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

**IN THE CONSTITUTIONAL COURT OF GUATEMALA
IN THE CONSTITUTIONAL ACTIONS OF AMPARO**

Files Numbers:

859-2020, 860-2020, 879-2020, 895-2020, 896-2020, 904-2020, 905-2020 AND 1029-2020

*Amicus Curiae Submission by the United Nations Special Rapporteur on the Rights to
Freedom of Peaceful Assembly and of Association
with regard to Amendments introduced by Decree 4-2020 of February 11, 2020 to the Law on
Non-Governmental Organizations for Development [Decree 2-2003], and to the Civil Code
[Decree Law 106]*

April 2020

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

1. Clément Nyaletsossi Voule is the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association.
2. Special Rapporteurs are part of the special procedures mechanism of the Human Rights Council, made up of independent human rights experts with the mandate to report and advise on human rights from a thematic or country-specific perspective. Special Procedures are a central element of the United Nations human rights system and cover all human rights: civil, cultural, economic, political, and social. As of April 2020, there were 44 thematic and 12 country mandates.
3. The mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association [hereinafter “The Mandate”] was established by Human Rights Council resolution 15/21 in October 2010. It has, subsequently, been renewed for three-year consecutive periods through resolution 24/5 in September 2013, resolution 32/32 in 2016, and resolution 41/12 in July 2019. Clément Nyaletsossi Voule assumed his role as Special Rapporteur on the rights to freedom of peaceful assembly and of association in April 2018.
4. The Special Rapporteur examines, monitors, advises, and publicly reports on the freedoms of assembly and of association worldwide. He does this by receiving individual complaints, conducting country visits, issuing thematic reports, providing technical assistance to governments, and engaging in public outreach and promotional activities – all with the ultimate goal of promoting and protecting the rights to freedom of peaceful assembly and of association worldwide.
5. This Amicus brief is submitted to the Constitutional Court of Guatemala by Clément Nyaletsossi Voule in his capacity as Special Rapporteur on the rights to freedom of peaceful assembly and of
6. association pursuant to Human Rights Council Resolution 41/12. This submission is provided by him on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials or experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations, to which Guatemala acceded on 7 July 1947.
7. Authorization for the positions and views expressed by Clément Nyaletsossi Voule, in full accordance with his independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.
8. Within the established framework, the Special Rapporteur wishes to contribute to the analysis of the compatibility of the provisions of Decree 4-2020 of February 2020 with international human

rights law, standards and principles with regard to the rights to freedom of association and the right to freedom of peaceful assembly as pillars of democracy and rule of law.

SUMMARY OF FACTS AND ARGUMENTS

9. On February 11, 2020, the Guatemalan Congress adopted Decree 4-2020, whereby it introduced amendments to the Law on Non-Governmental Organisations for Development [decree 2-2003] and to the Civil Code [Decree Law 106]. Following the adoption of the Decree by Congress, several organisations and private individuals filed constitutional actions of *Amparo* against Decree 4-2020, for considering it violated a number of fundamental rights protected under the Constitution. Decree 4-2020 was signed into law by the President of the Republic on February 27. On March 2, this Honourable Court accumulated files 859-2020, 860-2020, 879-2020, 895-2020, 896-2020, 904-2020, 905-2020 y 1029-2020 and ordered the provisional suspension of the act of approval of the Decree. A final ruling on its constitutionality is pending.
10. The constitutional objections raised by the Applicants against Decree 4-2020 in the matter of reference include: i) that some provisions are drafted in broad, unclear and ambiguous terms; ii) that it imposes unnecessary and disproportionate burdens on associations and creates obstacles to the exercise of the right to freedom of association; iii) that it introduces a sanctions regime that does not meet the required standards for the restriction to the right to freedom of association to be permissible; and iv) that the provisions regarding publicity requirements may affect right to privacy and unduly expose associates, affiliates, beneficiaries and donors to increased risk.
11. In this brief, the amicus curiae will refer to legally binding obligations emanating from international instruments Guatemala is party to, as well as to standards and principles arising from legal and institutional frameworks, other international treaty bodies, the jurisprudence of international regional courts or that form part of an existing or emerging practice.

FRAMEWORK OF INTERNATIONAL HUMAN RIGHTS LAW IN GUATEMALA

12. Guatemala is party to a number of international human rights instruments which explicitly guarantee the right to freedom of association, including the Universal Declaration of Human Rights (art. 20)¹, the International Covenant on Civil and Political Rights (ICCPR) (art. 22)², and

¹ U.N. General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art. 20. “(1) Everyone has the right to freedom of assembly and of association. (2) No one may be compelled to belong to an association.”

² U.N. General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 17, Art. 22. “(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic

the American Convention on Human Rights (art. 16)³. Additionally, Guatemala is party to other treaties which recognize the right to freedom of association for particular groups of people, such as the Convention on the Elimination of All Forms of Discrimination against Women⁴ and the Convention on the Rights of the Child⁵.

13. The right to freedom of association is recognized under article 34 of the Constitution of Guatemala, enhanced by the incorporation by this Honourable Court of the ‘constitutionality block’ doctrine via article 44 – that recognizes the inherent rights of human beings – and article 46 - that establishes the principle of pre-eminence of human rights treaties ratified by Guatemala over domestic law⁶.
14. As a full member of the United Nations and the Organization of American States, the interpretation of relevant law and standards, as well as the findings of bodies and experts under the procedures and mechanisms established within those systems, is particularly relevant to Guatemala. Reference will also be made in this brief to decisions from the European Court on Human Rights (ECtHR) and the African Court on Human and Peoples’ Rights, as well as reports and guidelines from the African Commission on Human and People’s Rights, and the Organisation for Security and Co-operation in Europe (OSCE), which may provide additional interpretative guidance.

society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. (3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.” Guatemala acceded to the ICCPR in 1992.

³ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, 22 November 1969, Article 16. “Freedom of Association (1) Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes. (2) The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others. (3) The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.” Guatemala ratified the American Convention on Human Rights in 1978.

⁴ See U.N. General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13. Art 7 (c). “States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.” Ratified by Guatemala in 1982.

⁵ See U.N. General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3. Art 15. “1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly. 2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.” Ratified by Guatemala in 1990.

⁶ Constitutional Court of Guatemala. File 1822-2011. Judgment of 17 July 2012.

RIGHT TO FREEDOM OF ASSOCIATION AND STATES' OBLIGATIONS

15. Freedom of association enables any groups of individuals to come together in order to collectively act, express, promote, pursue or defend a field of common interests⁷. It protects the right to form and join an association, both registered or unregistered⁸; to operate freely and to be protected from undue external interference⁹; to access funding and resources¹⁰; to freedom of expression and access to information¹¹ and to take part in the conduct of public affairs¹². The right to freedom of association applies for the entire life of the association¹³.
16. The international obligations of States concerning this right under the ICCPR are twofold. On the one hand, States have a positive obligation to create an enabling environment in which the right to freedom of association can be exercised. On the other hand, States have a negative obligation to refrain from interference with the rights guaranteed. The right to freedom of association is subject only to the limitations permitted by international law.

POSITIVE OBLIGATIONS OF THE STATE

17. The right to freedom of association imposes upon States the obligation to create, both in law and in fact, an enabling environment for its effective enjoyment¹⁴. States should take measures so that individuals who wish to come together to form associations find the necessary support and encouragement to do so by the overall social, legal, administrative, and political framework. States' obligations to create and maintain an enabling environment are not be limited to the association's formation, but extend to the association's ability to carry out the purposes for which it was

⁷ U.N. Human Rights Council, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, 21 May 2012, A/HRC/20/27, para. 51; U.N. Commission on Human Rights, Note by the Secretary General: Human rights defenders, 1 October 2004, A/59/401, para. 46. *See also* African Commission on Human and Peoples' Rights, Report of the Study Group on Freedom of Association & Assembly in Africa, pg. 23 (2014). Available at:

https://www.achpr.org/public/Document/file/English/report_of_the_study_group_on_freedom_of_association_assembly_in_africa.pdf.

⁸ A/HRC/20/27, *supra*, paras. 53, 56.

⁹ A/HRC/20/27, *supra* note 7, paras 63-66; U.N. Human Rights Council, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, 30 September 2019, A/HRC/41/41/Add.2, para. 15

¹⁰ A/HRC/20/27, *supra* note 7, paras 67-69. *See, generally* U.N. Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, Maina Kiai, 24 April 2013, A/HRC/23/39.

¹¹ A/HRC/41/41/Add.2, *supra* note 9, para. 15.

¹² A/HRC/20/27, *supra* note 7, para. 73.

¹³ *Id.*, para. 75.

¹⁴ *Id.*, para. 63. *See also* Inter-American Commission on Human Rights (IACHR), *Second Report on the Situation of Human Rights Defenders in the Americas [Second Report]*, OEA/Ser.L/V/II. Doc. 66, December 31, 2011, para. 157.

established¹⁵. They exist regardless of whether or not the associations follow the governmental lines of thought, national policies and actions in terms of social and economic development¹⁶.

18. Further, the positive obligations of states regarding the right to freedom of association include protecting the expression of ideas that are unpopular or critical of the government. As recognized by the Human Rights Committee, the free expression of ideas is necessary to ensure the proper functioning of government and is therefore “a cornerstone of a democratic society.”¹⁷ Underscoring this direct link between freedom of expression and freedom of peaceful assembly and of association, the Human Rights Council stated in resolution 15/21 (October 2010):

*Recognizing further that exercising the rights to freedom of peaceful assembly and of association free of restrictions, subject only to the limitations permitted by international law, in particular international human rights law, is indispensable to the full enjoyment of these rights, particularly where individuals may espouse minority or dissenting religious or political beliefs...*¹⁸

19. The right to freedom of association relies on several key principles. One of these principles is the presumption of lawfulness of the establishment, objectives, and activities of associations¹⁹. This means that the State should presume that the association has been established in a lawful manner and that its activities are lawful until it is proven that they are not.²⁰

¹⁵ European Court of Human Rights (ECtHR), *United Communist Party of Turkey and Others v. Turkey*, 19392/92, 30 January 1998, para. 33; IACHR, *Second Report*, *supra* note 14, para. 155.

¹⁶ U.N. General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*: resolution / adopted by the General Assembly, 8 March 1999, A/RES/53/144, December 9, 1998, Articles 2, 5, 7, 8. “Article 8. 1. Everyone has the right, individually and in association with others, to have effective access, on a nondiscriminatory basis, to participation in the government of his or her country and in the conduct of public affairs. 2. This includes, inter alia, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving.”

¹⁷ U.N. Human Rights Committee, *Viktor Korneenko et al. v. Belarus*, U.N. Doc. Communication No. 1274/2004 CCPR/C/88/D/1274/2004, para. 7.3 (2006).

¹⁸ U.N. Human Rights Council, Resolution 15/21, *The rights to freedom of peaceful assembly and of association*, 6 October 2010, A/HRC/RES/15/21, page 2.

¹⁹ A/HRC/20/27, *supra* note 7, para. 60; Organization for Security and Cooperation in Europe (OSCE), *Guidelines on Freedom of Association* (2015), para. 26. Available at: <https://www.osce.org/odihr/132371?download=true>.

²⁰ OSCE, *Guidelines on Freedom of Association* (2015), *supra*, Interpretative notes, Subsection 1: Guiding Principles, para 68, (citing Venice Commission, “Opinion on the compatibility with universal human rights standards of article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus”, CDL-AD(2011)036, 18 October 2011, para. 89, where it is stated that “The Venice Commission recalls that the mere fact that an association does not fulfil all the elements of the legal regulation concerned does not mean that it is not protected by the internationally guaranteed freedom of association. In ECtHR, *Chassagnou and Others v. France* [GC] (Application nos. 25088/94, 28331/95 and 28443/95, judgment of 29 April 1999), para. 100, the ECtHR emphasized the autonomous meaning of “association”: “The term ‘association’ [...] possesses an autonomous meaning; the classification in national law has only relative value and constitutes no more than a starting-point.”)

20. Another core element of the right to freedom of association is the entitlement to legal personality. States have a positive obligation to ensure and facilitate the ability of associations to acquire legal personality, allowing individuals to ‘act collectively in a field of mutual interest’²¹ Conversely, associations do not have an obligation to acquire legal personality if they choose so.²² Moreover, *de facto* associations are protected.²³ Indeed, laws that require mandatory registration for all associations can effectively impede the enjoyment of the right to freedom of association for specific individuals or groups, such as persons living in poverty and those working with them.²⁴

NEGATIVE OBLIGATION OF THE STATE: LIMITATION OF RESTRICTIONS TO THE RIGHT

21. As stated above, the right to freedom of association also imposes a negative obligation upon States, that of refraining from interfering with the right. While the right to freedom of association is not absolute, restrictions are the exceptions, and the right is the rule as indicated by the Human Rights Committee in its general comment No. 27 (1999)²⁵.

22. The legitimate permissible restrictions to the right to freedom of association are defined in art. 22 (2) of the ICCPR, in the following terms:

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

23. As established by the Human Rights Committee in interpreting the scope of permissible restrictions to the right to freedom of association contemplated in Article 22 (2) of the ICCPR,

²¹ ECtHR, *Gorzelik and Others v Poland*, Application No. 44158/98, February 17, 2004, para. 55. See also A/HRC/20/27, *supra* note 7, paras. 57-58.

²² U.N. General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association*, Clément Nyaletsossi Voule, 11 September 2019, A/74/349, para. 49. See also IACHR, Office of the Special Rapporteur for Freedom of Expression, *Protest and Human Rights*, OEA/SER.L/V/II, CIDH/RELE/INF.22/19, para. 21.

²³ U.N. General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, 4 August 2009, A/64/226, para. 21. See also IACHR, *Second Report*, *supra* note 14, para. 170.

²⁴ A/74/349, *supra* note 22, para. 49. As expressed by the Special Rapporteur in his report to the U.N. General Assembly, registration proceedings can be highly burdensome and bureaucratic, requiring extensive information and compelling applicants to conduct costly and time-intensive duties. The Special Rapporteur fears that this would only amplify pre-existing barriers facing the people living in poverty and ultimately impede their compliance. Some laws even provide for heavy fines or criminal prosecution for failure to register, which will only cause individuals to fall into deeper poverty and exclusion.

²⁵ U.N. Human Rights Committee, CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 13. “In adopting laws providing for restrictions ... States should always be guided by the principles that the restrictions must not impair the essence of the right ... the relation between right and restriction, between norm and exception, must not be reversed” (internal citations omitted.)

such restrictions must meet three cumulative²⁶ requirements: (1) restrictions must be prescribed by law; (2) the restriction must be defined to solely protect the legitimate aim of national security or public safety, public order, public health or morals, or the rights and freedoms of others; and (3) the restrictions must be ‘necessary in a democratic society’²⁷.

- Restrictions must be prescribed by law:

24. Limitations to the exercise of the right to freedom of association must be provided for by law. Not only must the law establishing the restriction be duly enacted, but also the provisions of the law must not be overly broad or vague²⁸. The Human Rights Committee in its General Comment No. 34 has clarified that to meet the principle of legality, a law may not confer unfettered discretion and it must provide sufficient guidance to those charged with its execution to enable right holders to ascertain or foresee what sort of behaviour is restricted and what is not²⁹. Similarly, the Inter-American Commission on Human Rights (IACHR) has indicated that States must ensure that provisions containing ambiguous language and broad discretion to authorities do not create a risk that the law could be interpreted to restrict the exercise of the right to freedom of association³⁰. The ECtHR has ruled that the law determining restrictions must be foreseeable. Law is foreseeable ‘if it is formulated with sufficient precision to enable the individual... to regulate his conduct’³¹.

- Restrictions must pursue legitimate aims:

25. Freedom of association can only be limited to meet the legitimate aims set out in art. 22 (2) of the ICCPR that is - national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others³². These grounds are exclusive and should be narrowly interpreted. States cannot rely on additional grounds, even those provided by domestic legislation, and States cannot loosely interpret international obligations in order to restrict

²⁶ U.N. Human Rights Committee, *Viktor Korneenko et al. v. Belarus*, *supra* note 17, para. 7.7 (elaborating on the need to satisfy all the requirements of Article 22(2) of the ICCPR in the case of an official or de facto dissolution). *See generally*, A/HRC/23/39, *supra* note 10, para. 19.

²⁷ U.N. Human Rights Committee, *Aleksander Belyatsky et al v. Belarus*, Communication No. 1296/2004, U.N. Doc. CCPR/C/90/D/1296/2004, para. 7.3. (2007).

²⁸ IACHR, *Second Report*, *supra* note 14, Recommendation 19, page 234. *See generally* UN Human Rights Committee (HRC), *CCPR General Comment no. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 13.

²⁹ U.N. Human Rights Committee (HRC), *General Comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, para. 25.

³⁰ IACHR, *Second Report*, *supra* note 14, para. 172.

³¹ ECtHR., *N.F. v Italy*, Application No. 37119/97, 12 December 2001, para. 29. *See also* ECtHR, *The Sunday Times v. The United Kingdom*, Application No. 6538/74, April 26, 1979, para. 49 (stating “a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”)

³² For further guidance on the interpretation of these grounds, *see* U.N. Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4, 28 September 1984.

the right to freedom of association³³. Further, States bear the burden of proving that any restrictions pursue a legitimate aim that cannot be fulfilled by means of less intrusive actions.³⁴ Indeed, the Human Rights Committee found that a State's restriction on a right was impermissible solely based on the State's failure to provide evidence of a legitimate interest in limiting such right.³⁵

- Restrictions must be necessary in a democratic society.

26. The ICCPR provides that any limitation must also be 'necessary in a democratic society'³⁶. This means that a fair balance has to be made between the interests of persons exercising the right to freedom of association, the associations themselves, and the interests of society as a whole.³⁷

27. In its General Comment no. 31 on the nature of the general obligation imposed on States parties to the ICCPR (2004), the Human Rights Committee states that:

'Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights'.³⁸

28. The Human Rights Committee has clarified that the State must demonstrate that the restrictions placed on the right are, in fact, necessary to avert a real and not only a hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose³⁹.

29. The Inter-American Commission on Human Rights⁴⁰ and the European Court of Human Rights corroborate this position that both pressing social need for the interference and proportionality of the measure are required⁴¹. This implies that clear and specific reasons need to be given for imposing restrictions. The European Court of Human Rights indicates that to verify the 'pressing

³³ A/HRC/23/39, *supra* note 10, para. 30.

³⁴ OSCE, *Guidelines on Freedom of Association*, *supra* note 19, para. 113, (citing ECtHR, *Süreç v. Turkey (No.1)*, Application no.26682, July 8, 1999, para. 58; ECtHR, *Refah Partisi (the Welfare Party) and others v. Turkey [GC]*, Application nos. 41340/98, 41342/98, 41343/98 and 41344/98, February 13, 2003.)

³⁵ U.N. Human Rights Committee, *Sergey Kovalenko v. Belarus*, Comm. No. 1808/2008, CCPR/C/108/D/1808/2008, para. 8.8 (2013).

³⁶ A/HRC/23/39, *supra* note 10, para. 19.

³⁷ OSCE, *Guidelines on Freedom of Association*, *supra* note 19, para. 35.

³⁸ U.N. Human Rights Committee (HRC), *General Comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 6.

³⁹ See, e.g. U.N. Human Rights Committee, *Lee v Republic of Korea*, Comm. No 1119/2002, CCPR/C/84/D/1119/2002 paras.7.2 and 7.3 (2005); U.N. Human Rights Committee, *Aleksander Belyatsky et al v. Belarus*, *supra* note 27, para. 7.3.

⁴⁰ IACHR, *Second Report*, *supra* note 14, para. 166.

⁴¹ For further guidance on 'necessary in a democratic society', see ECtHR, *United Communist Party of Turkey and Others v Turkey*, *supra* note 15, para. 45.

social need,' the reasons adduced by the national authorities to justify the interference must be 'relevant and sufficient'⁴².

30. To conform to the principle of proportionality, any restriction must be appropriate and narrowly tailored to achieve their protective function⁴³. As described by the African Court on Human and Peoples' Rights, the proportionality test is one that "weighs the impact, nature and extent of the limitation against the legitimate State interest [in] serving a particular goal."⁴⁴
31. The restriction must be necessary in a *democratic society*. As such, restrictions must not harm the democratic values of pluralism, broad-mindedness, and tolerance.⁴⁵ Given the importance of pluralism for the proper functioning of democracy, the fact that associations embrace minority or dissenting views or beliefs cannot be ground for restrictions⁴⁶. The onus of establishing the necessity and proportionality of the restriction always rests on the State.⁴⁷
32. It is against this international legal framework of obligations of States concerning the right to freedom of association that the Special Rapporteur wishes to discuss the provisions currently challenged before this Honourable Constitutional Court.

IMPORTANCE OF NON-GOVERNMENTAL ORGANISATIONS FOR DEMOCRACY AND DEVELOPMENT

33. Before analyzing the aspects of the Decree that are of particular concern in the light of international law standards, the Special Rapporteur wishes to underscore the central role that non-governmental organisations play in the strengthening of democracy and the rule of law, as well as in furthering the country's development. As he has previously emphasised, "[t]he exercise of the rights of freedom of peaceful assembly and of association contributes to the strengthening of an inclusive

⁴² ECtHR, *Handyside v United Kingdom*, Application No. 5493/72, December 7, 1976, paras. 48-50.

⁴³ U.N. Human Rights Council, *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, 4 February 2016, A/HRC/31/66, para. 30.

⁴⁴ African Court on Human and People's Rights, *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania*, Consolidated Applications Nos. 009/2011 and 011/2011, June 14, 2013, para.106.1 (citing ECtHR, *Handyside v United Kingdom*, *supra* note 42).

⁴⁵ U.N. Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, on his mission to Rwanda*, September 16, 2014, A/HRC/26/29/Add.2, para. 86(a); see Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Article 22, para.21, p. 394 (N.P. Engel, 1993).

⁴⁶ Inter-American Court of Human Rights (IACtHR), *Case of Manuel Cepeda Vargas v. Colombia*, Preliminary objections, merits, reparations and Costs, Judgment of May 26, 2010. Series C. No. 213, para. 173; ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, Application No. 37083/03, October 5, 2010, para. 53. See also U.N. Human Rights Committee, *Lee v Republic of Korea*, *supra* note 39, para. 7.3; U.N. Human Rights Committee, *Aleksander Belyatsky et al v. Belarus*, *supra* note 27, para. 7.3.

⁴⁷ U.N. Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule*, 17 May 2019, A/HRC/41/41, para. 49.

and effective system of checks and balances inherent to democracy and essential for societies in which power is held to account.”⁴⁸

34. It is widely recognized globally that an active and unfettered civil society is essential to development⁴⁹. States around the world, including Guatemala, have united to craft and adhere to the 2030 Agenda for Sustainable Development, which acknowledges the prominent role that civil society plays in its implementation⁵⁰. Indeed, development policies can hardly be sustainable without the active participation of individuals and civil society actors, in particular, those working to improve the lives of people living in poverty and those further behind⁵¹.
35. Yet, the space for civic engagement has been closing, with States increasingly placing restrictions on non-governmental organisations and other actors, impeding the rights of individuals and groups to fully exercise their rights to freedom of peaceful assembly, association and expression⁵². It is these rights which make it possible to open spaces for empowerment, participation, inclusion, transparency and accountability⁵³. As stated by the Special Rapporteur, “an enabling environment for civil society contributes to democracy and to development in equal measure, and development is interlinked with the realization of human rights in a way that the enjoyment of such rights supports the achievement of the three dimensions of sustainable development: economic, social and environmental.”⁵⁴
36. The Special Rapporteur has identified several global trends concerning restrictions in the exercise of the rights to freedom of peaceful assembly and of association and the overall closing of civic space. The use of legislation to suppress the legitimate exercise of freedom of peaceful assembly and of association is one of these trends⁵⁵.
37. As will be further discussed in the section below, the Decree 4-2020 is in direct contradiction with the creation of an enabling environment for civil society to continue contributing to the strengthening of democracy and development in Guatemala. In this regard, it is worth recognizing the significant contribution that historically civil society has made to the country. For example, non-governmental organisations in Guatemala have been vital in ensuring greater participation in public interest matters, particularly of underserving communities (often indigenous and rural communities). The efforts to ensure accountability for serious violations of human rights committed during the internal armed conflict would not have borne fruit without the tenacity and

⁴⁸ U.N. General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, Clément Nyaletsossi Voule, August 7, 2018, A/73/279, para. 14.

⁴⁹ A/74/349, *supra* note 22, para. 2.

⁵⁰ A/73/279, *supra* note 48, para. 10.

⁵¹ See generally A/74/349, *supra* note 22, para. 3.

⁵² *Id.*, para. 2.

⁵³ A/73/279, *supra* note 48, para. 10.

⁵⁴ *Id.*, para. 22.

⁵⁵ *Id.*, para. 70.

persistence of victims and their families, supported by a strong network of civil society organisations. Likewise, the steps to ensure transparency in the management of public affairs and resources have, in considerable measure, been made under the watchful eye of organisations dedicated to anti-corruption initiatives. Non-governmental organisations have raised the alarm but also to offered corrective actions when the rule of law has been threatened and work closely with the community to ensure that their voices are heard and represented in the discussion of policies and laws of public interest. Non-governmental organisations that provide direct services related to food, health and education, among others, are supporting the State in its international obligations to guarantee economic and social rights⁵⁶. These are only some of the areas to which civil society organisations have played an essential role for democracy, development and human rights in Guatemala.

ANALYSIS OF DECREE 4-2020 UNDER INTERNATIONAL HUMAN RIGHTS LAW

38. As will be further elaborated below, Decree 4-2020 contains provisions that could severely affect the full exercise of freedom of association, and could also have implications on other related rights, such as freedom of peaceful assembly and freedom of expression.

- **Some provisions of Decree 4-2020 are drafted in broad, unclear and ambiguous terms in contradiction to the principles of legality, necessity and proportionality.**

39. Article 13 of the Decree states that no foreign funds can be used to undertake activities that ‘alter public order’ in Guatemalan national territory or else they will be immediately deregistered, and its executives prosecuted⁵⁷. Reference to ‘public order’ is also included in article 21, when referring to the possibility of dissolving a civil association or non-governmental organisation at the request of public authorities listed in the Decree⁵⁸.

40. The protection of ‘public order’ is by no doubt, an attribute and responsibility of the State. And while it is one of the legitimate permissible restrictions to the right to freedom of association under art. 22 (2) of the ICCPR, the law establishing the restriction under this justification has to be sufficiently clear about which behaviour is restricted and which is not⁵⁹. As underscored by the Inter-American Commission on Human Rights, the principle of legality “requires restrictions to

⁵⁶ *Id.*, para 77.

⁵⁷ Congress of the Republic of Guatemala, Decree Number 4-2020, 28 February 2020, Article 13 (amending Article 15 of the Law on Non-Governmental Organizations [Decree 2-2003]).

⁵⁸ Congress of the Republic of Guatemala, Decree Number 4-2020, 28 February 2020, Article 21. (amending Article 25 of the Civil Code [Decree Law 106]).

⁵⁹ U.N. Human Rights Committee (HRC), *General Comment no. 34*, *supra* note 29, para. 25.

be formulated previously [to the restricted behaviour], in an express, accurate, and restrictive manner to afford legal certainty to individuals.”⁶⁰

41. Decree 4-2020 does not provide any guidance on what sort of behaviour would be considered to fall under ‘altering public order’. On the contrary, the Decree only includes an open reference to the term and does not describe what may constitute an alteration of public order in a clear, specific and limited manner. In those terms, members of a non-governmental organisation would not be able to anticipate if activities such as participating in a protest could be considered a prohibited activity for ‘altering public order’, affecting thus not only the right to freedom of association but other related fundamental rights, such as freedom of peaceful assembly and of expression. Further, it is evident that the sanction would not meet the requirements of necessity and proportionality, as it would be hard for the State to demonstrate that a less intrusive measure than immediately deregistering and dissolving the organisation would be insufficient.⁶¹
42. In addition to being an ambiguous cause for cancellation and dissolution that does not conform with the principle of legality in the terms discussed above, the restriction established under article 21 of the Decree 4-2020 can hurt access to funding for non-governmental organisations.
43. As has been consistently underscored by the Special Rapporteur the ability to seek, receive and use funds is critical to ensure the viability and sustainability of civil society organisations and thus, is a necessary component for the right to freedom of association⁶². Undue restrictions on this ability are a clear violation of the right to freedom of association⁶³ and for restrictions to be permissible, they must meet the stringent test.⁶⁴
44. Moreover, an enabling legal framework for the right to freedom of association should make it possible to have access to domestic and foreign funding without prior authorisation and formal constraints or administrative burdens being imposed on the process.⁶⁵ But the protection extends to the use and disposition of those funds throughout the life of the association.⁶⁶ The threat of sanctions of such scale as the dissolution of the organisation, as well as potential liability of its

⁶⁰ IACHR, *Second Report*, *supra* note 14, para. 165. See also IACtHR, *Case of Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008, Series C No. 177, para. 63; IACtHR, *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, paras. 55-56.

⁶¹ U.N. Human Rights Committee, *Lee v Republic of Korea*, *supra* note 39, paras.7.2 and 7.3; U.N. Human Rights Committee, *Aleksander Belyatsky et al v. Belarus*, *supra* note 27, para. 7.3.

⁶² A/HRC/23/39, *supra* note 10, para. 8; U.N. General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, 4 August 2015, A/70/266, para 67.

⁶³ A/HRC/23/39, *supra* note 10, paras. 15-18; A/70/266, *supra*, para 67.

⁶⁴ Analysis on International Law, Standards and Principles Applicable to the Foreign Contributions Regulation Rules 2011 by the U.N. Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Maina Kiai, April 20, 2016, at para 6. Available at: https://www.icnl.org/research/library/india_unsrfoaa/.

⁶⁵ A/73/279, *supra* note 48, para. 20.

⁶⁶ ECtHR, *United Communist Party of Turkey and Others v. Turkey*, *supra* note 15, para. 33; IACHR, *Second Report*, *supra* note 14, para. 155.

members, may discourage donors and funders from supporting an organisation, affecting thus not only the right to freedom of association but undermining as civil, cultural, economic, political and social rights as a whole.⁶⁷

- Decree 4-2020 imposes unnecessary and disproportionate burdens on associations and creates obstacles to the exercise of the right to freedom of association.

45. While States have the authority to regulate the registration, oversight, and control of organisations within their jurisdictions, the legal requirements established by them should not impede, delay, or otherwise limit the creation or functioning of these organisations.⁶⁸
46. Decree 4-2020 creates a series of new administrative requirements, including additional registrations and updating information before different public authorities (art. 9). It requires organizations to register in the Registry of Legal Entities [REPEJU for its initials in Spanish] of the Interior Ministry, followed by registration in the Secretary of the Presidency for Planning and Programming [SEGEPLAN for its initials in Spanish] when making changes to the articles of incorporation and bylaws, or when changing the legal representative or members of the board of directors (article 9). Additionally, it requires registering before the Tax authority; before the Foreign Ministry (for international NGOs) and the Office of the Inspector General (if the organisation receives public funds) (article 9).
47. Failing to update the information under the terms of article 9 within six months after the entry into force of the Decree, may result in the automatic cancellation of the legal recognition of an organisation and its dissolution (article 23).
48. The Special Rapporteur recalls that the formation of associations should not be subject to a prior authorization procedure, but rather regulated by a system of notification that is simple, easily accessible, non-discriminatory and non-onerous or free of charge⁶⁹, allowing associations to automatically receive legal personality as soon as they notify the authorities.⁷⁰ A registration procedure requiring association to register and update information before five (5) different government entities can hardly be considered simple and easily accessible. In the opinion of the Special Rapporteur there is little rationale for imposing such heavy administrative requirement.
49. The Special Rapporteur has warned about highly burdensome and bureaucratic registration proceedings that require extensive information and compel applicants to conduct costly and time-intensive duties. In particular, the Special Rapporteur is concerned about the impact burdensome

⁶⁷ A/HRC/23/39, *supra* note 10, para. 9.

⁶⁸ IACtHR, *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations, and Costs. Judgment of February 2, 2001, Series C. No. 72, para. 156; A/HRC/20/27, *supra* note 7, para. 65.

⁶⁹ A/HRC/23/39, *supra* note 10, para. 18.

⁷⁰ A/70/266, *supra* note 62, para. 26.

registration requirements have on marginalized communities and people living in poverty. In a country like Guatemala, where according to the World Bank poverty continues to be high and expected to increase in 2020-2021⁷¹, the obligation to register and update information before 5 different government entities would only amplify pre-existing barriers facing marginalized people and people living in poverty to fully enjoy their right to freedom of association and ultimately impede their compliance.

50. The Special Rapporteur has recommended States to take positive measures to ensure that everyone has equal opportunities to form and operate an association. This means that the barriers that prevent poor and marginalized groups from participating in civil society activities must be identified and actively tackled to ensure substantive equality. State efforts should focus on the removal of physical, economic, legal, cultural and political obstacles that prevent poor and marginalized groups from enjoying the right to freedom of association⁷².
51. In addition, the Decree 4-2020 forces non-governmental organisations to deposit and manage their funds through national banks. The banks account must be in the name of the organisation and it prohibits a third party to receive and administer funds on behalf of the organisation (article 15).⁷³
52. While the State can encourage the use of regulated financial services by registered associations as a measure to prevent illegal activities⁷⁴, it is important to reiterate that the ability to seek, receive and use resources from national, foreign and international sources is a critical part of the right to freedom of association.⁷⁵
53. To force associations to only use bank accounts and prohibit third parties from administering their funds may limit the proper functioning of organisations⁷⁶, and could have a disproportionate impact on smaller or rural associations that rely on other organisations to administer their resources or that have no banks near where they operate.
54. But the requirements imposed by the Decree that may hinder the effective enjoyment of the right to freedom of association not only are of an administrative nature. Indeed, some of them could affect the autonomy of associations to decide on and carry out their goals and objectives. An example of this is article 3 of the Decree, which broadly states that “the beneficiaries of the work

⁷¹ According to the World Bank estimates, the number of people living in poverty in Guatemala is projected to increase by more than 175,000 between 2019 and 2021. See more at: <https://www.worldbank.org/en/country/guatemala/overview>

⁷² A/70/266, *supra* note 62, para. 30.

⁷³ Congress of the Republic of Guatemala, Decree Number 4-2020, February 28, 2020, Article 15 (modifying Article 17 of the Law on Non-Governmental Organisations [Decree 2-2003]).

⁷⁴ A/HRC/23/39, *supra* note 10, para. 35.

⁷⁵ A/74/349, *supra* note 22, paras. 16, 51; A/HRC/20/27, *supra* note 7, para. 75.

⁷⁶ IACHR, *Second Report*, *supra* note 14, para. 163.

of the NGOs must be other people than its members and staff⁷⁷ This provision appears in contradiction of the recognition that the same Decree grants to community organisations (article 4), which by their very nature seek to advance the goals and interests of its associates. As mentioned earlier, associations have the right to define their internal structure, activities and action program, without interference from the State⁷⁸ and this includes pursuing a wide range of activities.⁷⁹

55. Even though it is important to prevent conflict of interests among the directors and members of the organisations, and preserve its non-for-profit nature, as drafted article 3 could impede individuals from organising themselves to collectively address their shared challenges or otherwise advance their common goals. Further, the Decree fails to provide justification for why this limitation would fall under the permissible restrictions to the right to freedom of association. The Special Rapporteur has affirmed that broad categorical restrictions on associations' types of activity are inherently suspicious. Indeed, they should be viewed as *prima facie* violations of international law, because pre-emptive and comprehensive bans on certain categories of work do not conform to the limitations set forth in international law⁸⁰.

The sanctions regime introduced by the Decree 4-2020 does not meet the standards of necessity and proportionality.

56. Decree 4-2020 establishes a series of new or additional administrative requirements to non-governmental organisations, including registering in the Registry of Legal Entities [REPEJU for its initials in Spanish] of the Interior Ministry, followed by registration in the Secretary of the Presidency for Planning and Programming [SEGEPLAN for its initials in Spanish] when making changes to the articles of incorporation and bylaws, or when changing the legal representative or members of the board of directors (article 9). Additionally, it requires registering before the Tax authority; before the Foreign Ministry (for international NGOs) and the Office of the Inspector General (if the organisation receives public funds) (article 9). Failure to update its information and lack of compliance with the requirements asked by the different institutions named in the Decree within the six months following its entry into force will result in the automatic cancellation of the organisation's registration (article 23).

57. The cancellation of the registration and subsequent dissolution of the non-governmental organisation may also be made at the request of the Attorney General's Office, the Tax Administration, the Inspector General's Office or the Ministry of interior "when demonstrated that

⁷⁷ Congress of the Republic of Guatemala, Decree Number 4-2020, February 28, 2020, Article 3 (modifying Article 2 of the Law on Non-Governmental Organisations [Decree 2-2003]).

⁷⁸ IACtHR, *Case of Baena Ricardo et al. v. Panama*. *supra* note 68, para. 156; *see also* A/HRC/20/27, *supra* note 7, para. 65.

⁷⁹ A/HRC/20/27, *supra* note 7, paras. 24, 32.

⁸⁰ A/70/266, *supra* note 62, para. 46.

its activities are against the law and public order" (article 21). Additionally, the cancellation can be ordered by the Registry of Legal Entities at the request of a third party or ex officio "for failure to comply with any of the provisions of the Law" (article 16).

58. The Special Rapporteur wishes to remind this honourable Court that involuntary dissolution is one of the most severe sanctions that the authorities can impose on an organisation. It should only be used when other, less restrictive measures would be insufficient and should be guided by the principles of proportionality and necessity.⁸¹ As held by the Inter-American Commission, decisions that result in the dissolution of the associations should be based upon a judicial decision⁸².

59. Authorising the State to forcibly dissolve a non-governmental organisation for not updating its information before the government entities established in the Decree would imply applying the most severe sanction possible for what could be an administrative error or an infraction that could be resolved with less restrictive measures⁸³. The severity of this sanction is aggravated by the fact that Decree 4-2020 only establishes the possibility to file an appeal on the cancellation decision before the Interior Ministry (article 16) and not a judicial authority. Associations should have the right to appeal decisions regarding suspension or dissolution before an independent and impartial court.⁸⁴

60. Furthermore, as with any severe sanction, the cancellation of the legal personality of an association and its subsequent dissolution should not be automatic. On the contrary, due consideration should be paid to the specific circumstances surrounding the alleged infraction and, in any case, as stated above, the association should have the right to appeal the decision before judicial authorities.

- **Provisions of Decree 4-2020 regarding publicity requirements may affect right to privacy and unduly expose associates, affiliates, beneficiaries and donors to increased risk.**

61. Finally, Decree 4-2020 states that non-governmental organisations must provide all information regarding their constitution, registration, bylaws, control and extinction, as well as of its associates to the Registry of Legal Entities (REPEJU), which will make it fully accessible to the public without limitations (article 10). Additionally, non-governmental organisations must publicize their general account balance at the end of every fiscal year (article 11). However, the Decree does not specify what type of information would be required from the organisation, its board of directors and its associates, that could be freely available for the general public.

⁸¹ A/70/266, *supra* note 62, para. 38; A/HRC/20/27, *supra* note 7, para. 75. *See also* ECtHR, *The United Macedonian Organisation Ilinden and others v. Bulgaria*, Application No. 34960/04, October 18, 2011, paras. 30-41, 49.

⁸² IACHR, *Second Report*, *supra* note 14, para. 168

⁸³ A/70/266, *supra* note 62, para. 38; A/HRC/20/27, *supra* note 7, para. 75

⁸⁴ A/70/266, *supra* note 62, para. 38.

62. The Special Rapporteur wishes to emphasise that the right to privacy is also important for the full enjoyment of the right to freedom of association, and it should not be compromised as a result of the excessive request of information from the State⁸⁵ Article 17 of the ICCPR recognizes the right to privacy in the following terms:

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

63. The oversight powers of the authorities over non-governmental organisations should be carefully delimited and the publicity of the information restricted, so as not to infringe on the right to freedom of association⁸⁶. As pointed out under the OSCE Guidelines on Freedom of Association, “Associations should not be under a general obligation to disclose the names and addresses of its members, since this would be incompatible with both their right to freedom of association and the right to respect for private life”⁸⁷. Likewise, the African Commission on Human and Peoples’ Rights specifically include as examples of detailed information that the States should not require from associations, “the minutes of their meetings, lists of their members, or personal information of their members....”⁸⁸

64. However, affecting the right to privacy of members and other persons affiliated to the organisation, including donors, may have other serious consequences, including exposing them to personal risk. As evidenced in a recent joint report by the Office of the U.N. High Commissioner for Human Rights in Guatemala and the National Human Rights Institution [Procuraduría de los Derechos Humanos], human rights defenders face significant threats and are subject to violence and intimidation in large numbers across the country⁸⁹. Requiring and publicising detailed information, including personal identifiers, as well as financial information, could make members of non-governmental organisations more vulnerable to threats and attacks. State authorities should at minimum establish clear criteria on the type of information that would be requested, and mechanisms to protect the confidentiality of sensitive information.

⁸⁵ IACHR, *Second Report*, *supra* note 14, para. 177.

⁸⁶ African Commission on Human and Peoples’ Rights, *Guidelines on Freedom of Association and Assembly in Africa* (2017), para. 33. Available at: <https://www.achpr.org/legalinstruments/detail?id=5>.

⁸⁷ OSCE, *Guidelines on Freedom of Association*, *supra* note 19, para. 167.

⁸⁸ African Commission on Human and Peoples’ Rights, *Guidelines on Freedom of Association and Assembly in Africa*, *supra* note 86, para. 33.

⁸⁹ Office of the United Nations High Commissioner for Human Rights Guatemala and the Human Rights Ombudsperson, *Situation of human rights defenders in Guatemala: Between the Commitment and the Adversity* [Situación de las personas defensoras de derechos humanos en Guatemala: Entre el compromiso y la adversidad] (2019). Available in Spanish at: http://www.oacnudh.org.gt/images/CONTENIDOS/ARTICULOS/PUBLICACIONES/Informe_personas_defensoras.pdf

CONCLUSION

65. The Special Rapporteur believes that the amendments introduced by Decree 4-2020 to the Law on Non-Governmental Organisations for Development [Decree 2-2003] and to the Civil Code [Decree Law 106], signed into law by the President on February 27, 2020, and which this Honourable Court has provisionally suspended, would unjustifiably restrict the right to freedom of association under international law, standards, and principles.
66. Given the recognition of international law by the Guatemalan Constitution, and more specifically the conventions and treaties Guatemala is a party to, the Special Rapporteur hereby urges the Honourable Constitutional Court of Guatemala to conduct a thorough and systematic assessment of the provisions challenged before it, taking into account both the positive obligations of the State and the conditions for legitimate restrictions under international law as discussed above.
67. The Special Rapporteur trusts that this Honourable Court will take into account the aforementioned standards and arguments when deciding the merits of the constitutional actions of *Amparo* filed in the matter of reference.
68. The Special Rapporteur also takes this opportunity to encourage all actors involved, including the Honourable Constitutional Court of Guatemala, to utilize their roles and responsibilities to work towards the full realization of the right to freedom of association in the country.

April 16, 2020



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on the Rights to Freedom of Peaceful Assembly and of Association