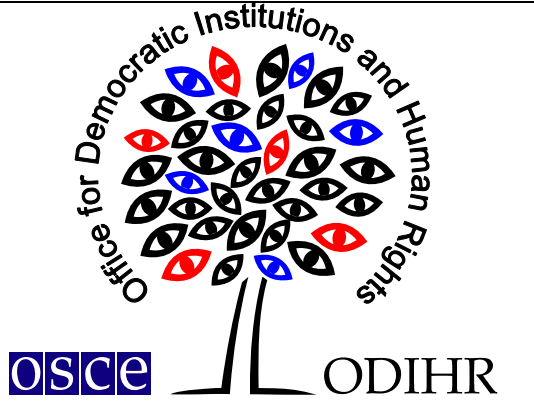


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OPINION

ON THE DRAFT LAW OF THE KYRGYZ REPUBLIC

“ON AMENDMENTS AND ADDITIONS TO SOME

LEGAL ACTS OF THE KYRGYZ REPUBLIC”

This opinion has been prepared on the basis of comments provided by Mr Jeremy McBride, Honorary Senior Research Fellow, University of Birmingham and Visiting Professor at the Institut International des Droits de l’Homme and is based on an unofficial English translation and the original Russian versions of the draft law provided by the OSCE Centre in Bishkek

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I. INTRODUCTION

1. *On 18 February 2009, a group of the Kyrgyz MPs submitted to the Zhogorku Kenesh a Draft Law “On Amendments and Addenda to Some Legal Acts of the Kyrgyz Republic” that pertained to the issue of non-commercial organisations. On 6 March 2009, the proposed amendments were discussed at a round table with participation of the drafters of the amendments, other MPs, representatives of executive authorities, NGOs, political parties and international organisations. The drafters stressed that they are open for discussion and called for the submission of proposals and comments.*
2. *On 11 March the OSCE Centre to Bishkek addressed the OSCE ODIHR with the request to provide opinion on the proposed Draft Law following the meeting with and Note Verbale to the Speaker of the Zhogorku Kenesh of the Kyrgyz Republic, dated as of 6 March 2009.*
3. *This Opinion has been prepared on the basis of an unofficial English translation of the Draft Law.*

II. SCOPE OF REVIEW

4. This Opinion analyzes the Draft Law of the Kyrgyz Republic “On Amendments and Addenda to Some Legal Acts of the Kyrgyz Republic” (hereinafter referred to as “the Draft Law”) in terms of its compatibility with relevant international and regional standards and OSCE Commitments pertaining to the freedom of association. The Opinion also draws upon relevant case law and international good practice relating to the regulation of public assemblies.
5. The provisions in the Draft Law are intended to amend and make additions to the Law “On Non-Commercial Organizations” (hereafter, “the NCO Law”) and the Law “On Registration of Legal Entities” (hereafter, “the Registration Law”).
6. This Opinion refers to standards which are legally binding upon the Kyrgyz Republic, in particular, the International Convention on Civil and Political Rights (ICCPR)¹ and the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally

¹ ICCPR, Article 22 reads that “1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. (...)”; this commitment is further reinforced in a number of other UN Conventions, such the International Convention on the Elimination of All Forms of Racial Discrimination [Article 5], the Convention on the Elimination of All Forms of Discrimination against Women [Article 7], the Convention on the Rights of the Child [Article 15], the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families [Article 26], the Convention on the Rights of Persons with Disabilities, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons.

Recognised Human Rights and Fundamental Freedoms ("the Declaration on Human Rights Defenders")².

7. The Opinion also refers to the Fundamental Principles on the Legal Status of Non-governmental Organisations in Europe³ ("the Fundamental Principles") and Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe⁴ ("Recommendation CM/Rec(2007)14). In applying these standards guidance can be derived from the case law of the United Nations Human Rights Committee and the European Court of Human Rights ("ECtHR").
8. The Opinion gives the consideration to the scope of the legislation as it is currently in force and the extent to which it is broadly compatible with international standards. There is then a clause by clause analysis of the likely effect of the proposed amendments and the compatibility of this with international standards, together with recommendations regarding changes needed to achieve such compatibility.
9. The OSCE/ODIHR notes that the Opinion provided herein is without prejudice to any other opinions or recommendations that the OSCE/ODIHR may wish to make on the issues under consideration in the future.

III. EXECUTIVE SUMMARY

10. The Draft Law seeks to amend the NCO Law and the Registration Law, two important measures underpinning the operation of non-commercial organisations and thus the role that can be played by civil society in the Kyrgyz Republic. The existing legislation is in most respects compatible with the international standards. This level of compatibility would be significantly diminished were the proposed amendments to be adopted. The changes entail the removal of recognition for informal organisations to operate, the removal of the capacity of potentially many people to become founders or members of non-commercial organisations, a prohibition on the activities that come within a broad definition of what is "political" or connected to elections, an extension in the grounds for denying registration to non-commercial organisation, enhanced powers of regulation over such organisations and substantial reporting obligations for them. Some of the changes might be brought into line with respective international standards through certain clarifications and tighter

² GA Res 53/144, 9 December 1998; the full text of the Declaration is available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.res.53.144.en?opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.res.53.144.en?opendocument).

³ CoE Fundamental Principles on the Status of Non-governmental Organisations in Europe and explanatory memorandum. Although not legally binding in general and on Tajikistan as a non-member State of the Council of Europe in particular, the Fundamental Principles nevertheless are internationally recognized as an authoritative body of standards widely used for the interpretation of international treaty norms concerning freedom of association. The Fundamental Principles in English or Russian are available at http://www.coe.int/T/E/NGO/public/Fundamental_Principles/Fundamental_principles_intro.asp

⁴ Adopted on 10 October 2007; the full text is available at <https://wcd.coe.int/ViewDoc.jsp?id=1194609&Site=CM&BackColorInternet=9999CC&BackColorIntranet>

drafting. However, it would not be possible to bring the most significant amendments into line with international standards and thus their deletion would be necessary. The proposed restrictions are not outweighed by the potentially beneficial extension of the provision for state support to non-commercial organisations.

11. Below is the list of major recommendations:

i) The following provisions should be deleted as incompatible with international standards:

- a. the reference to international non-commercial organisations in the proposed amendment to the second part of Article 1 of the NCO Law [para. 39];
- b. the replacement being proposed for the third part of Article 2 of the NCO Law [para. 45, 56-57];
- c. the prohibition on participation in political activities or activities in the process of nation-wide voting in the amendment to Article 4 of the NCO Law [para. 56-57];
- d. the restriction introduced by the proposed Article 6-1 of the NCO Law on becoming a founder, member or participant if unlawfully present [para. 72];
- e. the provision in the proposed Article 9-1 of the NCO Law for rejecting registration on account of a name causing insult [para. 89];
- f. the provision in the proposed Article 9-1 of the NCO Law for rejecting registration on account of false information [para. 93];
- g. the separate reporting requirement for money and property from international organisations and foreign states in the proposed amendment to Article 17 of the NCO Law [para. 123];

ii) The following modifications are required to bring the relevant provisions into line with international standards:

- h. there should be a reference to foreign law rather than legislation in the amendment to part two of Article 2 of the NCO Law [para. 43];
- i. the definition of information should be limited to that generated by non-commercial organisations in the proposed amendment to what would become part nine of Article 2 of the NCO Law [para. 46];
- j. the restriction introduced by Article 6-1 on the categories of persons that can become founders, members or participants should be limited and subjected to appropriate safeguards [para. 72-74];
- k. the amendments to Article 9 of the NCO Law should become amendments to the Registration Law [para. 75-80 and 129];

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- l. the possibility of correcting defects in registration documents should be introduced in the amendment proposed for Article 9 of the NCO Law [para. 79];
 - m. the provisions introduced by Article 9-1 of the NCO Law should become amendments to the Registration Law [para. 81-97 and 129];
 - n. the provision in the proposed Article 9-1 of the NCO Law for rejecting registration on account of a previous liquidation should cease to be absolute [para. 95];
 - o. a requirement to give reasons for refusing registration should be introduced [para. 97];
 - p. the mandate for regulation in the proposed amendment to Article 15 of the NCO Law should be revised [para. 109];
 - q. the power to attend events in the proposed amendment to Article 15 of the NCO Law should be limited to public ones or be accompanied by appropriate safeguards [para. 111-113];
 - r. the possibility of suspending the effect of a warning under the proposed amendment to Article 15 of the NCO Law should be introduced [para. 114];
 - s. the duration of the suspension power under the proposed amendment to Article 15 of the NCO Law should be defined [para. 116];
 - t. the scope of the liquidation power under the proposed amendment to Article 16 of the NCO Law should be brought into line with the terms of Article 15 [para. 119];
 - u. the reporting obligations under the proposed amendment to Article 17 of the NCO Law should be more precise [para. 121];
 - v. the power to prohibit transfers of money and property under the proposed amendment to Article 17 should be re-located and a right of appeal in respect of such a prohibition should be provided [para. 125-126];
 - w. Article 4 of the Draft Law should simply state that the activities, statutory goals and objectives of already registered entities comply with the Draft Law [para. 129];
 - x. an exemption from re-registration for already registered branches and representative offices of national non-commercial organisations should be introduced [para. 131].
- iii) The following provisions need clarification on issues as to their compliance with international standards:
- y. the acquisition of legal capacity for branches and representative offices pursuant to what would become part three of Article 6 [para. 68];

- z. the proposed amendments to Article 9 on the Registration Law [para. 78];
- aa. the scope of the insurance risks to be covered in the amendment to Article 9 of the NCO Law [para. 80];
- bb. the introduction of Article 9-1 of the NCO Law on the Registration Law [para. 82];
- cc. the first ground for refusing registration to non-commercial organisations in the proposed Article 9-1 of the NCO Law [para 85];
- dd. the form of documents in an application for registration for the purposes of the proposed Article 9-1 of the NCO Law [para. 86];
- ee. the limitations on carrying out economic activities [para. 102];
- ff. the reporting obligation with respect to the public under the proposed amendment to Article 17 of the NCO Law [para. 122];
- gg. "foreign share" in the proposed amendment to Article 3 of the Registration Law [ara.129].

IV. ANALYSIS AND RECOMMENDATIONS

- 12. The Draft Law seeks to amend ten articles of the NCO Law and one article in the Registration Law. It would also introduce two entirely new articles to the NCO Law.
- 13. In order to establish the compatibility or otherwise of the proposed amendments in the Draft Law it is essential to understand the scope of the existing legislation and the extent to which this is itself compatible with those standards. The provisions in the NCO and Registration Laws are thus examined before undertaking the analysis of the provisions in the Draft Law.

The NCO and Registration Laws

- 14. The NCO Law provides the legal base for the formation, registration and regulation of organisations created "on the basis of community of interests for implementing spiritual and other non-material needs in the interests of its members and (or) the whole society, where the deriving of a profit is not a major objective, and the obtained profit is not distributed among members, founders and official persons"⁵. Political parties, trade unions, religious organisations and co-operatives are, however, regulated by other laws than the NCO Law.
- 15. The Registration Law regulates the granting and revocation of legal personality to both commercial and non-commercial entities.
- 16. Such organisations are a form of non-governmental organisation and, in case they are membership-based, they are a manifestation of the right to freedom of

⁵ The NCO Law, Article 2.

association. This freedom is a fundamental element in securing and maintaining a healthy democracy. It can be subject to regulation but that should never be carried out to such an extent that the pursuit of legitimate objectives is precluded. Moreover, in examining a law such as the Draft Law, account always needs to be taken of the extent to which it actually facilitates the operation of associations as much as whether or not it impedes the carrying out of their activities.

17. Under the existing NCO Law, it is possible to establish non-commercial organisations in the form of public associations, foundations or institutions, the latter two being non-membership in character. Registration as a legal entity is not, however, obligatory for non-commercial organisations⁶.
18. It is also possible to establish branches and representative offices for non-commercial organisations both within the Kyrgyz Republic and abroad; these will not be discrete legal entities⁷. However, contrary to international standards⁸, the Registration Law requires registration of branches and representative offices.⁹
19. The NCO Law provides that the creation and operation of non-commercial organisations shall be governed by "voluntarism, self-governance, lawfulness and openness"¹⁰. The law also prohibits a person's participation or non-participation in the activity of a non-commercial organisation serving as the basis for a restriction on his or her rights and freedoms¹¹.
20. Non-commercial organisations can be established by legal entities and citizens or individuals¹². As regards the latter, the English translation uses both terms at different points in the NCO Law. However, given that Article 2 of the NCO Law provides that "a place of living or citizenship" is irrelevant for the purpose of founding non-commercial organisations, it is assumed that the NCO Law at present allows citizens and non-citizens to form non-commercial organisations. This is consistent with the requirements of the right to freedom of association as this applies to everyone regardless of nationality or citizenship¹³. Although there is no explicit provision in the NCO Law excluding children and persons in prison or with a criminal record from forming such organisations or participating in their activities, the first of these is probably affected by the

⁶ *Id.*, Article 6. However, according to the Registration Law [Article 13], only registered entities can open a bank account. Furthermore, any activity as a legal entity without being registered is prohibited and income resulting from this is forfeited to the state budget [*ibid*, Article 20].

⁷ *Id.*, Article 8.

⁸ See Principle 40 of the Fundamental Principles and paragraph 42 of Recommendation CM/Rec(2007)14.

⁹ The Registration Law, Article 3.

¹⁰ The NCO Law., Article 4.

¹¹ *Ibid*.

¹² *Id.*, Article 2.

¹³ Principle 15 of the Fundamental Principles and paragraph 16 of Recommendation CM/Rec(2007)14.

requirement that founders must be "capable"¹⁴ and thus potentially incompatible with the right to freedom of association¹⁵.

21. Only three persons are required to form a public association. However, unlike foundations and institutions and contrary to international standards, this capacity is not accorded to legal entities¹⁶.
22. The requirements for the Charter of a non-commercial organisation in Article 10 are entirely relevant, with the exception of the need to include the legal address¹⁷. Furthermore, the fact that the limitation in Article 12 on the activities that can be undertaken by such an organisation is simply the general law, the terms of its charter is ostensibly appropriate. Moreover, the explicit recognition in the latter provision of the possibility of a non-commercial organisation engaging in economic activities so long as the profit is not distributed to members, founders, employees or those on its governing body - can contribute to enabling such an organisation to raise the funds needed to pursue its activities.
23. The formal requirements in the NCO Law for establishing public associations, foundations and institutions, as well as those governing their management, are relevant and not unduly onerous.
24. The registration of a non-commercial organisation as a legal entity is governed by the Registration Law, which also applies to commercial legal entities. Registration is to be carried out by or under the auspices of the Ministry of Justice. Registration requires the submission of the foundation documents, namely the charter and founders agreement¹⁸. There is an appropriate prohibition on any other documents being required, although in the case of legal entities with foreign participation the documents specified in the Law 'On Foreign Investments in the Kyrgyz Republic' must also be supplied.
25. The function of the registration body is limited to verifying the completeness of the package of submitted documents, verifying their accuracy, issuing an order of registration if the foundation documents comply with the requirements of the legislation, entering information about the entity concerned in the register and issuing a certificate of registration¹⁹.

¹⁴ The NCO Law, Articles 19, 23 and 31.

¹⁵ UN Convention on the Rights of the Child, Article 15 provides that "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". See also paragraph 45 of the Explanatory Memorandum to Recommendation CM/Rec(2007)14.

¹⁶ Principle 15 of the Fundamental Principles and paragraph 16 of Recommendation CM/Rec(2007)14.

¹⁷ Obtaining an address may not be possible before becoming a legal entity and its inclusion also means that it is subject re-registration - as opposed to mere notification - in the event of a change.

¹⁸ The Registration Law, Articles 6 and 7.

¹⁹ *Id.*, Article 8.

26. There is a commendable 10-day deadline in the Registration Law for taking a registration decision, with the possibility of suspending it where defects in the foundation documents are found²⁰. There is, however, no indication of the consequences of failing to comply with this deadline.
27. Refusal of registration is only possible where the foundation documents do not comply with the requirements of the legislation²¹. There is liability for compensation for resulting losses in the event of registration being illegally refused²².
28. Changes to the foundation documents, as well as the opening or liquidation of a branch or representative office are subject to a requirement of being re-registered²³.
29. Apart from a court order pursuant to the Law “On Bankruptcy”, termination of the registration of a non-commercial organisation is - subject to verification by the registration body - possible only by decision of its founders or members²⁴. However, there is a special provision for the liquidation of public and religious associations and other organisations whose goals and acts are aimed at the exercise of extremist activity in the Law “On Counteracting Extremist Activities”²⁵.
30. All disputes about refusal or termination of registration are to be resolved in court upon application of an interested party²⁶.
31. The NCO Law provides for government support to the activities of non-commercial organisations but also explicitly prohibits interference by state bodies or officials in those activities²⁷, which should serve as a useful reminder for both officials and the courts, of the governing principle of self-governance already proclaimed in Article 4 of the law²⁸.
32. There are appropriate provisions in the NCO Law about conflict on interests in transactions involving non-commercial organisations²⁹ and apparently modest requirements governing transparency³⁰.
33. Overwhelmingly, the existing provisions in the NCO and Registration Laws governing non-commercial organisations are broadly in line with international standards. The exception concerns the inability of children with a degree of

²⁰ *Id.*, Article 10.

²¹ *Id.*, Article 12.

²² *Id.*, Article 20.

²³ *Id.*, Article 15.

²⁴ Law on Bankruptcy, Article 17.

²⁵ Law on Counteracting Extremist Activities., Article 9.

²⁶ The Registration Law, Article 19.

²⁷ The NCO Law, Article 5.

²⁸ See para 18 of this Opinion

²⁹ The NCO Law, Articles 13 and 14.

³⁰ *Id.*, Article 17; this concerns the revenue return structure and the amount of property.

maturity to establish non-commercial associations, the inability of legal entities to establish public associations, the need to register branches and subsidiaries (which are not legal entities) and the subjection of a change of address to the requirement of re-registration. Indeed, the degree of regulation seems to involve an appropriately light touch and the necessary judicial guarantees to secure compliance with the legislation are ostensibly provided.

Article 1 of the Draft Law

33. This contains all the amendments and additions to the NCO and Registration Laws and gives rise to almost all difficulties in the Draft Law as regards compliance with international standards. These amendments and additions are examined under headings relating to the provisions in the two Laws that are being amended or subject to additions.

Amendment to Article 1 of the NCO Law

34. There are three changes introduced modifying this provision
35. First, there will be no longer any reference to "*re-organization*" and "*liquidation*" in the functions of the NCO Law that are prescribed in Article 1. This is strange: although Article 16 of the NCO Law currently deals with these issues only by referring to other legislation, the Draft Law appears to seek to introduce an additional basis for liquidation³¹. It would be more appropriate to retain the existing formulation of the first part of Article 1 of the NCO Law since it has a clearer exposition of that Law's objectives and it is not inconsistent with those of the Draft Law.
36. The second and third changes relate to the definition of a non-commercial organisation. They generally introduce branches³² and representative offices, in particular those opened by international or foreign organisations.
37. Concern about the existing requirement of registration for branches and representative offices has already been noted³³. This does not, however, have any bearing on the proposed amendment, even though the latter may make their regulation more onerous³⁴, since their substantive position is not being affected by it.
38. Moreover, the specific linkage of branches and representative offices with foreign non-commercial organisations may be a better reflection of the involvement of the latter in the Kyrgyz Republic than including them in the non-commercial organisations to be regulated, as is the case in the existing

³¹ See para. 119-120 of this Opinion

³² The English text of the Draft Law uses the term "subsidiaries" but it is considered that this is not a matter of substance and the term "branch" is used throughout the remainder of this opinion. A similar view is taken of the use of "authorities" rather than "institutions".

³³ See para. 18 of this Opinion.

³⁴ See para. 79 of this Opinion

formulation of part one of Article 1 of the NCO Law. Furthermore there is nothing problematic in principle with a requirement that the branches and representative offices of non-commercial organisations not established under the law of a country be subject to some form of regulation³⁵. While the detail of the regulation being proposed is considered further below³⁶, there is no reason why this aspect of the recasting of part two of Article 1 of the NCO Law should be altered.

39. However, it may be that either reconsideration or clarification is required with respect to the addition of "international" to "foreign" in determining the branches and representative offices to be regulated. The NCO and Registration Laws only cover "foreign" organisations - which are understood to be those established under the law of a foreign country, notwithstanding that the scope of their operations may involve several countries, a region or even the entire world - but the proposed change may bring within the scope of those laws the offices of intergovernmental and international organisations which are more usually regulated by multilateral or bilateral treaty and specially tailored legislation. In the event that the legislation is indeed intended to cover such offices, it would be appropriate to note that this is not incompatible with existing international commitments. If, however, that is not the intention, clarification of what - if anything - the term "international" is intended to add to the term "foreign" is needed, particularly as it is found only in the amendments to Articles 1 and 6 whereas all other relevant amendments concern only foreign non-commercial organisations. It may well be that it is otiose and should, therefore, be deleted to avoid unnecessary confusion.
40. It should also be noted that the use of phrase "*among them those created in the form of public associations, foundations, authorities ...*" when referring to "*all non-commercial organisations*" could give the impression (at least in the English text) that there are other such organisations apart from those listed. However, there is no suggestion of this either in the NCO Law or the Draft Law and it may be that the phrasing should be modified.

Amendment to Article 2 of the NCO Law

41. There are six modifications proposed for this provision.
42. The first change is the deletion of the existing second and third parts providing that founders and members of non-commercial organisations can be "*legal entities and capable individuals, irrespective of a place of registration of legal entities and a place of living or citizenship or individuals*". The more restrictive replacement for this in a subsequent amendment is considered further below³⁷.
43. The second change is the introduction of a part defining foreign non-commercial organisations. This is generally unproblematic as it defines them by

³⁵ See Principle 37 of the Fundamental Principles and paragraph 45 of Recommendation CM/Rec(2007)14.

³⁶ See paras 78-82 of this Opinion

³⁷ See para. 69-74 of this Opinion

reference to the legislation of foreign states. However, there may be problems in practice of recognising some organisations as coming within this definition as the foreign legislation may not have provisions exactly identical to those in the NCO Law. Particularly, it regards the way non-commercial activity is defined and the activities that can be undertaken by the respective organisations. This is not something that can be dealt with by precise definitions³⁸. It will be essential that the authorities apply a flexible approach to the evaluation of foreign laws when assessing whether or not a foreign legal entity can benefit from this provision. They should rely on the general character of the relevant provisions rather than specific details. Moreover, it would be desirable to refer to "foreign law" rather than "foreign legislation" as in some countries the legal basis for some non-commercial organisations is based on judge-made law³⁹.

44. The third change is the replacement of the liability of all participants in or members of a non-commercial organisation that is not an independent legal entity for damage that it inflicts on a third party by a provision making the organisation liable for such damage. This reflects the apparent abolition of the possibility of establishing informal non-commercial associations, which is discussed further below⁴⁰. However, it is entirely appropriate that a non-commercial organisation which is an independent legal entity should - rather than its members or participants - be liable for any damage that it causes⁴¹.
45. The fourth and fifth changes are the introduction of a definition of political activity and of activity in the processes of nation-wide voting. As the significance of these definitions is only evident in the context of the prohibition on non-commercial organisations engaging in these activities that is proposed as an amendment to Article 4 of the NCO Law, this is considered further in the discussion of that amendment below⁴².
46. The sixth change relates to the definition of the property of a non-commercial organisation in the last part of Article 2. The amendment would replace "*non-commercial information on its activities*" by "*any information on its activities in electronic or printed media, and results of creative activity*". This would seem to be aimed at protecting copyright and similar interests in publications in both the printed and electronic form. However, the language used fails to distinguish between information that is generated by a non-commercial organisation itself and that generated by others such as broadcasters, newspapers and writers. While a non-commercial organisation should undoubtedly enjoy the protection of law with regard to the former, any property interests arising in respect of the latter ought not to accrue to it but to those who have generated the information

³⁸ Cf Article 1 of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations which provides that "[t]his Convention shall apply to associations, foundations and other private institutions (hereinafter referred to as "NGOs") which satisfy the following conditions: a. have a non-profit-making aim of international utility; b. have been established by an instrument governed by the internal law of a Party ...".

³⁹ Such as in the United Kingdom, for example.

⁴⁰ See para. 64-65 of this Opinion

⁴¹ See Principle 24 of the Fundamental Principles and paragraph 26 of Recommendation CM/Rec(2007)14.

⁴² See para. 48-58 of this Opinion

concerned. It would, therefore, be appropriate the scope of this provision and ensure that it covers only information generated by a non-commercial organisation.

Amendment to Article 4 of the NCO Law

47. The proposed amendment concerns the introduction of a new limitation on the activities of non-commercial organisations. Namely, they are totally prohibited from participating in political activities or activities in the process of nationwide voting as defined by the amendment to be made to Article 2. Breach of this prohibition will give rise to criminal responsibility determined in accordance with other legislation.
48. The prohibition has serious implications for the exercise of the both right to freedom of expression and right to freedom of association, as well as the right to freedom of assembly. Furthermore, it raises serious concerns in that it is in direct contradiction with OSCE commitments whereby OSCE participating States committed themselves to invite observers to their elections, and this does not only refer to international observers⁴³.
49. The definition of political activity for the purpose of the Draft Law is linked to the activity of political parties, which are separately regulated by the Law 'On Political Parties'. It is essentially twofold and includes (a) implementing the political will of a certain part of the population and participating in the management of state affairs, and (b) making proposals to public authorities for improvements in state and public affairs.
50. The first is about government in its broadest sense and thus particularly concerns the executive and the legislature at the national level and similar bodies at local and regional levels. While it might be seen primarily about those who are in government in this sense or seeking to get into that position, especially through the election process, it could also cover those who are concerned about the conduct of those holding or seeking such public offices with a view to informing the public and securing some form of accountability.
51. The second concerns the beginning of the process of bringing about change as regards either the content of the law or the conduct of the administration in the exercise of existing powers. This is something that can occur within a parliament or other bodies entrusted with this task, whether on a standing or ad hoc basis. The right to engage in such activity is guaranteed by the right to freedom of assembly and expression and the right of political participation⁴⁴.

⁴³ Paragraph 9 of the OSCE 1990 Copenhagen Document states that "*The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place. They therefore invite observers from any other CSCE participating States and any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law. They will also endeavour to facilitate similar access for election proceedings held below the national level. Such observers will undertake not to interfere in the electoral proceedings.*". The full text of the Document is available at http://www.osce.org/documents/odihr/1990/06/13992_en.pdf

⁴⁴ ICCPR, Articles 19, 21 and 25. See also the Constitution of the Kyrgyz Republic, Articles 13, 14, 25.

52. The prohibition on participation in “political activities” might lead to instances where advocacy for a change in the law will be considered as a political activity and will be, therefore, prohibited. The terms “political activities” would need to be defined in a narrow sense so that the scope of the prohibition does not go as far as affecting any activity that fall under the legitimate interest of the civil society, particularly non-commercial organizations who follow and address issues of public interest. It is essential for the draft law to draw a line between lobbying and advocacy activity on the one hand, and partisan political activity on the other hand.
53. There is a genuine public interest in regulating the activities of those who seek to be elected or appointed to the executive and legislature, particularly through the vehicle of political parties and it is appropriate that the latter are regulated by discrete provisions to those in the NCO Law. However, this does not mean that individuals or non-commercial organisations are thereby precluded advocacy on issues of public debate, whether or not the position is in accord with government policy and whether or not what they are advocating requires a change in the law or even the constitution.
54. The entitlement of non-commercial organisations to take part in political debate has been recognised in cases applying the right to freedom of association⁴⁵ and the only qualification on the freedom to campaign for change in the legal and constitutional basis of the State in that both the means used and the proposed change itself must not actually be anti-democratic⁴⁶. This is a position reaffirmed in both the Fundamental Principles⁴⁷ and Recommendation CM/Rec(2007)14⁴⁸, which also specifically encourage the participation of non-commercial organisations in mechanisms for dialogue, consultation and exchange with government on public policy objectives and decisions⁴⁹. Furthermore it should be noted that instruments concerned with specific forms of association have recognised that they should be able to undertake certain forms of activity, notably, observation of trials and other proceedings⁵⁰, participation in public affairs and criticism of governmental actions⁵¹,

⁴⁵ See, e.g., ECtHR judgement, *Koretsky and Others v Ukraine*, no 40269/02, 3 April 2008 in which the ECtHR observed that there had been no explanation for, or even an indication of the necessity of the existing restrictions on the possibility of associations to distribute propaganda and lobby authorities with their ideas and aims, their ability to involve volunteers as members or to carry out publishing activities on their own. See also Appl No 7525/76, *X v United Kingdom*, 11 DR 117 (1978), in which it was found that the scope of certain offences concerned with homosexual relations was not such as to prevent the advocacy of reform of the criminal law.

⁴⁶ See ECtHR judgement, *Refah Partisi (The Welfare Party) and Others v Turkey* [GC], no 10504/03, 7 December 2006.

⁴⁷ The Fundamental Principles, Principles 10 and 11

⁴⁸ See Paragraphs 11 and 12

⁴⁹ The Fundamental Principles, Principle 74

⁵⁰ See Article 9(3)(b) of the Declaration on Human Rights Defenders and para 43 of the Document of the OSCE Moscow, 1991 Meeting.

⁵¹ See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [Aarhus Convention], Articles 6-8 [full text is available at <http://www.unece.org/env/pp/documents/cep43e.pdf>]; the European Charter on the Statute for Judges, Article 1.8 [full text is available at http://www.coe.int/t/e/legal_affairs/legal_co-

promotion of human rights ideas⁵², provision of advice⁵³, provision of information to international organisations⁵⁴ and seeking information⁵⁵.

55. Moreover, the ECtHR has pointed out that the fact a non-commercial organisation's objectives might be seen as "political" should not necessitate it seeking the status of a political party where this is separately provided for under a country's law. Thus, it found a violation of the right to freedom of association under Article 11 of the European Convention on Human Rights⁵⁶ ("ECHR") where an organisation was refused registration because some of its aims were "political goals" within the meaning of the Constitution and could hence be pursued solely by a political party⁵⁷. The ECtHR emphasised that such an approach would run counter to freedom of association, because, in case it was adopted, the liberty of action which would remain available to the founders of an association, would become either non-existent or so reduced that it would be of no practical value. It was also important that associations could not accede to power through elections⁵⁸.
56. It is thus evident that the restriction on participation in political activities being proposed in the amendment to Article 4 is inconsistent with international standards and should not be retained.
57. The more specific restriction on participation in the process of nation-wide voting is also problematic. While the foregoing analysis would not preclude a bar on non-commercial organisations seeking to accede to power through elections, participation in the voting process is something that could embrace the expression of views against or in favour of the policies of a given party, which is permitted for non-commercial organisations under international standards⁵⁹. Furthermore, such participation could embrace the monitoring of elections. The proper conduct of elections is one of the human rights [i.e., the right to political participation⁶⁰] that international standards recognise individuals and associations as having the right to seek to protect⁶¹. Involvement in elections by non-commercial organisations can be made subject to legislation

[operation/legal_professionals/judges/instruments_and_documents/charte%20eng.pdf](#)]; the UN Declaration on Human Rights Defenders, Article 8; the Document of the OSCE Moscow Meeting, 1991, para. 43 [full text is available at http://www.osce.org/documents/odhr/1991/10/13995_en.pdf]

⁵² The Declaration on Human Rights Defenders, Article 7

⁵³ The Declaration on Human Rights Defenders, Article 9(3)(c)

⁵⁴ The Declaration on Human Rights Defenders, Article 9(4)

⁵⁵ The Aarhus Convention, Article 4

⁵⁶ The Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature, 4 November 1950.

⁵⁷ See ECtHR judgement, *Zhechev v Bulgaria*, nNo 57045/00, 21 June 2007.

⁵⁸ In this regard it contrasted to the situation of organisations dealt with in ECtHR judgement, *Gorzelik and Others v Poland* [GC], no 44158/98, 17 February 2004, which could seek election..

⁵⁹ See Principle 12 of the Fundamental Principles and paragraph 13 of Recommendation CM/Rec(2007)14. See also ECtHR judgement, *Bowman v United Kingdom*, no 24839/94, 19 February 1998.

⁶⁰ ICCPR, Article 25

⁶¹ The Declaration on Human Rights Defenders, Article 5

concerned with the funding of elections and political parties⁶² but that is not the object of the proposed amendment since the reach of the prohibition extends to any involvement in the voting process. In these circumstances, the inconsistency of the proposed amendment with international standards means that it cannot be retained.

Amendment to Article 5 of the NCO Law

58. The proposed rewording of Article 5.2 involves a considerable elaboration on what is currently stipulated as to the means through which state support can be provided to non-commercial organisations. These would comprise preferential taxes, customs or other duties and payments pursuant to specific legislation, targeted allocation of funds from the state budget, provision of privileges such as full or partial exemption from fees for the use of state or municipal property and the provision of state social contracts on a competitive basis.
59. The provision of state support to non-commercial organisations is encouraged by international standards⁶³. All the means listed in the reworded provision are appropriate. The stipulation that the procedure for allocating funds from the state budget and for providing state social contracts is to be annually established has the potential for ensuring that access to these forms of state support is genuinely open to all non-commercial organisations and not just a favoured few. Whether this proves to be the case will depend on the nature of the procedure adopted and the efficacy of judicial control over its implementation. Similarly the actual impact of these means depends upon the necessary legislation being adopted, the actual budget allocations made, privileges provided and state social contracts offered. The introduction of these possibilities provides an appropriate framework for the giving of much-needed public support to non-commercial organisations.
60. The fact that this provision is limited to non-commercial organisations with only certain objectives, that include charity, education, cultural and scientific, public health protection and physical culture and sports, is not objectionable. It is up to a state to determine its priorities for the provision of public support. Furthermore the listed objectives can legitimately be regarded as serving the public.

Amendment to Article 6 of the NCO Law

61. Two changes are being proposed for this provision.
62. Article 6.1 is replaced by the stipulation that "[n]on-commercial organisations may be established in the form of public associations, foundations and authorities". It presents certain duplication of Article 1. It is not clear why such duplication should be needed but the effect of this proposed amendment to the

⁶² See paragraph 13 of Recommendation CM/Rec(2007)14.

⁶³ See Principle 6 of the Fundamental Principles and paragraph 8 of Recommendation CM/Rec(2007)14.

wording of Article 6.2 is actually of considerable significance since it replaces the clear stipulation that non-commercial organisations can be created without being registered as legal entities.

63. The elimination of the express recognition that non-commercial organisations do not have to obtain the status of a legal entity through registration does not necessarily mean that the creation of such informal bodies is no longer possible under Kyrgyz law, although this seems most likely given the replacement of the provision governing the liability of members of or participants in an organisation that is not an independent legal entity. However, there is a clear need to clarify any remaining legal basis for being able to choose the informal route. The protection afforded by international standards also applies to groupings of an informal character so long as they have, or are meant to have, more than a fleeting existence. The possibility to establish informal entities is a necessary consequence of the general freedom to associate. It is not open to a State to require that freedom of association only be exercised by the establishment of an entity with legal personality⁶⁴.
64. Thus, insofar as proposed wording of Article 6.2 means that it is no longer possible for informal non-commercial organisations to operate, there will be a breach of the standards accepted by the Kyrgyz Republic.
65. Article 6.3 provides for the acquisition of legal capacity by branches and representative offices, including those established by international or foreign organisations.
66. It may be that this new provision just makes explicit what is already implicit in Article 8 of the NCO Law, which provides for branches and representative offices being invested with property and acting on the basis of a power of attorney from the main office. The additional stipulation is when this can take effect. However, there is a need to clarify whether the acquisition of legal capacity to which the amendment refers to is indeed no more than that or whether it actually amounts to branches and representative offices becoming legal entities.
67. The latter would be in conflict with the express terms of Article 8.2 of the NCO Law. Any compulsion for branches and representative offices to become discrete legal entities from their founding organisations would be an undue interference in the internal governance of those organisations⁶⁵.
68. Even if the referred legal capacity is just an explicit recognition of the existing position, this provision further underlines the significance of the requirement of registration for branches and representative offices, which is not compatible with international standards.

⁶⁴ This is explicitly recognised in Principle 5 of the Fundamental Principles and paragraph 3 of Recommendation CM/Rec(2007)14.

⁶⁵ See Principle 40 of the Fundamental Principles and paragraph 42 of Recommendation CM/Rec(2007)14.

Addition of Article 6-1 to the NCO Law

69. This provision seeks to determine who can be a founder, member or participant⁶⁶ of a non-commercial organisation.
70. It is provided that founders, participants or members shall be "*capable legal citizens of the Kyrgyz Republic and (or) capable legal entities*". Again, the concern previously noted⁶⁷ that the potentially limited scope for children to be founders, participants or members is not be in accordance with international standards remains operative.
71. However, Article 6-1.3 excludes a number of categories of people who may not be founders / members / participants of a non-commercial organisation⁶⁸, which is incompatible with international standards.
72. The proposed wording of the provision gives space for potentially broad interpretations and abuse. First, it has been recognised that an unlawful migrant's right to freedom of expression is independent of whether he has any right to stay in the country⁶⁹. Equally the mere fact that a gathering of persons is comprised of unlawful migrants has been found to be an insufficient justification for any interference with the exercise of their right to freedom of assembly, with it being emphasised that peaceful protest against legislation which has been contravened does not constitute a legitimate aim for a restriction on liberty⁷⁰.
73. Second, the law may legitimately ban persons associated with criminal groups, including terrorist organizations, from founding NCOs. However, whether the reason for denying incorporation is the association of the prospective founders

⁶⁶ This term is not used in the NCO Law and it is not clear whether it is an alternative term for member or is meant to be a discrete term. In the event that it is the latter a definition should be provided by the Draft Law.

⁶⁷ See para. 20 of this Opinion

⁶⁸ The Draft Law, Article 6-1.3 reads that "3. *The following persons may not be founders (participants, members) of a noncommercial organization:*

- 1) *a foreign citizen or a stateless person, in cases and on the grounds stipulated by Article 7 of the Law of the Kyrgyz Republic 'On External Migration';*
- 2) *a physical or legal person, in cases and on the grounds stipulated by Articles 9 and 10 of the Law of the Kyrgyz Republic 'On Counteracting Extremist Activities';*
- 3) *a physical or legal person as listed in subclause 2, clause 2, Article 6 of the Law of the Kyrgyz Republic 'On Counteracting Terrorist Financing and Laundering of Proceeds of Crime»;*
- 4) *a person kept in places of confinement by a court decision;*
- 5) *on other grounds as envisaged by the legislation of the Kyrgyz Republic'.*

⁶⁹ See ECtHR judgement, *J E D v United Kingdom* (dec.), no 42225/98, 2 February 1999, in which the ECtHR found that the applicant had not been subjected to any restrictions during his stay on his right to impart information on the situation in the Ivory Coast.

⁷⁰ See ECtHR judgement, *Cisse v France*, no 51346/99, 9 April 2002. The case concerned action taken by a group of aliens without valid residence permits who decided to take collective action to draw attention to the difficulties that they were having in obtaining a review of their immigration status. The ending of the assembly after a two-month period was, however, found to be justified because of the deterioration of the health of those who were on hunger strike and the wholly inadequate sanitary conditions.

with extremist or terrorist activities, the law should expressly require that the fact of such association be confirmed by a court decision. This is required in order to uphold the presumption of innocence as well as to prevent arbitrary application of the law. The burden of proof should lie on the relevant state body responsible for granting the status of a legal entity.

74. Third, Article 6-1.3(5) is open-ended, providing for a ban "*on other grounds as envisaged by the legislation of the Kyrgyz Republic*". Such restrictions will not be acceptable unless they have a legitimate aim, are proportionate in their scope and duration and have been imposed following a fair hearing. There is a need, therefore, to establish whether any existing provisions providing grounds for a bar satisfy these requirements and, to the extent that they do not, they should be either brought into line with international standards or deleted.

Amendment to Article 9 of the NCO Law

75. This amendment should actually be seen as an amendment to Registration Law.
76. The registration of branches and representative offices in the Registration Law is at present governed in general by a simplified process, entailing submission of the certified resolution for their creation and a certified copy of the organisation's foundation documents⁷¹. However, in the cases of non-commercial organisations with "foreign participation" there is a requirement to submit also the additional documents specified in the Law "On Foreign Investments in the Kyrgyz Republic"⁷². In the case of the branches and representative offices of foreign legal entities, Article 9 of the Registration Law requires in addition to the documents generally required to be submitted: the incorporation documents with a notarised translation into Kyrgyz or Russian; a resolution creating the branch or representative office and an appropriate power of attorney in Kyrgyz or Russian; and an excerpt from the trade register or other document certifying that the creating entity is a legal entity under the legislation of the country of its registration and a bank letter confirming its solvency with notarised translations into Kyrgyz or Russian.
77. The proposed amendment would require the submission of (a) a decision of an authorised body of the foreign country about registration of the foreign non-commercial organization and its foundation documents, notarised and legalised by diplomatic representative office of the Kyrgyz Republic in the foreign country or by the Ministry of Foreign Affairs of the Kyrgyz Republic; (b) a decision of the management body of the organisation concerned about the establishment (opening) of a subsidiary or representative office, including its goals and objectives; (c) the approved statute of the subsidiary or representative office, including its address (location) and contact telephone numbers; (d) and the decision about appointing a manager of the subsidiary or representative office and an authorisation issued to him or her by the foreign non-commercial organisation concerned. All these documents are to be presented in the state (official) language of the respective foreign country together with their

⁷¹ The Registration Law, Article 6, part five

⁷² Law On Foreign Investments in the Kyrgyz Republic, Article 6, part six.

translation in the state and official languages of the Kyrgyz Republic and attested as appropriate.

78. These requirements are slightly more extensive than those in the Registration Law but they are not on the whole problematic. There is, however, a need to establish that the new role to be performed by diplomatic representative office of the Kyrgyz Republic in the foreign country or by the Ministry of Foreign Affairs of the Kyrgyz Republic in notarising and legalising documents can be subject to judicial control as this non-evaluative function could be improperly used to delay the decision-making process⁷³. In addition, it seems inappropriate to require the provision of an address and telephone number for the branch or representative office since - as is evident from another amendment being made by the Draft Law⁷⁴ - a contract to obtain these can only be concluded once the capacity to act is obtained following a positive registration decision. Furthermore, the amendment should make it clear that the existing provisions in the Registration Law are no longer operative.
79. The proposed amendment also specifies a 10-day deadline for making a decision on the registration of a branch or representative office of a non-commercial organisation. This is the same period that is generally applicable for registration decisions and it is among the shorter ones seen in the practice of states⁷⁵. There is, however, no provision for correcting defects in the documents submitted - as is generally available under the Registration Law⁷⁶.
80. The third change to be effected by the amendment to this provision is the introduction of a requirement that the activities of the branch or representative office be insured for "*the amount of no less than one million som within a month from the registration date*". Such a requirement is not objectionable in itself, but there is a lack of specificity as to the nature of the risks to be insured against. This should be remedied before proceeding with the amendment. Otherwise the branch or representative office would not be certain that it has fulfilled this particular requirement.

Addition of Article 9-1 to the NCO Law

81. This addendum concerns the denial of registration for a non-commercial organisation, something that is also addressed by Article 12 of the Registration Law. Thus, it would be more appropriate to be an amendment to the Registration Law.

⁷³ The ECtHR found there to be no protection against arbitrary delay – and thus a violation of the right to freedom of association - in *Ramazanova and Others v Azerbaijan*, no 44363/02, 1 February 2007, in which the Ministry of Justice prolonged the whole registration procedure without issuing a final decision by continuously finding new deficiencies in the registration documents and returning them to the founders for rectification. The absence of sufficient protection was also found by the European Court in *Ismayilov v Azerbaijan*, no. 4439/04, 17 January 2008.

⁷⁴ See para. 65-68 of this Opinion

⁷⁵ See Principle 35 of the Fundamental Principles and paragraph 37 of Recommendation CM/Rec(2007)14.

⁷⁶ The Registration Law, Article 10, part three.

82. The additional provision specifies separate sets of grounds for denial of registration to non-commercial organisations and to branches and representative offices of foreign non-commercial organisations. As this additional provision does not address the issue of a denial of registration to branches and representative offices of non-commercial organisations that are not foreign, it must be assumed that this continues to be governed by the provisions of the Registration Law, though it would be appropriate to get more clarification on that.
83. Principle 3 of the Fundamental Principles on the Status of Non-Governmental Organizations in Europe says that “[l]egal personality should only be refused where there has been a failure to submit all the clearly prescribed documents required, if a name has been used that is patently misleading or is not adequately distinguishable from that of an existing natural or legal person in the country concerned, or if there is an objective in the statutes which is clearly incompatible with the law.”
84. There are five grounds for denial of registration to non-commercial organisations: (a) the foundation documents contradict the Constitution of the Kyrgyz Republic and the Kyrgyz legislation; (b) another non-commercial organization has been already registered under the same name; (c) the name of the non-commercial organization is insulting to morals, national and religious feelings of citizens; (d) documents necessary for the registration have not been presented fully or are not prepared as appropriate; and (e) the founder is someone who may not act as founder pursuant to the new Article 6-1⁷⁷.
85. The first ground is substantially the same as that in Article 12 of the Registration Law. It should be noted that in *Koretskyy and Others v Ukraine* the ECtHR found a similar provision insufficiently precise because it was not specified whether the provision was referring to “*only the substantive incompatibility of the aim and activities of an association with the requirements of the law ... or also to the textual incompatibility of the articles of association with the relevant legal provisions*”⁷⁸. Thus, it would be advisable to modify this provision to make it clear that the concern is with objects rather than textual matters.
86. The fourth ground for denial of registration is implicit in Article 8 of the Registration Law as the registration body only has to act from “*the moment of receipt of the required documents*”. This is undoubtedly a legitimate requirement. However, the registration body needs to provide clear guidance as to an application for registration. All problems should be identified at once so that applications are not repeatedly rejected with each of them being successively discovered and thus decision-making is in effect arbitrarily delayed.
87. The extent to which an application can justifiably be rejected on account of its founders is very much dependent upon the compatibility of the particular restrictions on being a founder with international standards. This has been

⁷⁷ See paras 69-74 of this Opinion

⁷⁸ See ECtHR judgement, *Koretskyy and Others v Ukraine*, No 40269/02, 3 April 2008, at para. 48

addressed above⁷⁹ and, insofar as the concerns noted there have been satisfactorily resolved, there is nothing problematic with such a ground for rejection.

88. As regards the two grounds linked to the name of the applicant non-commercial organisation, the first is clearly justified as it protects the legitimate interests of an already registered organisation. The second one is more problematic since a rejection based simply on a name that is insulting to morals, national and religious feelings of citizens runs the risk of infringing the rights to freedom of expression and of religion.
89. Certainly, there is a risk of arbitrary decision-making in the use of such broad criteria for rejection and, according to the ECtHR "*the State's power to protect its institutions and citizens from associations that might jeopardise them must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom*"⁸⁰. A restriction based on the possibility of insult is likely to be inappropriate where the underlying issue between different groups is a matter of public debate. A refusal of registration by reference to this possibility should not be used to stifle the activities of groups that are unpopular.
90. There is a considerable risk of subjective decision-making which may not be readily corrected through the courts. The Draft Law does not require from the responsible state agency to provide a detailed written statement of reasons why the application for incorporation [i.e. for granting status of a legal entity] has been denied. Given the significant risk for the exercise of various freedoms in such a ground for denial of registration, it would thus be more appropriate for it to be omitted from the Draft Law.
91. The grounds for denial of registration to the branches and representative offices of foreign non-commercial organisations are fivefold: (a) their goals and objectives contradict the Constitution of the Kyrgyz Republic and the Kyrgyz legislation; (b) information and documents necessary for registration have not been submitted fully or are not prepared as appropriate; (c) the presented foundation documents of the foreign non-commercial organization contain information that is confirmedly untruthful; (d) the goals and objectives of establishing the subsidiary or representative office pose a threat to the sovereignty, political independence, territorial inviolability, national unity and identity, cultural heritage and national interests of the Kyrgyz Republic; and (e) a court of the Kyrgyz Republic has earlier made a decision on liquidation (closing up) of the subsidiary or representative office of the foreign non-commercial organization.
92. The first two grounds are the same as ones used for denying registration to non-commercial organisations⁸¹ and are not problematic.

⁷⁹ See para. 69-74 of this Opinion

⁸⁰ ⁸⁰ See ECtHR judgement, *Koretskyy and Others v Ukraine*, No 40269/02, 3 April 2008, para. 51.

⁸¹ See para. 84 of this Opinion

93. The third ground appears to be strange: it is not clear why the submission of false information should be relevant to registration decisions for branches and representative offices of foreign non-commercial organisations but not to non-commercial organisations generally. In addition, the information concerned relates only to the foundation documents which will have been the basis on which a foreign non-commercial organisation acquired legal personality in its country of origin.
94. The ability to reject registration for a branch or representative office on account of the goals and objectives of establishing it being considered to "*pose a threat to the sovereignty, political independence, territorial inviolability, national unity and identity, cultural heritage and national interests of the Kyrgyz Republic*" is a matter within the sovereignty of the Kyrgyz Republic. It is also a comparable provision to the one allowing for the application of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisation to be excluded if the body invoking it "*by its object, its purpose or the activity which it actually exercises: (a) contravenes national security, public safety, or is detrimental to the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others; or (b) jeopardises relations with another State or the maintenance of international peace and security*"⁸². However, it will be essential to ensure that the taking of decisions on this ground is particularly well-informed and substantiated as a negative ruling will not only affect the foreign non-commercial organisation concerned but could prejudice the legitimate interests of citizens and national non-commercial organisations who had been expecting to work with it. In addition it could have an adverse impact on relations with the country in which the organisation concerned is established.
95. The final ground for rejection is previous liquidation of a branch or representative office of the organisation concerned. Its vague wording gives much space for interpretation and potential abuse and there will never be any possibility for expiating the fault leading to liquidation. International standards encourage a state to allow a foreign non-commercial organisation to set up a branch or representative office in its territory⁸³. An absolute ban on return - no matter how many years that may have passed and how much the organisation and/or circumstances may have changed - seems an unduly strict approach.
96. Furthermore, the Draft Law provides that a foreign non-commercial organisation can be refused to gain a status of a legal entity if a Kyrgyz court ruled to liquidate a branch or representation office of this foreign non-commercial organization⁸⁴. This provision seems to breach the principle of

⁸² European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisation, Article 4; full text is available at <http://conventions.coe.int/Treaty/en/Treaties/Word/124.doc>

⁸³ See Principles 37 and 38 of the Fundamental Principles and paragraph 45 of Recommendation Rec/CM(2007)14.

⁸⁴ The Draft Law, Article 9-1.2

proportionality⁸⁵ as it is open to arbitrary application: NCOs might be held responsible for behaviour of their sub-divisions and/or individual members. That would be admissible only if the allegations of the NCO's involvement are substantiated by evidence that these sub-divisions acted with, or could not have acted without, the support of this NCO per se or that such behaviour was the result of this NCO's programme or statute. Otherwise, the responsibility should be with the sub-division only. And in both cases, the prohibition of the association or its sub-division must be done on the basis of a relevant court decision accompanied by a statement of reasons. The possibility to appeal against this decision to a higher court ought to be granted as well. Judicial control is an important guarantor of the quality of decision-making. A denial could also affect the interests of citizens and national non-commercial organisations. So far, the Draft Law provides for such a possibility only in case denials concerned non-commercial organisations and not the branches and representative offices of foreign non-commercial organisations.

97. The absence of reasons for a denial of registration will undoubtedly lead international human rights bodies to conclude that there was no relevant and sufficient basis for it⁸⁶. The Draft Law should expressly require that all those allegations that might serve as grounds for denying granting of legal entity status be confirmed by a court decision, in order to uphold the presumption of innocence and to prevent arbitrary application of the law. The burden of proof should lie on the relevant state body responsible for granting the status.

Amendment to Article 12 of the NCO Law

98. These amendments concern the activities that can be carried out by a non-commercial organisation and particularly those of an economic or entrepreneurial character.
99. The change to the first part of Article 12 seems to be minimal, continuing to allow any activities that are not prohibited by law and which correspond to the organisation's goals as set out in its foundation documents and dropping only the reference to programme documents and other acts of the organisation for the purpose of defining its goals. It is thus potentially more generous in scope but it is doubtful if the change is particularly significant.
100. The main change concerns the carrying out of economic or entrepreneurial activities. Formerly part two allowed this subject to a condition of non-distribution of profits to founders, members, appointed persons and other employees and members of the governing body. The amended version stipulates

⁸⁵ Proportionality is one of the criteria states should be guided by while adopting restriction clauses. Collective responsibility should not be put on public associations [including non-commercial organisations] for conduct or acts of their sub-divisions or individual members.

⁸⁶ The absence of an explanation for restrictions on permitted activities was significant in the conclusion that they were not justified in the *Koretskyy* case. See also the friendly settlement of the petition about the unreasoned refusal to register a religious association in Appl No 28626/95, *Khristiansko Sdruzhenie 'Svideteli Na Iehova' (Christian Association Jehovah's Witnesses) v Bulgaria*. 92 DR 44 (1998), pursuant to which the association would be registered. See also Principle 35 of the Fundamental Principles and paragraph 38 of Recommendation Rec/CM(2007)14.

that the activities can only be carried out to "*the extent it serves the purpose of achieving the goals for which [the organisation] was founded*" and no longer gives any illustration of the type of economic activities that are authorised.

101. It is unlikely that the removal of the prohibition in part two on distributing profits is of any consequence since the definition of non-commercial organisations provides that "*obtained profit is not distributed among members, founders and official persons*"⁸⁷. However, the limitation on carrying out economic activities to the extent that this serves the purpose of achieving the organisation's objectives is likely to give rise to confusion. An expansive interpretation could mean that any generation of income - whatever the means - is permissible as this would give the organisation the finance needed to pursue its objectives. A more restrictive view could be that the economic activity must have a particular link with the objectives. For instance, an organisation working on sporting matters could sell sports equipment but could not engage in trade unconnected with sporting matters. Furthermore, the use of the phrase "*the extent it serves*" might also be taken as implying some limitation on the amount of economic activity that could be engaged in, so that an organisation might, for example be faced with a claim that the pursuit of its activities required only the raising of 100,000 som and it had breached this by undertaking activities that had generated 200,000 som.
102. None of the limitations on the economic activity that can be pursued by non-commercial organisations is objectionable in principle as no particular means of generating income are mandated by international standards, albeit that it is recognised that allowing this in some form is an essential means of support for such organisations⁸⁸. The problem is the uncertainty as to what is permitted and the risk, therefore, that a non-commercial organisation could find itself sanctioned for breaching the law despite its best endeavours to act lawfully. It is thus essential that this provision be recast to give a clearer indication of what is actually being authorised in the sphere of economic activities.
103. There is no change to the third part about certain activities being subject to special legal conditions and requiring a licence and this is entirely consistent with international standards⁸⁹.
104. The fourth part, which requires a record of revenues and expenditures related to entrepreneurial activity, is new but is consistent with standards governing the accountability of non-commercial organisations⁹⁰.

Amendment to Article 15 of the NCO Law

⁸⁷ The NCO Law, Article 2, part one.

⁸⁸ See Principle 13 of the Fundamental Principles and paragraph 14 of Recommendation Rec/CM(2007)14.

⁸⁹ *Ibid.*

⁹⁰ See Principles 60 and 62 of the Fundamental Principles and paragraphs 62 and 63 of Recommendation Rec/CM(2007)14

105. The proposed amendment stipulates that governmental bodies bear responsibility to create "*conditions for restricting activities of non-commercial organisations*".
106. It is not clear from the wording of the existing Article 15 whether this provision actually creates responsibility or is merely declaratory in character since it refers to the responsibility being borne "*in accordance with the legislation*", which may be an oblique reference to the general basis of responsibility of governmental bodies for unlawful acts. It is important that the actual position be clarified as it would be entirely inappropriate for the effect of the amendment to preclude governmental bodies to be protected from any responsibility for their unlawful acts in respect of non-commercial organisations and their founders, members and participants.
107. The absence of any such responsibility would be in breach of the obligation to provide an effective remedy for a violation of rights and freedoms guaranteed by the ICCPR⁹¹. There is no obvious reason why the existing provision needs to be replaced by the new one, particularly as it is possible to introduce supplementary Articles into the NCO Law.
108. In the absence of any other certain basis of responsibility in this context, it would thus be appropriate to turn the proposed amendment into a supplementary Article of the NCO Law and to retain Article 15 in its existing terms.
109. The arrangements for regulation introduced by the amendment are directed at ensuring compliance with a non-commercial organisation's "statutory goals and objectives" - presumably those in its foundation documents - by the organisation and any branch or representative office⁹². This appears to be a strange mandate since securing compliance with an organisation's goals and objectives is more properly a matter for its founders, members and participants. The legitimate interest of the state is in ensuring that the organisation and any branch or representative office complies with the law which embraces much more than the statutory goals and objectives. This is not just a matter of language but is one of the approach required to ensure respect for the principle of self-governance that is required by international standards⁹³ and is enshrined in Article 4.1 of the NCO Law. Founders, members and participants should thus have the primary responsibility for securing compliance with an organisation's goals and objectives. It would, therefore, be appropriate to amend the mandate for regulation accordingly.
110. For the purpose of regulation justice authorities would be entitled to receive the order documents of an organisation's management and information from statistical and tax authorities and other bodies of state supervision and control, to send its representatives "*for participating in events arranged by the organisation*" and, no more than once a year, to inspect the activities of the organisation, "*including money spending and use of other property*".

⁹¹ ICCPR, Article 2(3).

⁹² The Draft Law, Article 15.1

⁹³ See Principle 45 of the Fundamental Principles and paragraph 47 of Recommendation Rec/CM(2007)14.

111. NCOs should benefit from the presumption that their activity is lawful in the absence of evidence to the contrary. The requirements of regular reporting provide a sufficient guarantee of visibility for non-profit organizations, and heightened scrutiny in the absence of evidence of any illegal activity would not serve any justifiable purpose.⁹⁴ The proposed clause actually might mean unconditional right of the registration authority to send its representatives to attend an NCO event.
112. It is redundant in the cases when the event is public, which means that anyone can attend it. When it concerns not public events: it may potentially impede legitimate NCO activities which require restricted access or should be conducted in a confidential manner for lawful reasons [e.g. shelter for domestic violence victims, peer support groups, etc.].
113. Besides, in many cases the issue of access to certain type of meetings (e.g. meetings on private property) may have direct implications for the right to privacy, and the organizing party should retain the right to deny access⁹⁵. This should not be interpreted as to preclude duly authorized access by law enforcement officials, providing there is evidence of illegal activity; however, this issue does not concern NCOs solely and is presumably addressed by other legislation [Criminal Code, for instance]. However, the draft law may include a provision which would exhaustively enumerate and clearly define the specific types of meetings to which registration authority representatives may have unimpeded access.
114. Subject to what has already been said about the purpose of regulation, the use of a written warning as the first response to an instance of non-compliance with legal requirements is in keeping with international standards, as there is the possibility of an appeal against such a warning to a court⁹⁶. However, given the one-month deadline for providing a remedy in the event of such a warning, it would be important to ensure that an appeal can be dealt with by a court or otherwise provide for the possibility of suspending the obligation arising from a warning⁹⁷, particularly given the power of suspension of activities in part four⁹⁸. This may already be something that is possible under the administrative law and procedure generally applicable in the Kyrgyz Republic. In the absence of that possibility, it would be appropriate to modify the amendment accordingly.
115. The power of suspension of activities of a non-commercial organisation or of a branch or representative office of such an organisation for failure to remedy an instance of non-compliance with legal requirements will not be problematic if there is also the possibility of having the effect of a warning suspended pursuant

⁹⁴ See Principle 66 of the Fundamental Principles and paragraph 67 of Recommendation Rec/CM(2007)14.

⁹⁵ ICCPR, Articles 17 and 21. See also Principle 67 of the Fundamental Principles and paragraph 69 of Recommendation Rec/CM(2007)14.

⁹⁶ See Principle 70 of the Fundamental Principles and paragraph 72 of Recommendation Rec/CM(2007)14.

⁹⁷ See Principle 69 of the Fundamental Principles and paragraph 71 of Recommendation Rec/CM(2007)14.

⁹⁸ See para. 115-116 of this Opinion

to an appeal against it. Undoubtedly the state needs a means of sanctioning a failure to remedy such non-compliance but this is a fairly drastic measure and it should not be possible to impose it if there are legitimate grounds for contesting its validity through an appeal that is heard and determined promptly by a court.

116. While suspension of activities might be an appropriate response to a failure to act on a warning, it would be more appropriate for a warning to follow a failure to provide requested information within the 15-day deadline, especially as there is always a risk of the information having actually been sent but then being lost or mislaid. An escalation of the response to an apparent failure of compliance in the form of suspension of activities without a prior warning seems disproportionate. As a consequence, the amendment should be modified to limit suspension to situations of failure to act on a warning where this has not been appealed. There is also a need for some provision as to how long a measure of suspension can last and as to how its operation might be terminated. The present provision seems indefinite and would thus be tantamount to liquidation. An appropriate addition to the amendment should accordingly be made.
117. Subject to what has already been said about the purpose of regulation, repeated violation of obligations under the law could legitimately provide the basis for liquidating the non-commercial organisation or the branch or representative office of such an organisation. However, this is truly a draconian measure which should not be taken lightly⁹⁹. It should certainly not be a disproportionate response to the violations concerned, particularly given the power of suspension of activities. It should, therefore, be used only occasionally. It is appropriate for part five to stipulate that this can only be ordered by a court. It is also important for officials responsible for regulation to be appropriately trained to understand that seeking liquidation must always be an exceptional measure. It is assumed that the organisation, branch or representative office will be a party to any liquidation proceedings but this needs to be confirmed.

Amendment to Article 16 of the NCO Law

118. This amendment concerns the introduction of a new basis for liquidating a non-commercial organisation apparently consequent upon the regulatory provision in the new part five of Article 15¹⁰⁰.
119. The present provision refers to the Civil Code and other legislation for this purpose, while the Registration Law refers to this being done either by decision of the entity itself or upon a court ruling as to bankruptcy. The new basis for liquidation - which also applies to the branches and representative offices of foreign non-commercial organisations but not those of other non-commercial organisations - is that the entity concerned has violated the laws of the Kyrgyz Republic. However, this formulation is somewhat broader than that in the new part five of Article 15, which provides for liquidation in the event of "*repeated violation of [an organisation's] statutory goals and objectives or of laws of the*

⁹⁹ See Principle 71 of the Fundamental Principles and paragraph 74 of Recommendation Rec/CM(2007)14.

¹⁰⁰ See para. 117 of this Opinion

Kyrgyz Republic, and failure ...to submit the information and data stipulated in this Article". The present provision concerns only a violation of the law, which could encompass something really minor. As a consequence, there is the possibility of liquidation being used in a disproportionate manner. That contradicts international standards. It is assumed that this is not the intention and that, despite the drafting, the two provisions are meant to be consistent. It would be appropriate, therefore, to bring the drafting of the new part two of Article 16 into line with the terms of the new part five of Article 15.

Amendment to Article 17 of the NCO Law

120. The amendment proposed for this provision entails the replacement of the brief stipulation regarding transparency - namely, that information on the revenue return structure and the amount of property of a non-commercial organisation shall be submitted to the state bodies in accordance with the current legislation - by a much more detailed set of requirements.
121. In the first place non-commercial organisations and the branches and representative offices of foreign non-commercial organisations must (a) keep accounting and statistical records in the established order; (b) present information on their activities to state statistical and justice authorities in the established order; and (c) submit to tax authorities information about the structure of their earnings and the size and composition of their property on the annual basis, no later than the month that follows the accounting period, in the established order.
122. In principle these requirements do not seem unduly burdensome or inappropriate. However, while what is entailed by the first and third requirements would seem to be relatively straightforward even without knowing what is meant by "the established order", more clarification is needed as to what is involved in fulfilling the second requirement. It may be that the reference to "the established order" - presumably a form of subsidiary legislation - is sufficient for an organisation, branch or representative office to understand the topics to be addressed and the level of detail needed but this is not self-evident from the text of the Draft Law. In the absence of certainty on this point, an organisation, branch or representative office could find itself inadvertently subjected to the measures provided for in the amended Article 15. The amendment should, therefore, either provide fuller details in its own provision or give a clearer indication as to where those details can be found. Certainly, such details should be found in legislation and not some form of administrative guidance that can be changed without sufficient warning to enable an organisation, branch or representative office to prepare appropriately.
123. The requirement in the proposed part two that money and property coming to non-commercial organisations and the branches and representative offices of foreign non-commercial organisations from international organizations and foreign states is to be accounted for in a separate balance sheet is not inappropriate given a state's legitimate interest in knowing for regulatory and taxation purposes income and property derived from overseas. However, it is not clear why there should be a separate procedure for the accounting and

submission of information about such money and property to that which is generally applicable. Such an obligation could become an undue burden for an organisation, branch or representative office, particularly as there are undoubtedly controls regarding the actual importation of goods and the receipt of foreign money transfers that allow regulatory interests to be protected at that point. It would thus be appropriate to delete this requirement from the proposed part two.

124. In principle, the requirement that non-commercial organisations and the branches and representative offices of foreign non-commercial organisations undertake reporting on their activities on an annual basis is not problematic per se. It serves the legitimate interest in transparency; such a report can be beneficial to the organisations, branches and representative offices in helping the public to understand and appreciate the important contribution to the community that they can make. Moreover, the issues to be covered seem relevant and appropriate: they include implementation of profit-for-public programmes and governmental social contracts; the amounts and sources of funding for their activities, the sizes and composition of their property, their expenditure; number and structure of personnel; and the use of the unpaid labour of citizens. However, there is a need for greater precision as to the form of the reporting to be made. The Draft Law states that this is to be done "*via mass media*"; it also notes that the "*forms and terms of the information submission shall be determined by the Government of the Kyrgyz Republic*" which leaves the position rather unclear. Use of the mass media could mean just a newspaper article or even a television interview, although it might also mean the publication of a report either in a printed form or on the web site of the organisation, branch or representative office concerned. The format of the report as well as the details that need to be provided in it should be settled at the time the amendments come into force so that appropriate preparation can be made. It can be possibly settled through subsidiary legislation [as the Draft Law seems to envisage], which should not be changed without sufficient cause and notice in future.
125. It should be noted that the prohibition to transfer money or other kinds of property to certain recipients has nothing to do with publicity and transparency of activities.¹⁰¹
126. The grounds on which such a prohibition can be issued are the following: protecting the constitutional order, morals, health, rights and legal interests of other persons and ensuring the defence of the country and state security. In principle, these grounds could present sufficient justification for prohibition. However, the current wording is very broad: it leaves plenty of scope for abuse and could result in unjustified damage to the reputation of an individual or an organisation¹⁰². This provision can be acceptable only in case if such a prohibition is subject to judicial control. The notification of prohibition must be issued in a prompt manner to those concerned, who shall enjoy the right to appeal it in court.

¹⁰¹ It would be more appropriate for such a provision to be located in the provisions dealing with regulation proposed for Article 15.

¹⁰² Contrary to Article 17 of the ICCPR.

Amendment to Article 3 of the Registration Law

127. The provision being introduced as a new part four for this provision is undoubtedly designed to address the concern previously raised that some of the changes proposed for the NCO Law concern matters that more properly belong to the Registration Law¹⁰³.
128. Thus, it is provided that "specific aspects of registration of non-commercial organizations, including those with foreign share, and registration of their subsidiaries and representative offices shall be stipulated also by the (...) NCO Law". This ensures that those looking to the Registration Law for guidance on this matter will know that they need also to look at the NCO Law.
129. However, this provision does not deal with the problem of conflict between some of the new provisions and those in the Registration Law¹⁰⁴. Moreover, this approach does not result in coherently framed legislation and thus is likely to make it more difficult to understand and observe which is inimical to securing the rule of law. It is recommended that the relevant amendments in the Draft Law - insofar as they are retained - be modified so as to become amendments to the Registration Law rather than the NCO Law. There can be no objection to the Draft Law amending two laws since this is already being done in its present form and a division of the amendments between the two laws would represent a more satisfactory approach to drafting and law reform.
130. It should also be noted that the new part four refers to non-commercial organisations "with foreign share" rather than foreign non-commercial organisations. Insofar as this is not an infelicity of translation, the text ought to be harmonised as the former is not a term defined anywhere in the existing or amended laws. As a result, it creates uncertainty as to whether it means foreign non-commercial organisations or non-commercial organisations that might have some foreign founders, members or participants.

Article 4 of the Draft Law

131. This provides that, notwithstanding the changes that will be effected by the enactment of the proposed amendments, non-commercial organisations and the branches and representative offices of foreign non-commercial organisations that are already registered do not have to undergo a re-registration process if their activities, statutory goals and objectives comply with the Draft Law. However, the possible uncertainty as to whether statutory goals and objectives are in compliance with the Draft Law and the risk of penalties being incurred should this not be the case could well inhibit them from undertaking some activities, notwithstanding that these are actually lawful. This possibility could be avoided by Article 4 of the Draft Law simply stating that there is no requirement of registration for these entities, with the state then being left to

¹⁰³ See para. 79-80 of this Opinion

¹⁰⁴ See para. 78 and 82 of this Opinion.

protect its legitimate interest in ensuring compliance with the law through use of the regulatory powers being introduced by the amendment to Article 15 of the NCO Law¹⁰⁵.

132. However, it should be noted that the exemption from the requirement of re-registration does not apply to the branches and representative offices of national non-commercial organisations. There does not seem to be any pressing reason why they should not also have the benefit of this exemption and it would, therefore, be appropriate for this provision to be amended accordingly.

V. CONCLUSION

133. The adoption of the provisions in the Draft Law in their current form would seriously undermine the legal status of non-commercial organisations and thus the role that can be played by civil society in the Kyrgyz Republic. Although certain provisions can be brought into line with international standards through appropriately framed amendments, there is a number of provisions - notably the removal of recognition for informal organisations to operate, the removal of the capacity of potentially many people to become exist founders or members of non-commercial organisations and the prohibition on the activities that come within a broad definition of what is "political" or connected to elections - could not be retained in any form consistent with those standards. The potentially beneficial extension of the provision for state support to non-commercial organisations is undoubtedly welcome but will be of little consequence if the establishment and operation of non-commercial organisations is handicapped in the manner proposed by the Draft Law's other provisions.
134. In any case, an evaluation of legal provisions can only give a limited indication of the possible impact - positive or negative - that they may have on fulfilling international standards. The manner in which particular provisions are applied is likely to be even more significant in this regard. Certainly actual practice can undermine the intended effect of some provisions and this possibility requires a particularly cautious approach to ones framed in a manner that is not clearly compatible with international standards.

¹⁰⁵ See also para. 105-117 of this Opinion.