

Restrictions on the right to freedom of association

Case study of the legal environment of human rights NGOs in Azerbaijan,
Belarus and the Russian Federation



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ACRONYMS

NGO	Non-governmental organization
UN	United Nations
CoE	Council of Europe
ECtHR	European Court of Human Rights
UN HRC	United Nations Human Rights Committee
ECHR	European Convention on Human Rights and Fundamental Freedoms
UDHR	United Nations Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
UN Declaration on Human Rights Defenders	UN Declaration on the Right and Responsibility of on Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

1 INTRODUCTION

1.1 Background and objectives

Existence and effective operation of non-governmental organizations is seen as one of the foundations of a genuine democracy and strong civil society. The principal legal platform for their existence is laid down by the right to freedom of association guaranteed by international human rights law. Freedom of association forms a fundamental framework for exercise of other rights and enables individuals to unite their efforts and pursue common purposes in their society. Societies move forward when their members are empowered to mobilize behind common interest and take joint action. Even in the most challenging environments, civil society can empower citizens and contribute to strengthening democracy. While there is no single recipe for improving the human rights situation worldwide, a common ingredient in bringing about positive change is the strong role of civil society¹.

Freedom of association is universally recognized as an essential component of democracy enhancing further human rights development. It guarantees the right to form and join associations, political parties and trade unions and recognizes the importance of citizens to influence their governments and contribute to social, economic and political development.

The importance and relevance of the right to freedom of association was demonstrated by the consensus decision of 30 September this year by the UN Human Rights Council to establish the first-ever UN Special Rapporteur on freedom of assembly and association², to provide a special attention to these fundamental freedoms currently lack.

Freedom of association, however, is not an absolute right. It is subject to restrictions provided by international human rights standards, intended to ensure balance between the individual and the community, or between competing rights. Governments may take steps

¹ The speech of the US delegation at the UN Human Rights Council on 30 September 2010.

² UN Human Rights Council Resolution, A/HRC/15/L.23 of 27 September 2010.

to ensure that the aims and activities of organisations do not, for example, genuinely threaten public safety or national security, and may ensure that members of NGOs do not promote hate speech or racism, or use NGOs for personal financial gain.

In many countries a large gap exists between the protections provided by law and the daily experience of organizations claiming their right to freedom of association. As binding international human rights instruments are quite general and vague and the case law is rather sparse, governments are entitled with a broad discretion of interpretation of the right to freedom of association and its restrictions. In many cases governments claim the restrictions as legitimate but may use it as a tool to suppress human rights organizations, as they are often perceived to pose a threat if they are critical of state policy.

This paper identifies a growing trend of the adoption of restrictive laws regulating establishment and operation of NGOs in Azerbaijan, Belarus and the Russian Federation. Broad and vague provisions often provide the authorities with a possibility to misapply and arbitrarily abuse the laws, often resulting in severe consequences on the right to freedom of association. The Governments try to hamper the ability of individuals to exercise their right to form NGOs, by imposing cumbersome and partial registration procedures, often resulting in refusal of its registration, by establishing a wide discretionary right to control NGOs activities or by imposing financial constraints.

This paper seeks to analyze the permissibility of restrictions on freedom of association provided by international human rights standards and the legality of means taken by governments to restrict the work of human rights NGOs. The limits of discretion of national authorities to interpret the restrictions must be defined in order to avoid their arbitrary application and to ensure effective exercise of the right to freedom of association.

While freedom of association remains an underdeveloped right in international human rights law, human rights NGOs are facing increasingly sophisticated attempts by governments to restrict their activities through a variety of means. This paper suggests the

ways in which the right to freedom of association could be developed to provide better protection to human rights NGOs.

1.2 Structure of analysis

The analysis consists of three parts where both international regulation of freedom of association and its national implementation are taken into consideration, followed by conclusions addressing key findings and implications of restrictive exercise of the right.

The first part introduces background information, main objective of the analysis and its relevance. It describes main key issues to be addressed in the analysis and lists main sources that were used for comprehensive research.

The second part of analysis provides legal interpretation of permissible restrictions applied to freedom of association, based on provisions of international and regional legally binding instruments. As binding documents are not specific enough on the content of freedom of association and restrictions, case law and soft law instruments play a significant role in their interpretation. The analysis primarily focuses on the legal framework of the UN and the CoE. The ICCPR and the ECHR are the guiding treaties in this analysis, due to the focus of analysis on the situations with regard to respect for freedom of association in countries which have signed the mentioned treaties.³ The ECtHR case law, as well as reports and documents of international human rights monitoring mechanisms, such as the UN HRC and the mandates of the UN Special Rapporteurs, are of fundamental value in analyzing content and restrictions on freedom of association.

The third part of the analysis discusses the establishment of the right to freedom of association in national law and its application in practise. It identifies the challenges and restrictions that human rights defenders face with regard to enjoyment of this right and argue their legality based on international legal requirements interpreted in first part of

³ With Belarus as an exception which is the only European country that has not signed the European Convention of Human Rights.

analysis. It particularly analyses the situation in Azerbaijan, Belarus and the Russian Federation - countries which have been recently considered as particularly restrictive with regard to the operation of human rights organizations and their activities. This analysis identifies the main prevailing trends related to the freedom of association in those countries and argues their legality on the basis of international human rights standards.

Conclusions include the major findings on the legal means used to restrict the exercise of the right to freedom of association and will emphasize their (il)legality from the perspective of international human rights standards. It will discuss the implications of restrictive NGO law and its arbitrary application on human rights situation and development of civil society and democracy in authoritarian countries.

1.3 Methodology and sources

The analysis is a multidisciplinary research, carried out mainly from legal and socio-political perspectives. It is based both on primary and secondary sources. It primarily focuses on binding international and regional human rights treaties, as well as national laws regulating operation of NGOs in the countries. The ECtHR case law on freedom of association and both the UN and the CoE soft law, like resolutions, reports and recommendations are used as a primary source in analyzing international standards of the content of freedom of association. Scholarly literature and articles are used as a very useful source to recognize the complexity of freedom of association with regard to its national implementation. Reports of both national and international NGOs were used as a unique and essential source of analysing arbitrary application of national NGOs laws and arguing its legality. Two field trips resulted in collection of valuable information that enabled me to make a personal analysis of how restrictions are applied. A trip to the South Caucasus region provided with the possibility to take part in the regional meeting of the South Caucasus Network on Human Rights Defenders and meet numerous local NGOs⁴. During my other trip to Belarusian Human Rights House in exile in Vilnius, Lithuania where Human Rights House Network's annual meeting was held I met the representatives of

⁴ www.caucasusnetwork.org

NGOs from 15 countries, including Belarus and the Russian Federation⁵. As a result of interviews with members of the local NGOs during both trips, I received beneficial first-hand information on restrictions on freedom of association applied by governments and on its effect to their operation and human rights activities. It greatly contributed to identifying clear violations of the right to freedom of association.

⁵ www.humanrightshouse.org

2 INTERNATIONAL STANDARDS OF FREEDOM OF ASSOCIATION

2.1 Legal framework of freedom of association

International human rights law establishes the right of individuals to form human rights organizations and engage in activities to protect human rights. The possibility of human rights NGOs to be established and to operate is ensured by extensive international guarantees of freedom of association. Freedom of association, which is the essential right for human rights NGOs to function, was first established in the United Nations Universal Declaration of Human Rights⁶. Despite its non-binding effect, it was adopted by the UN member states and established the universal language of human rights, based on the principle that human rights are the “foundation of freedom, justice and peace in the world”.⁷ In 1966 freedom of association was given a binding legal weight in the UN International Covenant on Civil and Political Rights⁸. It is the first human rights treaty that codified the right to freedom of association on international level and now includes the great majority of states in the world. Article 22 (1) of ICCPR provides:

“Everyone shall have the right to freedom of association with others”.

Specific state commitments to protect human rights defenders, including human rights NGOs, are reaffirmed in 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 Freedoms⁹ and in a number of UN General Assembly and Human Rights Council resolutions. The UN Declaration on Human Rights Defenders was adopted by the UN General Assembly by consensus in 1998 and is the first UN instrument to acknowledge the importance of the work done by human rights defenders. Article 5 of the UN 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:

⁶ Art. 20 of the UDHR: “Everyone has the right to freedom of peaceful assembly and association”.

⁷ General Assembly resolution 217 A (III).

⁸ UN. Doc. A/6316 (1966)

⁹ UN General Assembly resolution A/RES/53/144.

(b) To form, join and participate in non-governmental organizations, associations or groups.”

Regional human rights organizations have adopted legal instruments to protect human rights defenders at a regional level, establishing the freedom of association as one of the fundamental rights to be respected¹⁰. In terms of regional organizations, the analysis will only focus on the protection guaranteed by instruments of CoE, namely the European Convention of Human Rights and Fundamental Freedoms. Its Article 11 guarantees the right to freedom of association to all the individuals within the jurisdiction of CoE member states. Moreover, its respect is ensured by the ECtHR that supervises the fulfillment of the obligations by the member states.

The mentioned human rights instruments form the fundamental basis for universal and regional promotion and protection of the right to freedom of association which contributes to the enhancement of democracy and civil society. However, the right to freedom of association is effective only if national legislation encompasses international human rights standards and facilitates its exercise. Therefore, it is of utmost importance to ensure that the commitments placed in international and regional human rights instruments are effectively and universally respected at a national level.

2.2 Scope and content of freedom of association

Freedom of association is generally defined as the right to associate with others to pursue a common interest.¹¹ Jeremy McBride argues that respect for the freedom of association is both to establish a “genuine democracy” and to ensure that, once achieved, it remains “healthy and flourishing”. He argues that the formation of non-governmental organizations, which he equates with civil society, is the “fruit of associational activity”¹².

10 Article 11 of the European Convention on Human Rights of 4 November 1950, Article 16 of the American Convention on Human Rights of 22 November 1969, Article 10 of the African Charter on Human and Peoples' Rights of 21 October 1986.

¹¹ Joseph Sarah (2000), para.19.11, p.432.

¹² McBride Jeremy (2005), p.1.

Neither the ICCPR nor the ECHR provide a detailed list of possible purposes that NGOs could pursue. Its scope is assumed to be very broad, provided that its purpose is legal and lawful. Religious societies, political parties, commercial undertakings and trade unions are as protected by Article 22 of the ICCPR as are cultural or human rights NGOs, soccer clubs or associations of stamp collectors.¹³ The right to form an NGO, deriving from the right to freedom of association, recognizes that individuals are entitled to unite together to pursue a common purpose.¹⁴ At its core lies a simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others. This premise underpins NGO action to defend human rights.¹⁵ The former European Commission of Human Rights defined freedom of association in its case law as “a general capacity for the citizens to join without undue interference by the State in associations in order to attain various ends”.¹⁶ The ECtHR elaborated on this issue and affirmed that Article 11 of the ECHR “does not seek to protect a mere gathering of people desirous of “sharing each others company”; it follows that, in order for it to be an association, some kind of institutional structure is required, even if it is only an informal one.”¹⁷

The right to freedom of association encompasses not only the right to form a new organization or to join an existing one, but also ensures a right for it to effectively function and operate. Otherwise, the right to freedom of association would lose its substance, that is, to reach the goals and conduct its activities. This was concluded by the ECtHR when it stated that “the right guaranteed by Article 11 would be largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association [...]. It follows that the protection afforded by Article 11 lasts for an association’s entire life [...]”.¹⁸ Therefore, the issues of operation and dissolution of organization are also covered by Article 11 of the ECHR and it can only be

¹³ Nowak Manfred, (2005), p. 497.

¹⁴ *Sidiropoulos and Others v. Greece*, para. 40.

¹⁵ International Council on Human Rights Policy, Report on Human Rights Organizations, para.47.

¹⁶ *X v. Sweden*, para.52.

¹⁷ CoE Thematic Report on Freedom of Association, para.1.b.5.

¹⁸ *United Communist Party of Turkey and Others v. Turkey*, para. 33.

dissolved by state authorities if the conditions for restrictions provided by the international human rights standards are met.¹⁹

The right to freedom of association is inalienable and applies to all, regardless of associations being in favour of or critical towards the governments' activities. As stated by the UN Special Representative on Human Rights Defenders, the protection of freedom of association includes human rights NGOs whose work may offend the Government, including organizations that criticize policies, publicize human rights violations perpetrated by authorities, or question the existing legal and constitutional framework.²⁰ However, many authoritarian governments that are subject to criticism by human rights NGOs tend to use both legal and illegal instruments to suppress and restrict their activities.

2.3 Legal restrictions of freedom of association

Article 2 of the ICCPR provides that State Parties hold obligation to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the ICCPR, including the right to freedom of association²¹. This obligation is twofold. First, states have a positive obligation to ensure the respect of the right to freedom of association, which means that states must take appropriate measures in order to ensure the full enjoyment of the right to freedom of association to all individuals in their territory. They also have a negative obligation to refrain from arbitrary interference with the right. It can be restricted based on the need to balance between a right of individual and public interests or the right of other individuals. However, it cannot be restricted under the conditions other than the ones provided by the ICCPR.

Article 22 (2) of the ICCPR provides a list of permissible restrictions upon the freedom of association that are to be:

“...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

¹⁹ Viktor Korneenko v. Belarus

²⁰ Report of UN Special Representative on Human Rights Defenders, para.49.

²¹ Identical obligation is established in Article 1 of the Convention.

health or morals or the protection of the rights and freedoms of others.”²²

Limitation clauses found in international human right law relating to freedom of association are, on the face of it, quite broad, and permit rather extensive limitations. The ECtHR, however, interpreted restrictions on freedom of association cautiously and narrowed the scope of governments to invoke restriction clauses: only convincing and compelling reasons can justify restrictions on freedom of association”²³. The ECtHR affirmed that states have the right to satisfy themselves that an association's aim and activities are in conformity with national legislation, and therefore interfere with the right to freedom of association, however, they must do so in a manner compatible with their obligations under the ECHR²⁴. In order for a state to justify its interference with the right to freedom of association, all these requirements must be met cumulatively and applied in a least restrictive manner.

2.3.1 Prescribed by law

The requirement of legality of restrictions of freedom of association means the existence of a certain legal basis in national legislation allowing states to deviate from international human rights standards, in other words, it has to be prescribed by law. Neither the ICCPR, nor the ECHR do not provide, which national legal acts are to establish such restrictions. As provided in the Siracusa principles, it must be national law of general application, which is consistent with the ICCPR and is in force upon application.²⁵ The term “law” is to be intended as a general-abstract parliamentary act or an equivalent unwritten norm of common law.²⁶ The Special Rapporteur on Human Rights Defenders discussed this issue in her report on freedom of association where she admitted that “it would seem reasonable to presume that an interference is only “prescribed by law” if it derives from any duly promulgated law, regulation, decree, order, or decision of an adjudicative body. By contrast, acts by governmental officials that are *ultra vires* would seem not to be

²² The restrictions provided by the ECHR are almost identical to Art 22(2) of the ICCPR, therefore the analysis of the restrictions will include ECHR case law on this issue.

²³ Ibid.13, para.40. See also *Gorzelik and Others v. Poland*.

²⁴ Ibid.13, para.40.

²⁵ The Siracusa Principles, para. 15.

²⁶ Ibid.12, p.505.

“prescribed by law”, at least if they are invalid as a result.”²⁷ Therefore, the governments cannot apply restrictions using administrative regulations, for example. However, in most cases application of restrictions on freedom of association will be caused by a court or other national authority applying this law, but not by the law itself. Even if the relevant national law is misapplied, the ECtHR that does not have a right to interpret domestic law will nevertheless conclude that such interference was “prescribed by law”²⁸. In such a situation the Siracusa Principles provides a guarantee of adequate safeguards and effective remedies to be provided to the individuals concerned.²⁹

Another aspect of the requirement “prescribed by law” is the quality of the national law providing for restrictions on the freedom of association. As the ECtHR stated in its case law, it also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the articles of the ECHR. Quality in this sense implies that [...] it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.”³⁰ It requires a certain level of foreseeability, which depends on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.³¹ Therefore, it must be published and easily accessible to all individuals concerned and cannot be vague or too general for them to be able to foresee what consequences can derive from their certain actions.

Therefore, national legislation regulating exercise of the right to freedom of association must clearly indicate the scope of state discretion that must be in compliance with international human rights standards.

2.3.2 Necessary in a democratic society

Another requirement for legitimate restrictions on freedom of association calls for a balance between the right of individual and society interests. A state obligation to prove

²⁷ Report of Special Rapporteur on Human Rights (2009), para. 27.

²⁸ Zvonimir Mataga, (2006), p. 17.

²⁹ Ibid. 24, para. 18.

³⁰ *Amuur v. France*, para. 50.

³¹ *N.F. v Italy*, para 26-28.

this link is established in the Siracusa Principles where it is stated that “the burden is upon the state [...] to demonstrate that limitations do not impair the democratic functioning of the society.”³² A state itself makes the initial assessment of what is “necessary in a democratic society” in each case. The ECtHR has elaborated on this issue in its case law stating that “necessary” in this context does not mean “useful”, “reasonable” or “desirable”. It implies the existence of a “pressing social need” for restrictions to be applied in this situation. There must be particularly serious reasons for interferences by public authorities to be legitimate for these purposes.³³ For example, a promotion of Sharia law as the ordinary law, which is a regime “clearly diverging from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts” cannot be justified as necessary in a democratic society³⁴.

Moreover, the requirement of necessity encompasses an element of proportionality. It calls for a balance between the intensity of restrictions on freedom of association and specific grounds for state interference. Objective justification for limiting the right is not sufficient. The State must “demonstrate that [...] it is in fact necessary to avert a real, and not only hypothetical danger [...] and that less intrusive measures would be insufficient to achieve this purpose”³⁵. The scope of the restriction “imposed [...] must be proportional to the value, which the restriction serves to protect. It must not exceed that needed to protect that value”.³⁶

As there is no single definition of what democratic society is, the Siracusa Principles suggest to hold society “which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights”³⁷ as a guiding reference in that respect. The reference to a democratic society means that proportionality

³² Ibid. 24, para 20.

³³ See, for example, *Handyside v. United Kingdom*; *Dudgeon v. United Kingdom*.

³⁴ *Refah Partisi (The Welfare Party) and Others v. Turkey*, para. 72.

³⁵ *Lee vs The Republic of Korea*, paras 7.2.-7.3.

³⁶ *Faurisson v France*, separate opinion of its members E. Evatt, Mrs. D. Kretzmer and E. Klein, para.8

³⁷ Ibid.24, para.21.

and necessity must be considered in light of “pluralism, tolerance, broadmindedness and people’s sovereignty”³⁸ which are the basic democratic values.

2.3.3 Legitimate aims of restrictions

For a state interference with the right to freedom of association to be lawful, it must pursue a legitimate aim upon application of restrictions. As provided in Article 22(2) of the ICCPR, freedom of association can only be restricted:

- in the interests of national security or public safety,
- in the interests of public order (*ordre public*),
- in the interests of protection of public health or morals,
- in the interests of protection of the rights and freedoms of others.

It is sufficient to pursue one of the above mentioned aims for a measure to restrict the right to freedom of association to be lawful. It is important to interpret them as narrowly as possible in order to avoid abuse of them by states applying the restrictive measures. The state restricting the right to freedom of association has an obligation to justify its compliance with one of the grounds listed above.

The Siracusa Principles provide a guiding definition for each legitimate aim serving as justification to restrict the right to freedom of association. Protection of **national security** should be characterized as protection of “the existence of the nation or its territorial integrity or political independence against force or threat of force.” It does not apply to “merely local or relatively isolated threats to law and order.”³⁹ In contrast to public order, national security is endangered only in grave cases of political or military threat to the entire nation.⁴⁰ Moreover, the Johannesburg Principles elaborates on legitimate national security interest, stating that it does not include the interest “to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial

³⁸ Ibid.12, p.505

³⁹ Ibid. 24, para.29-30.

⁴⁰ Ibid.12, p.506.

unrest.”⁴¹ For example, the state cannot invoke protection of national security and territorial integrity to refuse registration of organization that promotes traditions and culture of national minority.⁴²

Public order is defined as “a sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded”⁴³, including respect for human rights. As the ECtHR has stated in its case law, democracy is without doubt a fundamental feature of the European public order.⁴⁴ The ECHR establishes a very clear connection with democracy by stating that “the maintenance and further realization of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights”⁴⁵.

Public safety as a legitimate aim intends to protect safety of persons, their life, physical integrity, or their property from a serious damage. Moreover, the Siracusa Principles provide a safety clause that restriction for public safety can only be invoked if adequate safeguards and effective remedies against abuse are ensured.⁴⁶

Public health can be invoked as a legitimate aim to restrict a right to freedom of association if there is a need to take such measures to ensure prevention and protection of the population or its individuals from a serious threat to their health. For example, promotion of use of cannabis when such a use is considered a crime in a state leads to promotion of a breach of law resulting in detrimental consequences for public health, therefore, can be considered as inadmissible objective of organization and therefore restricted.⁴⁷

⁴¹ The Johannesburg Principles, para.2.

⁴² Ibid. 13, para. 37.

⁴³ Ibid. 24, para. 22.

⁴⁴ *United Communist Party of Turkey and Others v Turkey*, para.45.

⁴⁵ *Klass and others v Federal Republic of Germany*, para.59.

⁴⁶ Ibid.24, para. 33-34.

⁴⁷ *Larmela v. Finland*, para. 54.

A state enjoys a certain margin of discretion when referring to **public morals** as a legal ground for restricting a right to freedom of association. However, the Siracusa Principles take into account its dynamic dimension when applied as public morality can be qualified in a different way in different countries or cultures. Therefore, fundamental values of community must be respected.⁴⁸

Rights and freedoms of others as a legitimate aim to restrict a right to freedom of association is one of the most sensitive grounds in terms of its abuse by states. The Siracusa Principles provide that this term includes not only rights and freedoms recognized by the ICCPR but also extends beyond it.⁴⁹ In case of conflict of two rights or freedoms which are recognized by different mechanisms, priority should be given to rights that are not subject to limitations. The Siracusa Principles expressly affirm the right of human rights defenders, including human rights NGOs, to criticize the government and express their own opinion, providing that restriction of a certain right will not be based on saving reputation of the state or its officials from public criticism.⁵⁰

The ECtHR has on numerous occasions affirmed that the ECHR is a “living instrument”⁵¹, which means that it applies to situations when a balance between public and private interests is challenged, that is, in case of application of restrictions on human rights, including the right to freedom of association. It is dependent on specific situation and circumstances of the case. However, restriction of a right must not be implemented in a contradiction to the other right or interest, it is rather a reconciliation of both rights. Therefore, permissible restrictions must be always justified and least restrictive in order not to deprive the right of its essence.

⁴⁸ Ibid. 24, para. 27.

⁴⁹ Ibid. 24, para.35.

⁵⁰ Ibid. 24, para. 37.

⁵¹ See, for example, *Tyrer v. United Kingdom*, para. 31.

2.4 Derogation from the right to freedom of association

The ICCPR provides for a possibility of states to derogate from certain rights under certain circumstances. Article 4 of the ICCPR states:

“In time of public emergency which threatens the life of the nation [...] the States Parties [...] may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law [...].”⁵²

For a state to have a right to derogate from its human rights obligations, it needs to meet certain requirements. First, the right needs to be qualified as derogable under international human rights standards. Second, there needs to be a “public emergency which threatens the life of the nation” situation and the measure taken must be “strictly required by the exigencies of the situation”. Siracusa Principles provide for a clarification of what is a threat to life of nation: it includes a threat to physical integrity of population, political independence or territorial integrity of states, or basic functioning of institutions ensuring human rights.⁵³ It also states that emergency does not need to effect the whole population or the whole territory of the state, it can be a certain group of people or a certain territory where the threat occurs.⁵⁴ A situation of armed conflict on the territory of a state would most likely amount to such an emergency, as would other situations that might threaten the life or security of the nation.⁵⁵ Third, the measure taken must be strictly necessary and proportionate, and based on exigencies of the situation in the state, taking into account the “severity, duration and geographical scope”⁵⁶ of the measure. Moreover, it must be based on examination of actual situation and on the imminent, not potential, danger to nation. Fourth, in case of derogation, a state needs not violate its other international obligations, both provided by international treaties and customary law. Finally, the state, availing itself of derogation, has an obligation to make an official proclamation of existence of the situation in the country and the measures applied.⁵⁷

⁵² The same terminology is enshrined in Article 15 of the Convention.

⁵³ Ibid. 24, para. 39.

⁵⁴ Also *Ireland v. United Kingdom*, para.205.

⁵⁵ Duffy Helen, (2007), p. 293.

⁵⁶ Ibid. 24, para.51.

⁵⁷ Ibid. 24, paras. 42, 44.

Both the ICCPR and the ECHR list the rights that are non-derogable in any circumstances. The right to freedom of association is derogable, provided that the state meets the conditions set out by international human rights standards, including the requirement of necessity and proportionality.⁵⁸ In the last decade the right to freedom of association is one of the rights that are often called into question in the presence of a perceived terrorist threat, by proscribing certain organizations or activities.⁵⁹ Several UN Special Rapporteurs have expressed concern with regard to situation of human rights defenders, including human rights NGOs, when combating terrorism in emergency situations. The UN Special Rapporteur on Human Rights Defenders stated that in many current and recent emergencies human rights defenders are often prevented from conducting their human rights work. In addition, where defenders have tried to fulfil their role they have themselves been vigorously targeted in what amounts to an actual policy of silencing them. Legitimate limits may be placed on the exercise of rights in a state of emergency, thus abusing respect for human rights.⁶⁰ As a response to deteriorating situation, in his report on the impact of the war on terror to freedom of association and peaceful assembly The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has stated that states should not resort to derogation measures with respect to the rights to freedom of assembly and association and that the measures limiting these rights provided for in the ICCPR are sufficient to fight terrorism effectively.⁶¹ As the European Commission of Human Rights has stated in its so called Greek case⁶², the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the ECHR for the maintenance of public safety, health and order, are plainly inadequate. In both cases states must comply with international human rights standards when taking measures to counter terrorism and when those measures limit or derogate from

⁵⁸ In its General Comment No.29, UN Human Rights Committee expressed concern over insufficient attention being paid by states to the principle of proportionality, when derogating from human rights obligations, para.4.

⁵⁹ Ibid.55, p.322.

⁶⁰ Report of UN Special Rapporteur on Human Rights Defenders (2003), para. 49.

⁶¹ The UN General Assembly resolution A/61/267, para.13.

⁶²*The Greek case* (Denmark, Norway, Sweden, The Netherlands v. Greece), para. 153.

the rights ensured in the ICCPR or the ECHR, necessity and proportionality requirements must be met.⁶³

⁶³ Recently it was again reaffirmed by the UN General Assembly in its resolution A/RES/64/163, para.6.

3 FROM INTERNATIONAL TO NATIONAL LEVEL: PREVAILING TRENDS IN AZERBAIJAN, BELARUS AND THE RUSSIAN FEDERATION

In many countries a large gap exists between the protection of freedom of association provided by law and the daily experience of human rights NGOs that are subject to government repression. As governments are often subject to criticism of NGOs, they may see them as a threat to their legitimacy and therefore seek to impede their activities despite their international human rights obligations. Human rights NGOs are often perceived to pose threat if they comment on the most politicized areas like democracy, respect for human rights or impunity of state officials for their committed violations. Very often governments claim that the restrictions that they place on the right to freedom of association are legitimate but in reality this study shows that they tend arbitrarily interpret them and extend their application field and therefore use it as a tool to repress such organizations. Governments may use legal procedures to disrupt the work of human rights NGOs in the alleged need to protect the public from human rights NGOs activities. In most cases they tend to imply burdensome procedures of NGOs registration which is often a precondition of full enjoyment of the right to freedom of association upon acquisition of legal entity status; and once they are established, the governments apply strict policy of supervisory control over NGOs activities and the use of their funds, sometimes leading to accusation of being engaged in extremism activities, which often results in serious consequences like deprivation of the right to freedom of association.

3.1 Restrictions on formation and registration of human rights organizations

3.1.1 Importance of establishment of legal personality of NGOs

Establishment of legal personality for NGOs is of significant importance as it provides them with the possibility to fully exercise the right to freedom of association. In most cases it is a precondition for a right to open a bank account, to receive grants from donors, to engage in court proceedings or to rent premises.

In states practice there are two models applied to NGOs to acquire legal personality. Most democratic countries set up a requirement for NGOs to send a notification on the establishment of a certain organization, which is sufficient for it to acquire legal personality. In other countries, however, national NGO laws often provide for a compulsory registration of NGOs in state registry as a basic condition for them to acquire legal personality and to be able to conduct their activities.

There is no mutual consensus on the issue of compulsory registration on international arena. Neither the ICCPR, nor the ECHR do not include any explicit provision on this issue. However, Fundamental Principles on NGOs provide that NGOs can be either informal bodies or organizations, which have legal personality.⁶⁴ The UN Special Rapporteur on Human Rights Defenders have recently stated that “registration should not be compulsory and that NGOs should be allowed to exist and carry out collective activities without having to register if they so wish”⁶⁵. Therefore, it comes out that it is for NGOs themselves to decide upon their intention to acquire legal personality, and national law should provide them with this possibility. However, some scholars admit that a requirement to register organizations and acquire legal personality is permissible under Article 22 (2) of the ICCPR. The need to protect public order would allow authorities to use compulsory registration as a mean to control legality of organizations. The protective purpose of a state can justify compulsory registration system in order to make it possible for authorities to control lawfulness of formation of associations by requiring submission of articles of associations evidencing its purpose, place of business, organs and financing.⁶⁶ However, very often it does not negatively affect NGOs as they themselves seek for legal personality in order to acquire certain rights that are of crucial importance to the implementation of their activities.

Laws enabling NGOs to acquire legal personality play a significant role in exercising the right to freedom of association, ensured by international human rights instruments. The

⁶⁴ CoE Fundamental Principles on NGOs, para.5.

⁶⁵ Report of UN Special Rapporteur on Human Rights Defenders (2009),

⁶⁶ Ibid. 12, p.506

Fundamental Principles on NGOs provide that when a legal personality is not automatically acquired through the establishment of NGO, the procedure must be as simple and undemanding as possible and must not entail the exercise of discretion.⁶⁷ The ECtHR has recognized a right to form a legal entity in order “to act collectively in a field of mutual interest, which is one of the most important aspects of the right to freedom of association”⁶⁸. Therefore, arbitrary application or burdensome requirements with regard to NGO registration may amount to violation of the right to freedom of association ensured by international human rights standards.

In terms of practical efficiency of acquisition of legal personality is rather controversial in countries applying restrictive policy on establishment of NGOs. The requirement of compulsory registration as a precondition for the NGOs to operate often leads to opening the states a possibility to overly control and interfere in NGO activities and therefore impede the right to freedom of association. On the other hand, informal non-registered NGOs which may avoid direct burdensome state control, are actually deprived of their effective operation as it is conditional on rights granted upon its registration.

3.1.2 NGO registration in Azerbaijan

Azerbaijan holds international obligation to respect and promote the right to freedom of association as it is a state party both to the ICCPR and the ECHR⁶⁹ and therefore bound by their provisions. On a national level, the right is established in the Constitution of Azerbaijan and unrestricted activity of all associations is ensured.⁷⁰ The Law on Non-Governmental Organizations (Public associations and Foundations) (hereinafter - Azerbaijani NGO Law) regulates establishment and operation of non-governmental organizations in Azerbaijan and the Law on State Registration and State Register of Legal Entities (hereinafter – Azerbaijani State Register Law) lays down procedural registration rules. The whole national legal framework seems to correspond to international freedom of

⁶⁷ Ibid. 64, Explanatory memorandum, para. 42

⁶⁸ Ibid. 13, para. 40

⁶⁹ The ICCPR was ratified by Azerbaijan on November 13, 1992; the Convention - April 15, 2002.

⁷⁰ Article 58 (2) of the Constitution of Azerbaijan.

association standards, however, some provisions may result in violation of the right, especially having in mind that its effectiveness significantly depends on the implementation by Azerbaijani state authorities.

Azerbaijani national legislation does not explicitly provide for a compulsory registration requirement for NGOs, however, it states that “a non-governmental organization shall receive the legal entity status only after passing state registration.”⁷¹ As a result, even though theoretically informal organizations could exist, organizations without legal entity status are deprived of rights that are essential to formation and operation of NGOs, like a right to receive a grant.⁷² Therefore, all NGOs willing to effectively operate in Azerbaijan are subject to state registration exercised by the Ministry of Justice. Despite the right to register organization, provided by the national law on NGOs, organizations critical to government are often subject to abusive application of the regulation resulting in delays of their registration.

In its case *Ramazanova and others v. Azerbaijan*⁷³ the ECtHR has found that a significant delay in registration or refusal to register organization amounted to a violation of Article 11 of the ECHR⁷⁴. The applicant was refused to register her founded public association named “Assistance to the Human Rights Protection of the Homeless and Vulnerable Residents of Baku” for five times due to each time newly-found deficiencies in documents required for the registration. Moreover, the Ministry of Justice did not respond to applicant’s requests within the time limits proscribed by relevant law and almost 4 years passed after the first submission of application until the organization was finally registered under the ruling of the Supreme Court of Azerbaijan. The ECtHR has found that “repeated failures by the Ministry of Justice to issue a definitive decision on state registration of the association amounted to de facto refusals to register the association” and based it on its previous decisions, defined without any considerations that a refusal to grant legal entity status to

⁷¹ Article 16.2.

⁷² Law on Grants, Art. 3 (2).

⁷³ *Ramazanova and Others v. Azerbaijan*.

⁷⁴ See *Nasibova v. Azerbaijan*, and *Ismayilov v. Azerbaijan*.

organization amounts to such interference⁷⁵. The Ministry of Justice justified its actions as delayed due to its heavy workload and argued that the lack of legal entity status did not prevent organization from conducting its activities. However, taking into account the importance of rights acquired upon the establishment of a legal entity in Azerbaijan, such as a right to open a bank account, to receive grants or to rent premises, inability to establish such an entity leads to deprivation of any meaning of the right to freedom of association.

State interference, however, can be justified under the terms provided in Article 11(2) of the ECHR, that is, if such interference is “prescribed by law” to pursue a legitimate aim when it is “necessary in a democratic society”. The ECtHR considering if such interference as delay in registration can be justified, recalled that national law must provide “a measure of legal protection against arbitrary interferences by public authorities” with the right to freedom of association.⁷⁶ Therefore, it must indicate the scope of discretion provided for public authorities in exercising their power, which was not the case in the current situation. It did not provide for such delays that lasted for several months as the Article 9 of Azerbaijani State Register Law set a ten-day time-limit for Ministry of Justice to decide on the state registration of organization. Furthermore, the ECtHR has found that the law did not provide the applicants with sufficient legal protection against the arbitrary actions of the Ministry of Justice and therefore did not meet the quality of law requirement. The law should establish possible consequences, moreover, it should provide for an automatic registration of a legal entity or any other legal consequences in the event the Ministry failed to take any action in a timely manner. In addition, the law did not specify a limit on the number of times the Ministry could return documents to the founders ‘with no action taken’ thus “enabling it, in addition to arbitrary delays in the examination of each separate registration request, to arbitrarily prolong the whole registration procedure without issuing a final decision by continuously finding new deficiencies in the registration documents and returning them to the founders for rectification.”⁷⁷

⁷⁵ See, for example, *Gorzelik and Others v. Poland*, para. 53.

⁷⁶ *Ibid.* 73, para.62.

⁷⁷ *Ibid.* 73, para.66.

Following the ECtHR decisions, amendments to Azerbaijani State Register Law prolonged the time-limit for registration of non-governmental organizations up to forty days providing that in exceptional cases, in need of further investigation, the period can be prolonged for additional thirty days⁷⁸. It established the mechanism of automatic acquisition of legal entity status of organizations if Ministry of Justice does not respond to their applications within defined time-limits⁷⁹. In addition, it included a requirement for the Ministry of Justice to define all shortcomings at the same time and present it to the applicant for further elimination⁸⁰ which the Ministry abused, as provided in the ECtHR cases mentioned above. Therefore, the law now provides for a more clear and foreseeable consequences and in that way seeks to ensure a higher quality of law.

Despite legal improvements in Azerbaijani State Register Law, extending time-limit for registration, the ECtHR in its latest case against Azerbaijan on the right to freedom of association, *Aliyev and Others v. Azerbaijan*, has once again come to the same conclusion that extensive delay to reply to a request to register association amounts to de facto refusal to register it.⁸¹ In this case the national court has justified significant delay of Ministry of Justice by stating that new law provisions on registration entered into force in the meantime of the process of applicant's application for registration and therefore applies to current situation. The ECtHR has dealt with the issue of retrospectivity of law and concluded that "mere entry into force of a new act [...] absolving the Ministry of Justice from responsibility for breaches of procedural requirements [...] is arbitrary and incompatible with the interests of justice and legal certainty"⁸². However, despite the ECtHR ruling, the decision has not been yet executed and the applicant organization has not been yet registered. Moreover, neither recent law amendments, nor the ECtHR decisions ensured better protection of the right to freedom of association to certain human rights NGOs critical to governmental activities. Recent examples show that authorities continue to abuse

⁷⁸ Article 8 of Azerbaijani State Register Law. It is important to mention that commercial institutions are to be registered within 5 days, as provided in Article 7-1 of the same law.

⁷⁹ *Ibid.*, Art. 8.5.

⁸⁰ *Ibid.*, Art. 8.3.

⁸¹ *Aliyev and Others v. Azerbaijan*, para. 33.

⁸² *Ibid.*, para. 39.

national provisions on NGO registration and do not respond to them in timely manner or provide ill-founded deficiencies which are disproportionate to the postponement of the registration⁸³. For example, the Election Monitoring and Democratic Studies Center was refused its registration for six times in the period of 2006-2008 on the basis of such disproportional grounds like a failure to inform about the change of legal address or a failure to include original receipt of fee payment for registration⁸⁴.

The latest Azerbaijani NGO Law amendments establish different regulation for foreign NGOs or foreigners engaged in NGOs activities in Azerbaijan. It provides that only those foreigners and stateless persons who permanently reside in Azerbaijan can establish NGOs.⁸⁵ This provision is in violation of international human rights obligations to which Azerbaijan is committed to as such a limitation clearly contradicts the right to freedom of association protected both by the ICCPR and the ECHR. Both human rights treaties clearly state that *everyone* has the right to freedom of association which can only be restricted on the grounds provided in their respective articles. Moreover, Article 1 of the ECHR provides an obligation to all its signatories to secure “to everyone within their jurisdiction” the rights ensured by the ECHR. Prohibition of establishment of NGOs to foreigners and stateless persons who do not permanently reside in Azerbaijan is a clear state interference with the right to freedom of association. Therefore, it is important to define if such a prohibition is necessary in a democratic society in order to serve certain aims, which is a burden of state to prove it. Based on the analysis of what a definition of necessity in democratic society encompasses⁸⁶, such a limitation most likely would not satisfy the requirement of the existence of a “pressing social need” for such a limitation and the state would fail to demonstrate its necessity “to avert a real danger”⁸⁷. In addition, it would be contrary to the main idea of existence of a democratic society which aims for respect and protection of human rights for everyone. As provided in the Siracusa Principles, democratic society refers to recognition and respect for internationally protected human rights, therefore, a

⁸³ Legal Education Society (2010).

⁸⁴ Election Monitoring and Democratic Studies Center, (2006).

⁸⁵ Article 9.4 of Azerbaijani NGO Law.

⁸⁶ Chapter 2.3.2 of the analysis.

⁸⁷ Ibid. para 42 and 43.

ground for such a restriction would be clearly contradictory.⁸⁸ In addition, Article 25.3 of the Constitution of Azerbaijan guarantees “equality of rights and liberties to everyone, irrespective of (...) nationality.”⁸⁹ As the Constitution, which promotes for equality of rights to everyone, possesses the highest legal power in Azerbaijan⁹⁰, the Azerbaijani NGO Law provision granting the right to freedom of association only to those foreigners and stateless persons who permanently reside in Azerbaijan can be challenged as being contradictory to the Constitution.

The new law also includes different rules on registration of foreign NGOs in Azerbaijan. The newly adopted provisions Azerbaijani NGO Law provides that foreign NGOs or those organizations that are permanently funded by foreign governments or foreign legal or physical entities shall be registered on the basis of international agreements concluded between the organization and the state authority”⁹¹. Such a provision entails discriminatory treatment of foreign NGOs and violates the right to freedom of association, which is granted to all individuals both by the ICCPR, the ECHR and the Constitution of Azerbaijan. In its case *Moscow Branch of the Salvation Army v. Russia*, where the applicant was refused re-registration of a foreign religious organization, the ECtHR has ruled that there is “no reasonable and objective justification for a difference in treatment of [...] foreign nationals as regards their ability to exercise the right to freedom of religion through participation in the life of organised religious communities”⁹². Therefore, the right to freedom of association can not be restricted on the basis of the nationality of applicants as it greatly contributes to pluralism in a democratic society that forms a part of international freedom of association standards.

Moreover, as the provision does not include any detailed indications on specification of such agreements and the requirements for foreign NGOs, it provides the Ministry of Justice as a competent authority with a broad discretion to interpret it and to define the

⁸⁸ Ibid. 24, para. 44.

⁸⁹ Ibid. 70

⁹⁰ Ibid. 70, Art. 147.

⁹¹ Ibid. 70, Article 16.2.

⁹² *Moscow Branch of the Salvation Army v. Russia*, para. 82.

requirements for agreements in a way restricting the right to freedom of association to respective NGOs. Effectiveness of this provision highly depends on its interpretation and practical implementation. Azerbaijani government has claimed that such a provision aims “at creating favourable conditions for their functioning, state registration, administration and regulation of relations with government institutions. [...] This norm aims at facilitating broader opportunities for operation of those organisations in Azerbaijan and ensuring additional legal guarantees for their co-operation with government agencies, local authorities, media and other organisations.”⁹³ However, such a rather vague and unclear regulation and its discriminate application to foreign NGOs might result in legal uncertainty of foreign NGOs in Azerbaijan, which might sometimes lead to refusal of registration.

Current national legislation regarding NGO registration in Azerbaijan cannot be considered contributing to respect for the right to freedom of association and to improvement of civil society environment in the country as it increases administrative burden of NGOs willing to register, provides for discriminatory regulation with regard to certain NGOs and therefore restricts their rights in relation to their registration.

3.1.3 Compulsory NGO registration and its consequences in Belarus

In Belarus, the legal climate for establishment and operation of NGOs is rather unfavourable. The Constitution of Belarus ensures everyone the right to freedom of association⁹⁴, whereas the Law on Public Associations (hereinafter - Belarusian NGO Law) provides for compulsory registration of non-governmental organizations and explicitly prohibits the activities of non-registered organizations⁹⁵. Belarusian NGO Law lists the requirements for registration of NGOs and provides the Ministry of Justice with the right to suspend registration for up to one month for elimination of any deficiencies occurred. It also lists the grounds for refusal of registration of the applicants, which include incorrigible violations of requirements for registration, non-compliance of relevant documents with

⁹³ Report of the CoE Commissioner for Human Rights (2010), para.2.

⁹⁴ Article 36.

⁹⁵ Belarusian Law on Public Associations, Article 7.

legal requirements and a failure to eliminate violations subject to suspension of registration. Examples of recent years show that independent human rights organizations are often confronted with systematic refusals of registration, which are widely based on minor mistakes or discrepancies of the required information. Organizations that are critical to governmental policy are often subject to arbitrary interpretation of the laws that regulate registration of non-governmental organizations. Several cases of constant refusals have been challenged in the UN Human Rights Committee, basing the complaints on legitimate restrictions provided in Article 22(2) of the ICCPR.⁹⁶

In 2000 the human rights organization Helsinki XXI that has been established with the purpose to assist in implementation of the UN Declaration on Human Rights Defenders in Belarus was rejected its registration by the Ministry of Justice due to its declared activity to defend the rights of third persons. In the view of the Ministry of Justice, it was contrary to the provisions of the UN Declaration on Human Rights Defenders, the Belarusian Constitution and other relevant laws.⁹⁷ The UN HRC, assessing the existence of a violation of the right to freedom of association of Helsinki XXI, referred to legitimate restrictions provided by Article 22(2) of the ICCPR. It considered that even if such restrictions as a prohibition to defend the rights of third persons was prescribed by national law, it is important for the state to prove the necessity of such restrictions in a democratic society. In other words, it is necessary to define why a refusal of registration would be based on defence of rights of third persons. Taking into account the consequences of refusal of the registration, i.e. the unlawfulness of activities of non-registered organization, the UN HRC concluded that such a decision of the Ministry of Justice does not meet the requirements provided in Article 22(2) of the ICCPR.⁹⁸

Another case refers to human rights NGO Nasha Viasna which was established by the former members of human rights NGO Viasna that was dissolved in violation of Article

⁹⁶ Belarus is not a party to the Convention, therefore, the refusal decisions cannot be brought to the ECHR. The ICCPR was ratified on 23 March 1976.

⁹⁷ *Boris Zvozskov v. Belarus*, para. 2.2.

⁹⁸ *Ibid.*, para.7.4.

22(2) of the ICCPR as stated by the UN HRC⁹⁹. Despite its decision, Belarus has not re-registered the organization, moreover, it did not register the new organization based on the fact that it is illegal in Belarus to use a name of dissolved organization. Moreover, it was twice refused of registration due to several minor deficiencies like incorrect indication of the place of work of one of the founders or incorrect name of the organization as the name was provided in capital letters. More importantly, the minor shortcomings were considered to constitute misleading information, therefore, providing the Ministry of Justice with the right to refuse registration. Despite the fact that Belarusian NGO Law provides for a possibility of one month to rectify corrigible deficiencies, which was the case of Viasna, during the court proceedings the Ministry of Justice itself affirmed that it has the right to provide an opportunity to correct shortcomings but there is no obligation to do it.¹⁰⁰ However, even though the Ministry of Justice was legally provided with such a right to refuse registration of organization, based on minor deficiencies, it does not prove the necessity of its interference with the right to freedom of association granted to the applicants by the ICCPR and the Constitution of Belarus. In addition, it must be bound by the principle of proportionality, that is, restrictions made must be proportionate to pursued aims and consequences. It must provide compelling reasons proving the legitimate aim to be pursued based on such restriction of the applicant's right. That being said, one must refer to legal consequences of refusal of registration of organization in Belarus, that is, illegality of activities of organization that is exercising its right to freedom of association guaranteed by the international human rights mechanism binding Belarus itself.

In Belarus, individuals engaged in activities of non-registered organizations are exposed to criminal sanctions. Article 193.1 of the Criminal Code of the Republic of Belarus provides for a fine or imprisonment from six months to two years for participation in such activities, which was introduced in 2005. This provision must be read in conjunction with Statement No.49 of the Ministry of Justice of Belarus, which extends application of registration requirements to different types of citizens' groups which had previously been allowed to

⁹⁹ *Aleksander Belyatsky v. Belarus*.

¹⁰⁰ *Public Human Rights Association "Nasha Viasna" v. the Ministry of Justice of Belarus*, p. 172.

function without registration as legal persons¹⁰¹. It encompasses both the organizations which were dissolved by decisions of national courts or suspended of their activities by responsible registration authorities and the ones which failed to get registered by state authorities. Both the founders and the actual participants engaged in such activities are subject to criminal responsibility. In 2006-2009 17 individuals were convicted of such a crime in Belarus, 5 of them were sentenced to 6-18 months of imprisonment.¹⁰² For example, 6 members of non-registered *Youth Front* organization actively engaged in election monitoring were charged under this article and sentenced to imprisonment.¹⁰³ The same article provides for a possibility of individuals engaged in the activities of non-registered organizations to be exempted from criminal responsibility if they voluntarily cease their activities and no other criminal elements are found in their actions¹⁰⁴. However, it refers to the right of discretion of the competent authorities, that is, national courts. In other words, they have a right but not an obligation to exempt an individual from criminal responsibility, which presupposes possible arbitrary application of the provision.

Prohibition of operation of NGOs that were refused their state registration and acquisition of legal entity status and criminalization as a result of continuation of their activities deprive individuals of their right to freedom of association ensured by Article 22 of the ICCPR to which Belarus is a state party and holds its international human rights obligations. However, if such a restriction is applied in Belarus, it must then meet the requirements provided by the ICCPR. Even though it meets the requirement of its establishment by national law, it does not meet the requirement of necessity for it in a democratic society. Deprivation of the right to freedom of association, based on the registration failure, which international community considers it to be an important element of genuine democracy and development of civil society in states, is contrary to basic substance of this right. Moreover, such a restriction must meet proportionality requirement,

¹⁰¹ Expert Opinion of the Conformity of Article 193-1 of the Criminal Code of the Republic of Belarus.

¹⁰² Human Rights Centre Viasna (2010) p.24.

¹⁰³ Campaign "STOP 193.1!" initiated by the Assembly of Pro-Democratic NGOs
<http://193.belngo.info/view.pl/english/practice>, <http://humanrightshouse.org/Articles/11881.html>

¹⁰⁴ It does not apply to persons who commit such acts in two years following the voluntary cessation of the acts.

which in this case is rather disproportionate, having in mind the practical impossibility of registration of certain human rights NGOs in Belarus. Therefore, criminal responsibility imposed to individuals engaged in activities of non-registered organizations in Belarus is contrary to its international human rights obligations established both in the ICCPR and its own Constitution.

3.1.4 Regulation on NGO registration in the Russian Federation

In the Russian Federation, its Constitution¹⁰⁵ ensures everyone the right to freedom of association while the Federal Law on Non-Profit Organizations (hereinafter – Russian NGO Law) and the Federal Law on Public Associations (hereinafter - Russian Associations Law) regulate the establishment and operation of NGOs in the Russian Federation, the latter going into more detailed regulation of public associations¹⁰⁶. The state is also bound by international human rights obligations provided in the ICCPR and the ECHR.¹⁰⁷ However, major law amendments, negatively affecting free operation of NGOs in the Russian Federation, were made in 2006 in order, as stated by the state authorities, to improve the registration process and the supervision of NGO activities, to ensure their transparency and protect national security in fighting terrorism and extremism¹⁰⁸. The goal itself is legitimate and widely acknowledged by the international community, however, some provisions are rather restrictive and discriminatory, including registration of NGOs in the Russian Federation.

Law amendments adopted in 2006 changed the registration procedure for NGOs operating in the Russian Federation. Prior to that, only public associations were subject to state registration in order to acquire the legal entity status, while other NGOs held obligation to notify the tax authorities under the same procedure as commercial entities. As of 2006,

¹⁰⁵ Article 30 of the Constitution of the Russian Federation.

¹⁰⁶ Public associations include public organisations, mass movements, public foundations, public institutions and others (see Art. 7 of the FLPA).

¹⁰⁷ The Russian Federation ratified the ICCPR and the Convention on 16 October 1973 and on 5 May 1998 respectively.

¹⁰⁸ Amendments adopted by the Federal Law of Russian Federation in 2006 concern both the Russian Association Law and the Russian NGO Law.

article 13¹ of Russian NGO Law provides for a state registration of all NGOs by the Federal Registration Service without referring to it as to a condition to acquire legal personality. Therefore, it is an obligatory requirement for all NGOs willing to operate in the Russian Federation, followed by the unduly high registration fee, compared to the one applied to commercial organizations¹⁰⁹. Moreover, the new law provides for a compulsory registration of changes of the constituent documents of the already-registered NGOs, such as charters, following the same procedure as for the registration of the NGOs themselves. As it was mentioned before, the purpose of the state can justify compulsory registration system in order to ensure the lawfulness of NGOs, but it cannot exceed the limits of the state authorities to interfere with the activities and management of NGOs. However, practice shows that based on their broadened discretion rights and legitimate requirements, registration authorities tend to abuse the right to freedom of association and interfere in its exercise, by taking into account the goals and work methods of NGOs when applying for registration. For example, in 2007 a Russian LGBT organization Rainbow Home was refused registration based on its aim to promote the rights of gays and lesbians. The authorities claimed that “the organisation's activity related to propaganda of non-traditional sexual orientation may undermine the security of the Russian society and state due to the following circumstances: disruption of the society's spiritual values; disruption of sovereignty and territorial integrity of the Russian Federation due to the decreasing number of its population”¹¹⁰. A denial of registration on such a ground is arbitrary and discriminatory as both the ECtHR and the UN HRC confirmed that a right to sexual orientation is included in the right to non-discrimination protected both by the ECHR and the ICCPR respectively.¹¹¹ Numerous cases show the prevailing trend of authorities to suppress establishment of human rights organizations in an arbitrary manner.¹¹²

¹⁰⁹ CoE Expert Council report on NGO Law (2009), para. 270.

¹¹⁰ Alternative NGO Report on Compliance of the Russian Federation with the ICCPR (2009). p.57.

¹¹¹ See, among others, *Alekseyev v. Russia* and *Toonen v. Australia*

¹¹² See, for example, case of public organization Velikaya Scyfia <http://scythia.hrworld.ru/materials.htm> [2010-10-12], public organization “Support for Social Responsibility and Security” and Saint Petersburg Peace Park public foundation <http://www.publicverdict.org/topics/nevidim/3200407.html> [2010-10-02]

The new law also lists the grounds for denial of state registration of NGOs where one of the grounds to refuse it is related to submission of required documents in a non-full manner or the documents contain unreliable information¹¹³. Such a provision empowers competent authorities with a broad right of discretion to interpret and apply such law. The law does not provide for a more detailed regulation on what information is held to be unreliable and does not limit state's discretionary powers. Moreover, in determining legitimate restrictions of the right to freedom of association, proportionality principle must be taken into account. In this case, the consequences of the restrictions applied, that is, denial of state registration, are rather disproportional, having in mind that lack of certain information is a corrigible deficiency that can be rectified. Even though an NGO denied of its registration is not deprived of a right to re-apply, however, it would be a new procedure with another applicable fee for registration. Therefore, such restrictions violate the right to freedom of association and are contrary to guarantees enshrined in the ECHR and the ICCPR that are obligatory to the Russian Federation.

The Russian NGO Law encompasses special regulation with regard to registration of foreign NGOs, in that way excluding them under discriminatory basis from the general application of NGO laws. Both Russian Associations Law and Russian NGO Law provide that only those foreign nationals and stateless persons who legally domicile in the Russian Federation may become the founders and the members of NGOs.¹¹⁴ As it was already concluded above, such a limitation contradicts both the ICCPR and the ECHR as both provide that everyone has the right to freedom of association which can only be restricted on the grounds provided in their respective articles. Such a clear interference by a state cannot be justified as a necessity in democratic society as non-discriminatory exercise of the right to freedom of association in itself contributes to promotion of such society. Moreover, the new law extends a list of grounds for denial of registration applied to branches of the foreign NGOs operating in the territory of the Russian Federation, including such a ground which refers to goals of NGOs being contradictory to or

¹¹³ Article 23 of the Russian Associations Law and Article 23¹ of the Russian NGO Law.

¹¹⁴ Article 19 of the Russian Associations Law and Article 15 of the Russian NGO Law.

threatening such national values as sovereignty, political independence, territorial integrity or national interests.¹¹⁵ Given the arbitrary interpretation of the provisions by the Russian authorities, it can be subject to state interference with the right to freedom of association exceeding limits given by the international standards.

The right to freedom of association is not necessarily violated by requirements to register or license the association, so long as these schemes do not impair the activities of an association. However, the tendency of recent years to adopt increasingly restrictive NGO laws in all three countries serves their interests to refuse registration of organizations that criticize their policy, report on human rights violations and call for fight against impunity of state authorities¹¹⁶. The practice to postpone registration of certain non-governmental organizations by delaying or refusing it due to identified recurrent deficiencies is prevailing and used most commonly as it results in absolute deprivation of the right to freedom of association. Refused of registration and therefore of legal personality organizations are deprived of all the rights that are essential to effective exercise of freedom of association. Despite the legal guarantees provided both by national law and international norms binding the states, national NGO laws leave a broad margin of discretion for registration authorities to arbitrarily decide on NGO registration. Moreover, in the case of Belarus, a person engaged in the activities of non-registered NGO and therefore exercising his or her right to freedom of association is subject to criminal prosecution, which undermines all fundamental principles of democratic society.

3.2 Supervisory control over activities of non-governmental organizations

The right to freedom of association covers not only the establishment of NGOs, but also the possibility for their members to achieve their objectives and pursue activities without undue state interference. The CoE Recommendations on NGOs provides a more detailed interpretation of the limits of states supervisory powers regarding exercise of the right to freedom of association. It provides that no external intervention in the operation of NGOs

¹¹⁵ Article 23¹ of the Russian NGO Law.

¹¹⁶ In addition to current NGO laws of Azerbaijan, Belarus and the Russian Federation, see the full text of the draft proposal of the Azerbaijani NGO Law <http://www.irfs.az/content/view/2436/lang.eng/> [2010-09-15]

is allowed unless in case of a serious breach of the legal requirements applicable to NGOs.¹¹⁷ In its case law the ECtHR considered that states may have a right to interfere – subject to the condition of proportionality – with freedom of association in the event of non-compliance by an association with reasonable legal formalities applying to its establishment, functioning or internal organizational structure.¹¹⁸ However, some countries intolerant of claims to rights tend to exceed these limits by seeking to control and interfere in the activities of NGOs. Therefore, once the NGOs are formally registered under the national registration procedures and granted legal entity status in order to be able to fully operate and enjoy their rights, another principal concern is the excessive authorization of the state authorities to control activities of NGOs that is subject to interference with the right to freedom of association ensured by international and regional human rights mechanisms.

3.2.1 Regulation on NGO control in Azerbaijan

In Azerbaijan, NGOs may pursue their activities under two conditions: it must not be prohibited by national law and it cannot be contradictory with their objectives.¹¹⁹ Since June 2009, when major changes to Azerbaijani NGO Law, affecting independent operation of NGOs, were adopted, competent state authorities are entitled with unlimited discretion right to monitor and pursue supervision over compliance of NGO activities with national legislation.¹²⁰ The law does not provide for any guidance or criteria on application of such rights of state authorities and therefore is subject to an overly broad discretion right over control of NGOs activities without any established limitations which may lead to a clear interference with their right to freedom of association, including their internal affairs. Moreover, the Azerbaijani NGO Law includes a provision on responsibility of NGOs in case of violation of requirements related to their activities, providing for a liquidation of respective NGOs as the only possible sanction to respond to such violations. It follows as a consequence of two warnings to eliminate the violations received by state authorities

¹¹⁷ CoE Committee of Ministers Recommendation on NGOs, para.70.

¹¹⁸ *Ertan and Others v. Turkey*, para. 54.

¹¹⁹ Article 22.1 of Azerbaijani NGO Law.

¹²⁰ Article 29.5 of Azerbaijani NGO Law.

within one year. The law itself providing for response to law violations committed by NGOs does not contradict international human rights standards. However, the law does not provide for precise criteria of what kind of violations are subject to the warnings which might be followed by a liquidation of NGOs as the only final measure, therefore, NGOs are not protected from arbitrary application of such provisions by the state authorities.

The ECtHR has questioned the legality of such a regulation, based on criteria set forth to define permissible restrictions of the right to freedom of association. In its case *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*¹²¹ the applicants have challenged the legality of dissolution of the Azerbaijani NGO *Tebieti Mühafize Cemiyeti*, based on the violations of the rules provided in its charter, such as absence of assembly of members every five years or improper way of informing its branches on their participation in its assemblies. The ECtHR agreed that dissolution of the NGO constituted interference with the right to freedom of association and followed the requirements set forth in Article 11 (2) of the ECHR in order to define its legality: it must be proscribed by law, pursue legitimate aims and be necessary in a democratic society. Despite the fact that such interference was proscribed by the Azerbaijani NGO Law, the ECtHR concluded that respective law did not meet the requirement of quality of law provided by the international human rights standards. It ruled that the provision providing for the dissolution of the NGOs is rather too general and is subject to extensive interpretation. It provides the Ministry of Justice with a “rather wide discretion to intervene in any matter related to an association’s existence”, therefore, it becomes difficult for NGOs to foresee which actions might be subject to the violations qualified as incompatible with the respective law provisions.¹²² Moreover, the ECtHR provided that dissolution is “the most drastic sanction possible in respect of an association and, as such, should be applied only in exceptional circumstances of very serious misconduct”¹²³. In addition, the ECtHR assessed whether the requirement of necessity in a democratic society, including the respect for the principle of proportionality, was met, that is, whether the violations of the law can justify the sanction. Having in mind

¹²¹ *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*.

¹²² *Ibid.*, para.62.

¹²³ *Ibid.*, para.63.

that only compelling and convincing reasons can justify restrictions and state interference must correspond to a “pressing social need”¹²⁴, the ECtHR considered that “the nature and severity of the sanction imposed are factors to be taken into account when assessing the proportionality of the interference”. As dissolution was the only applicable sanction, it concluded that “a mere failure to respect certain legal requirements on internal management of NGOs cannot be considered such serious misconduct as to warrant outright dissolution”¹²⁵. Therefore, Article 31.4, providing for a dissolution as the only possible sanction available under the law without any precise criteria for types of violations that are subject to the application of such provisions, does not meet the requirement of quality of law, does not prove to be necessary in a democratic society in a violation of the principle of proportionality and therefore is in contradiction with the right to freedom of association protected by the Article 11 of the ECHR.

The current Azerbaijani NGO Law, providing for unrestricted supervisory control of NGOs by state authorities without any minimum safeguards or protection clauses for NGOs, is not in compliance with international human rights standards as it allows for unrestricted external interference in NGOs activities. As the protection of the right to freedom of association extends to all activities of NGOs and not only to a right to establish NGO, every case of state interference with the right must satisfy requirements set forth by Article 11(2) of the ECHR. The same requirement applies to national provisions on dissolution of NGOs. As the Azerbaijani NGO Law does not differentiate the seriousness of misconduct in the event of violation of their bylaws or the national legislation, all NGOs are subject to undifferentiated and discriminatory application of the only established sanction which is supposed to be applied in exceptional circumstances only, as provided under international human rights standards. Therefore, such a restrictive regulation is not in compliance with international obligations of Azerbaijan to respect and promote the right to freedom of association.

¹²⁴ See Chapter 2.3.2.

¹²⁵ Ibid.121, para.82.

3.2.2 The situation in the Russian Federation

In the Russian Federation, both the Russian Associations Law and the Russian NGO Law include provisions on a certain level of the supervision and control over activities of NGOs operating in the Russian Federation by various state authorities¹²⁶. Both laws provide that registering body has a right to exercise control over compliance of activities of NGOs with their statutory goals, including summoning the documents of NGOs containing resolution on their activities, and participating in any events organized by NGOs. Moreover, since 2006 when new law amendments were adopted, the Russian NGO Law establishes an obligation for NGOs to provide “documents containing an account of its activities, composition of its governing bodies, documentation accounting for the financial expenditures and the use of other resources including those obtained from international and foreign organizations, foreign nationals and stateless persons”.¹²⁷ Legal establishment of such provisions without providing any limits or procedural protection means for NGOs empowers state authorities with broad discretion right to interfere in the activities of NGOs. It provides them with a legitimate right to request for any internal documents of NGOs, to attend their events without any restrictions and to assess their compliance with the statutory goals. Certainly, as affirmed by the ECtHR, the state has a right to ensure that NGOs activities comply with rules set out in national legislation under the condition that it meets requirements set out to justify such interference¹²⁸. The CoE Recommendations on NGOs provide that information with regard to NGOs activities can only be requested “where there has been a failure to comply with reporting requirements or where there are reasonable grounds to suspect that serious breaches of the law”¹²⁹. However, current powers are too broad and overly excessive and are likely incompatible with the state’s negative obligation to refrain from arbitrary interference with the right to freedom of association and with international standards providing for certain requirements to be met, particularly principle of proportionality, in order to justify such interference.

¹²⁶ Article 38 of the Russian Associations Law and Article 32 of the Russian NGO Law.

¹²⁷ *Ibid.*, Article 32 (3).

¹²⁸ *Ibid.*13.

¹²⁹ *Ibid.*117, para.68.

As a consequence of the above mentioned powers, new law provisions establish that the failure to respond to state requirements, such as provision of certain documents, may result in warning or in a court claim by the state authority for the liquidation of respective NGO. The practice shows that such a right is broadly exercised by the authorities. As of 1 January 2009, over 2000 NGOs were excluded from the state registry.¹³⁰ For example, Russian NGO “Sodeystvie” protecting refugee rights was liquidated due to its failure to notify location of its executive body and to provide its report¹³¹. It clearly provides the competent authorities with possibility of arbitrary application of the laws, especially having in mind hostility of Russian state authorities towards human rights NGOs that are critical of governmental policies. Such a regulation is challenging in terms of international human rights standards and the principle of proportionality which must be respected in terms of application of restrictions on the right to freedom of association as it allows for interference in the internal affairs of NGOs without weighty reasons. As the issue of dissolution of NGOs is a part of the right to freedom of association, protection granted by Article 11 of the ECHR extends to it as well, therefore, requirements to justify restrictions, that is, dissolution, must be met. As already stated in the case of Azerbaijan, dissolution as the only sanction for NGOs violations is not in compliance with international human rights standards. Having in mind the scope of state interference and the consequences of the failure to fulfil the obligations provided by law, it clearly contradicts the international freedom of association standards which provide that the principle of proportionality must be respected in both framing and applying sanctions for non-compliance with a particular requirement.¹³²

The Russian national legislation provides for stricter regulation with regard to supervision of the foreign NGOs operating in the Russian Federation. Registration authorities are entitled with additional supervisory power to ban implementation of a certain program by the foreign NGOs in the territory of the Russian Federation.¹³³ As it does not list the

¹³⁰ Ibid. 110, p. 59.

¹³¹ Ibid.,

¹³² Ibid. 117, para.128.

¹³³ Ibid. 126.

grounds or provide any precise criteria for application of this right, the Russian state authorities are entitled with a rather excessive discretion right to decide upon activities of foreign NGOs and pursue a complete control. A right of state authorities to terminate operational programs of foreign NGOs is a clear interference with NGOs internal affairs and the overall right to freedom of association which can only be justified by meeting requirements set out in Article 11 of the ECHR. Under such regulation foreign NGOs will lose the freedom to organize their own activities, and as it will not be voluntary, it will form a violation of the right to freedom of association¹³⁴.

Moreover, in case of non-compliance with either banning on their programs or any other requirements, like the provision of any documents, foreign NGOs might be excluded from the state registry at sole discretion of the state registration authorities, without referring cases to the court¹³⁵. A one time failure to provide required information is sufficient to initiate exclusion. As it does not provide for any criteria on how to determine NGO's incompatibility with the requirements and what can constitute a violation subject to the application of such sanction is rather discretionary. Moreover, it challenges the respect for principle of proportionality enshrined in Article 11 of the ECHR and Article 22 of the ICCPR as part of the requirement of being "necessary in a democratic society" to be met in order to justify restrictions applied to a right of freedom of association. Having in mind its indiscriminate application, including minor administrative violations, and the following consequences, that is, the organization's inability to function, such a provision is in violation with the principle. Moreover, as it is only applied to foreign NGOs, they are placed in less favourable position than the national NGOs and discriminated in terms of their right to associate, ensured by the ICCPR, the ECHR and the Constitution of the Russian Federation which all entitle everyone with the right to freedom of association. In addition, foreign NGOs are discriminated in terms of a state body deciding on the dissolution of organization. In case of foreign NGOs, it is the registration authority that

¹³⁴ Jeremy McBride (2005), p. 58.

¹³⁵ Art. 32 (8) of the Russian NGO Law.

orders the decision for dissolution without referring to a court while under international human standards termination of an NGO should be ordered only by a court.¹³⁶

Both the Azerbaijani and the Russian NGO Laws significantly broaden supervisory powers of registration authorities to excessively control NGOs activities and apply punitive measures against NGOs, without providing clear criteria on when such powers should be exercised. The ECtHR concluded that national laws must "afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the ECHR. It would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the ECHR, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise".¹³⁷ Having in mind the practice of the state authorities of both countries to suppress organizations that are critical towards the governmental policy and the consequences of failure to comply with the requirements provided in the laws, such excessive interference of state authorities violates the right to freedom of association ensured both by the ICCPR and the ECHR. In order to comply with their international human rights obligations, states must clearly define the grounds for dissolution and apply the sanctions that are proportionate to legitimate aim to be achieved. Moreover, it must respect the principle of non-discrimination and ensure that foreign NGOs should be subject to the same rules that apply to national NGOs¹³⁸.

3.3 Restrictions on access to funding and its utilization

As a principle, NGOs are not established with the aim of making profit, however, funding is an indispensable condition for NGOs to operate and pursue their activities. Neither the ICCPR, nor the ECHR do not expressly provide NGOs with a right to funding, neither deprive them of a right to engage in economic activities to serve their purposes. However, UN Declaration on Human Rights Defenders serves as a stronger legal background for a right to funding as it establishes it as an individual right of human rights defenders,

¹³⁶ Ibid. 117, Para.74.

¹³⁷ Ibid. 121, para.57.

¹³⁸ Ibid. 65, para.126.

independent of any other rights. Article 13 states that “everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms [...]”. The Special Rapporteur on human rights defenders has expressed her support highlighting that access to funding to human right organizations is an “inherent element of the right to freedom of association”.¹³⁹ The same provision includes a reference to Article 3 of the Declaration which provides for a state obligation to ensure domestic law regulating human rights, enshrined in Declaration, including access to funding by NGOs, to be in compliance with its international obligations. Therefore, all three parts of access to funding – solicit, receive and utilize – are indispensable of full exercise of the right to freedom of association.

The Fundamental Principles on NGOs set out a similar but more specific standard than the Declaration: NGOs may receive funding from “another country, multilateral agencies or an institutional or individual donor”¹⁴⁰ and can be used for pursuance of their activities. In addition, NGOs “may engage in any lawful economic, business or commercial activities in order to support its non-profit-making activities”¹⁴¹. It sets out a condition of restrictive use of profits gained by NGOs to pursuance of their objectives and activities.

In many countries the issue of NGO access to funding is controversial as it is a very efficient way to disrupt their activities and make them cease their existence. Governments establish legal restrictions and provide justifications, such as prevention of money-laundering or support of terrorism, as such objectives are internationally acceptable.¹⁴²

3.3.1 Access to funding in Azerbaijan

In Azerbaijan, provision, receipt and utilization of grants to NGOs is regulated by the Law of the Republic of Azerbaijan on Grants (hereinafter - the Azerbaijani Law on Grants). It

¹³⁹ Ibid. 65, para. 91.

¹⁴⁰ Ibid. 64, para.50.

¹⁴¹ Ibid. 64, para.13.

¹⁴² The Special Rapporteur on human rights defenders expressed her concern on access to funding in her report on freedom of association (2009), para.94.

provides for a possibility of NGOs to receive grants from Azerbaijani state authorities, legal entities and individual persons, as well as international organizations, foreign governments, public organizations, individuals and other foreign donors. It sets out a clear requirement to conclude a written agreement between the donor and the recipient which serves as a legal ground to receive and utilize funding. In addition, Article 4 of the Azerbaijani Law on Grants provides for a compulsory state registration of grant agreements concluded by Azerbaijani legal entities and individuals as donors.

On 25 December 2009 the Azerbaijani President adopted a decree which introduced a new requirement for NGOs to register all grant agreements with the Ministry of Justice before making any transactions of granted funding. It sets out a clear prohibition on NGOs to utilize the funding before its registration. The new regulation is followed by amendments to Administrative Code of the Republic of Azerbaijan, which increases fines for failure to submit a grant agreement from 50AZN to 1000-2500AZN.¹⁴³ In addition, the latest amendments to Azerbaijani NGO Law oblige the NGOs to submit their annual financial reports without detailing the range of information to be included in it. Moreover, new provisions provide for a responsibility of NGO in case of failure to submit reports.¹⁴⁴

More restrictive regulation of receipt and utilization of funding complements the state's discretion right to pursue overall control of NGOs activities in Azerbaijan in a much broader manner than provided by the Fundamental Principles on NGOs which state that NGOs should submit their annual reports to a "designated supervising body where any taxation privileges or other public support has been granted to the NGOs"¹⁴⁵. In order to ensure transparency and accountability of utilization of the funding granted by the state authorities, such a requirement is justifiable and recognizable by international human rights standards. However, as in the case of Azerbaijan it applies to all grant agreements, received from either national or foreign donors without any specific regulatory goal established in the law, it provides the Ministry of Justice with a broader legal right to supervise all

¹⁴³ Art. 223-1 of the Administrative Code of the Republic of Azerbaijan.

¹⁴⁴ Azerbaijani NGO law, Article 29.4 and Article 31.6.

¹⁴⁵ Ibid. 64, para.60.

funding received by NGOs in Azerbaijan and may serve as a tool to strengthen state control over NGOs. As provided by the Fundamental Principles on NGOs, reporting requirements must be tempered by other obligations relating to respect for privacy and confidentiality. Donor's desire to remain anonymous must be observed, however, it sets out some limits for it, such as the need to combat black market money transfers.¹⁴⁶ In any case, it must observe the principle of proportionality - one of requirements to be met in order to justify restrictions on the right to freedom of association. Moreover, a question of legality of heavily increased fine for a failure to register a grant agreement, compared to previous regulation, should be challenged, having in mind necessity of the restriction on freedom of association and its ability to justify the sanction. In addition, due to limited funding of Azerbaijani NGOs, application of such fines might lead to termination of many NGOs, which would be contrary to international state's obligation to promote respect for the right to freedom of association.

The new regulation on failure to submit annual financial reports is rather unclear and may be subject to arbitrary application as it does not provide for precise sanctions and refers to application of relevant legislation of Azerbaijan. As well as in the case of supervisory control over NGO activities in Azerbaijan discussed above, the provision might be subject to abusive interpretation leading to dissolution of NGOs as a consequence of failure to meet requirements set out in national legislation regulating NGOs operation in Azerbaijan which is the only possible sanction to be applied.¹⁴⁷ Its indiscriminate application and severe consequences irrespective of the violation committed by NGOs is contrary to principle of proportionality.

As a right to access funding forms a fundamental part of the right to freedom of association, its severe restrictions in Azerbaijani law deprive NGOs of ability to pursue their objectives and activities and therefore of a possibility to exercise their right to freedom of association guaranteed both by the ICCPR, nor the ECHR which have a binding

¹⁴⁶ Ibid.64, para. 67.

¹⁴⁷ See Chapter 3.2.

effect to Azerbaijan. Therefore, overly burdensome requirements and excessive control over funding of NGOs in Azerbaijan may lead to restrictions of freedom of association exceeding limits provided by international human rights standards. The Commissioner for Human Rights of the CoE expressed his concern over a rather restrictive regulation of NGO funding in Azerbaijan for “attempts to control activities of NGOs in an unduly strict manner”.¹⁴⁸ Therefore, in order to meet its international obligations, Azerbaijan must facilitate access to and utilization of funding to NGOs which may be subject to restrictions in the interest of transparency when granted by state authorities and set out clear grounds for broader interference to justify its legitimate aims.

3.3.2 NGO funding in the Russian Federation

In the Russian Federation, recent amendments to national legislation, adopted in 2006, provide for a rather strict regulation for funding received from foreign donors. The Russian Government adopted a decree which served as a legal basis for the government to establish a list of international organizations which can be subject to a tax-exempt policy only upon approval by the state.¹⁴⁹ It drastically decreased the number of international organizations enjoying tax-exempt with regard to their grants. The decree failed to establish concrete criteria upon which certain international organization can be included in the list. Such a discriminatory regulation with regard to grants received from different donors may lead to arbitrary application and is subject to a state’s discretion to decide on international organizations that would be exempted from taxation in terms of their grants to NGOs. It does not directly deprive NGOs from receiving funding from other foreign international organizations but it interferes with a right of Russian NGOs to access funding on non-discriminatory basis and therefore violates their right to freedom of association.

The Russian NGO Law provides for a separate restrictive regulation over utilization of the funding received by foreign NGOs operating in the Russian Federation. It establishes a requirement for foreign NGOs to submit regular reports on their financial resources and

¹⁴⁸ Ibid. 93, para. 46.

¹⁴⁹ Decree of the Government of the Russian Federation on the list of international organizations whose grants extended to the Russian tax-payers shall be exempt from the taxation.

their utilization, as well as their allocation to physical persons or legal entities. The law enables competent state authorities to ban a transfer of NGOs resources to certain recipients for the purposes of protecting the Constitutional system, morality, rights and interest of other persons and the national security.¹⁵⁰ The state authorities justify such interference by the need to ensure transparency and accountability of foreign NGOs on the use of their resources, to avoid money laundering and tax evasion and to prevent their interference in the state affairs.¹⁵¹ Fundamental Principles on NGOs allow for certain regulation on receiving and utilizing funding, however, it must meet the principle of proportionality, in other words, there must be a legitimate aim to be pursued in order to justify restrictions on a right to funding. Moreover, it provides that foreign and national funding should be subject to the same rules, in particular as regards the possible uses of the funds and reporting requirements.¹⁵² Therefore, having in mind the negative perception of foreign NGOs by the Russian state authorities, often considering them as a threat to national security and subject to state interference¹⁵³, such discriminatory regulation provides a state with a discretion to selectively apply respective provisions and therefore place excessive control over the funding of foreign NGOs. Moreover, a right to ban allocation of funding to certain recipients is a clear state interference with internal NGOs affairs, which deprive them of exercising their voluntary independent right to freedom of association.

In case of failure to meet the requirements in a timely manner the foreign NGOs may be excluded from the register of foreign NGOs which means that they would be deprived of all the rights that are essential to existence and effective operation of NGOs in the Russian Federation.¹⁵⁴ Exclusion of foreign NGOs from state register is equal to their dissolution as it deprives them of the fundamental rights in the Russian Federation. As stated by the ECtHR, dissolution as a sanction with regard to exercise of freedom of association should be applied only as a last-resort sanction for very serious misconduct of NGOs.¹⁵⁵ Having in

¹⁵⁰ Art. 32.4 (13) of the Russian NGO Law.

¹⁵¹ Bogoroditskii Aleksej (2010).

¹⁵² Ibid., 64, para.57.

¹⁵³ Ibid. 151, p. 4.

¹⁵⁴ Art. 32.4 (8) of the Russian NGO Law.

¹⁵⁵ See Chapter 3.2.

mind that exclusion from state register is the only sanction provided by the law in terms of funding-related violations, regardless of the seriousness of violations, such a provision does not meet the principle of proportionality and therefore violates the right to freedom of association ensured by Article 11 of the ECHR.

As funding is a vital mean for NGOs to pursue their objective and activities, restrictive regulation on a right to access funding exceeding limits provided by international human rights standards deprives NGOs of ability to pursue their objectives and activities independently and fails to ensure effective exercise of the right to freedom of association. Restrictions on a right to funding are subject to the same requirements provided both by the ICCPR and the ECHR in order to justify their legality as international protection of freedom of association extends to it on the same terms. Moreover, discriminatory regulation with regard to funding-related issues of foreign NGOs placing more restrictions and burdensome requirements on them and their activities is contrary to the right to freedom of association ensured on a non-discriminatory basis. Foreign NGOs are placed in less favourable position than national NGOs and discriminated in terms of their right to associate, ensured by the ICCPR, the ECHR and by the state constitutions, which all entitle everyone with such a right.

3.4 Impact of counter-terrorism measures on freedom of association: the case of the Russian Federation

In the wake of 11 September 2001 and the following terrorist acts, it was unanimously agreed by international community on the need to take additional measures and to adopt stricter laws on counter-terrorism and anti-extremism in order to protect both national and international security. Application of such laws often results in human rights restrictions or derogation from them as a necessary mean to combat terrorism. Therefore, national security as a legitimate aim to restrict human rights has been most challenged lately. In some authoritarian countries, however, which are ignorant to criticism and claims of rights, particularly the Russian Federation, the limits are often exceeded and such laws are justified by them as a legitimate mean to restrict the rights of those claiming for

democracy, respect of human rights and fight against impunity¹⁵⁶. As human right NGOs are actively engaged in such activities, the right to freedom of association is often challenged by laws protecting national security.

In the Russian Federation, the Law on Counteraction of Extremist Activity (hereinafter – the Russian Extremism Law)¹⁵⁷ was adopted as a response to increasing danger to its national security and a need to ensure stricter control over terrorist activities in the country. Its purpose and objectives serve legitimate aims accepted by the international community, however, vague definition of extremist activities established in the law entitles state authorities with a broad discretion right to interpret which acts may qualify for extremist activities. Article 1 of the Russian Extremism Law provides a list of rather broad range activities of public associations or natural persons amounting to extremist activities and includes such acts that aim at forcible change of constitutional system of a country, seizure or acquisition of peremptory powers, exercise of terrorist activity, excitation of racial, national or religious strife, as well as social hatred associated with violence or calls for violence. The latter act has been most commonly applied with regard to human rights NGOs claiming for justice and publicizing cases of human right violations. A number of active human rights NGOs resulted in state accusations of instigating alleged social hatred for their critics of state policy. For example, the head of Russian – Chechen Friendship Society, engaged in coverage of human rights violations in North Caucasus for a number of years, has been convicted of extremist charges for alleged incitement to ethnic hatred by publishing anti-war appeals of the president of Chechen Republic of Ichkeria and the whole

¹⁵⁶ The analysis will focus on situation in the Russian Federation as freedom of association is challenged by the arbitrary application of anti-extremism law on extensive basis there; however, it is more and more identified in other countries within the scope of this analysis.

Overall concern on excessive application of counter-terrorism measures with regard to work of human rights defenders is extensively expressed in soft law. See, for example:

- UN General Assembly resolution A/RES/64/163, para. 6.

- CoE Expert Council on NGO Law. para. 266.

- Ibid., Doc. A/61/267, para. 11.

- European Commission for Democracy through Law, Report on counter-terrorism measures and human rights, para.30.

¹⁵⁷ Federal Law on the Counteraction of Extremist Activity of the Russian Federation.

organization was dissolved as it did not dissociate from such activities¹⁵⁸. Such arbitrary application of a rather vague definition of extremist activity may often lead to dissolution of the whole organization as the Russian NGO Law provides that persons convicted of extremist crimes cannot be founders or members of an NGO¹⁵⁹. Moreover, Article 15 of the Russian Extremism Law establishes a requirement for NGOs to declare its disagreement with such actions and their failure results in qualification of extremism in their activity.

Challenging illegitimacy of restrictions on freedom of association based on the interests of countering extremism is rather controversial. Certainly, general requirements, such as prescription by law, necessity in a democratic society and legitimate aims, ensured by international human rights standards, play a significant role in defining legitimacy of restrictions. Question of proportionality is a key question in striking balance between national security imperatives and concerns for civil liberties and human rights¹⁶⁰. It means that adopted measures must justify the aims achieved where such interference should not be arbitrary and should not impair the right more than it is necessary under certain circumstances. However, current one-sided focus on security concerns both nationally and on international level resulted in a situation that is favourable to abuses and arbitrary interpretation and application of these restrictions. First of all, the lack of clear universal definition of terrorism on international level provides the state with a wide discretion right to define its scope and application limits¹⁶¹. Secondly, the ECtHR in numerous cases affirmed and granted national authorities a “wide margin of appreciation” with regard to the existence and interpretation of the threat of terrorism, which means that it is government rather than the court that is granted a prerogative to define what constitutes public emergency and therefore to take certain measures to fight it¹⁶². Undoubtedly, the ECtHR referred to legitimate, proportional and necessary interpretation, however, in such countries like the Russian Federation, whose policy is rather detrimental to favorable

¹⁵⁸ NGO report on new Russian NGO Legislation (2007), p. 13.

¹⁵⁹ Russian NGO Law, Art. 15.

¹⁶⁰ Michaelsen Chistopher (2010).

¹⁶¹ The analysis will not discuss the issue of definition of terrorism on international level as, based on its complexity, it is subject to a separate wide-scope analysis.

¹⁶² Ibid.54, para.78.

operation of human rights organizations, such a right is subject to abusive and arbitrary application. Therefore, due to absence of clear international standards and lack of the ECtHR case law with regard to restrictions of freedom of association applied under the guise of combating terrorism, as well as due to vague definition of extremism established in the Russian law, it is rather difficult to challenge illegality of actions of the Russian authorities taken against human rights organizations. However, the HRC expressed the need for more precise definition of extremist activity in the Russian Extremism Law in order to avoid its arbitrary application and ensure the rights of individuals and associations¹⁶³. Moreover, following developments in soft law such as the Siracusa Principles suggest that the discretion left to governments should be re-considered and adjusted¹⁶⁴. Certainly, state has a right to take certain measures in order to avoid terror and ensure security of state and its people. However, the bottom line of limitation should be based on universally accepted standard that a right itself cannot be deprived of its essence. National security and human rights cannot be placed in a rather competitive situation as “they are each other’s precondition”.¹⁶⁵

¹⁶³Concluding observations of the UN HRC on the Russian Federation (2003), para. 20.

¹⁶⁴ Ibid. 160.

¹⁶⁵ European Commission for Democracy through Law, Opinion on the protection of human rights in emergency situations (2006), para.8.

4 CONCLUSIONS

For human rights NGOs to work effectively they need enabling and facilitating legal and policy environment. Based on the right to freedom of association guaranteed by international human rights standards, they are enabled to exist and exercise their activities. Analysis of the legal NGO environment in Azerbaijan, Belarus and the Russian Federation shows that the efficiency of NGOs is much dependent on the state policy where they operate. Acceptance of, and commitment to the fundamental nature of the right of individuals to organize freely to work for human rights has yet to be fully realized.

Respective states tend to adopt restrictive NGO laws, as well as to leave a space for their arbitrary application in order to suppress organizations whose work is unfavourable to their policy and who comment on sensitive areas like injustice, human rights violations or impunity of state officials for their committed violations. Lack of a clearly established margin of discretion of state authorities enable governments to excessively interfere with the right to freedom of association and suppress human rights NGO.

This analysis of state practice in the three respective countries supported the conclusion that state authorities aiming to suppress human rights NGOs chose to adopt strict regulation on NGO **establishment and their registration**. Prevailing trend of state authorities to suppress the establishment of human rights NGOs in an arbitrary manner has been identified. States arbitrary application of legal provisions on registration has most severe impact on exercise of the right to freedom of association as it often results in delay of registration or its refusal based on minor mistakes or discrepancies of the required information and therefore in deprivation of essential rights. In Belarus, continuation of activities by individuals in NGOs refused of their registration may result in **criminal responsibility**, which means that individuals are punished for exercising their human rights. Such restrictive arbitrary regulation does not meet the requirements set forth by international human rights law, particularly the principle of proportionality where balance between the intensity of the restrictions and the need must be ensured.

Another burden for the NGOs is to meet the requirements related to **state control over their activities**, resulting in heavy restrictions on the right to freedom of association. National NGO law provides state authorities with excessive discretion right to monitor and pursue supervision over compliance of NGO activities or even ban certain actions without any precise criteria on when such powers should be exercised. Under such circumstances the right to freedom of association is deprived of its basic essence as NGOs lose their fundamental right to operate independently. As a consequence, such interference often results in liquidation of respective NGOs as it is the only possible sanction under national laws. Due to its indiscriminate application irrespective of the seriousness of violations and severe consequences, such regulation is considered contrary to principle of proportionality and therefore a breach of international human rights law.

The same obstacles apply for NGOs who seek funding to pursue their activities. In the countries studied there is little domestic support for human rights activities, and NGOs may require foreign funding to survive. However, these states view it as a threat to its legitimacy or its national security, particularly in the case of foreign funding. Therefore, they adopt **legal restrictions on funding** from abroad. Regulations result in exercise of the discretionary right of states to interfere in such affairs and place unclear burdensome financial reporting requirements for NGOs, which may result in their dissolution. Severe restrictions over funding deprive NGOs of possibility to pursue their activities and therefore of effective exercise of their right to freedom of association.

Recent **counter-terrorism legislation**, allowing for a wide scope of restrictions on human rights in order to ensure endangered national security, has become a tool for authoritarian countries to set up stricter regulation on establishment and operation of human rights NGOs. International law provides for certain degree of state control over the work of NGOs in order to ensure their legitimacy and prevent terror. However, due to a still evolving concept of terrorism and a rather vague definition both nationally and internationally, such regulation is subject to arbitrary application with the aim to eliminate

human rights NGOs critical to state policy. It contradicts states obligation to respect the right to freedom of association.

This analysis shows that effective protection of the right is rather dependent on national implementation of international human rights standards. However, there is still little specific regulation on NGOs at an international level and rather sparse ECtHR case law on their interpretation that is legally binding states, within whose territories NGOs are established. International standards should provide clear and precise requirements and limits for state interference with the right to freedom of association of binding effect in order to leave states with the minimum possible discretion right. Developments not envisaged upon the time when respective human rights treaties were drafted may require their progressive interpretation in order to ensure that the spirit and the letter of the treaties are upheld.

In turn, national NGO laws must stipulate more specific regulatory measures on exercise of freedom of association, which would articulate clear requirements for NGO registration, operation and funding. It must set clear limits of permissible restrictions, ensure their application on a transparent and non-discriminatory manner, respect for the principle of proportionality, accompanied by appropriate procedural guarantees that ensure due process and judicial review in case of misapplication of the laws.

Restrictive NGO laws and their arbitrary application discourage NGOs from conducting their human rights activities and enhancing democracy and social development in the countries as it creates a climate of uncertainty and fear. Unfettered state power to refuse NGOs registration or to dissolve them for minor discrepancies, as well as interfere in their activities and put financial constraints severely impairs existence of an independent civil society and weakens the respect for human rights. As a consequence, severe human rights violations stay unrevealed and receive less international pressure and alert. This way states enjoy freedom to abuse human rights to serve their interests and stay unpunished for their failure to fulfil their obligations set forth in international human rights instruments.

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