



INTERNATIONAL  
COMMISSION  
OF JURISTS

UNITED NATIONS HUMAN RIGHTS COUNCIL

**Special Rapporteur on the rights to freedom of peaceful assembly and of  
association**

**INTERNATIONAL COMMISSION OF JURISTS (ICJ) RESPONSE TO THE  
QUESTIONNAIRE ON BEST PRACTICES THAT PROMOTE AND PROTECT THE  
RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION**

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## ICJ response to the questionnaire on best practices that promote and protect the rights to freedom of peaceful assembly and of association

1. The International Commission of Jurists (ICJ) welcomes the opportunity to respond to the questionnaire on best practices prepared by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, issued to States, national human rights institutions, non-governmental organisations and regional human rights mechanisms with a view to annexing responses to the Special Rapporteur's report to the Human Rights Council for consideration at its 20<sup>th</sup> regular session in June 2012.

2. This response does not respond to all questions in the questionnaire, nor does it purport to address questions affecting all countries. It is instead focussed on three areas: (1) addressing global issues relevant to practices affecting the rights of peaceful assembly and association by LGBT individuals and organisations; (2) examining issues relevant to Myanmar's new law on peaceful protest; and (3) answering questions relevant to the law and practice in South Africa. The ICJ does not express any views concerning the remaining questions posed by the Special Rapporteur, or concerning countries and issues outside the scope of this document.

### PART I:

#### PRACTICES AFFECTING PERSONS' SEXUAL ORIENTATION AND GENDER IDENTITY

3. There is an alarming global pattern in both practice and law of imposing restrictions on the rights of peaceful assembly and of association by lesbian, gay, bisexual and transgender (LGBT) individuals and organizations. To illustrate this global trend, which has negatively impacted advocacy on sexual orientation and gender identity issues, Part I of this response concerns itself with recent developments in a number of countries. Part I also identifies some positive practices.

#### Question 1(b)

Please... provide one or more recent examples where the right to freedom of peaceful assembly in your country has been adequately enjoyed and the reasons for citing this example(s).

4. **Botswana:** In December 2011, an LGBT organisation called LEGABIBO participated in the World AIDS Day march in Moshupa. It was the first time that an LGBT organisation participated in a public assembly attended by government officials, including President Ian Khama.<sup>1</sup>

#### Question 2(b)

Please... provide one or more examples where peaceful protesters were effectively protected.

5. **Bulgaria:** For the pride marches in 2008 and 2009, the LGBT organisation BGO Gemini worked closely with the police to ensure the safety of march participants. The police and the NGO shared concerns and information about possible attacks and developed safety plans.<sup>2</sup> This cooperation continued for the successful Sofia pride march in 2010.<sup>3</sup>

<sup>1</sup> Sexuality Policy Watch, *Lesbians and Gays of Botswana (LEGABIBO) joins World AIDS day march in Moshupa, Botswana, for the first time in such a public event*, available at URL <<http://www.sxpolitics.org/?p=6981>> (last accessed 16 January 2012).

<sup>2</sup> "60 arrested during the first gay parade in Sofia", *Vesti*, 28 June 2008, available at URL <<http://www.vesti.bg/index.phtml?tid=40&oid=1212757>> (last accessed 16 January 2012); and "Gay Parade – peaceful and quiet", *Vesti*, 27 June 2009, available at URL <<http://www.vesti.bg/?tid=40&oid=2257791>> (last accessed 16 January 2012).

<sup>3</sup> "Sofia Pride 2010 was the second largest LGBT march in the Balkans", *Sofia Pride*, 28 June 2010, available at URL <<http://www.sofiapride.info/en/home/item/55-recap>> (last accessed 16 January 2012).

6. **Poland:** In July 2010, Warsaw hosted the first EuroPride in Eastern Europe.<sup>4</sup> Although counter-demonstrators were present and yelled slurs at the marchers, about 2,000 police officers controlled the crowd and protected the marchers' right to freedom of peaceful assembly.<sup>5</sup> Some counter-demonstrators were arrested.<sup>6</sup>

Question 3

Please describe measures taken to ensure that any restrictions on the free exercise of the right to freedom of peaceful assembly are in accordance with your obligations under international human rights law (proportionality test and due process guarantees). Please explain the legal status of spontaneous assemblies.

7. **Hungary:** In February 2011, the Budapest Metropolitan Court overturned an earlier decision by the Budapest Police to deny a permit for a march submitted by the Rainbow Mission Foundation, an LGBT organisation. The police had denied the organizers' request to continue the route of the procession to Parliament Square on the grounds that it would disrupt traffic. The court, however, found that the march to Parliament Square would not disrupt traffic.<sup>7</sup>

8. **Poland:** In January 2006, the Constitutional Tribunal found unconstitutional article 65 of the Road Traffic Act 1997. The Mayor of Warsaw had denied a request for permission for an equality parade, organised by LGBT organisations, because of a failure to submit a traffic organisation plan under article 65 of the Act. The Constitutional Tribunal held that the only constitutional restriction on the right to assemble is the requirement of prior notification. Any further limitation of the right failed to protect the right to peaceful assembly. Rules for the use of public roads were not constitutionally significant to justify the interference with the right. Furthermore, the "public morals" protected by the Constitution were distinct from the particular moral views of politicians and legislators.<sup>8</sup> The facts of this case were later heard by the European Court of Human Rights in the case of *Bączkowski and Others v Poland*, which found that the rights to freedom of assembly and non-discrimination had been violated by Poland.<sup>9</sup>

9. **Thailand:** In February 2010 the Administrative Court of Chiang Mai ruled that transgender individuals could participate in the annual flower festival parade and that the regulations prohibiting individuals from expressing "sexual deviance" were unconstitutional.<sup>10</sup>

Question 6

Please describe one or more recent examples where the right to freedom of peaceful assembly may have not been respected and the reasons for citing this example(s). In particular, please describe challenges faced in the implementation of laws, policies or programmes for the promotion and protection of the right to freedom of peaceful assembly in your country. Please provide details of any lessons learnt in that regard. Briefly evaluate, in both law and practice, the enjoyment of the right to freedom of peaceful assembly in your country, including by women, individuals facing discrimination or violence because of their sexual orientation and gender identity, as well as persons with disabilities, espousing

<sup>4</sup> Kamil Tchorek, "Warsaw's gay pride reveals the face of modern Poland", *The Guardian*, 19 July 2010, available at URL <<http://www.guardian.co.uk/commentisfree/2010/jul/19/poland-gay-pride-warsaw>> (last accessed 16 January 2012).

<sup>5</sup> Ibid.

<sup>6</sup> Andrew Kureth, "Europride passes relatively peacefully", *Warsaw Business Journal*, 17 July 2010, available at URL <<http://www.wbj.pl/article-50361-europride-passes-relatively-peacefully.html?type=>>> (last accessed 16 January 2012).

<sup>7</sup> Amnesty International, *Hungary: Court overturns ban of Pride march 2011*, AI Index Eur 27/003/2011, 21 February 2011.

<sup>8</sup> Alli Jernow (Ed.), *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook* (Geneva: Atar Roto Presse SA, 2011), pp.105-107.

<sup>9</sup> *Bączkowski and Others v Poland*, European Court of Human Rights Application N° 1543/ 06 (3 May 2007).

<sup>10</sup> Above note 8, at pp.165-167.

minority or dissenting views or beliefs, and belonging to other groups at risk.

10. Around the world, the right to freedom of peaceful assembly for LGBT individuals and organisations is severely threatened. Participants in pride parades, equality marches and similar events are often attacked or intimidated by hostile counter-demonstrators. Police protection may be inadequate or non-existent. In some countries, potential threats to the peace by counter-demonstrators are invoked as justifications for the refusal to allow peaceful assemblies, in clear violation of international obligations. In other countries, new or proposed legislation imposing restrictions on freedom of expression concerning LGBT individuals or sexual orientation issues means that the right to peaceful assembly is equally at risk. Public order and the protection of public morals, both permissible purposes for restrictions under article 21 of the ICCPR, are the most frequently cited reasons for such interferences. What is clear is that public order and public morals are being misappropriated by public authorities to justify discrimination on the basis of sexual orientation. The following are a few recent examples:

11. **Belarus:** In May 2010, the Minsk City Executive Committee denied permission for the Slavic Pride march. Marchers who defied the ban found themselves facing police officers who forcibly prevented the march and assaulted and arrested participants. Those who were arrested were fined for taking part in an unsanctioned public action and then released.<sup>11</sup>

12. **Croatia:** In June 2011, the Split Pride parade was attacked by protesters armed with rocks, bottles and tear gas. The protesters screamed, “Kill the faggot!” and “You must die!”. Police were apparently unprepared for the violent counter-demonstrators and failed to protect parade participants. At least eight people were injured and a number of people have been arrested.<sup>12</sup> The Prime Minister and President of Croatia condemned the violence.<sup>13</sup>

13. **Malaysia:** In November 2011, the police banned the fourth annual Seksualiti Merdeka festival. This was an arts and performance festival celebrating “sexual diversity” originally scheduled to take place in Kuala Lumpur. The reason given for the ban was protection of public order.<sup>14</sup>

14. **Moldova:** GenderDoc-M, an LGBT organisation, has been repeatedly denied permission to hold a peaceful demonstration in Chisnau. The Moldovan Government has justified its refusals based on “public morality” and “public order.” The case of *GenderDoc-M v Moldova* is currently pending before the European Court of Human Rights. The ICJ has submitted comments in this case as a third-party intervener.<sup>15</sup>

15. **Nigeria:** In November 2011, the Senate adopted a draft bill prohibiting same-sex marriage and also criminalizing anyone who supports gay clubs, societies, organizations, processions or meetings. The prison term for such an offense is ten years. The bill is now pending before the House of Representatives.<sup>16</sup>

<sup>11</sup> ILGA Europe, *Ban of Slavic Pride 2010 in Minsk*, available at URL <[http://www.ilga-europe.org/home/news/latest\\_news/ban\\_of\\_slavic\\_pride\\_2010\\_in\\_minsk](http://www.ilga-europe.org/home/news/latest_news/ban_of_slavic_pride_2010_in_minsk)> (last accessed 16 January 2012), 12 May 2010.

<sup>12</sup> “Split Gay Pride Abandoned Amid Riots by 10,000 Anti-Gay Protestors”, *UK Gay News*, 11 June 2011, available at URL <<http://ukgaynews.org.uk/Archive/11/Jun/1104.htm>> (last accessed 16 January 2012).

<sup>13</sup> “Croatia President, Prime Minister, Condemn Violence At Gay Pride Parade”, *The New Civil Rights Movement*, 12 June 2011, available at URL <<http://thenewcivilrightsmovement.com/croatia-president-prime-minister-condemn-violence-at-gay-pride-parade/politics/2011/06/12/21908>> (last accessed 16 January 2012).

<sup>14</sup> Human Rights Watch, *Malaysia: Reverse Ban on Sexual Diversity Festival*, 8 November 2011, available at URL <<http://www.hrw.org/news/2011/11/08/malaysia-reverse-ban-sexual-diversity-festival>> (last accessed 16 January 2012).

<sup>15</sup> *GenderDoc-M v Moldova*, European Court of Human Rights Application N°9106/06, 21 June 2010, third party intervention by the International Commission of Jurists and ILGA Europe.

<sup>16</sup> International Commission of Jurists, *Nigeria’s Same-Sex Marriage Bill Threatens the Rights of Everyone – ICJ*, 1 December 2011, available at URL <<http://www.icj.org/dwn/database/ICJ%20Press%20Release%20Nigeria.pdf>> (last accessed 16 January 2012).

16. **The Russian Federation:** In October 2010, in the case of *Alekseyev v Russia*,<sup>17</sup> the European Court of Human Rights held that the denial of permission for gay pride parades in Moscow in 2006, 2007, and 2008 violated the right to freedom of peaceful assembly under article 11 of the European Convention on Human Rights. Despite this judgment, gay pride events continue to be banned, most recently in 2011 in Moscow and St. Petersburg. In May 2011, participants in Moscow who defied the ban and attempted to march were arrested by police. In November 2011, the Vasilestrovskii District Court in St. Petersburg ruled that the earlier denial of permission for Slavic Pride was unlawful and ordered authorities to grant permission for future events. Also in November 2011, legislators in St. Petersburg and Moscow adopted draft legislation to ban ‘public actions aimed at the propaganda of sodomy, lesbianism, bisexuality, transgenerness amongst minors’. Such laws, if ultimately enacted, will affect not only freedom of expression but also freedom of assembly and association. A law in the Ryazan oblast, punishing “public acts aimed at promoting homosexuality among juveniles” has already been used to convict LGBT activists, and their conviction was upheld by the Constitutional Court. The case of one of those activists is now pending before the UN Human Rights Committee and the other before the European Court of Human Rights. A similar law has also been adopted in the Arkhangelsk oblast, where a civil court rejected a challenge to the law. In addition, in Kostroma oblast, on 27 December 2011, demonstrators who protested in front of the Parliament during the debate on similar legislation were arrested by police.<sup>18</sup>

17. **Serbia:** In September 2011, the National Security Council cancelled the planned Belgrade Pride. Authorities stated that they could not control extremist groups nor protect participants from violent counter-demonstrators. At least three counter-protests had been planned. The previous year, police and marchers were injured and more than 250 arrests were made. Belgrade Pride had previously been banned in 2009.<sup>19</sup>

18. **Ukraine:** A draft law tabled in June 2011 has the stated intent of establishing criminal liability for people who promote “sexual relations between persons of the same sex”. The “promotion of homosexuality”, which is not defined, is prohibited. The proposed bill would amend the Criminal Code, the Law on the Protection of Public Morals, and laws on mass media, television and radio, and publishing. Although primarily aimed at limiting freedom of expression on matters relating to homosexuality, the bill has obvious implications for freedom of peaceful assembly and freedom of association because it restricts the content of all expressive activities.<sup>20</sup>

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<sup>17</sup> *Alekseyev v Russia*, European Court of Human Rights Applications N° 4916/07, 25924/08 and 14599/09 (11 April 2011), available at URL <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=alekseyev%20%7C%20v.%20%7C%20russia&sessionid=84979613&skin=hudoc-en>> (last accessed 17 January 2012).

<sup>18</sup> See generally, “Confusion: Moscow Appeal Court OKs Gay Pride Ban... But St. Petersburg Judge Rules Ban in Second City Was Illegal”, *UK Gay News*, 14 November 2011, available at URL <<http://ukgaynews.org.uk/Archive/11/Nov/1401.htm>> (last accessed 17 January 2012); “Moscow Authorities Now Propose Anti Gay Bill ILGA-Europe condemns St. Petersburg measure”, *UK Gay News*, 17 November 2011, available at URL <<http://ukgaynews.org.uk/Archive/11/Nov/1701.htm>> (last accessed 17 January 2012); and “The Moscow authorities are already preparing a ban on the promotion of homosexuality after St. Petersburg”, *Gazeta*, 17 November 2011, available at URL <[http://www.gazeta.ru/news/lenta/2011/11/17/n\\_2099418.shtml](http://www.gazeta.ru/news/lenta/2011/11/17/n_2099418.shtml)> (last accessed 17 January 2012).

<sup>19</sup> “Serbia considers gay march ban”, *Irish Times*, 30 September 2011, available at URL <<http://www.irishtimes.com/newspaper/breaking/2011/0930/breaking21.html>> (last accessed 17 January 2012); and “Belgrade Gay Pride Banned: Members of the European Parliament Express Deep Regret”, *UK Gay News*, 30 September 2011, available at URL <<http://ukgaynews.org.uk/Archive/11/Sep/3001.htm>> (last accessed 17 January 2012).

<sup>20</sup> Human Rights Watch, *Ukraine: Reject Homophobic Law*, 16 October 2011, available at URL <<http://www.hrw.org/news/2011/10/16/ukraine-reject-homophobic-law>> (last accessed 17 January 2012); and Human Rights Watch, *Ukraine: Letter to Chairman of Parliament Volodymyr Lytvyn Regarding Proposal for a Bill on Banning “Propaganda of Homosexuality”*, 16 October 2011, available at <<http://www.hrw.org/news/2011/10/16/ukraine-letter-chairman-parliament-volodymyr-lytvyn-regarding-proposal-bill-banning->>> (last accessed 17 January 2012).

Question 7(b)

Please... provide one or more recent examples where the right to freedom of association has been adequately enjoyed in your country and the reasons for citing this example(s).

19. LGBT organizations are often denied permission to register as NGOs or are shut down on vague “public morality” grounds. LGBT organizations have had some success in obtaining judicial recognition of their right to freedom of association.
20. **Argentina:** In 2006, the Supreme Court of Justice ruled that denial of recognition as a legal entity for an association of transgender individuals, Asociacion Lucha por la Identidad Travesti-Transsexual, was a denial of the right to freedom of association and was discriminatory on the basis of gender identity.<sup>21</sup>
21. **Lesotho:** In November 2010, after numerous delays, the Registrar General registered an LGBT organization called Matrix. This is the first LGBT organization in Lesotho to gain official Government recognition.<sup>22</sup>
22. **Mongolia:** The State Registration Authority initially denied registration to the LGBT Centre based in Ulaanbaatar. The State Registration Authority said that the name of the Centre was not moral.<sup>23</sup> The Authority reversed its decision in December 2009 after a campaign of letters sent by civil society organizations to Mongolian authorities. This is the first LGBT organization in Mongolia.<sup>24</sup>
23. **Philippines:** Ang Ladlad, an LGBT organization, was denied permission to register as a political party by the Commission on Elections on the ground that it was against public morality and religious belief. In April 2010, the Supreme Court held that the refusal to register Ang Ladlad violated the rights to freedom of association and expression. It rejected the use of both public morality and religion as grounds for the refusal.<sup>25</sup>
24. **Turkey:** Lambdaistanbul, an LGBT organization, was closed down by the public prosecutor on the grounds that both its name and statute were against morality. The Court of Appeals disagreed. In a decision issued in November 2008, the Court of Appeals unanimously held that LGBT individuals have a right to freedom of association and that neither the name of the organization nor its statute contravened morality. In April 2010, a similar decision was reached by the Izmir Court of First Instance concerning the closure of Siyah Pembe Uçgen Izmir (Black Pink Triangle Izmir).<sup>26</sup>

Question 14

Please describe one or more recent examples where the right to freedom of association may have not been respected and the reasons for citing this example(s). In particular, please describe challenges faced in the implementation of laws, policies or programmes for the promotion and protection of the right to freedom of association in your country. Please provide lessons learnt in that regard. Briefly evaluate, in both law and practice, the enjoyment of the right to freedom of association in your country, including by women, individuals facing discrimination or violence because of their sexual orientation and gender identity, as well as persons with disabilities, espousing minority or dissenting views or beliefs, and belonging to

<sup>21</sup> Above note 8, at pp.109-112.

<sup>22</sup> Above note 8, at p.94.

<sup>23</sup> International Gay & Lesbian Human Rights Commission, *Mongolia: Register LGBT Centre*, 20 July 2009, available at URL <<http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/941.html>> (last accessed 17 January 2012).

<sup>24</sup> International Gay & Lesbian Human Rights Commission, *Mongolia: First LGBT Advocacy NGO Registered and Recognized by Government*, 16 December 2009, available at URL <<http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/1049.html>> (last accessed 17 January 2012).

<sup>25</sup> Above note 8, at pp.114-116.

<sup>26</sup> Above note 8, at pp.117-119.

other groups at risk.

25. **Bahrain:** In February 2011, police arrested approximately 200 men attending a “gay party” at the Hidd Sports Club in al-Muharraq. The reason was allegedly “immoral activities”.<sup>27</sup>
26. **China:** In January 2010, the Mr. Gay China pageant, held in a private club, was shut down by Beijing police.<sup>28</sup>
27. **Democratic Republic of Congo:** In October 2010, a Member of Parliament introduced a proposed law in the National Assembly which provides in part: “All associations that promote or defend sexual relations against nature are forbidden within the territory of the DRC”. The draft law has not yet been subject to a vote.<sup>29</sup>
28. **Indonesia:** In March 2010 the ILGA Asia conference in Surabaya was cancelled by police. This was after a group of Muslim fundamentalists entered the hotel where the conference was taking place and demanded that it be shut down.<sup>30</sup>
29. **Nigeria:** The “Same Gender Marriage” bill, adopted by the Senate in November 2011, provides that anyone who supports the registration or operation of a gay club or meeting will be subject to a criminal penalty. The bill is now pending before the House of Representatives.<sup>31</sup>
30. **Uganda:** The draft Anti-Homosexuality Bill, introduced by M.P. Bahati in the fall of 2009 but not yet adopted, would criminalize activities related to the “promotion of homosexuality”, including “attempting to legitimize homosexuality”. If the offender is an association or NGO, then its certificate of registration would be cancelled and its director held criminally liable. There are reports that the bill could be tabled in the current session of Parliament.<sup>32</sup>
31. **Ukraine:** A draft law tabled in June 2011 has the stated intent of establishing liability for people who promote “sexual relations between persons of the same sex”. The “promotion of homosexuality”, which is not defined, would be prohibited. The proposed bill would amend the Criminal Code, the Law on the Protection of Public Morals, and laws on mass media, television and radio, and publishing. Although primarily aimed at limiting freedom of expression on matters relating to homosexuality, the bill has obvious implications for freedom of peaceful assembly and freedom of association because it restricts the content of all expressive activities.<sup>33</sup>

## PART II: MYANMAR’S NEW FREEDOM OF ASSEMBLY LEGISLATION

32. This second part of the ICJ’s response is restricted to the question of Myanmar’s

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<sup>27</sup> “Bahrain arrests 200 men at a gay party – newspapers”, *Reuters*, 9 February 2011, available at URL <<http://in.reuters.com/article/2011/02/09/idINIndia-54770520110209>> (last accessed 17 January 2012).

<sup>28</sup> Raymond Li, “Pressure on gays intensifies after pageant shutdown”, *South Morning China Post*, 17 January 2010, available at URL <<http://www.asylumlaw.org/docs/sexualminorities/China011710.pdf>> (last accessed 17 January 2012); and Andrew Jacobs, “Chinese Gay Pageant is Shut Down”, *The New York Times*, 16 January 2010, available at URL <<http://www.nytimes.com/2010/01/16/world/asia/16beijing.html>> (last accessed 17 January 2012).

<sup>29</sup> International Commission of Jurists, *Democratic Republic of Congo: The Bill Concerning Sexual Practices Against Nature and Violations of Human Rights*, 8 December 2010, available at URL <<http://www.icj.org/dwn/database/ICJ%20Analysis%20DRC%20Bill.pdf>> (last accessed 18 January 2012).

<sup>30</sup> ILGA Asia, *ILGA Asia Conference cancelled*, 23 March 2010, available at URL <<http://ilga.org/ilga/en/article/mlPTdpy1WQ>> (last accessed 18 January 2012).

<sup>31</sup> Above note 16.

<sup>32</sup> International Commission of Jurists, *Uganda: The International Commission of Jurists Urges Parliament Not to Pass Anti-Homosexuality Bill*, 9 May 2011, available at URL <<http://www.icj.org/dwn/database/Uganda%20AHB%20Press%20Release.pdf>> (last accessed 18 January 2012).

<sup>33</sup> Above note 20.



(Burma's) new freedom of assembly legislation, signed into law by President Thein Sein on 2 December 2011.<sup>34</sup>

Question 3

Please describe measures taken to ensure that any restrictions on the free exercise of the right to freedom of peaceful assembly are in accordance with your obligations under international human rights law (proportionality test and due process guarantees). Please explain the legal status of spontaneous assemblies.

33. Myanmar's new protest law constitutes a step in the right direction, but falls short of international standards and of Myanmar's obligations under international law regarding freedom of assembly. The new law allows for peaceful demonstrations to take place, which had not been the case before, but this is permitted only under strict conditions. Organisers of demonstrations must ask for the authorities' permission at least five days in advance, and provide the time, place, and reason for the protest, as well as the planned route and information on what the protest will be about. The law forbids protesters from blocking traffic or causing any public disturbance. Anyone who protests without permission risks up to one year of imprisonment, and any who disturbs a peaceful protest may be sentenced to up to two years of imprisonment.<sup>35</sup>

34. It is understood that the new law on peaceful assembly replaces section 2 of the Martial Law Order 2/88, in effect since 1988, which had banned any form of protest by more than five people.<sup>36</sup> In that sense, the new law is a step in the right direction. Problematically, however, authorities still have the power to refuse to give permission to the conduct of a peaceful protest. Although authorities must provide justification for such a refusal,<sup>37</sup> this feature of the law is incompatible Myanmar's obligations under international law and standards. It also remains unclear what grounds may, under the law, justify a refusal to give permission.<sup>38</sup>

35. As noted by the UN Special Rapporteur on the situation of human rights in Myanmar,<sup>39</sup> Myanmar is party to several human rights instruments that reflect the freedom of assembly, including the Convention on the Rights of the Child (article 15), the Convention for the Elimination of All Forms of Discrimination Against Women (article 7), and the International Labour Organisation's Convention concerning Freedom of Association and Protection of the Rights to Organise Convention. Also applicable to Myanmar is article 20 of the Universal Declaration of Human Rights.

36. As a fundamental freedom, the exercise of the right to freedom of peaceful assembly must be free from any restrictions, except in cases permitted by international law, and in particular by international human rights law.<sup>40</sup> Such restrictions must be prescribed by law and considered as necessary in a democratic society "in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the

<sup>34</sup> Ashley Hileman, 'Myanmar president approves peaceful protest bill', *Jurist Legal News and Research*, 4 December 2011, available at URL <<http://jurist.org/paperchase/2011/12/myanmar-president-approves-peaceful-protest-bill.php>> (last accessed 5 January 2012).

<sup>35</sup> 'Myanmar's president signs protest bill', *AFP*, Yangon, 3 December 2011, available at URL <<http://bit.ly/ABFp0X>> (last accessed 5 January 2012).

<sup>36</sup> Wendy Zeldin, 'Burma: Peaceful Protest Law', *Law Library of Congress*, 30 December 2011, available at URL <[http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205402928\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402928_text)> (last accessed 5 January 2012). The ICJ is unable to confirm whether or not the new law does replace the pre-existing Martial Law. This submission has had to base itself on media reports on the content and operation of the new law, due to the unavailability of a translation of the law in any of the UN languages.

<sup>37</sup> 'A law for peaceful protest', *Sydney Morning Herald*, Sydney, 5 December 2011, available at URL <<http://www.smh.com.au/world/a-law-for-peaceful-protest-20111204-1odfq.html>> (last accessed 5 January 2012).

<sup>38</sup> This submission has had to base itself on media reports on the content and operation of the new law, due to the unavailability of a translation of the law in any of the UN languages.

<sup>39</sup> UN General Assembly 'Situation of human rights in Myanmar', UN Doc A/66/365 (2011), para 52.

<sup>40</sup> UN Human Rights Council Resolution 15/21, UN Doc A/HRC/RES/15/21 (2010), preambular para 9.

protection of the rights and freedoms of others”, and proportional to those ends.<sup>41</sup>

37. The ICJ therefore submits that Myanmar’s new law, by imposing undue restrictions on its citizens’ right to freedom of assembly, does not meet international standards. The obligation for protesters to request authorization in particular, instead of instituting a prior notice requirement, as is the standard practice, goes beyond what can be considered necessary and proportional. Although certain objectives, such as public safety, can legitimately justify the imposition of restrictions, the lack of any form of judicial review or appeals mechanism that would make the authorities accountable for such decisions poses a serious challenge to the compliance of the Act with international standards. Such an omission permits the authorities to ground their refusal on a *prima facie* legitimate motive but without being held to account on the necessity and proportionality of the measure by an independent organ.

### **PART III: RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION IN SOUTH AFRICA**

38. South Africa became a democratic country in 1994 following an oppressive *apartheid* era. The supreme law of the land is the 1996 Constitution of the Republic of South Africa (Constitution). All laws of the Republic and all conduct in the Republic must be consistent with the Constitution.<sup>42</sup> Legislation and conduct inconsistent with the Constitution is invalid, and may be so declared by the Constitutional Court. Chapter 2 of the Constitution contains the Bill of Rights, where rights and freedoms are stipulated. These rights may be limited according to section 36 in terms of a law of general application subject to the requirements and/or factors listed in the section.

#### Question 1

Please a) describe positive legislative/institutional measures taken to facilitate the exercise of the right to freedom of peaceful assembly in your country; and b) provide one or more recent examples where the right to freedom of peaceful assembly in your country has been adequately enjoyed and the reasons for citing this example(s).

39. The following legislation facilitates the right to freedom of peaceful assembly:

- Section 17 of the Constitution provides that “everyone has the right to, peacefully and unarmed to assemble, to demonstrate, to picket and to present petitions”.
- The Regulation of Gatherings Act 1993 regulates assemblies and processions. It requires convenor(s) of a gathering or demonstration to provide the local authorities and police with 7 (seven) days notice of a gathering or demonstration to be held.<sup>43</sup> In the event that convenor(s) is/are unable to provide 7 days notice, notice must be given at the earliest opportunity no less than 48 hours prior to the gathering or demonstration.<sup>44</sup>

40. As an example of where the right to the freedom of peaceful assembly was enjoyed, on 27 October 2011, the African National Congress Youth League (ANCYL), held a mass protest/demonstration for economic freedom, demanding employment, free quality education and basic services. This was a peaceful march from Johannesburg to the Pretoria Union Buildings (seat of the Presidency). Police and a private security company hired by the ANCYL were present.<sup>45</sup> This example is cited due to the fact that it was a mass march

<sup>41</sup> Ibid, para 4.

<sup>42</sup> Section 2.

<sup>43</sup> Section 3(2).

<sup>44</sup> Ibid.

<sup>45</sup> See, <http://www.iol.co.za/news/south-africa/gauteng/ancyl-march-moves-from-sandton-to-pretoria-1.1166416> (accessed 12 January 2012).

comprising many young people who were unemployed and without adequate access to basic services. It was feared that the gathering may have turned violent. However, the gathering was not refused on these grounds, and it was overall peaceful.

Question 2

Please a) describe positive legislative/institutional measures taken to protect peaceful protesters, including against agents provocateurs and/or counter-demonstrators; and b) provide one or more examples where peaceful protesters were effectively protected.

41. The following legislation protects peaceful protesters:

- The Regulation of Gatherings Act requires that the convenor appoint marshals for a gathering or demonstration.<sup>46</sup>
- Police are also deployed in most instances. The powers of the police at gatherings or demonstrations are regulated by section 9, with the use of force regulated by section 9(2).

42. As an example of a peaceful protected protest, the ANCYL protest/demonstration of 27 October 2011 mentioned in para 40 above included the presence of police and a private security company hired by the ANCYL.<sup>47</sup>

Question 4

Please a) describe positive legislative/institutional measures taken to ensure accountability for i) arbitrary restrictions to hold assemblies; ii) arbitrary or excessive use of force by law enforcement officials against peaceful demonstrators; and iii) violence by *agents provocateurs* and/or counter-demonstrators; and b) provide one or more examples for each of these situations where such measures have been implemented.

43. The following legislation contributes to accountability:

- The Regulation of Gatherings Act regulates the use of force by the police at gatherings or demonstrations in section 9(2), specifically 9(2)(b)(c)(d) and (e).
- Section 9 provides that in the event that the gathering or demonstration is unauthorized, as defined in section 5, or that there is a threat of danger to persons or property, law enforcement agencies must disperse the gathering or the demonstration.
- Section 9(2)(b) permits the use of force by police forces, with the exclusion of the use of weapons likely to cause serious bodily injury or death.
- Section 9(2)(c) states that the degree of force which may be so used shall not be greater than is necessary for dispersing the persons gathered and shall be proportionate to the circumstances of the case and the object to be attained.
- Section 9(2)(d) provides that in the case of a person who hinders, obstructs or interferes with persons participating in a gathering or demonstration by killing or attempting to kill someone; seriously injuring someone; manifesting the intention to kill or seriously injure someone; destroying or causing serious damage to property; attempting to destroy or for serious damage to property; and/or manifesting the intention to destroy or cause serious damage to property, law enforcement officials may use force necessary to prevent such actions including the use of firearms and other weapons.

<sup>46</sup> Section 3(3)(g).

<sup>47</sup> See, <http://www.iol.co.za/news/south-africa/gauteng/ancyl-march-moves-from-sandton-to-pretoria-1.1166416> (accessed 12 January 2012).

- Section 9(2)(e) states that the degree of force which may be so used shall not be greater than is necessary for the prevention of the actions mentioned in (d) and the force shall be moderated and be proportionate to the circumstances of the case and the object to be attained.
- The Regulation of Gatherings states that in the case of riot damage at a gathering, the convenor(s) of the event are liable together with any other person lawfully liable.<sup>48</sup> In the case of riot damage at a demonstration, every person participating in the demonstration shall be liable.<sup>49</sup> Perpetrators of criminal activities at such gatherings, whether a protestor or counter-demonstrator, are subject to due process of the law.

44. As an example of ensuring accountability in a freedom of assembly context, several police officers were charged for murder when an unarmed protestor, Mr. Tatane, died on 13 April 2011 after having been allegedly beaten and shot by the police over the course of a community protest against poor service delivery. Although protestors had begun to damage municipal property, the Regulation of Gatherings Act is clear that the degree of force used must be proportionate to the circumstances of the case and the object to be attained.

Question 6

Please describe one or more recent examples where the right to freedom of peaceful assembly may have not been respected and the reasons for citing this example(s). In particular, please describe challenges faced in the implementation of laws, policies or programmes for the promotion and protection of the right to freedom of peaceful assembly in your country. Please provide details of any lessons learnt in that regard. Briefly evaluate, in both law and practice, the enjoyment of the right to freedom of peaceful assembly in your country, including by women, individuals facing discrimination or violence because of their sexual orientation and gender identity, as well as persons with disabilities, espousing minority or dissenting views or beliefs, and belonging to other groups at risk.

45. While the right of freedom to assembly is respected in South Africa, challenges remain in the implementation of the laws in cases where protestors become violent and cause damage to other persons or property. There have been several instances where service delivery protests and gatherings become violent, with demonstrators failing to adhere to the Constitution and the Regulation of Gatherings Act. Law enforcement agencies have sometimes responded to such violence with excessive force.

46. In August 2011, the South African Police Services proposed to revive the National Public Order Policing Unit in accordance to the Public Order Policy, which was approved by the Minister of Police in August 2011. The policy seeks to assist in the policing of public protests and gatherings with the aim of curbing crime, intimidation and violence during public protests.

Question 7

Please a) describe positive legislative/institutional measures taken to facilitate the exercise of the right to freedom of association by national and international organizations (e.g. are associations free to decide on their objectives, activities and board composition?); and b) provide one or more recent examples where the right to freedom of association has been adequately enjoyed in your country and the reasons for citing this example(s).

<sup>48</sup> Section 11(1)(a).

<sup>49</sup> section 11(1)(b).

47. The following legislation facilitates the right to freedom of association:

- The right to freedom of association is constitutionally protected under section 18 of the Constitution.
- Section 19 of the Constitution provides everyone with political rights, including,
  - The right to form a political party;
  - The right to participate in the activities of a political party or cause.
- Section 23(2) addresses labour relations, and guarantees the rights of employees and employers to form, join and participate in the activities of trade unions and employers' organisations.
- Section 23(4) grants every trade and employers' organization the right:
  - To determine its own administration, programmes and activities;
  - To organise; and
  - To form and join a federation.
- Sections 4 and 6 of the Labour Relations Act (LRA)<sup>50</sup> provide for employees and employers respectively, the right to freedom of association.
- Section 8 of the LRA provides for the rights of trade unions and employers' organisations.
- The Non-Profit Organisations Act (NOA)<sup>51</sup> regulates the right of freedom of association by national organisations and provides the freedom for non-profit organisations (NPOs), such as non-governmental organisations (NGOs) and other civic associations, to decide on their objectives, activities, board and member composition. The NOA places a duty on state organs to put in place policies and measures that will support and promote NPOs.<sup>52</sup>

48. Examples and reasons for citing examples:

- In 2010, South Africa held its municipal elections. All political associations and their members could participate freely, illustrating that South Africa has moved from a one-dimensional dispensation, which banned any political parties opposed to the regime at the time, to a State which generally respects the right of association and particularly political association.
- On 3 January 2012, Mr Phillip Dexter, a Member of Parliament for the political party Congress of the People (COPE) announced his resignation from COPE and joined the ruling ANC party, a recent example of an individual exercising his right to freedom of association, in this case political association.

Question 8

Please detail the procedures to be followed to establish an association in your country, including the legal grounds upon which an application for registration can be rejected, where applicable. Please a) describe positive legislative/institutional measures taken to ensure a non-discriminatory, expeditious, easily accessible and inexpensive registration process; and b) provide one or more examples where such measures have been implemented. Are there effective remedies in case the registration is denied or delayed? Please indicate, if available, how many people have pursued these remedies, and the result thereof. Please specify the legal status of unregistered or de facto associations.

49. The following rules must be respected to register a political association:

- The registration of political parties (party formations) as such is unregulated.

<sup>50</sup> No. 66 of 1995.

<sup>51</sup> No. 71 of 1997.

<sup>52</sup> Section 3.

- Sections 18 to 20 of the Electoral Act<sup>53</sup> deal with the registration of political parties for participation in the elections. Political parties must in addition to other requirements do the following:
  - To participate in national elections, a deposit of R25 000 is required and R5000 to participate in elections for any provincial legislature;<sup>54</sup>
  - Submit the name, abbreviation, distinguishing emblem in colour, its constitution and names of national and regional leaders.<sup>55</sup>
- If a political party contravenes section 19(8) of the Electoral Act,<sup>56</sup> the registration process will not continue.
  - An objection against the registration of a political party may be made in terms of section 19(9), whereby the objector may submit a written objection with reasons to the Chief Director.

50. Concerning the registration of trade unions, the following rules apply:

- Regulated by the Labour Relations Act,<sup>57</sup> trade unions or employers' organisations must have the following to register:<sup>58</sup>
  - A name meeting the requirements of section 95(4);
  - A constitution that meets the requirements of section 95(5) and (6);
  - An address in the Republic;
  - Independent status ; and
  - Submit a properly completed prescribed form.
- Once the trade union or employers' organisation has proof of the fulfilment of the aforementioned requirements, it may proceed to apply for registration by submitting the following to the registrar:
  - A prescribed form that has been properly completed;
  - A copy of its constitution; and
  - Any other information that may assist the registrar to determine whether or not the trade union or employers' organisation meets the requirements for registration.
- Cancellation of registration may be decided by the Registrar of the Labour Court by giving notice to the registrar of Labour Relations in terms of section 106 of the LRA by showing one of the following:
  - Winding up of the trade union or employers' organisation in terms of section 103 or 104 respectively; or

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<sup>53</sup> No. 202 of 1993.

<sup>54</sup> Section 19(2)(a) and (b).

<sup>55</sup> Section 19(3).

<sup>56</sup> The grounds stated in section 19(8) are as follows:

(a) The Commission may disallow a proposed name, abbreviated name, distinguishing mark or symbol of a party in the event that it –

- i) Resembles the proposed name, abbreviated name, distinguishing mark or symbol, as the case may be, of any other party to such extent that it may, in the opinion of the Commission, deceive or confuse; or
- ii) Contains anything which in the opinion of the Commission portrays the propagation of or incitement to violence or hatred or which may cause serious offence to any section of the population on the grounds of race, sex, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, creed, culture or language.

(b) If the Commission is of the opinion that the name, abbreviated name, distinguishing mark or symbol of a party referred to in subsection (3) corresponds with, or substantially resembles, the name, abbreviated name, distinguishing mark or symbol, as the case may be, of another party, it –

- i) Shall take into account the fact that the party which is associated with the name, abbreviated name, distinguishing mark or symbol, as the case may be, for the longest period, should prima facie be entitled thereto;
- ii) May, for the purposes of subparagraph (i) – (aa) afford the party concerned an opportunity to deliver such proof, including oral evidence or sworn or affirmed statements by any person which, in the opinion of the Commission, could be of assistance in the expeditious determination of the matter; and (bb) administer an oath or affirmation to any person appearing to testify before it.

<sup>57</sup> Section 95.

<sup>58</sup> Sections 95, which refers to the requirements for registration of trade unions or employer's organisations, and 96, which outlines the registration process.

- Declaration that a trade union is no longer independent in terms of section 105.
- The Registrar of Labour Relations must:
  - Be satisfied that the trade union or employers' organisation is no longer functioning as a genuine trade union or employers' organisation; or
  - Issue the trade union or employers' organisation with a written notice affording the union or organisation 60 days to comply with sections 98, 99 and 100.
- Registration of a trade union or employers' organisation may not be cancelled without the registrar of Labour Relations:
  - Giving notice of the registrar's intention to cancel the registration of the trade union or employers' organisation; and
  - Inviting the trade union or employers' organisation or any other interested parties to make written representations as to why the registration should not be cancelled.
- An unregistered trade union or employers' organisation shall cease to have rights enjoyed as a registered trade union or employers' organisation. An unregistered political party cannot participate in any electoral process.
- Where registration of a political party has been denied, it is unclear what remedies are available to the political party. Section 34 of the constitution grants any aggrieved persons to approach a court. Where registration of a trade union or employers' organisation is cancelled, in accordance to section 34 of the constitution mentioned above, aggrieved persons may, if not approaching a court, approach an independent and impartial tribunal or forum. Trade unions or employers' organisations may approach the Labour Court at the tribunal entrusted with matters arising out of the LRA.

51. With regard to the registration of civic associations in terms of the NOA:

- The registration of a NPO with the Directorate of NPOs is not mandatory. However, it is advisable as there are benefits and allowances declared by the Minister of Welfare and Population Development.<sup>59</sup> In order to register as an NPO a civic organisation must complete the prescribed form and submit two copies of its constitution.<sup>60</sup>
- The Director of NPOs must consider an application for registration within two months and if the requirements are met satisfactorily, register the NPO.<sup>61</sup> If the NPO has failed to meet the requirements the NPO needs to give written reasons for its decision and afford the applicant one month from the date of the notice to comply with the requirements.<sup>62</sup> If the NPO complies within the stipulated time, the Director must register it.<sup>63</sup> However, if it fails to comply with the requirements within the stipulated time the Director will refuse to register it and give written reasons
- Appeals against refusal to register may be made to the Arbitration Tribunal.<sup>64</sup>

Question 9

Please explain the procedure available to suspend or dissolve an association in your country. Are there effective remedies in case an association suspended or dissolved? Please indicate, if available, how many people have pursued these remedies and the result thereof.

<sup>59</sup> Section 11.

<sup>60</sup> Section 13(1).

<sup>61</sup> Section 13(2).

<sup>62</sup> Section 13(3).

<sup>63</sup> Section 13(5).

<sup>64</sup> Section 14.

52. There is a procedure available to suspend or dissolve an association in South Africa, but it comes with necessary safeguards. For example, a suspended or dissolved association may exercise the right to bring a matter before a court for adjudication, in accordance with section 34 of the Constitution.

53. In the case of a trade union or employers' organisation, the Labour Court may be approached for appropriate relief.

54. In the case of NPOs, the Director may cancel the registration of the NPO if the NPO fails to comply with a compliance notice; comply in time, or makes false representations in a document, narrative or financial report to the Director.<sup>65</sup> An NPO may appeal against the decision to cancel its registration to the Arbitration Tribunal.<sup>66</sup>

Question 11

Please indicate under which conditions associations can receive domestic and foreign funds or resources in your country. Are there any specific limitations (including in practice) on receiving funds or resources?

55. South Africa regulates the public funding of political parties, but not the private funding of political parties.

56. Section 236 of the Constitution states that to enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.

57. The Public Funding of Represented Political Parties Act (PFRPPA) regulates public funding.<sup>67</sup> The PFRPPA established a Represented Political Parties Fund, which is overseen by the Independent Electoral Commission. The PFRPPA stipulates the approved sources of income in section 2(2). The PFRPPA does not address however the reception of foreign funds.

58. NPOs are not restricted in receiving domestic or international funding in the NOA. There is no specific regulation of reception of domestic or international funding.

Question 13

In this context, please a) describe positive specific legislative/institutional taken to build and strengthen the human rights capacity of administrative officials in charge of implementing the law in your country; and b) provide one or more recent examples where such measures have been implemented.

59. The following legislation has been put in place in South Africa to build and strengthen human rights capacity of administrative officials:

- All public administration must be governed by the democratic values and principles enshrined in the Constitution.<sup>68</sup>
- All conduct in the Republic must be consistent with the Constitution, including duties carried out by administrative officials in charge of implementing the law. The Constitution's Bill of Rights contains human rights principles which all officials must respect. It is the duty of all public administration departments or organisations to ensure that its policies and measures are not in conflict with the Constitution and that all administrative officials are adequately and efficiently trained.

<sup>65</sup> Section 21.

<sup>66</sup> Section 22.

<sup>67</sup> No 103 of 1997.

<sup>68</sup> Section 195(1).



- The Promotion of Administrative Justice Act regulates the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in the Constitution.
- The Registrar of Labour Relations is the administration official who oversees matters pertaining to trade unions or employer's organisations. The powers of the Registrar are found in LRA.
- The Chief Electoral Officer is the administration official who oversees the registration of political parties for electoral purposes. The powers of the Chief Electoral Officer are found in the Electoral Act.
- The Directorate of NPOs is the administration official who oversees all matters pertaining to registered NPOs. The powers of the Director are found in the NOA.

Question 14

Please indicate any cooperation your country has with the United Nations and regional human rights mechanisms aimed at maximizing the promotion and protection of the rights to freedom of peaceful assembly and of association.

60. Although all persons in South Africa enjoy the right to freedom of association, challenges remain in certain instances, not necessarily from the state or state agencies, but from certain parts of the South African community:

- Women in South Africa generally enjoy the right to freedom of association. Gender equality is an important principle in association and in particular the political sphere. South Africa has women who not only enjoy the right to freedom of association but also in some instances who lead political associations, such as Ms Helen Zille of the Democratic Alliance. Another example of this is the ANC Women's League.
- Individuals facing discrimination or violence because of their sexual orientation and gender identity generally enjoy the right to freedom of association in any organisation or to form their own organisations, such as the National Coalition for Gay and Lesbian Equality. However, in certain rural or socially conservative areas of the South Africa community, such individuals do not always enjoy freely the right to freedom of association as community members sometimes harass or attack them.
- Similarly, persons with disabilities, dissenting views or beliefs, also have the right to freedom of association. An example is the free space that opposition political parties have in the country. Although the ANC is the ruling party, there is no ban or restrictions on other political groups with opposing and/or minority views.
- The Constitution provides for the safeguarding of the right to equality and provides that no person or state agents or organs may unfairly discriminate against anyone, directly or indirectly, on the grounds provided in Section 9(3), which include gender, sex, sexual orientation, disability and belief, amongst others.<sup>69</sup> There is however, room for improvement in all spheres in ensuring the peaceful enjoyment for all of the right to freedom of association.

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<sup>69</sup> Section 9(3) and (4).