Law enforcement searches of the private premises of organizations should only follow when based on a valid search warrant or other court authorizations, and allowing for the presence of an attorney.[26] In the second draft law, Article 48 has been amended to include the requirement that the Ministry provide written notification two weeks in advance to the concerned association or NGO. The requirement of advance notice is an important safeguard and this revision is welcome.

Violations and Penalties. Article 53 sets forth the sanctions for violating Article 46 – that is, the annual reporting requirement. Article 54 addresses the failure of the association/NGO to comply with its governing documents. In case of a repeat violation, subsequent to a warning, the association/NGO "shall be punished according to laws in force." The draft law provides no additional guidelines or limits on governmental decision-making. Regulatory officials are thus free to determine sanctions based on arbitrary and subjective grounds. The draft law provides no procedural safeguards, such as notice and the opportunity to be heard and/or to rectify the problem. "Sanctions for the failure of filing reports or complying with other provisions of the law governing civil society organizations should provide adequate warning and an opportunity to correct such administrative infractions."[27]

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

- Revise Article 41 to remove ambiguity or provisions which require employing Cambodians "to the maximum extent possible" and proportionality of staff to programs.

- Revise Article 43 to limit the notification requirement to the opening of a branch office, and remove the notification requirement for merely conducting activities; and revise Article 43 to guard against government intervention based on facilitating "working performance" of associations/NGOs "as a partnership."

[25] ICNL has not reviewed the Law on Audit.

[26] Report submitted by the UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, in accordance with General Assembly resolution 62/152 (4 August 2009) p. 23 (http://www.icj.org/IMG/report_of_sr_on_hrds_to_ga.pdf).

[27] Report submitted by the UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, in accordance with General Assembly resolution 62/152 (4 August 2009) p. 23 (http://www.icj.org/IMG/report_of_sr_on_hrds_to_ga.pdf). Moreover, "States should not criminalize non-compliance with the law governing civil society organizations." Id.

- Revise Article 46 to clarify the reporting obligations of domestic associations/NGOs and alliances; consider a graduated reporting requirement that would exempt smaller organizations from reporting, or at least simplify their reporting obligation.

- Revise Articles 53 and 54 to provide procedural safeguards (notice and opportunity to respond) and to narrow government discretion in the determination of appropriate penalties.

VII. Miscellaneous Issues

Scope of Law. Article 3 states the law applies to registered associations and domestic NGOs, and to foreign NGOs that have concluded a memorandum with the Government of Cambodia. There are questions relating to the distinction between associations and domestic NGOs and the permissible purposes each can pursue. Reference is made to "members' interests" and to "public interests" (Article 4) Without any definition provided of "public interests", the Ministry is placed in a position to decide what purposes do and do not qualify, and in turn, what organizations may be registered as NGOs. In addition, the second draft law revised Article 3 to exclude from the scope of the law "community-based organizations / mass organizations created locally inconsistent with conditions set forth in this law and operated in compliance with other existing laws for mutual assistance." Because ICNL is unfamiliar with "other existing laws" in Cambodia, we must defer to local partners and experts on the proposed new language. We have concerns, however, that the exclusion will confuse rather than clarify the scope of the law.

Re-registration. Article 55 requires all domestic associations/NGOs which have been previously registered to re-apply for registration once the draft Law comes into force. The time period for re-registration is 365 working days (as opposed to 180 days in the first draft law). Failure to re-apply within 365 working days will subject the organization to having its prior registration nullified. Re-registration can be a burdensome process, and there are alternatives, which we'd be pleased to discuss should there be interest.

Funding Sources for Domestic Organizations. Article 38 defines the available resources for domestic associations and NGOs to include member contributions, resources, and properties of the organization, gifts from individuals or legal entities, and income generated from legitimate activities. It is commendable that this list allows for membership fees, charitable gifts, and "Other incomes generated from legitimate activities". It is not clear whether this last category is intended to refer narrowly to economic activities, or is intended more broadly to serve as a "catch-all" category which would allow for resources from legitimate sources that are not listed. It is well accepted under international good regulatory practice that associations/NGOs should be allowed to engage directly in economic activities in order to pursue their primary purposes; in light of the importance of this category of funding, the draft law should expressly allow for it. In addition, it is important to ensure, through a "catch-all" phrase, that funding from other legitimate sources is allowed. For example, funding from multilateral organizations, like the UN, or bilateral aid agencies, like USAID or DFID, is not explicitly included in the list of available resources; the inclusion of clear catch-all category would cover this gap.

Alliances of Associations and Domestic NGOs: In addressing alliances, we raise two concerns. First, Chapter 3 of the draft law assumes a narrow definition of alliance, limiting its reach to alliances of associations or domestic NGOs only. It is common in other countries to allow the full spectrum of legal entities, including for-profit businesses, cooperatives, foundations, and even government agencies and municipalities, to form alliances to better achieve their legitimate purposes (i.e., associations, federations, umbrella organizations, coordination bodies). It is commendable that the second draft includes express affirmation that foreign NGOs can be members of an alliance. (Article 21) The role of foreign NGOs is, however, limited, as they are prohibited from serving as leaders of an alliance. Second, Chapter 3 of the draft law lacks fundamental procedural safeguards during the registration process, namely, a clear and limited list of objective grounds for refusal; a fixed time period for governmental review of registration applications; the requirement to provide written notice in case of refusal; and an opportunity for appeal to an independent court. Taken together, these gaps open the door to inconsistency, delay, and unpredictability in the handling of applications for the registration of alliances.